

**OPEN RECORDS AND MEETINGS OPINION  
2016-O-11**

DATE ISSUED: June 29, 2016

ISSUED TO: Williston City Commission

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Rob Port asking whether the Williston City Commission violated N.D.C.C. §§ 44-04-19 and 44-04-20 by holding meetings that were not preceded by notice.

**FACTS PRESENTED**

On September 23, 2015, the Williston Herald featured an article on the Williston City Commission's (Commission) discussion on sunseting crew camps held during a regular Commission meeting on September 22, 2015.<sup>1</sup> The article mentions an "ad hoc committee" assembled by Mayor Howard Klug which met, prior to the meeting, with hotel operators, apartment and housing developers, representatives from the oil industry, and crew camp operators, to discuss the issue. The article states the "ad hoc committee" meetings, attended by no more than two commissioners, were "not open to the public."

**ISSUE**

Whether a series of meetings that included the Mayor of Williston and at least one city commissioner were subject to open meetings law.

**ANALYSIS**

All meetings of a public entity must be open to the public unless otherwise specifically provided by law.<sup>2</sup> A "meeting" is defined as a "formal or informal gathering...of [a] quorum of the members of the governing body of a public entity regarding public business."<sup>3</sup> A "quorum" means "one-half or more of the members of the governing body, or any smaller number if sufficient for a governing body to transact business on

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<sup>1</sup> Renèe Jean, Mancamps sunset – maybe, Williston Herald, Sept. 23, 2015.

<sup>2</sup> N.D.C.C. § 44-04-19.

<sup>3</sup> N.D.C.C. § 44-04-17.1(9)(a).

behalf of the public entity.”<sup>4</sup> A governing body is “the multimember body responsible for making a collective decision on behalf of a public entity.”<sup>5</sup>

The Commission is the governing body of the City of Williston and is composed of five members: Mayor Howard Klug and Commissioners Brad Bekkedahl, Tate Cymbaluk, Chris Brostuen, and Deanette Piesik.<sup>6</sup> Thus, under open meetings law, anytime three of the members are present and public business is being discussed, the Commission is holding a public meeting that must be preceded by sufficient notice.<sup>7</sup> The meetings referred to in the Williston Herald were four distinct meetings requested to be held by various entities with the Mayor.<sup>8</sup> No more than two Commissioners ever attended the meetings, thus no quorum of the entire Commission was present.

However, there are other ways in which gatherings of fewer than a quorum of members of the entire governing body may still be subject to open meetings law. For example, a governing body can create a committee when it delegates any of its public business to two or more people. Any committee of a governing body is also subject to the open meetings law.<sup>9</sup> Also, if a series of smaller gatherings collectively involve a quorum and a particular topic of public business is discussed, it is considered a meeting subject to open meetings law.<sup>10</sup>

### Committee Analysis

The definition of a “governing body” includes “any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.”<sup>11</sup> Under this definition, any group of persons delegated authority to perform any function on behalf of a governing body, including gathering information,

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<sup>4</sup> N.D.C.C. § 44-04-17.1(15).

<sup>5</sup> N.D.C.C. § 44-04-17.1(6).

<sup>6</sup> N.D.C.C. § 44-04-17.1(6) (definition of “governing body”); (9) (definition of “meeting”); (13) (definition of “public entity”); see also City of Williston website: <http://www.cityofwilliston.com/CityCommission.aspx>.

<sup>7</sup> N.D.C.C. §§ 44-04-19, 44-04-20.

<sup>8</sup> Letter from Jordon Evert, Williston City Att’y, to Sandra L. DePountis, Asst. Att’y Gen. (Oct. 13, 2015).

<sup>9</sup> N.D.A.G. 2015-O-10.

<sup>10</sup> N.D.C.C. § 44-04-17.1(9)(a)(2) (the definition of “meeting” includes a gathering of “[l]ess than a quorum of the members of the governing body of a public entity regarding public business, if the members attending one or more of such smaller gatherings collectively constitute a quorum and if the members hold the gathering for the purpose of avoiding” open meeting law requirements).

<sup>11</sup> N.D.C.C. § 44-04-17.1(6).

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reporting or recommending action, as well as taking action, is subject to the state's open meetings law.<sup>12</sup> A governing body does not need to make a formal motion to create a committee.<sup>13</sup> Rather, if the governing body of a public entity consents or otherwise delegates authority to a group of people to perform any function on behalf of the governing body, a committee is formed.<sup>14</sup> Committees of a governing body have the same requirements to notice its meetings and prepare minutes because they are subject to open meetings law.

Here, the Commission provided the following explanation regarding the group who met with people representing the apartment and hotel industry:

During the summer of 2015, several apartment owners (apartment industry) and hotel owners and operators (hotel industry) had requested a meeting with Mayor Klug concerning the issue of whether crew camp permits should be extended within the City of Williston and its extra-territorial jurisdiction.

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As a result of the apartment industry's and hotel industry's request, Mayor Klug had requested Brad Bekkedahl (City Commissioner for Williston), [along with several other individuals from different departments including the Fire Chief, Police Chief, Economic Development Director, Williston's Building Official, Planning Director, and Williston's Principal Planner,] to also attend these meetings.<sup>15</sup>

According to the Commission, at no time did the entire Commission authorize or approve the formation of an ad hoc committee nor did it delegate authority for the committee to be formed.<sup>16</sup> Instead, the Mayor, on his own initiative, asked certain people to join him to meet with representatives from the apartment and hotel

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<sup>12</sup> N.D.A.G. 2014-O-05; N.D.A.G. 2013-O-12; N.D.A.G. 2009-O-12; N.D.A.G. 2009-O-05; N.D.A.G. 2007-O-13; N.D.A.G. 2006-O-03.

<sup>13</sup> N.D.A.G. 2014-O-05.

<sup>14</sup> N.D.A.G. 2014-O-05, N.D.A.G. 2013-O-12.

<sup>15</sup> Letter from Jordon Evert, Williston City Att'y, to Sandra L. DePountis, Asst. Att'y Gen. (Oct. 13, 2015).

<sup>16</sup> Id. Email from Jordon Evert, Williston City Att'y, to Sandra DePountis, Asst. Att'y Gen. (Oct. 29, 2015, 4:44 PM); see also Acknowledgment Statements from Mayor Klug (signed Nov. 12, 2015), and Commissioners Cymbaluk (signed Nov. 12, 2015), Bekkedahl (signed Nov. 18, 2015); Brostuen (signed Nov. 10, 2015); and Piesik (signed Nov. 12, 2015).

industries.<sup>17</sup> Commissioner Brostuen and Commissioner Piesik were not aware that the meetings were taking place and the content of the meetings was not discussed until the Commission's September 22, 2015, regular meeting.<sup>18</sup> Because the entire Commission did not consent or otherwise delegate authority for the "ad hoc committee" to meet with various entities, the "ad hoc committee" is not considered a committee of the Commission that would be subject to open meeting laws.

#### Series of Smaller Gatherings Analysis

The definition of meeting also includes situations where members of a governing body purposely meet in groups that are less than a quorum in order to circumvent the open meetings law.<sup>19</sup> This definition recognizes there is a threshold at which multiple conversations on a particular subject regarding public business collectively involve a quorum so that the series of conversations have the potential effect of forming consensus or furthering the governing body's decision-making process on that subject.<sup>20</sup>

For example, in a recent opinion to the Fargo City Commission, two of the five Commissioners met with various departments regarding the resignation of the police

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<sup>17</sup> Letter from Jordon Evert, Williston City Att'y, to Sandra L. DePountis, Asst. Att'y Gen. (Oct. 13, 2015); Email from Jordon Evert, Williston City Att'y, to Sandra DePountis, Asst. Att'y Gen. (Oct. 29, 2015, 4:44 PM); see also Acknowledgment Statements from Mayor Klug (signed Nov. 12, 2015), and Commissioners Cymbaluk (signed Nov. 12, 2015), Bekkedahl (signed Nov. 18, 2015); Brostuen (signed Nov. 10, 2015); and Piesik (signed Nov. 12, 2015).

<sup>18</sup> Letter from Jordon Evert, Williston City Att'y, to Sandra L. DePountis, Asst. Att'y Gen. (Oct. 13, 2015); Email from Jordon Evert, Williston City Att'y, to Sandra DePountis, Asst. Att'y Gen. (Oct. 29, 2015, 4:44 PM); see also Acknowledgment Statements from Mayor Klug (signed Nov. 12, 2015), and Commissioners Cymbaluk (signed Nov. 12, 2015), Bekkedahl (signed Nov. 18, 2015); Brostuen (signed Nov. 10, 2015); and Piesik (signed Nov. 12, 2015).

<sup>19</sup> N.D.C.C. § 44-04-17.1(9)(a)(2) (gatherings of "[l]ess than a quorum of the members of the governing body of a public entity regarding public business, if the members attending one or more of such smaller gatherings collectively constitute a quorum and if the members hold the gathering for the purpose of avoiding the requirements of" the open meetings law). For a series of conversations to fall under this definition, it is not necessary that the Commission intends to violate the law. See N.D.A.G. 2014-O-23; N.D.A.G. 2012-O-02; N.D.A.G. 2011-O-17; N.D.A.G. 98-O-05.

<sup>20</sup> N.D.A.G. 2015-O-06; N.D.A.G. 2015-O-04; N.D.A.G. 2014-O-23; N.D.A.G. 2014-O-19; N.D.A.G. 2012-O-02; N.D.A.G. 2011-O-17; N.D.A.G. 98-O-05.

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chief.<sup>21</sup> The content of these conversations were relayed to the other Commissioners through telephone calls and discussions. The telephone calls and discussions enabled the Commission to negotiate a separation agreement through a series of smaller gatherings that collectively involved a quorum of the Commissioners outside the view of the public, and violated open meetings law.<sup>22</sup>

In this instance, Mayor Klug asked Commissioner Bekkedahl to meet with representatives from the apartment industry on June 17, 2015, to discuss the status of crew camps.<sup>23</sup> He again asked Commissioner Bekkedahl to join him in a meeting with the hotel industry regarding crew camps on August 21, 2015.<sup>24</sup> The two also met with the crew camp operators prior to the September 22, 2015, meeting.<sup>25</sup> Mayor Klug and Commissioner Bekkedahl provided written, signed statements, attesting that they did not discuss any of the information from these meetings with any other Commissioner prior to the September 22, 2015, regular Commission meeting.<sup>26</sup> Commissioner Bekkedahl also attests that he had no knowledge of any other meetings “or their content in which [he] did not attend.”<sup>27</sup>

When Commissioner Bekkedahl could not attend, Mayor Klug asked Commissioner Cymbaluk to join him in a meeting on August 5, 2015, with individuals from the oil industry regarding the continuation of crew camps.<sup>28</sup> Mayor Klug and Commissioner Cymbaluk provided written, signed statements, attesting that they did not discuss any of the information from this meeting with any other Commissioner prior to the September 22, 2015, regular Commission meeting.<sup>29</sup> Commissioner Cymbaluk also

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<sup>21</sup> N.D.A.G. 2015-O-04.

<sup>22</sup> Id.

<sup>23</sup> Letter from Jordon Evert, Williston City Att’y, to Sandra L. DePountis, Asst. Att’y Gen. (Oct. 13, 2015). No agenda was prepared for this meeting but notice was posted on the calendar next to the scheduled meeting room and the room “was open to the public to enter if they wished.”

<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> Letter from Jordon Evert, Williston City Att’y, to Sandra L. DePountis, Asst. Att’y Gen. (Oct. 13, 2015); see also Acknowledgment Statements from Mayor Klug (signed Nov. 12, 2015) and Commissioner Bekkedahl (signed Nov. 18, 2015).

<sup>27</sup> Acknowledgement Statement from Commissioner Bekkedahl (signed Nov. 18, 2015).

<sup>28</sup> Letter from Jordon Evert, Williston City Att’y, to Sandra L. DePountis, Asst. Att’y Gen. (Oct. 13, 2015). No agenda was prepared for the meeting but the “room was open to the public to enter if they wished.”

<sup>29</sup> Letter from Jordon Evert, Williston City Att’y, to Sandra L. DePountis, Asst. Att’y Gen. (Oct. 13, 2015); see also Acknowledgment Statements from Mayor Klug and Commissioner Cymbaluk (both signed Nov. 12, 2015).

attested that he was not aware of the content or discussions of the other meetings attended by Mayor Klug or Commissioner Bekkedahl until such information was relayed at the regular Commission meeting.<sup>30</sup>

I appreciate the attempt taken by Mayor Klug and Commissioner Cymbaluk to stay within the parameters of the open meetings law. However, despite their best efforts, regardless of whether they discussed the August 5 meeting with the other commissioners, the law was violated at the point three commissioners were involved in crew camp meetings.

There is a threshold at which multiple conversations regarding public business, collectively involving a quorum, trigger open meetings law.<sup>31</sup> The meetings that involved Mayor Klug and Commissioner Bekkedahl were not in violation because the two of them did not constitute a quorum of the Commission. Once Commissioner Cymbaluk attended a meeting regarding the same subject matter, a quorum of the Commission shared common knowledge about the state of crew camps. Even though each discussion involved the perspective of a different party, the overall topic was the duration of crew camps in Williston. Even without discussing the topic further after the meetings, the discussion itself provided sufficient information to each individual party. Therefore, although I appreciate the signed statements,<sup>32</sup> and that the commissioners made efforts to follow the open meetings law, the involvement of a quorum of the Commission in a discussion that was of great public interest violated the open meetings law.

## CONCLUSION

The Commission did not violate the open meetings law when the Mayor of Williston requested one city commissioner and various city department heads to meet with representatives from various industries regarding crew camps. However, when a different Commissioner attended a crew camp meeting on August 5, 2015, a quorum of

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<sup>30</sup> Acknowledgment Statement from Commissioner Cymbaluk (signed Nov. 12, 2015); see also Email from Jordan Evert, Williston City Att'y, to Sandra DePountis, Asst. Att'y Gen. (Oct. 29, 2015, 4:44 PM).

<sup>31</sup> N.D.A.G. 2015-O-06; N.D.A.G. 2015-O-04; N.D.A.G. 2014-O-23; N.D.A.G. 2014-O-19; N.D.A.G. 2012-O-02; N.D.A.G. 2011-O-17; N.D.A.G. 98-O-05.

<sup>32</sup> Letter from Jordon Evert, Williston City Att'y, to Sandra L. DePountis, Asst. Att'y Gen. (Oct. 13, 2015); Email from Jordon Evert, Williston City Att'y, to Sandra DePountis, Asst. Att'y Gen. (Oct. 29, 2015, 4:44 PM); see also Acknowledgment Statements from Mayor Klug (signed Nov. 12, 2015), and Commissioners Cymbaluk (signed Nov. 12, 2015), Bekkedahl (signed Nov. 18, 2015); Brostuen (signed Nov. 10, 2015); and Piesik (signed Nov. 12, 2015).

the Commission was then involved in a series of smaller gatherings about the same topic, in violation of the open meetings law.

#### STEPS NEEDED TO REMEDY VIOLATION

The Mayor and Commissioner Cymbaluk must draft minutes of the August 5, 2015, meeting and provided them to Mr. Port, free of charge.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2.<sup>33</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>34</sup>

Wayne Stenehjem  
Attorney General

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cc: Rob Port (via email only)

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<sup>33</sup> N.D.C.C. § 44-04-21.1(2).

<sup>34</sup> Id.