

**OPEN RECORDS AND MEETINGS OPINION
2018-O-10**

DATE ISSUED: May 17, 2018

ISSUED TO: Wildrose City Council

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Patricia Potteiger asking whether the Wildrose City Council violated N.D.C.C. § 44-04-20 by holding meetings without providing notice and by failing to create meeting minutes consistent with N.D.C.C. § 44-04-21.

FACTS PRESENTED

Ms. Patricia Potteiger alleges that the Wildrose City Council continually holds meetings, both in person and by text message, without providing public notice.¹ Ms. Potteiger provided a set of text messages that she participated in while employed as the auditor of Wildrose that occurred on December 17, 2017, regarding a city water main issue. Ms. Potteiger also alleges that meeting minutes for the January 8, 2018, City Council meetings were insufficient to meet the requirements of N.D.C.C. § 44-04-21(2).²

ISSUES

1. Whether the Wildrose City Council held "meetings" through various means without complying with open meeting requirements of posting notice, allowing the public the right to attend, and composing meeting minutes.
2. Whether the January 8, 2018, Wildrose City Council meeting minutes complied with N.D.C.C. § 44-04-21(2).

¹ Letters from Patricia Potteiger to Office of Att'y Gen. (Jan. 28, 2018).

² Ms. Potteiger also alleges the meeting minutes are inaccurate and fail to reflect the substance of all discussions. The Office of Attorney General does not review meeting minutes for accuracy; rather, this office only has the authority to review minutes to determine whether they are in compliance with N.D.C.C. § 44-04-21(2). See N.D.A.G. 2016-O-06.

ANALYSIS

Issue One

Except as otherwise specifically provided by law, all “meetings” of a governing body of a public entity must be open to the public,³ preceded by sufficient public notice in compliance with N.D.C.C. § 44-04-20, and minutes must be taken in compliance with N.D.C.C. § 44-04-21.

“Meeting” means a formal or informal gathering or a work session, whether in person or through electronic means such as telephone or videoconference, of:

1. A quorum of the members of the governing body of a public entity regarding public business; or
2. Less 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 section 44-04-19.⁴

There are two things to consider under the definition of “meeting” when looking at the interaction of individual members of a governing body – the number of members involved, which must collectively involve a “quorum,”⁵ and the topic of discussion, which must relate to the governing body’s “public business.”⁶ Over the years, the Office of Attorney General has issued several opinions on the definition of “meeting” and the application of open meeting laws to evolving technology.

The definition of “meeting” recognizes that a quorum of a governing body does not need to be present at any one time for the “quorum rule” to be met. In 1998, this office recognized that a series of conversations regarding public business between members of a governing body, which collectively involved a quorum, were considered “meetings”

³ N.D.C.C. § 44-04-19.

⁴ N.D.C.C. § 44-04-17.1(9)(a). The law does not require the board intend to violate the law. Rather, the law requires the governing body intentionally meet in groups smaller than a quorum, yet collectively involve a quorum, and intentionally discuss or receive information regarding items of public business. N.D.A.G. 98-O-05.

⁵ N.D.C.C. § 44-04-17.1(15) (definition of “quorum”).

⁶ N.D.C.C. § 44-04-17.1(12) (definition of “public business”).

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subject to the open meetings law.⁷ This rule has consistently been applied and analyzed in several opinions since 1998, recognizing the “quorum rule” can be reached when conversations regarding public business in person, by telephone, or through electronic means, collectively involve a quorum of the governing body.⁸

In addition, when a quorum of a governing body is present at another group’s meeting, but the discussion relates to the governing body’s public business, it is a meeting of that governing body, even if the members do not participate, do not call the meeting or set the agenda, or attend only as “concerned citizens.”⁹

The definitions of “meeting” and “public business” cover all stages of the decision-making process, including information gathering, formulating or narrowing options or actions, and building support or consensus on matters of public business.¹⁰ A decision does not need to be reached therefore for discussions to be considered “public business” that would trigger open meetings law. However, discussions involving only ministerial matters are not considered “public business.”¹¹ Ministerial matters include setting a meeting date or time, providing information for a governing body to review before an upcoming meeting, and adding an item to an agenda, as long as no substantive discussion occurs regarding the agenda item between a quorum of members of a governing body.¹² It is only when these discussions go beyond ministerial matters and delve into the substantive merits of an issue or suggested agenda topic, provide opinions regarding public business, build support and consensus for certain positions, or otherwise become steps in the decision-making process, that open meetings law are triggered.¹³

⁷ N.D.A.G. 98-O-05.

⁸ N.D.A.G. 2016-O-11; 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. 2013-O-01; N.D.A.G. 2012-O-02; N.D.A.G. 2011-O-17; N.D.A.G. 2010-O-09; N.D.A.G. 2008-O-22; N.D.A.G. 2007-O-08; N.D.A.G. 2006-O-11; N.D.A.G. 2005-O-04; N.D.A.G. 2005-O-02; ND.A.G. 2004-O-18; N.D.A.G. 2004-O-08; ND.A.G. 2003-O-18; N.D.A.G. 2001-O-14; N.D.A.G. 2000-O-08; N.D.A.G. 98-O-05.

⁹ N.D.A.G. 2016-O-23; N.D.A.G. 2014-O-13; N.D.A.G. 2013-O-14; N.D.A.G. 2012-O-06; N.D.A.G. 2008-O-10; N.D.A.G. 98-O-18; N.D.A.G. 98-O-10; N.D.A.G. 98-O-08.

¹⁰ N.D.A.G. 2017-O-02; N.D.A.G. 2015-O-06; 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-04; N.D.A.G. 2008-O-13; N.D.A.G. 2004-O-15; N.D.A.G. 2004-O-08; N.D.A.G. 98-O-11; N.D.A.G. 98-O-05.

¹¹ N.D.A.G. 2015-O-12; N.D.A.G. 2014-O-12; N.D.A.G. 2013-O-07; N.D.A.G. 2013-O-01; N.D.A.G. 2012-O-02; N.D.A.G. 2007-O-14; N.D.A.G. 2007-O-08.

¹² N.D.A.G. 2015-O-12; N.D.A.G. 2014-O-12; N.D.A.G. 2013-O-07; N.D.A.G. 2013-O-01; N.D.A.G. 2012-O-02; N.D.A.G. 2007-O-14; N.D.A.G. 2007-O-08.

¹³ N.D.A.G. 2015-O-12; N.D.A.G. 2014-O-12; N.D.A.G. 2013-O-07; N.D.A.G. 2013-O-01; N.D.A.G. 2012-O-02; N.D.A.G. 2007-O-14; N.D.A.G. 2007-O-08.

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Finally, the definition of “meeting” applies to the use of emails and text messages when they include a “quorum” of the governing body and “public business” is considered or discussed.¹⁴

In preparing this opinion, I asked each member of the Council to individually submit a signed, written statement of any conversations through any means, including in person or by telephone, with any other Council member regarding matters of public business since October 30, 2017.¹⁵ I also asked for copies of any text messages sent between members of the Council with any other member dealing with matters of public business.

Understandably, the Council members were not able to remember every discussion or conversation that took place since October.¹⁶ Text messages were also deleted before receiving this office’s request for information. However, the Council’s response to this office, signed statements, and provided text messages, reveal a widespread practice of discussing matters of public business by various means outside of properly noticed meetings.¹⁷

I reviewed several text messages provided by the Council and Ms. Potteiger. I also reviewed the sworn statements of the Council about recalled text conversations previously deleted. The Council recalls two specific issues that were discussed via group text on matters of public business regarding a possible city water main issue and concerns of trespassing occurring on city-owned property.¹⁸ In addition to these specific topics, the Council generally admits to receiving text messages regarding various city issues and questions, some initiated by Ms. Potteiger as auditor at the time.¹⁹

¹⁴ N.D.A.G. 2017-O-04; N.D.A.G. 2015-O-14; N.D.A.G. 2015-O-12; N.D.A.G. 2014-O-12, N.D.A.G. 2013-O-07; N.D.A.G. 2010-O-09; N.D.A.G. 2008-O-22; N.D.A.G. 2007-O-14; N.D.A.G. 98-O-05.

¹⁵ Pursuant to N.D.C.C. § 44-04-21.1, this office is authorized to review alleged violations of open meetings law for failure to properly post notice of public meetings occurring within ninety days of the request for an opinion.

¹⁶ Letter from Amber Fiesel, Att’y, City of Wildrose, to Office of Att’y Gen. (Feb. 21, 2018).

¹⁷ Attachments, Letter from Amber Fiesel, Att’y, City of Wildrose, to Office of Att’y Gen. (Feb. 21, 2018).

¹⁸ *Id.*

¹⁹ *Id.* Some Council members state that they did not actually reply to the texts. However, like in emails or meetings in which members of the governing body are present but not participating, it is the fact that the Council members were included in the text messages involving public business that will trigger the quorum rule.

The Council asserts that its use of the text messaging is not meant as a tool to circumvent open meetings law, but rather as a way of being informed of matters of public business and being able to have a quick method to recognize and address issues that may come up on a daily basis.²⁰ While I understand the Council's desire to be informed and responsive to city matters, the use of such text messages inevitably leads to a quorum of the Council discussing matters of public business outside of a properly noticed meeting.

Like emails, text messages can be used for ministerial purposes such as setting a meeting date and time, or providing information to review before the next Council meeting. It may also be permissible to send out a text message to determine who is available to help or answer a question, although further actions and conversations should be done individually, without the involvement of a quorum. However, texting cannot be used to discuss the substance of an issue of public business.²¹

In addition to the text messages, the Council also engaged in discussions, collectively involving a quorum, on matters of public business. One such example is when the mayor and Council president, on January 10, 2018, after a telephone conversation with each other, reached out to the rest of the Council members to discuss the job performance of the city auditor and whether to terminate her.²² After speaking with each member, the mayor and Council president again called each other to relay the conversations, confirm that the whole Council was in favor of moving forward with termination, and proceeded to call a meeting that night to move forward with termination.²³ A quorum of the Council also collectively were involved with discussions regarding how the termination hearing would proceed at another meeting.²⁴ These conversations collectively involved a quorum on a matter of public business and violated the open meeting laws.

²⁰ Attachments, Letter from Amber Fiesel, Att'y, City of Wildrose, to Office of Att'y Gen. (Feb. 21, 2018).

²¹ In one text message provided by the Council, information was shared by text but also stated "please do not respond to this text." This is permissible as no discussion took place on the merits of a matter of public business. Rather, information was provided for the Council to review, and a warning not to discuss the matter was provided.

²² Attachments, Letter from Amber Fiesel, Att'y, City of Wildrose, to Office of Att'y Gen. (Feb. 21, 2018).

²³ *Id.*

²⁴ *Id.*

The Council acknowledges it discussed matters of public business by text messages and in series of smaller gatherings collectively involving a quorum. Therefore, it is my opinion that the Council violated the open meetings law.

Issue Two

Minutes must be kept of all public meetings which must include, at a minimum:

1. The names of the members attending the meeting;
2. The date and time the meeting was called to order and adjourned;
3. A list of topics discussed regarding public business;
4. A description of each motion made at the meeting and whether the motion was seconded;
5. The results of every vote taken at the meeting; and
6. The vote of each member on every recorded roll call vote.²⁵

Unless otherwise provided by law, votes of a governing body must be open, public votes, and all “nonprocedural” votes must be recorded roll call votes.²⁶ A member of the public should be able to determine how an individual Council member voted on all nonprocedural matters by reading the minutes.²⁷

Minutes are not required to be a verbatim report, and it is not necessary for the minutes to reflect the specific discussion or concerns raised by members of the public at the meetings.²⁸ Rather, minutes must include a separate listing of the topics discussed regarding public business by the governing body.

The Office of Attorney General does not review any alleged inaccuracies in meeting minutes, but will only review the content of the meeting minutes to determine whether they meet the minimum requirements set out above.²⁹ The office also cannot review the sufficiency of minutes until the minutes have been approved by the governing body, because a deficiency in the minutes may still be cured by the body.³⁰

²⁵ N.D.C.C. § 44-04-21(2).

²⁶ N.D.C.C. § 44-04-21(1). “Nonprocedural” includes all votes that pertain to the merits of the matter before the governing body.

²⁷ N.D.A.G. 2005-O-10 (meeting minutes that state “motion carried” were insufficient to determine how each member of the governing body voted on nonprocedural matters and were therefore insufficient to comply with N.D.C.C. § 44-04-21).

²⁸ N.D.A.G. 2016-O-06; N.D.A.G. 2013-O-06; N.D.A.G. 2010-O-06; N.D.A.G. 98-O-14.

²⁹ N.D.A.G. 2016-O-06; N.D.A.G. 2013-O-06; N.D.A.G. 2004-O-16.

³⁰ N.D.A.G. 2001-O-01; N.D.A.G. 98-O-25.

The Council explains that Ms. Potteiger, as auditor at the time of the January 8, 2018, meeting, did not finish compiling the minutes before being terminated on January 10, 2018.³¹ The new interim auditor, therefore, first attempted to draft the meeting minutes based on Ms. Potteiger's notes.³² The Council approved the minutes at its regular meeting on February 5, 2018.³³ The approved minutes included the date, time, location of the meeting, members attending, and a list of topics discussed.³⁴ The minutes, however, lacked information on any final action taken by the Council and the results of any roll call votes. However, thereafter, this office forwarded information it received from Ms. Potteiger in her request for an opinion on to the Council, and the Council utilized the additional information to update the minutes, including updating final action information.³⁵ The Council approved the amended meeting minutes at its next regularly scheduled meeting on March 12, 2018.³⁶ These minutes complied with all requirements of N.D.C.C. § 44-04-21(2).

CONCLUSIONS

1. The Wildrose City Council held several "meetings" through various means without complying with open meeting requirements of publishing notice, allowing the public the right to attend, and composing meeting minutes.
2. The amended and approved January 8, 2018, meeting minutes contained the items required by N.D.C.C. § 44-04-21(2).

STEPS NEEDED TO REMEDY VIOLATION

The Wildrose City Council shall provide copies of its signed statements to Ms. Potteiger, and anyone else requesting them, free of charge. I would also encourage the Wildrose

³¹ Letter from Amber Fiesel, Att'y, City of Wildrose, to Office of Att'y Gen. (Feb. 21, 2018).

³² *Id.*

³³ *Id.*

³⁴ Letter from Amber Fiesel, Att'y, City of Wildrose, to Office of Att'y Gen. (Feb. 21, 2018); see *also* Minutes (Initial draft) Wildrose City Council (Jan. 8, 2018); and Email from Amber Fiesel, Att'y, City of Wildrose, to Office of Att'y Gen. (Mar. 9, 2018, 3:12 p.m.).

³⁵ Letter from Amber Fiesel, Att'y, City of Wildrose, to Office of Att'y Gen. (Feb. 21, 2018). Ms. Potteiger provided a two-page summary to this office of the Jan. 8, 2018, meeting which was forwarded on from this office when requesting information for this opinion.

³⁶ See emails from Amber Fiesel, Att'y, City of Wildrose, to Office of Att'y Gen. (Mar. 9, 2018, 3:12 p.m., Mar. 14, 2018, 3:12 p.m. and Mar. 14, 2018, 3:16 p.m.).

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City Council to educate itself on the application of open meetings law by utilizing the resources available on the Office of Attorney General's website.

As the January 8, 2018, Wildrose City Council meeting minutes were updated and approved at the March 12, 2018, meeting with all items that meet the requirements of N.D.C.C. § 44-04-21, no further action is necessary on this issue.

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. § 44-04-21.2.³⁷ It may also result in personal liability for the person or persons responsible for the noncompliance.³⁸

Wayne Stenehjem
Attorney General

sld

cc: Patricia Potteiger (via email only)

³⁷ N.D.C.C. § 44-04-21.1(2).

³⁸ *Id.*