

**OPEN RECORDS AND MEETINGS OPINION  
2018-O-17**

DATE ISSUED: October 11, 2018

ISSUED TO: Divide County Ambulance Board

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Ken Rensch asking whether the Divide County Ambulance Board violated N.D.C.C. § 44-04-20 by holding meetings without public notice.

**FACTS PRESENTED**

The Divide County Ambulance District (DCAD) Board of Directors held its annual meeting on March 28, 2018.<sup>1</sup> An announcement was made at the end of the annual meeting that a board meeting would follow at which time the Board of Directors would elect officers for the next year.<sup>2</sup> The requestor alleges the DCAD failed to provide public notice for the board meeting held after the annual meeting, and that the DCAD conducted other official business at various times through multiple means such as telephone, text, email, and smaller gatherings, without providing public notice of the meetings.

**ISSUES**

1. Whether the Divide County Ambulance District Board of Directors violated N.D.C.C. § 44-04-20 by failing to notice its March 28, 2018, board meeting held after the district's annual meeting.
2. Whether the Divide County Ambulance District Board of Directors 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.

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<sup>1</sup> N.D.C.C. § 11-28.3-07. A regular meeting of the electors who reside within the boundaries of a district shall be held in the first quarter of each calendar year.

<sup>2</sup> Letter from Garth Sjue, att'y for DCAD, to Att'y Gen.'s Office (June 1, 2018).

## ANALYSIS

### Issue One

Rural ambulance service districts and the boards that serve them are public entities because the districts are created by statute to exercise public authority or perform a governmental function.<sup>3</sup> They are therefore subject to the state's open records and open meetings law.

Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity in substantial compliance with N.D.C.C. § 44-04-20.<sup>4</sup> The DCAD does not publish an annual schedule of its upcoming meetings and therefore all meetings are considered special meetings.<sup>5</sup>

Notice of meetings must be posted at the principal office of the governing body, if one exists, at the location of the meeting on the day of the meeting, given to anyone who asks to receive notice of upcoming meetings, and for a county ambulance district, either filed with the county auditor or posted on the public entity's website.<sup>6</sup> For special meetings, notice must be given to the public entity's official newspaper and to any representatives of the news media asking to be notified of the special meeting.<sup>7</sup>

In past opinions, this office recognized that if a meeting is adjourned, a quorum of a governing body cannot continue to discuss matters of public business outside of a properly noticed meeting.<sup>8</sup> Although it could be argued that the DCAD's annual meeting was not "adjourned" here, and the announcement and subsequent discussion was merely a continuation of the meeting, the meeting itself was not properly noticed. The agenda for the annual meeting was never provided to the auditor's office or on the county's website, posted at the location of the meeting on the day of the meeting, or

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<sup>3</sup> N.D.C.C. § 44-04-17.1(13) (definition of "public entity"); N.D.C.C. ch. 11-28.3. See *also* N.D.A.G. 2016-O-17.

<sup>4</sup> N.D.C.C. §§ 44-04-19, 44-04-20.

<sup>5</sup> N.D.A.G. 2018-O-07.

<sup>6</sup> N.D.C.C. § 44-04-20(4), (5). The DCAD does not have a principal office and no one requested to receive personal notice. Letter from Garth Sjue, att'y for DCAD, to Att'y Gen.'s Office (June 1, 2018).

<sup>7</sup> N.D.C.C. § 44-04-20(6).

<sup>8</sup> N.D.A.G. 2014-O-11; N.D.A.G. 2011-O-08; N.D.A.G. 2007-O-02; N.D.A.G. 98-O-16; *but see* N.D.A.G. 2003-O-03; N.D.A.G. 99-O-08.

given to the official newspaper.<sup>9</sup> The DCAD therefore violated open the meetings law when it failed to provide notice of its annual meeting and discussion thereafter in substantial compliance with N.D.C.C. § 44-04-20.

## Issue Two

All meetings of the governing body of a public entity are required to be open to the public unless otherwise specifically provided by law,<sup>10</sup> 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.<sup>11</sup> A “meeting” is defined as a formal or informal gathering or a work session ... of [a] quorum of the members of the governing body of a public entity regarding public business.”<sup>12</sup> 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>13</sup> Under this definition, when a governing body delegates authority to any two or more people to perform any function on its behalf, including gathering information, reporting, or taking action, a “committee” is formed that is subject to all of the requirements of the open meetings law.<sup>14</sup> When a quorum of the committee gathers to perform the function delegated, it is holding a “meeting” that must be noticed in compliance with N.D.C.C. § 44-04-20.<sup>15</sup>

This office recently issued an opinion outlining the definition of “meeting” and its application to uses of technology that may implicate open meetings law.<sup>16</sup> That opinion recognized that when a quorum of a governing body, or committee thereof, is included in emails and text messages on matters regarding public business, the open meetings

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<sup>9</sup> Two ads were published in the Divide County Journal on March 14 and March 21, 2018, which provided notice of the date, time, and location of the meeting, along with a brief reference to discussion on a mill levy increase. However, N.D.C.C. § 44-04-20(6) requires an agenda to be provided to the official newspaper for special meetings with topics that may be considered at such special meetings being limited to those included in the agenda.

<sup>10</sup> N.D.C.C. § 44-04-19.

<sup>11</sup> N.D.C.C. §§ 44-04-19, 44-04-20.

<sup>12</sup> N.D.C.C. § 44-04-17.1(9)(a).

<sup>13</sup> N.D.C.C. § 44-04-17.1(6).

<sup>14</sup> N.D.A.G. 2018-O-09

<sup>15</sup> *Id.* Minutes must also be taken in compliance with N.D.C.C. § 44-04-21.

<sup>16</sup> N.D.A.G. 2018-O-10.

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law is triggered, and such exchanges are considered violations as they occur outside of a properly noticed meeting where the public has the right to attend.<sup>17</sup>

In preparing this opinion, I asked each member of the DCAD Board of Directors to individually submit a signed, written statement of any conversations through any means with any other Board member regarding matters of public business since March 28, 2018. I also asked for copies of text messages and emails sent between members of the Board with any other member dealing with matters of public business. The DCAD Board of Directors did not provide all of the requested information, however, the information that was provided reveals a widespread practice of holding “meetings” without providing notice.

The DCAD held several subsequent meetings after its annual meeting, none of which were properly noticed.<sup>18</sup> The minutes of these meetings also reveal the formation of several committees when the Board of Directors delegated various tasks to two or more people.<sup>19</sup> According to the DCAD, only the contract and staffing committee, consisting of Jody Gunlock and Cody Barnhart, met in person on two occasions.<sup>20</sup> This committee also exchanged a number of text messages and emails.<sup>21</sup> The emails and text messages involved a quorum of the committee discussing the task delegated to it by the

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<sup>17</sup> *Id.* The opinion also reiterates a long standing principle that when a series of smaller gatherings, in person or by other means such as by telephone, collectively involve a quorum, and public business is considered or discussed, the open meetings law is again triggered and violated when such discussions are not held at a properly noticed public meeting. Finally, the opinion recognizes a distinction between a quorum’s exchanges on ministerial matters, such as setting a meeting date or time, versus discussions regarding public business. It is only the latter that will implicate open meetings law.

<sup>18</sup> Letter from Garth Sjue, att’y for DCAD, to Att’y Gen.’s Office (June 1, 2018). Meetings occurred on April 11, April 25, and May 9, 2018.

<sup>19</sup> See Minutes, DC Ambulance (April 11, 2018) (committees for contract and staffing options; equipment, data, medication; and an audit review); Minutes, DC Ambulance (April 25, 2018) (reference made to numerous items that would “be taken over by the sub committees”); Minutes, DC Ambulance (May 9, 2018) (committee reports for personnel and logistics/finance).

<sup>20</sup> Letter from Garth Sjue, Att’y for DCAD, to Att’y Gen.’s Office (June 22, 2018). The committee was formed to explore contract and staffing options for the delivery of ambulance services moving forward. Numerous emails between Ms. Gunlock and Mr. Barnhart ensued carrying out this delegated task.

<sup>21</sup> *Id.*

Board of Directors, therefore implicating open meetings law.<sup>22</sup> No notice was ever provided of any of these committee meetings. Finally, the Board of Directors was included in a group text message, initiated by the requestor of this opinion.<sup>23</sup> Although the Board of Directors state that only the president and requestor actually sent text messages, the entire Board was included in the group text regarding matters of public business. As a quorum was present and public business was being considered and discussed, the open meetings law was triggered and violated as the text messaging occurred outside of a properly noticed, public meeting.<sup>24</sup>

I appreciate that at the time at issue in this opinion, the DCAD was scrambling to provide staffing to ensure ongoing operation of the ambulance service after its contractor, who is the requestor for this opinion, terminated services with the county.<sup>25</sup> However, the DCAD nonetheless has a duty and responsibility to comply with open meetings law requirements. Although I am unable to confirm how many violations occurred, the widespread practice of meeting by various means without notice shows the DCAD Board of Directors continually violated open meetings law.

#### CONCLUSIONS

1. The Divide County Ambulance District Board of Directors violated N.D.C.C. § 44-04-20 by failing to properly notice its March 28, 2018, annual meeting and discussion thereafter.
2. The Divide County Ambulance District Board of Directors and its committees 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.

#### STEPS NEEDED TO REMEDY VIOLATION

The DCAD Board of Directors should review its meeting minutes and update them to reflect detailed recollections of all discussions that occurred. The Board should also create meeting minutes, utilizing their statements, emails, texts, and recollections of any committee meetings that took place, including what information was gathered. I urge the Board to review the resources online, specifically the Open Meeting Manual, found

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<sup>22</sup> *Id.*, see also Letter from Garth Sjue, att’y for DCAD, to Att’y Gen.’s. Office (June 1, 2018) with attached emails.

<sup>23</sup> See Statements by Jody Gunlock, President, and Rob Melby, Vice President, Divide Cnty. Ambulance Dist. Bd. of Dir.

<sup>24</sup> See N.D.A.G. 2018-O-10.

<sup>25</sup> Letter from Garth Sjue, att’y for DCAD, to Att’y Gen.’s Office (June 1, 2018).

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on the Office of Attorney General website, to educate itself on its responsibilities under the open meetings law.

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>26</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>27</sup>

Wayne Stenehjem  
Attorney General

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cc: Ken Rensch (via email only)

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<sup>26</sup> N.D.C.C. § 44-04-21.1(2).

<sup>27</sup> *Id.*