

**OPEN RECORDS AND MEETINGS OPINION  
2018-O-20**

DATE ISSUED: December 10, 2018

ISSUED TO: Cass County Commission

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Archie Ingersoll asking whether the Cass County Commissioners violated N.D.C.C. § 44-04-19 during its trip to Washington, D.C., to attend the White House Leadership Conference.

**FACTS PRESENTED**

The Cass County Commissioners, along with other county officials from North Dakota, South Dakota, and Wyoming, were invited to attend the White House State Leadership Conference in Washington, D.C., on August 30, 2018. Three of the five Commissioners decided to attend the event.<sup>1</sup> As a quorum would be present, a press release was issued to local media on August 8, 2018, stating:

Please be advised that a quorum of Cass County Commissioners will be present during a trip to Washington, D.C. on Thursday, August 30<sup>th</sup> to meet with Senior Administration officials.<sup>2</sup>

Reporters from The Forum of Fargo-Moorhead inquired into whether they would be able to attend the meeting.<sup>3</sup> The Commission reached out to White House staff who, after a series of follow up conversations, stated it would not grant media access to the briefing portion of the conference.<sup>4</sup> Instead, White House staff offered to make special accommodations and grant access to members of the local media to be present in the

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<sup>1</sup> Letter from Rick Steen, Chair, Cass Cnty. Comm'n, to Att'y Gen.'s Office (Oct. 18, 2018).

<sup>2</sup> Memo from Cass Cnty. Comm'n Office to Local Media (Aug. 8, 2018).

<sup>3</sup> Letter from Rick Steen, Chair, Cass Cnty. Comm'n, to Att'y Gen.'s Office (Oct. 18, 2018).

<sup>4</sup> *Id.*

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area outside the room where the briefing would take place and interview commissioners as they entered and exited the briefing.<sup>5</sup>

The reporters were told they could accompany the Commissioners to all meetings and gatherings, other than the briefing portion of the conference prohibited by White House staff.<sup>6</sup> No reporter accompanied the Commissioners on their trip.<sup>7</sup> While in Washington, in addition to the briefing, the Commissioners attended meetings with Senators Hoeven and Heitkamp.<sup>8</sup> The Commissioners did not know when the meetings with the Senators would occur prior to the trip, so no notice was provided.<sup>9</sup>

The Commissioners participated in individual telephone conversations with reporters from the Fargo Forum at the conclusion of the briefing.<sup>10</sup> At the next Commission meeting in Fargo on September 4, 2018, the Commissioners discussed the trip and reviewed a draft memorandum that outlined the discussions and meetings that took place during the Washington trip.<sup>11</sup> This memorandum was finalized and sent to the Commissioners' standard email distribution list to the media on September 5, 2018, and was officially received and recorded at the Commission's September 17, 2018, meeting.<sup>12</sup>

### ISSUE

Whether the attendance of a quorum of Cass County Commissioners at a trip to Washington, DC violated open meeting laws.

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<sup>5</sup> *Id.*

<sup>6</sup> Email from Birch P. Burdick, State's Att'y, Cass Cnty., to Att'y Gen.'s Office (Oct. 22, 2018, 4:01 PM).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Letter from Rick Steen, Chair, Cass Cnty. Comm'n, to Att'y Gen.'s Office (Oct. 18, 2018); *see also* Memo for White House Conference Event (Aug. 29-31, 2018).

<sup>11</sup> Letter from Rick Steen, Chair, Cass Cnty. Comm'n, to Att'y Gen.'s Office (Oct. 18, 2018); Minutes, Cass Cnty. Bd. of Comm'rs (Sept. n 4, 2018); Memo for White House Conference Event (Aug. 29-31, 2018).

<sup>12</sup> Letter from Rick Steen, Chair, Cass Cnty. Comm'n, to Att'y Gen.'s Office (Oct. 18, 2018); Memo from Cass Cnty. Comm'n Office to Local Media (Sept. 5, 2018); Minutes, Cass Cnty. Bd. of Comm'rs (Sept. 17, 2018); Memo for White House Conference Event (Aug. 29-31, 2018.)

## ANALYSIS

When a quorum of a governing body is present and its public business is being considered or discussed, it is a “meeting” subject to open meetings law, regardless of what entity called the meeting or set the agenda.<sup>13</sup> All “meetings” of a public entity require notice to be published in substantial compliance with N.D.C.C. § 44-04-20 and the public, including reporters, have the right to attend.<sup>14</sup> The briefing at the White House involved discussing issues regarding the Commission’s public business.<sup>15</sup> It was therefore a “meeting” subject to open meetings law. I recognize the Commission did not have control over who was allowed into the briefing as it was dictated by White House staff. However, there is no exception to the open meetings law for such a circumstance. The Commission chose to send a quorum to a meeting involving public business when it knew this would not be open to the public. In addition to the closed briefing, a quorum of the Commission attended meetings with Senators Hoeven and Heitkamp, which were not noticed in compliance with N.D.C.C. § 44-04-20.<sup>16</sup> The Commission therefore violated open meetings law when a quorum of the Commission met on matters of public business at the White House briefing and meetings with the Senators.

## CONCLUSION

A quorum of the Commission’s participation in various meetings in Washington, D.C., violated open meetings law when notice was not published and the public was not allowed to attend.

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<sup>13</sup> N.D.A.G. 2014-O-13 (if a quorum of members of the governing body are present and its public business is being discussed, it is a meeting subject to open meeting laws regardless of what entity called the meeting or set the agenda); see *also* N.D.A.G. 2016-O-23 (“This conclusion applies even if the members of the governing body merely listen, do not participate in the meeting, or attend merely as a ‘concerned citizen.’”)

<sup>14</sup> N.D.C.C. §§ 44-04-19, 44-04-20.

<sup>15</sup> Memo for White House Conference Event (Aug. 29-31, 2018).

<sup>16</sup> The Commission provides that “a number of final details” were “still in flux in the days immediately preceding the trip” and “logistics and schedules were still being coordinated and updated hours before [the Commissioners] arrived.” <sup>16</sup> Email from Birch P. Burdick, State’s Att’y, Cass Cnty., to Att’y Gen.’s Office (Oct. 22, 2018, 11:01 AM). However, this office consistently holds that special or emergency meetings called on short notice to handle urgent matters do not obviate the notice requirements of N.D.C.C. § 44-04-20. See N.D.A.G. 2015-O-06 (in the same amount of time it took the auditor to relay public information to the Commissioners, a meeting could have been scheduled and noticed); N.D.A.G. 2014-O-23 (the Council had several hours to convene a properly noticed meeting); N.D.A.G. 2011-O-13 (the School Board had several hours to post notice of the emergency meeting).

#### STEPS NEEDED TO REMEDY VIOLATION

The Commissioners provided a memorandum regarding the visit to Washington, D.C. The visit was discussed at its next regular meeting and the Commissioners who attended the meeting provided personal interviews to the Fargo Forum regarding the substance of the briefing and meetings. No further remedial measures therefore need to be taken.

Wayne Stenehjem  
Attorney General

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cc: Archie Ingersoll (via email only)