

**OPEN RECORDS AND MEETINGS OPINION
2021-O-04**

DATE ISSUED: May 12, 2021

ISSUED TO: City of Surrey

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Terra Knipp asking whether the Surrey City Council (Council) violated N.D.C.C. § 44-04-20 by failing to adequately notice topics to be discussed at a special meeting. Ms. Knipp also alleges the Council violated N.D.C.C. § 44-04-20 by continuing to discuss public business after the Council adjourned its special October 27, 2020, meeting.

FACTS PRESENTED

The Council held a special meeting on October 27, 2020, to discuss a protocol for handling complaints and reviewing complaints that had been received.¹ All seven of the Council members - Mayor Chuck Tollefson, Council President Mike Thiesen, Council Vice President Elaine Christenson, Twila Gantzer, Jennifer Johns, Steve Fennewald, and Brent Dickinson - were present.² At the beginning of the meeting, Mayor Tollefson read a prepared statement that was not included on the special meeting notice/agenda.³ The special meeting continued with the properly noticed agenda items.⁴

¹ Notice, Surrey City Council, Special Meeting (Oct. 27, 2020).

² Minutes, Surrey City Council, Special Meeting (Oct. 27, 2020).

³ Letter from Andrew J. Schultz, Att'y, City of Surrey, to Att'y Gen.'s Office (Nov. 23, 2020); *see also*, Minutes, Surrey City Council, Special Meeting (Oct. 27, 2020). According to the Council's attorney, the Mayor's statement was to be added to the next regular meeting agenda, when the Mayor was supposed to read it again verbatim and no action was to be taken on the statement until then.

⁴ Minutes, Surrey City Council, Special Meeting (Oct. 27, 2020).

After the meeting adjourned, three council members, Jennifer Johns, Brent Dickinson, and Elaine Christianson, discussed “different government structures of cities in North Dakota.”⁵ Ms. Christianson memorialized their discussion in writing and submitted it to the Council at its November regular meeting.⁶

ISSUES

1. Whether the Council’s October 27, 2020, special meeting agenda adequately provided notice of topics to be discussed in compliance with N.D.C.C. § 44-04-20.
2. Whether three Council members continuing to discuss public business following the October 27, 2020, special meeting violated N.D.C.C. § 44-04-20.

ANALYSIS

Issue One

Public notice must be given in advance of all meetings of a public entity.⁷ Every notice must contain the date, time, and location of the meeting and an agenda of the topics to be discussed at the meeting.⁸ The “[t]opics that may be considered at an emergency or special meeting [of a governing body] are limited to those included in the notice” of the meeting.⁹ “The purpose of an agenda is to provide sufficient ‘information to interested members of the public concerning the governing body’s anticipated business in order that they may attend the meeting or take whatever other action they deem appropriate.’”¹⁰ “The importance of identifying what will take place at a meeting is greater for special meetings because they are unpredictable and often scheduled on short notice.”¹¹

⁵ Letter from Andrew J. Schultz, Att’y, City of Surrey, to Att’y Gen.’s Office (Nov. 23, 2020); Memo from Elaine Christianson, Vice President, Surrey City Council, to Surrey City Council (Oct. 27, 2020).

⁶ Memo from Elaine Christianson, Vice President, Surrey City Council, to Surrey City Council (Oct. 27, 2020); Letter from Andrew J. Schultz, Att’y, City of Surrey, to Att’y Gen.’s Office (Nov. 23, 2020).

⁷ N.D.C.C. § 44-04-20(1).

⁸ N.D.C.C. § 44-04-20(2).

⁹ N.D.C.C. § 44-04-20(6).

¹⁰ N.D.A.G. 2019-O-17; N.D.A.G. 2014-O-13; N.D.A.G. 2014-O-01.

¹¹ N.D.A.G. 2019-O-17; N.D.A.G. 2018-O-28; N.D.A.G. 2011-O-15.

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The City Council provided notice of the October 27, 2020, special meeting with the date, time, and the following agenda:¹²

1. Council discussion regarding protocol of how complaints should be handled
2. Complaints received: Heisler, Waller, Fugere, Gantzer

No other items to be discussed

NO OTHER ITEMS MAY BE DISCUSSED.¹³

At the beginning of the special meeting, Mayor Tollefson read a three-and-a-half-page handwritten statement that was not included in the meeting notice.¹⁴ The topics in Mayor Tollefson's statement ranged from “abstention vote; comments about the mayor at a school sporting event; e-mail to Diane; attorney matters regarding committees; behavior at the last regular meeting; Carrie Francis resignation; mayor control of council meetings; home rule.”¹⁵

The special meeting agenda did not sufficiently describe the statement Mayor Tollefson prepared prior to the special meeting. In reading a prepared statement, about topics that were not included in the special meeting notice/agenda, members of the public were prevented from obtaining proper advance notice. Therefore, it is my opinion that the Council violated N.D.C.C. § 44-04-20 when it failed to list all topics intended to be discussed at the meeting in its notice and lacked the specificity required for a special meeting notice.

Issue 2

Notice must be given in advance of all meetings of a public entity.¹⁶ For a gathering to be considered a “meeting,” two primary elements must be considered: whether a

¹² The Council’s October 27, 2020 special meeting notice failed to disclose the location of the meeting in violation of N.D.C.C. § 44-04-20(2). Failing to include the location prevents members of the public from obtaining proper advance notice of special meetings.

¹³ Notice, Surrey City Council, Special Meeting (Oct. 27, 2020). *See also*, Letter from Andrew J. Schultz, Att’y, City of Surrey, to Att’y Gen.’s Office (Nov. 23, 2020).

¹⁴ Letter from Andrew J. Schultz, Att’y, City of Surrey, to Att’y Gen.’s Office (Nov. 23, 2020).

¹⁵ Minutes, Surrey City Council, Special Meeting (Oct. 27, 2020).

¹⁶ N.D.C.C. § 44-04-20(1).

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quorum was present and the topic of discussion.¹⁷ A formal or informal gathering constitutes a meeting when a quorum of the members of the governing body is present at the gathering regarding public business.¹⁸ Public business means “all matters that relate or may foreseeably relate in any way to: [t]he performance of the public entity's governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power; or [t]he public entity's use of public funds.”¹⁹ This office has explained that public business for a city “includes any matter that could foreseeably be brought before the city council in the context of its responsibilities to the public or over which the council has the potential to determine the outcome.”²⁰ Further, “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.”²¹ A decision does not need to be reached for discussions to be considered “public business” that would trigger open meetings law.²² However, discussions involving only ministerial matters²³ are not considered “public business.”²⁴

¹⁷ N.D.C.C. § 44-04-17.1(9)(a)(1); N.D.A.G. 2008-O-11; N.D.A.G. 2007-O-08; N.D.A.G. 98-O-05.

¹⁸ N.D.C.C. § 44-04-17.1(9)(a)(1).

¹⁹ N.D.C.C. § 44-04-17.1(12).

²⁰ N.D.A.G. 96-F-09 (citing N.D.A.G. Letter to Atkinson (Mar. 5, 1976); *St. Cloud Newspapers v. Dist. 742 Cmty. Schools*, 332 N.W.2d 1, 6 (Minn. 1983); *State ex rel. Badke v. Village Bd.*, 494 N.W.2d 408, 418 (Wis. 1993)).

²¹ N.D.A.G. 2018-O-10 (citing 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).

²² N.D.A.G. 2018-O-10.

²³ 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. *See*, N.D.A.G. 2018-O-10; 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.

²⁴ N.D.A.G. 2018-O-10; 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.

This office has also previously determined that the gathering of the members of a governing body or committee is a meeting, “even when no motions are made and no action is taken.”²⁵ “Under these definitions, a quorum of a governing body performing any function, including discussing public business, is subject to the state's open meetings laws, including the requirements to give notice of its meetings and prepare minutes.”²⁶ However, “individual members of a governing body are generally not prohibited from talking to another member, even regarding public business as long as the members talking do not constitute a quorum of the governing body or a committee of the governing body.”²⁷

Here, the three Council members had not been delegated any authority by the Council and were not a committee. Thus, when two councilmembers had a discussion after the October 27, 2020, special meeting, with a Councilmember standing nearby, it did not involve a quorum of the Council. Therefore, it is my opinion that no violation of the open meetings law occurred.

CONCLUSIONS

Issue 1

The Council’s October 27, 2020, special meeting agenda did not adequately provide notice of topics that were discussed in compliance with N.D.C.C. § 44-04-20.

Issue 2

The discussion following the October 27, 2020, special meeting did not violate open meetings law because three members did not constitute a quorum of the seven member Council.

STEPS NEEDED TO REMEDY VIOLATION

Mayor Tollefson’s statement was noted in the October 27, 2020, special meeting minutes. Anyone who requests a copy of the special meeting minutes should have them provided free of charge.

²⁵ N.D.A.G. 2007-O-02 (citing N.D.A.G. 98-O-16; N.D.A.G. 98-O-08).

²⁶ N.D.A.G. 2007-O-02 (citing N.D.A.G. 2003-O-13; N.D.A.G. 2003-O-15; N.D.A.G. 2001-O-11).

²⁷ N.D.A.G. 2007-O-08 (citing N.D.A.G. 98-O-05; N.D.A.G. 2006-O-11; N.D.C.C. § 44-04-17.1(6)).

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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. § 44-04-21.2.²⁸ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁹

Wayne Stenehjem
Attorney General

cc: Terra Knipp (via email only)

²⁸ N.D.C.C. § 44-04-21.1(2).

²⁹ *Id.*