

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 98-O-08**

DATE ISSUED: May 4, 1998

ISSUED TO: The Honorable Bob Dykshoorn, President, City of Mandan Board of Commissioners

CITIZEN'S REQUEST FOR OPINION

On April 1, 1998, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Kelly Schmidt asking whether the Mandan City Commission violated N.D.C.C. § 44-04-20 by holding a meeting that was not preceded by sufficient public notice.

FACTS PRESENTED

On Monday, March 30, 1998, various department heads of the City of Mandan met for lunch at a local restaurant to discuss city business, particularly the items on the agenda of the city commission meeting scheduled for the next day. Similar lunch meetings are commonly held by the department heads on the day before regular city commission meetings. The meeting was attended by three members of the five-member Mandan City Commission, including Commission President Bob Dykshoorn. It is undisputed that the discussion pertained to city business and was attended by a quorum of the city commission. In fact, in response to an inquiry from this office, Commission President Dykshoorn stated that he remarked during the lunch meeting that some form of public notice will be needed in the future because of the possibility that a majority of the city commission could appear at the meeting. Although no one was excluded from the meeting, and the door to the meeting room was open at all times, there was no public notice filed or posted for the meeting. No minutes were kept and no formal actions were taken.

ISSUE

Did the attendance of a quorum of the members of the Mandan City Commission at the March 30 department head meeting constitute a "meeting" of the Mandan City Commission, required to be open to the public and preceded by public notice under N.D.C.C. § 44-04-20?

ANALYSIS

The situation presented is nearly identical to one previously addressed by this office regarding the City of Carrington. See N.D.A.G. 96-F-06. In that opinion, the department heads met with the mayor to discuss the items on the agenda for the city council meeting scheduled for the next day.

According to the facts provided, problems and issues are discussed at the department head meetings that could foreseeably be brought before the city council, including specific agenda items. The other city council members did not receive an agenda but were invited to attend the mayor's meeting with the city department heads. This invitation suggests that the attendance of other city council members at the mayor's meeting would not be a chance gathering, particularly if the council members have a history of attending those meetings. Even if it was a chance gathering, the members' presence during the discussion would allow them to gather information regarding city council business and therefore convert the gathering into a "meeting" under the open meetings law. Interaction or discussion is not required. In addition, it is difficult to imagine that no discussion would occur between city council members and the department heads, or among the city council members themselves, at such a meeting.

In summary, it is my opinion that the presence of the other city council members at a meeting between the mayor and city department heads regarding city council business constitutes a meeting of the city council under the open meetings law, even if the mayor and other council members merely listen and do not interact or participate in the discussion.

N.D.A.G. 96-F-09.

Although the laws applied in the 1996 opinion were amended during the 1997 legislative session, the same result would be reached under current law. Any gathering of a quorum of the members of a governing body regarding public business is a "meeting." N.D.C.C. § 44-04-17.1(8)(a). This definition includes both formally-convened gatherings and informal gatherings. Id. Action need not be taken at a gathering for it to be a "meeting." See Peters v. Bowman Public School Dist., 231 N.W.2d 817 (N.D. 1975); Letter from Attorney General Allen Olson to Myron Atkinson (March 5, 1976). Rather, the gathering need only pertain to the "public business" of the governing body, which includes all stages of the decision-making process from information gathering to final action. N.D.C.C. § 44-04-17.1; N.D.A.G. 96-F-09. "Public business" means "all matters that relate or may foreseeably relate in any way to . . . [t]he performance of the public

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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." N.D.C.C. § 44-04-17.1(11).

The 1996 opinion regarding the Carrington City Council relied extensively on State ex rel. Badke v. Village Board, in which the Wisconsin Supreme Court stated that

interaction between members of a governmental body is not necessary for a convening of a meeting to have taken place nor is interaction necessary for the body to have exercised its powers, duties, or responsibilities. Listening and exposing itself to facts, arguments, and statements constitutes a crucial part of a governmental body's decision making.

. . .

[E]ven if the Village Board members did not interact at the Plan Commission meetings, their presence at the meetings allowed them to gather information that influenced a decision about a matter over which they had decision making authority. The public had a right to be made aware of the existence of this information as well. This is sufficient to trigger the open meeting law.

494 N.W.2d 408, 415 (Wis. 1993). "[C]ouncil members should be aware that their acceptance of the invitation and presence at the meeting would likely violate the open meetings law unless prior notice has been provided by the council under N.D.C.C. § 44-04-20." N.D.A.G. 96-F-09.

Not every gathering of two or more commissioners is a meeting.

By adopting the "quorum rule," the Legislature impliedly exempted from the open meetings law most conversations between [less than a quorum of the] Board members. Individual Board members are generally not prohibited from gathering information on their own or from talking to another Board member, even regarding public business.

N.D.A.G. 98-O-05. However, any gathering of a quorum of the members of a governing body to discuss or receive information regarding the body's public business is a "meeting," generally required to be open to the public and preceded by sufficient public notice.

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Commission President Dykshoorn has indicated that no person was excluded from the informal gathering, but has acknowledged that the gathering was attended by a quorum of the Mandan City Commission and pertained to city business. Therefore, it is my opinion that the March 30 gathering was a "meeting" required to be preceded by sufficient public notice under N.D.C.C. § 44-04-20.

In response to the question of when notice of a meeting like the one described in this opinion should be provided, N.D.C.C. § 44-04-20(5) requires that public notice be provided "at the same time as such governing body's members are notified." When the attendance of a quorum of the members of a governing body is a surprise, notice must be provided immediately. However, if it is reasonable to suspect that a quorum might attend a gathering, public notice should be provided when the members learn of the gathering. Here, because the department heads regularly meet before the city commission meeting, and because it is not unusual for one or more city commissioners to attend, notice should be provided by the Mandan City Commission as soon as it knows when the department head meeting will be held.

CONCLUSION

It is my opinion that the attendance of a quorum or more of the members of a governing body at a meeting of another group or organization regarding the public business of the governing body is a "meeting" of the governing body required to be open to the public and preceded by sufficient public notice. It is my further opinion that the Mandan City Commission violated N.D.C.C. § 44-04-20 because it did not provide any public notice of its March 30 meeting.

STEPS NEEDED TO REMEDY VIOLATION

According to Commission President Dykshoorn, the informal gathering on March 30 was limited to topics that were thoroughly discussed again at the city commission meeting the next day. Thus, other than knowing exactly what was discussed at the informal meeting, it does not appear the public was deprived of the accountability that is served by having governing bodies discuss items of public business in the open. Compare N.D.A.G. 98-O-05 (public was unable to hear Board of Higher Education members' discussion on performance of university president). As a result, I do not believe a new meeting of the city commission is required, as long as accurate and complete minutes of the March 30 gathering are prepared in compliance with N.D.C.C. § 44-04-20(2).

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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. N.D.C.C. § 44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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