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OPEN RECORDS AND MEETINGS OPINION
2023-O-03

DATE ISSUED: August 22, 2023

ISSUED TO: Wells County Commission

CITIZEN'S REQUEST FOR OPINION

Sheriff Christopher A. Kluth requested an opinion from this office under North Dakota Century Code § 44-04-21.1, asking whether Wells County Commission (Commission) violated N.D.C.C. § 44-04-19 by improperly noticing a meeting and failing to create minutes.¹

FACTS PRESENTED

Approximately once a month, Wells County holds a Departments Meeting for county employees to update them on developments in the county.² One of these meetings occurred on February 24, 2022 (February Departments Meeting). Many county employees, including three members of the five-member Commission, namely Stan Buxa, Dennis Dockter, and Leone Klocke, attended the February Departments Meeting.³ According to the Commission, the three members were there solely in an “observational role.” The Commission acknowledges “there was county business discussed, but not in any decision-making capacity.”⁴

Prior to the beginning of the February Departments Meeting, Wells County State’s Attorney, Kathleen Murray, expressed concern that a quorum of the Commission was present, which then began a group discussion of the issue.⁵ The consensus of the group was that the February Departments Meeting did not trigger open meeting requirements for the Commission and therefore the presence of a quorum was not a concern.⁶ Due to that belief, no notice was posted and no minutes were taken.⁷ However, minutes were subsequently prepared for the February Departments Meeting after they were requested by Wells County Sheriff, Christopher Kluth.⁸

¹ Email from Christopher Kluth, Sheriff, Wells Cnty. Sheriff’s Off., to Drew Wrigley, Att’y Gen. (Mar. 18, 2022, 9:16 PM).

² Email from Dan Stutlien, Wells Cnty. Auditor, attaching letter from Stan Buxa, Chairman, Wells Cnty. Comm’n, to Annique M. Lockard, Assistant Att’y Gen. (Apr. 6, 2022, 6:22 PM).

³ *Id.*

⁴ *Id.*; N.D.C.C. § 44-04-17.1(12).

⁵ Email from Dan Stutlien, Wells Cnty. Auditor, attaching letter from Stan Buxa, Chairman, Wells Cnty. Comm’n, to Annique M. Lockard, Assistant Att’y Gen. (Apr. 6, 2022, 6:22 PM).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

ISSUE

1. Whether the Commission held an open meeting requiring proper notice and proper minutes to be taken under N.D.C.C. § 44-04-19.
2. Whether the Commission posted proper notice of the February Departments Meeting under N.D.C.C. § 44-04-20.
3. Whether the Commission kept minutes of the February Departments Meeting as required under N.D.C.C. § 44-04-21(2).

ANALYSIS

Issue One

A meeting is defined in the North Dakota Century Code 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.”⁹ In order to establish a quorum, “one-half or more of the members of the governing body” must be present.¹⁰

In previous opinions, this office has explained that “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.’”¹¹ Further, “when . . . the group’s discussion pertains to the public business of the governing body, the attendance of the members of the governing body is a ‘meeting’ subject to open meeting laws, even if the attendance of a quorum at the meeting is unplanned or unexpected.”¹² “This conclusion applies even if the members of the governing body merely listen, [and] do not participate in the meeting.”¹³ “[W]hen a quorum of members of a governing body attends a meeting of another group, and the group's discussion pertains to the public business of the governing body, the attendance of the members of the governing body is a ‘meeting’ for which notice must be

⁹ N.D.C.C. § 44-04-17.1(9)(a).

¹⁰ N.D.C.C. § 44-04-17.1(15); Email from Dan Stutlien, Wells Cnty. Auditor, attaching letter from Stan Buxa, Chairman, Wells Cnty. Comm’n, to Annique M. Lockard, Assistant Att’y Gen. (Apr. 6, 2023, 6:22 PM). *See also* N.D.A.G. 2022-O-16; N.D.A.G. 2018-O-10; N.D.A.G. 2004-O-08.

¹¹ N.D.A.G. 2018-O-10, *citing* 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.

¹² N.D.A.G. 2016-O-23, *citing* 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-08.

¹³ *Id.*

provided.”¹⁴ In this current matter, three out of the five members of the Commission constitute a quorum, and a Commission quorum was present at the February Departments Meeting.

To be clear, this office has also long recognized that “[a] quorum can engage in ministerial discussions, such as requesting an item be placed on the agenda, providing information for the [governing body] to review before an upcoming meeting, or confirming a date or time of a meeting, without having such discussions trigger open meetings law.”¹⁵ “[W]hen these discussions go beyond ministerial matters and delve into the substantive merits of an issue or suggested agenda topic, provide opinions regarding public business, or build support and consensus for certain positions, the open meetings law is triggered and notice is required before the ‘meeting.’”¹⁶

Public business is defined in the North Dakota Century Code as “all matters that relate or may foreseeably relate in any way to . . . any matter over which the entity has supervision, control, jurisdiction, or advisory power.”¹⁷ According to the correspondence and agenda for the February Departments Meeting, topics were the A.R.P.A. Grant Application,¹⁸ a Wells County Policy Manual Acknowledgement Form, drug testing policies, telecommuting, sick leave banking, and other county business.¹⁹ These topics are under the control, supervision, or advisory power of the Commission and therefore constitute public business.²⁰

¹⁴ N.D.A.G. 2013-O-14, *citing* N.D.A.G. 2005-O-07; N.D.A.G. 98-0-18. “The Commission alleges it did not know that a quorum would be present at this ‘community forum.’ This is questionable considering the notice of the ‘community forum’ was printed in a newspaper article discussing the Commission. The Commission is cautioned that if it is reasonable to suspect beforehand that a quorum might attend a meeting, public notice should be provided when the members learned of the gathering. If it is a surprise, notice must be provided immediately at the meeting or in some circumstances, after the meeting.”

¹⁵ N.D.A.G. 2015-O-12, *citing* N.D.A.G. 2013-O-01; N.D.A.G. 2007-O-08.

¹⁶ N.D.A.G. 2015-O-12, *citing* N.D.A.G. 2015-O-06; N.D.A.G. 2012-O-02. “The definition of ‘meeting’ covers all stages of the decision-making process, including information gathering, consensus building, formulating or narrowing of options, and action regarding public business. The ‘quorum’ requirement is met when members of a governing body engage in a series of smaller gatherings or conversations regarding a particular topic of its public business, in person or through electronic means, each involving two or more members of the governing body that collectively constitute a quorum.”

¹⁷ N.D.C.C. § 44-04-17.1(12); *See also* N.D.A.G. 2017-O-08.

¹⁸ A.R.P.A. is the American Rescue Plan Act, which was designed to provide emergency grants and loans for small businesses. See <https://www.whitehouse.gov/american-rescue-plan> (Last visited Aug. 14, 2023).

¹⁹ Email from Dan Stutlien, Wells Cnty. Auditor, to Laplant, Alexa R. et al., attaching Agenda, Wells Cnty. Dep’ts Meeting (Feb. 22, 2022, 5:18 PM); Wells Cnty. Dep’ts Meeting Minutes, February 24th ~ Noon; Email from Dan Stutlien, Wells Cnty. Auditor, attaching letter from Stan

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It is my opinion that the February Departments Meeting was subject to open meetings laws, as advised by the Wells County States Attorney at the time of the February Departments Meeting, because a quorum of the Commission was present during a discussion of public business.²¹

Issue Two

This office previously determined, “[u]nless otherwise provided by law, public notice must be given in advance of all meetings of a public entity.”²² These public notices must include, “date, time, and location of the meeting, an agenda with topics to be considered, and notice of any expected executive session.”²³ Notice must be posted “at the principle office of the governing body holding the meeting . . . and at the location of the meeting on the day of the meeting.”²⁴ The notice then must be filed with the county auditor, designee of the county, or on the county’s website.²⁵ No notice was posted prior to the February Departments Meeting which became a gathering of a quorum of the Commissioners, during which a discussion of public business was held, which, as analyzed above, constituted a Commission meeting. The lack of notice of the February Departments Meeting is a violation of N.D.C.C. § 44-04-20.

Issue Three

Minutes must be kept of all open meetings and are records subject to N.D.C.C. § 44-04-18. The minutes must include at a minimum:

- a. The names of the members attending the meeting;
- b. The date and time the meeting was called to order and adjourned;
- c. A list of topics discussed regarding public business;
- d. A description of each motion made at the meeting and whether the motion was seconded;
- e. The results of every vote taken at the meeting; and
- f. The vote of each member on every recorded roll call vote.²⁶

Buxa, Chairman, Wells Cnty. Comm’n, to Annique M. Lockard, Assistant Att’y Gen. (Apr. 6, 2022, 6:22 PM).

²⁰ N.D.C.C. § 44-04-17.1(12)(a); Email from Dan Stutlien, Wells Cnty. Auditor, attaching letter from Stan Buxa, Chairman, Wells County Comm’n, to Aunique M. Lockard, Assistant Att’y Gen. (Apr. 6, 2022, 6:22 PM).

²¹ N.D.C.C. § 44-04-17.1(9)(a); Email from Christopher Kluth, Sheriff, Wells Cnty. Sheriff’s Office, to Drew Wrigley, Att’y Gen. (Mar. 18, 2022, 9:16 PM).

²² N.D.A.G. 2018-O-19.

²³ *Id.* See also N.D.C.C. § 44-04-20(2).

²⁴ N.D.C.C. § 44-04-20(4).

²⁵ N.D.C.C. § 44-04-20(4). The notice requirement changed with S.B. 2232, 2023 N.D. Leg. to require meeting notices be posted on the entity’s website if they have a website; however, at the time of the February Departments Meeting, the website posting requirement was optional.

²⁶ N.D.C.C. § 44-04-21(2). See also N.D.A.G. 98-O-09.

Minutes for the February Departments Meeting were compiled, after the fact, by Daniel Stutlien, Wells County Auditor.²⁷ However, the meeting minutes compiled after the February Departments Meeting are incomplete and do not comply with law. These minutes omit the names of the members attending the meeting and the date and time the meeting was called to order and adjourned.²⁸

CONCLUSION

The Commission conducted a meeting as defined under N.D.C.C. § 44-04-17.1, and violated the open meetings law when they failed to provide proper notice and complete proper minutes for the February Departments Meeting. The Commission has taken steps to prevent this from occurring in the future by giving a directive that notice be posted, and minutes be taken for each Departments Meetings to be held in the future.²⁹

STEPS NEEDED TO REMEDY VIOLATION

While I commend the steps the Commission has taken to mitigate these violations, I also urge them to review their obligations under the open meetings laws, which are readily available on the North Dakota Attorney General's website. In the future, the Commission should also heed the advice of their attorney.

Concerning the February Departments Meeting, the Commission must create notices, post them at the main office for one week, file them with the appropriate county office or post them on their website. Additionally, the Commission must complete proper minutes for the February Departments Meeting and allow the minutes to be obtained free of charge by Wells County Sheriff Christopher Kluth and anyone else who requests them. Moving forward, the Commission must provide adequate notice and take appropriate minutes for future Departments Meetings when a quorum of the Commission is present.

I have every reason to expect the Commission will remedy this violation. However, 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. § 44-04-21.2.³⁰ Failure to take

²⁷ Email from Dan Stutlien, Wells Cnty. Auditor, attaching letter from Stan Buxa, Chairman, Wells Cnty. Comm'n, to Annique M. Lockard, Assistant Att'y Gen. (Apr. 6, 2022, 6:22 PM). Minutes were not taken live at the February Departments Meeting, but were compiled at the request of Sheriff Christopher Kluth, who requested this opinion.

²⁸ N.D.C.C. 44-04-21(2)(a).

²⁹ Email from Dan Stutlien, Wells Cnty. Auditor, attaching letter from Stan Buxa, Chairman, Wells Cnty. Comm'n, to Annique M. Lockard, Assistant Att'y Gen. (Apr. 6, 2022, 6:22 PM).

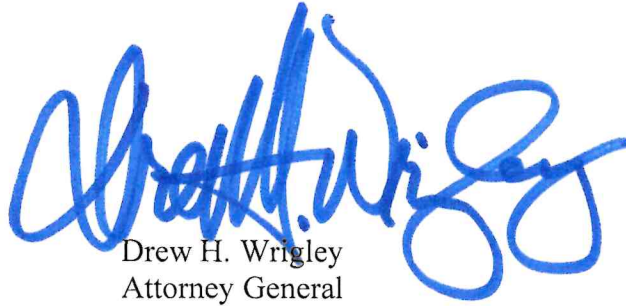
³⁰ N.D.C.C. § 44-04-21.1(2).

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these corrective measures may also result in personal liability for the person or persons responsible for the noncompliance.³¹



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meo/aml

cc: Christopher Kluth, Wells Cnty. Sheriff *via email*

³¹ *Id.*