

**OPEN RECORDS AND MEETINGS OPINION
2008-O-21**

DATE ISSUED: August 25, 2008

ISSUED TO: Workforce Safety and Insurance

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from James Long asking whether the Workforce Safety and Insurance (WSI) Board of Directors violated N.D.C.C. §§ 44-04-19 and 44-04-20 by holding a meeting without notice.

FACTS PRESENTED¹

On the evening of May 21, 2008, WSI Board member² Mark Gjovig, Bruce Furness, interim WSI CEO, Stacy Sjogren, WSI consultant for Carver governance, and Mary Thompson, WSI staff member, met for dinner at a Bismarck restaurant.³ The purpose of the planned dinner meeting was to review the agenda for the next day's WSI Board meeting because it would be the first time the Carver model of governance would be used at a WSI Board meeting.⁴ CEO Furness was included because Mr. Gjovig believed that the discussion would give CEO Furness an opportunity to familiarize himself with the governance model.

For the first 45 minutes of the meeting, Mr. Gjovig, Mr. Furness, Ms. Sjogren and Ms. Thompson discussed the process under which the new Carver Governance Model

¹ The facts presented are derived from a memorandum from WSI Special Assistant Attorney General Anne Jorgenson Green to Assistant Attorney General Mary Kae Kelsch, June 12, 2008, unless otherwise noted. The Attorney General is required to base an open records and meetings opinion on facts given by the public entity. N.D.C.C. § 44-04-21.1.

² WSI's Board has 11 members including: John Dyste, Brad Ballweber, Mark Gjovig, Mark Jackson, Ed Grossbauer, Roberta Ripplinger, Michael Gallagher, John Eickhof, J.P. Wiest, Ernest Godfread, M.D., and Terry Curl.

³ The East 40 Chophouse and Tavern.

⁴ The Carver Policy Governance Model is a method to govern the operation of boards through a set of principles and concepts developed and taught by John and Miriam Carver. See www.carvergovernance.com accessed on August 6, 2008.

functioned, how each agenda item was introduced with a purpose and a goal, and how agenda items could best be presented under the new governance model. According to WSI, there was an agreement among the four individuals to avoid discussing substantive issues of the meeting agenda for the next day and only discuss the procedural and administrative process by which the governance model functioned to bring each agenda item forward.

During the meeting, Mr. Gjovig phoned WSI Board members Paul Jackson and Michael Gallagher and invited the two to join the group at the restaurant. They arrived at the restaurant sometime around 6:45 to 7:00 p.m. Mr. Jackson and Mr. Gjovig are both members of a three-member committee of the WSI Board referred to as the governance committee. Ed Grossbauer is the third member of the governance committee, but was not present.

When Mr. Jackson and Mr. Gallagher joined the group, Ms. Sjogren reminded them all to avoid discussing substantive WSI business. Mr. Gjovig explained to Mr. Jackson and Mr. Gallagher what had been discussed up to that point and then there was a brief discussion of how to frame, coach, and introduce issues in the context of the Carver Governance Model. This discussion lasted until approximately 7:00 p.m. when the topic of conversation turned to non-WSI Board business such as “oil exploration in western North Dakota.” It was also around this time that another Board member who had been dining at the same restaurant alone, John Dyste, was invited to join the larger group. At that time, according to the participants, the discussion was of a social nature and did not include any substantive WSI Board issues.

ISSUE

Whether it was a violation of the open meetings law when a quorum of WSI's governance committee met without providing notice of the meeting to the public or media.

ANALYSIS

When a quorum⁵ of the members of a governing body for a public entity gathers, either informally or formally, regarding public business, the gathering is a meeting.⁶ WSI is a public entity⁷ and its Board of Directors is a governing body.⁸ A governing body also

⁵ The word “quorum” means “one-half or more of the members of the governing body, or any smaller number if sufficient for a governing body to transact business on behalf of the public entity.” N.D.C.C. § 44-04-17.1(14).

⁶ N.D.C.C. § 44-04-17.1(8).

⁷ N.D.C.C. § 44-04-17.1(12).

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includes any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.⁹ Under this definition, a committee delegated authority to perform any function on behalf of a governing body is subject to the state's open meetings law.¹⁰ As used in N.D.C.C. ch. 44-04, the phrase "public business" means "all matters that relate or may foreseeably relate in any way to:

- a. The performance of the public entity's governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power; or
- b. The public entity's use of public funds."¹¹

Thus, the definition of meeting has four main elements:

1. Public entity
2. Governing body
3. Public business
4. Gathering of a quorum of the members

Meetings must be open to the public,¹² preceded by sufficient public notice,¹³ and summarized in sufficient minutes.¹⁴ Not every gathering, however, constitutes a meeting; chance or social gatherings are not meetings as long as public business is not considered or discussed.¹⁵

According to WSI, Mr. Gjovig, Mr. Furness, Ms. Sjogren, and Ms. Thompson were not a committee of the WSI Board. These four individuals do not constitute a quorum of the WSI Board or a committee of the Board so it was not a violation of the open meetings

⁸ N.D.C.C. § 44-04-17.1(6).

⁹ *Id.*

¹⁰ N.D.A.G. 2007-O-13; N.D.A.G. 2005-O-03; N.D.A.G. 2005-O-02; N.D.A.G. 2003-O-15; N.D.A.G. 2003-O-13.

¹¹ N.D.C.C. § 44-04-17.1(11).

¹² N.D.C.C. § 44-04-19.

¹³ N.D.C.C. § 44-04-20.

¹⁴ N.D.C.C. § 44-04-21.

¹⁵ N.D.C.C. § 44-04-17.1(8)(b); see N.D.A.G. 2003-O-19 (social interactions of a quorum of board members at a public park and outside the Northwood community center were not meetings where no public business was discussed); N.D.A.G. 2002-O-07 (social gatherings that consisted of a quorum of school board members at local bar after school board meeting was not a meeting under N.D.C.C. § 44-04-17.1(8) because no public business was discussed); N.D.A.G. 99-O-09.

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law for them to meet, and would not have been a violation even if they had discussed public business.¹⁶ Mr. Gjovig and Mr. Jackson, however, are a quorum of the three-member governance committee of the Board. Thus, when Mr. Jackson arrived at the restaurant, a quorum of the governance committee was present.

In a 2004 opinion, I explained that for the purposes of the open meetings law, the determination of whether public business was discussed by a committee was dependent upon the authority delegated to the committee by the governing body.¹⁷ If the subject matter of the committee's discussion included topics within the authority delegated to the committee, the discussion would be public business under N.D.C.C. § 44-04-17.1(11).¹⁸ Thus, to be a meeting of the governance committee, the committee members must be discussing a topic that is within the authority delegated to that group by the governing body.¹⁹

WSI explains that the purpose of the governance committee is to assist the Board in managing the recruitment, education, and self-assessment needs of its members in order to govern effectively.²⁰ When Mr. Jackson arrived, and for a brief period thereafter, the discussion included educating those present on how to frame, coach, and introduce issues in the context of the Carver Governance Model. This is consistent with both the education aspect of the governance committee and its purpose of ensuring the Board governs effectively.²¹ Therefore, the short discussion regarding the implementation of a new procedural process at the Board's meeting the next day related to the purpose of the committee as set forth by Board policy.

Thus, when Mr. Jackson arrived at the restaurant and when the topic turned to public business, the four main elements of a "meeting" under the open meetings law were present: a quorum of the governance committee of the WSI Board met and discussed the public business of the committee. At the point Mr. Jackson arrived and the topic involved public business, it was necessary to provide public notice consistent with N.D.C.C. § 44-04-20. It is therefore my opinion that the governance committee violated N.D.C.C. § 44-04-20 by holding a meeting without providing public notice.

¹⁶ See N.D.C.C. § 44-04-17.1(8) (definition of "meeting").

¹⁷ N.D.A.G. 2004-O-15.

¹⁸ Id.

¹⁹ See N.D.C.C. § 44-04-17.1(6) (definition of "governing body").

²⁰ Governance Policy Number: GP-9.

²¹ Id.

STEPS NEEDED TO REMEDY VIOLATION

The WSI Board must prepare and post a notice regarding the above meeting of the governance committee consistent with N.D.C.C. § 44-04-20(6). The Board must also prepare detailed minutes of the meeting and include a statement in the notice indicating that the public may receive a free copy of such minutes upon request. A copy of the notice and the minutes must be provided to Mr. Long free of charge.

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. § 44-04-21.2.²² It may also result in personal liability for the person or persons responsible for the noncompliance.²³

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²² N.D.C.C. § 44-04-21.1(2).

²³ Id.