

**OPEN RECORDS AND MEETINGS OPINION
2008-O-22**

DATE ISSUED: September 9, 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 Janell Cole of Forum Communications asking whether a committee of the Board of Directors ("Board") of Workforce Safety and Insurance ("WSI") violated N.D.C.C. § 44-04-19 by discussing its business outside of an open meeting.

FACTS PRESENTED

During the May 22, 2008, WSI Board meeting, a three-member committee was appointed to study the compensation and per diem paid to WSI Board members. The committee consisted of WSI Board members Roberta (Bobbie) Ripplinger, John Dyste, and J.P. Wiest.

On May 23, J.P. Wiest called Bobbie Ripplinger to suggest the following topics to be included on the agenda for the upcoming committee meeting: a small increase in per diem, a per diem for preparation time, and a monthly per diem. Bobbie Ripplinger has stated that the topics were not discussed in any detail and the telephone call was very short.

On June 2, 2008, Bobbie Ripplinger e-mailed committee members John Dyste and J.P. Wiest, and Mary Marthaller, WSI executive assistant, regarding suggested topics for the upcoming committee meeting. The e-mail stated:

John and JP: It's time to get moving on our ad hoc committee regarding the per diem for board members. I visited with JP and also with Cindy Ternes [Director of Finance] at WSI.

JP suggested that rather than give a big jump in the per diem, that we raise [it] a little per day but then start paying board members for the preparation time. One day or two for preparation before each meeting.

OPEN RECORDS AND MEETINGS OPINION 2008-O-22

September 9, 2008

Page 2

Another thought was to pay a monthly per diem per member. Cindy worked out three different scenarios for us to review. Another direction we received was to look into different rates for Chairman, vice chairman and committee chairs.

Please e-mail me with your suggestions. When I receive them I will put it together, contact Mary and schedule a public meeting for us to discuss all options and then we can present something to the Board.
Thanks. Bobbie¹

On June 3, John Dyste sent an e-mail to Bobbie Ripplinger regarding the proposed committee agenda, stating:

Bobbie

I have reviewed the proposal from Cindy [Ternes] and the three scenarios seem reasonable. I am having a tough time suggesting a pay increase at this time. I know that we put in much prep time (this is the most time I have ever spent on any board). I like the fact that Cindy's proposals start in 2010. I like JP's idea of paying for prep time. Maybe for the remainder of 2008 the board would get an extra per diem day for each meeting with the CGO [Chief Governance Officer] getting 3, and the Vice-CGO and committee chairs getting 2 per diem days. This could be increased in 2009 and then go to something like Cindy's proposal. I like the idea of an extra per diem now rather than an increase in the per diem.

Let me know if you need any thing else.

Thanks

John²

A recording of the committee's June 10 meeting shows Chair Ripplinger made the following comments at the beginning of the meeting:

I did ask J.P. and John to send me some suggestions that we could discuss Both of them suggested that if we do raise the per diem that it should be somewhat minimal. If we do a drastic hike going up into the

¹ E-mail from Bobbie Ripplinger to J.P. Wiest, John Dyste, and Mary Marthaller, WSI Executive Assistant (June 2, 2008, 11:39 a.m.).

² E-mail from John Dyste to Bobbie Ripplinger (June 3, 2008, 9:52 p.m.).

thousands of dollars [that] is not something that any of us on the board were interested in doing. Both of them have suggested the fact that the time involved, that maybe a compromise for the first part of the remainder of the biennium might be that the board members get paid adequately for the time spent and that there is considerable preparation work going into a board meeting.³

Janell Cole asks whether the communications prior to the June 10 meeting resulted in a violation of the open meetings law. Bobbie Ripplinger has stated that the purpose of the communications among committee members prior to the June 10 meeting was to generate topics for the agenda for that meeting.

ISSUE

Whether telephone calls and e-mails between a quorum of the members of a committee appointed by WSI's Board of Directors, before the scheduled public meeting of the committee, constituted "meetings" that were required to be preceded by public notice.

ANALYSIS

Generally, all meetings of a public entity must be open to the public,⁴ and public notice must be given in advance of the meetings.⁵ Governing bodies of public entities are subject to the open meetings and notice requirements.⁶ Committees that have authority delegated to them by a governing body are also subject to the open meetings and notice requirements.⁷ The WSI Board is a governing body subject to the open meetings and notice requirements;⁸ thus, the committee formed to study the issue of compensation of Board members is also subject to the open meetings and notice requirements.

³ Recording of June 10, 2008, meeting of WSI ad hoc committee on Board compensation.

⁴ See N.D.C.C. § 44-04-19.

⁵ See N.D.C.C. § 44-04-20(1).

⁶ See N.D.C.C. §§ 44-04-17.1(12)(a) and 44-04-20(1).

⁷ See N.D.A.G. 2003-O-13 (employee relations committee of a city council); N.D.A.G. 2003-O-15 (committee of an airport authority); N.D.A.G. 2005-O-02 (committee of a county historical society); N.D.A.G. 2005-O-03 (committee of a city commission).

⁸ See N.D.C.C. §§ 44-04-17.1(6) and 44-04-17.1(12)(a).

OPEN RECORDS AND MEETINGS OPINION 2008-O-22

September 9, 2008

Page 4

A meeting subject to the open meetings and notice requirements occurs when a quorum⁹ of the members of a committee meets and discusses its public business.¹⁰ A quorum of this three-member committee in this case is two members. "Public business" does not include discussion about what the agenda items should be for an upcoming meeting, as long as the substance of the issues are not discussed.¹¹ Thus, if a quorum of the committee members met before the open meeting and discussed only what the agenda items should be for the upcoming meeting, there would be no violation of the open meetings and notice requirements. A meeting can occur in person or through electronic means, such as by telephone or e-mail.¹²

The issue here is whether the communications by telephone and e-mail before the June 10 meeting went beyond setting the agenda for the upcoming meeting. Bobbie Ripplinger's comments during the June 10 meeting suggest that she had discussed the issue of Board member compensation with other committee members before the meeting. She explained that the topic of compensation of Board members had been under discussion by the Board for several months before the committee was formed, and was also discussed at the WSI Board meeting on May 22, 2008, the day the committee was formed. She stated she had personally talked with several members of the 11-member Board about Board member compensation, during the months before the committee was formed. She has stated that, given these conversations with Board members prior to formation of the committee, she may have made comments at the June 10 committee meeting that suggested she had talked about the issues with the committee members between the day the committee was formed and the June 10 meeting. But she stated she had no conversations with either committee member in person or by telephone about the substance of the issue of Board member compensation after the committee was formed. Under N.D.C.C. § 44-04-21.1(1), by law the Attorney General must base the opinion on the facts given by the public entity.

The e-mail exchanges do raise some concerns, however. The June 2 e-mail from Bobbie Ripplinger to John Dyste and J.P. Wiest is not problematic because it merely informs the committee members of J.P. Wiest's suggested topics for the agenda for the June 10 meeting.

The response to Bobbie Ripplinger by John Dyste, however, is problematic. Since the committee has only three members, any communication from one member to another about the substance of the issues outside of a properly-noticed meeting is a violation of the open meetings law. Rather than responding to Bobbie Ripplinger's e-mail with other

⁹ See N.D.C.C. § 44-04-17.1(14).

¹⁰ See N.D.C.C. § 44-04-17.1(8)(a)(1).

¹¹ See N.D.A.G. 98-O-05 and N.D.A.G. 2007-O-08.

¹² See N.D.C.C. § 44-04-17.1(8)(a); N.D.A.G. 2007-O-14.

suggested agenda topics, Mr. Dyste comments on the merits of the different means of compensation and gives his opinion on them. This commentary addressed the substance of the issues and therefore, violated the open meetings law.

CONCLUSION

It is my opinion that the WSI committee violated the open meetings law when a quorum of the committee members exchanged an e-mail discussing public business before the public meeting and thereby held a "meeting" that was not preceded by public notice.

STEPS NEEDED TO REMEDY VIOLATION

The minutes of the June 10, 2008, meeting must be amended to reflect the comments expressed by the committee members regarding the various options for Board member compensation discussed at the June 10 meeting. A copy of the revised minutes must be provided to Ms. Cole, 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's fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2.¹³ It may also result in personal liability for the person or persons responsible for the noncompliance.¹⁴

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¹³ N.D.C.C. § 44-04-21.1(2).

¹⁴ Id.