

**OPEN RECORDS AND MEETINGS OPINION
2009-O-12**

DATE ISSUED: July 17, 2009

ISSUED TO: Williams County Commission

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from LuAnn Casler asking whether the Williams County Commission violated the open meetings law by holding a meeting that was not open to the public.

FACTS PRESENTED

The Williams County Commission (Commission) is a five-member commission. The Commission has assigned Commissioners David Montgomery and Don Arson to hold the Emergency Services Department portfolio.

On May 8, 2009, Commissioners Montgomery and Arson met with Sheriff Scott Busching and Human Resources Administrator Helen Askim at the Courthouse Café in Williston to discuss whether the Williams County Emergency Services director should be terminated from his position. At the meeting, the commissioners determined that the director should be terminated and subsequently did so.

LuAnn Casler alleges that the Commission held a meeting for which public notice was not provided.

ISSUE

Whether the Commission violated N.D.C.C. § 44-04-20 when it failed to give notice of the May 8, 2009, meeting that included two county commissioners.

ANALYSIS

The Commission is a governing body of a public entity.¹ All meetings of a public entity must be open to the public unless otherwise specifically provided by law.² A "meeting"

¹ N.D.C.C. § 44-04-17.1(12)(b).

² N.D.C.C. § 44-04-19.

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is defined as a “formal or informal gathering . . . of [a] quorum of the members of the governing body of a public entity regarding public business.”³ A “governing body” includes any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.⁴ Under this definition, a committee that is delegated authority to perform any function on behalf of a governing body, including fact gathering, reporting, or recommending action, as well as taking action, is subject to the state’s open meetings law.⁵ Thus, committees of a governing body have the same notice requirements as the governing body because they are subject to the open meetings law.⁶

The Commission did not believe that public notice was necessary for the May 8, 2009, meeting among Commissioners Montgomery and Arnson, Sheriff Scott Busching, and Human Resources Administrator Helen Askim because:

No regular or special meetings [of the Commission] were held without notice to the public. [And] no decision-making discussions occurred among or between the 5 members of the Williams County Commission outside of a meeting, via telephone or email nor at a meeting at-which a quorum was present.⁷

Because the Williams County Board of County Commissioners is a five-member commission, a gathering of two commissioners would generally not constitute a quorum.⁸ However, a gathering of two commissioners would be subject to the open meetings law if they were meeting pursuant to authority delegated to them by the governing body.⁹ Here, Commissioners Montgomery and Arnson were acting in their

³ N.D.C.C. § 44-04-17.1(8)(a).

⁴ N.D.C.C. § 44-04-17.1(6).

⁵ N.D.A.G. 2007-O-13. See also N.D.A.G. 2009-O-05 and N.D.A.G. 2003-O-13.

⁶ N.D.A.G. 2003-O-13. See also N.D.C.C. § 44-04-20(1) (public notice must be given in advance of all meetings of a public entity as defined in section 44-04-17.1).

⁷ E-mail from Helen Askim, Human Resources Administrator, on behalf of the Williams County Commission, to Mary Kae Kelsch, Assistant Attorney General (June 23, 2009, 9:39 AM).

⁸ N.D.C.C. § 44-04-17.1(14) (“[q]uorum” means “one-half or more of the members of the governing body. . .”).

⁹ See N.D.C.C. §§ 44-04-17.1(6) (definition of governing body) and 44-04-17.1(8)(a)(2) (definition of meeting). See also N.D.A.G. 2009-O-05 (assignment of a portfolio to two members of a city commission triggers the open meetings law if the members attend a meeting in their portfolio capacity); N.D.A.G. 2007-O-13.

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capacity as holders of the Commission's Emergency Services Department portfolio when they met to discuss the Williams County Emergency Services director.¹⁰

The Commission describes its portfolios as follows:

Williams County assigns one or two Commissioners to be the primary contact for each Department Head, these assignments are known as each Commissioner's *Portfolio*. In practice these "Portfolio Commissioners" are responsible for general oversight of their "Portfolio Departments" which includes assisting as needed with the management and/or discipline issues and conducting an annual performance evaluation of the Department Head at the end of each calendar year.¹¹

Regardless of the label given to a group of persons, as long as there is a delegation of authority from the governing body to two or more people, those individuals constitute a committee.¹² Many past opinions of this office have explained that the definition of governing body includes a committee to which authority is delegated to perform any function on behalf of a governing body.¹³

For example, in 2007 the Grand Forks School Board directed two board members to conduct a search for an interim superintendent.¹⁴ The board members believed they were only performing the executive duties of the board, but did not consider themselves a committee.¹⁵ However, the school board's instructions to the board members to find a new superintendent created a committee of the board subject to the notice requirements of the open meetings law.¹⁶

Similarly, this year when the mayor of Mandan and a city commissioner met with the business development director and other city employees to discuss implementation of an electronic door ordinance, the mayor and commissioner did not consider themselves to be a committee. The city commission had appointed the mayor and commissioner to

¹⁰ Williams County Response (attachment to e-mail from Helen Askim to Mary Kae Kelsch (June 23, 2009, 9:39 AM)).

¹¹ Id. (emphasis in original).

¹² See N.D.C.C. § 44-04-17.1(6) (definition of governing body). But see N.D.A.G. 2004-O-12 (assignment of a portfolio or the delegation of authority to one person does not trigger the open meetings law).

¹³ See N.D.C.C. § 44-04-17.1(6) (definition of governing body). See also N.D.A.G. 2009-O-05; N.D.A.G. 2008-O-21; N.D.A.G. 2007-O-13; N.D.A.G. 2005-O-02; N.D.A.G. 2003-O-15; N.D.A.G. 2003-O-13; N.D.A.G. 2001-O-04.

¹⁴ N.D.A.G. 2007-O-13.

¹⁵ Id.

¹⁶ Id.

hold the city's "Business Development Portfolio." Consequently, the meeting attended by the mayor and commissioner with city officials to discuss business development constituted a meeting of a committee of the commission. The meeting related to the duty delegated to the mayor and commissioner by the city commission. Thus, the meeting required public notice.¹⁷

Here, Williams County Commissioners Montgomery and Arnson met on May 8, 2009, pursuant to the authority delegated to them by the full Commission.¹⁸

When a portfolio is held by more than one member of a governing body such as the two county commissioners in this instance, any meeting attended by the two commissioners is subject to the state's open meetings law if the meeting pertains to the business assigned to that portfolio.¹⁹ Here, the topic of the meeting was the performance of the head of the Department of Emergency Services, which directly related to the business of the Department of Emergency Services portfolio. As previously explained, when a committee of a governing body meets to discuss public business, it is a meeting as defined by the open meetings law and must be noticed accordingly.²⁰ Therefore, it is my opinion that the Williams County Commission violated the open meetings law by failing to give notice of the May 8, 2009, meeting held by Commissioners Montgomery and Arnson.

CONCLUSION

The Williams County Commission violated N.D.C.C. § 44-04-20 when it failed to provide notice of a May 8, 2009, meeting attended by two county commissioners who had been delegated authority by the Commission.

STEPS NEEDED TO REMEDY VIOLATION

The Williams County Commission must post a notice of the May 8, 2009, meeting, listing the time, date, location, and topics which were considered at that meeting. The notice should be posted at the Commission's principal office, filed in the county auditor's office, and given to the official newspaper of the county and any other person who has requested notice of Commission meetings. The Commission must also create minutes

¹⁷ N.D.A.G. 2009-O-05.

¹⁸ On May 7, Commissioner Montgomery even called Commission Chairman Daniel Kalil to verify that the holders of the Emergency Services portfolio had the authority to make decisions about discipline, including termination, of Mr. Casler's employment. Williams County Response (attachment to e-mail from Helen Askim to Mary Kae Kelsch (June 23, 2009, 9:39 AM)).

¹⁹ N.D.A.G. 2009-O-05; N.D.A.G. 2008-O-21.

²⁰ See N.D.C.C. § 44-04-17.1(8) (definition of "meeting").

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to address the public business and discussions conducted at the May 8, 2009, meeting which must be provided at no cost to the requester and any other person who requests copies.

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. § 44-04-21.2.²¹ It may also result in personal liability for the person or persons responsible for the noncompliance.²²

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mjm/vkk

²¹ N.D.C.C. § 44-04-21.1(2).

²² Id.