

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 98-O-10**

DATE ISSUED: May 7, 1998

ISSUED TO: R. James Maxson, Velva City Attorney
Kenneth Fox, President, Velva City Commission
Carol Bickler, Velva City Auditor

CITIZEN'S REQUEST FOR OPINION

On March 17 and 18, 1998, this office received requests for an opinion under N.D.C.C. § 44-04-21.1 from Jack Jackson of the Valley Star asking whether the Velva City Commission violated N.D.C.C. §§ 44-04-18, 44-04-20, and 44-04-21 by failing to give public notice of a special city commission meeting held on March 15, by failing to prepare minutes of the meeting, and by failing to deny access to a copy of the minutes in writing upon request.

FACTS PRESENTED

On the evening of March 15, four of the five members of the Velva City Commission (Commission) attended a meeting of the Velva Community Development Corporation (VCDC) regarding a city home rule charter and a sales tax. In a letter responding to an inquiry from this office, and in a subsequent telephone conversation with a member of my staff, Velva city officials indicated that the commissioners were unaware that a quorum would attend the meeting. All commissioners were invited, but no responses to the invitations were required and the VCDC meeting was the first meeting that was held since the Commission asked the VCDC to look into home rule and sales tax issues. Some individual members had previously attended a VCDC meeting, but there was no practice of a quorum of the commissioners attending VCDC meetings.

No notice was posted or filed, and no minutes were kept, of the March 15 meeting of the Commission. The meeting was apparently not recorded. On March 18, Mr. Jackson requested a copy of the minutes of the meeting. Mr. Jackson is editor of the Valley Star, which is the Velva city newspaper, and publishes minutes of all Commission meetings. Mr. Jackson was told no minutes exist and his request for a written denial was refused. The City has provided this office with draft minutes of the meeting.

ISSUES

1. If the attendance of four city commissioners at the March 15 meeting of the Velva Community Development Corporation was a "meeting" of the Commission, required to be preceded by public notice, was notice provided in substantial compliance with N.D.C.C. § 44-04-20?

ATTORNEY GENERAL OPEN RECORDS AND MEETINGS OPINION

Velva City Attorney, Velva City Commission, Velva City Auditor

May 7, 1998

Page 2

2. Whether sufficient minutes were kept of the Commission "meeting."
3. Whether the City violated N.D.C.C. § 44-04-18(6) by failing to deny Mr. Jackson's request for the minutes in writing as he requested.

ANALYSES

Issue One:

A quorum of the members of the Commission attended a meeting of the VCDC regarding a city home rule charter and a city sales tax. When a quorum of the members of a governing body of a public entity attend the 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." N.D.A.G. 98-O-08; N.D.A.G. 96-F-09. This conclusion applies even if the commissioners merely listen and do not participate in the meeting. N.D.A.G. 96-F-09. A city home rule charter and sales tax are items of city business. Thus, it is my opinion that the attendance of four of the five Commission members at the VCDC meeting was also a "meeting" of the Commission required to be open to the public under N.D.C.C. § 44-04-19 and preceded by public notice in substantial compliance with N.D.C.C. § 44-04-20.

Public notice of a meeting must be provided at the same time the members of the governing body of a public entity are notified, and is the responsibility of the governing body's presiding officer. N.D.C.C. § 44-04-20(5). The notice must be posted at the public entity's main office, if any, and filed, in the case of cities, with the city auditor. N.D.C.C. § 44-04-20(4). On the day of the meeting, the notice must be posted at the location of the meeting, if different from the public entity's main office. Id. In addition, for special or emergency meetings, the presiding officer or designee must notify the public entity's official newspaper and any other members of the media who have requested it.

When the attendance of a quorum of the members of a governing body at a meeting of another organization is a surprise, notice must be provided immediately. However, if it is reasonable to suspect beforehand that a quorum might attend a gathering, public notice should be provided when the members learn of the gathering. For this meeting, there was no prior history of a quorum of the members of the Commission attending the VCDC meetings, and the commissioners did not anticipate that a quorum would attend this meeting. Therefore, by notifying the city newspaper, as required for special meetings, when the commissioners realized that a quorum of the members of the Commission were present, the commissioners acted reasonably. However, a written

ATTORNEY GENERAL OPEN RECORDS AND MEETINGS OPINION

Velva City Attorney, Velva City Commission, Velva City Auditor

May 7, 1998

Page 3

notice was not prepared, posted at the meeting location, or filed with the city auditor. Under the circumstances, the Commission would have substantially complied with N.D.C.C. § 44-04-20 if it prepared a notice and filed it with the city auditor the following day, but none was prepared.

It is my opinion that notifying the city newspaper of the March 15 meeting, by itself, was not substantial compliance with the public notice requirements in N.D.C.C. § 44-04-20.

Issue Two:

Minutes must be kept of all meetings required to be open to the public under N.D.C.C. § 44-04-19. N.D.C.C. § 44-04-21(2). Here, no minutes were prepared because the Commission was not aware that the attendance of a quorum of the commissioners at a meeting of another group was also a Commission meeting. Draft minutes, however, have been prepared and provided to this office. The draft minutes contain all the information listed in N.D.C.C. § 44-04-21(2). However, because there were two meetings involved, and because the same person is note-taker for both the Commission and the VCDC, the draft minutes need to be more clear on whose minutes they are, and which body did or did not act. For example, statements in the minutes that "no action taken" and "no motions made" in this context are unclear because they could apply to the Commission, to the VCDC, or both. Any confusion could be cleared up if the minutes were entitled "City Commission Minutes."

Because the Commission reasonably did not provide prior written notice of the meeting, and the public was therefore not able to be present and observe the information being gathered by the Commission, the meeting should have been tape recorded, or, at least, the minutes should be more detailed than required in N.D.C.C. § 44-04-21(2). Specifically, the minutes should summarize the information received at the meeting and state each member's position on the topics discussed by the VCDC, if expressed. The notice should indicate that a recording or detailed minutes of the meeting will be available.

It is my opinion that sufficient minutes were not kept of the Commission's March 15 meeting as required in N.D.C.C. § 44-04-21(2).

Issue Three:

Whenever a request for access to or copies of records of a public entity is not granted, the public entity must explain the legal authority for not granting the request and must make the denial in writing if requested. N.D.C.C. § 44-04-18(6). Mr. Jackson requested a copy of the minutes of the March 15 meeting and asked that any denial of his request

ATTORNEY GENERAL OPEN RECORDS AND MEETINGS OPINION

Velva City Attorney, Velva City Commission, Velva City Auditor

May 7, 1998

Page 4

be made in writing. As discussed above in Issue Two, minutes were not kept because the Commission was unaware that its gathering on March 15 was a "meeting," and the city auditor explained that to Mr. Jackson. However, the denial was not made in writing as he requested. Therefore, it is my opinion the City violated N.D.C.C. § 44-04-18(6) when it failed to deny Mr. Jackson's request for the minutes in writing, as he requested.

CONCLUSIONS

1. The attendance of a quorum of the Commission members at the March 15 meeting of the VCDC was a "meeting" of the Commission, but was not preceded by sufficient public notice under N.D.C.C. § 44-04-20.
2. Minutes of the March 15 meeting were not kept as required in N.D.C.C. § 44-04-21(2).
3. The City violated N.D.C.C. § 44-04-18(6) when it refused to explain in writing, upon request, why it was not providing copies of the minutes of its March 15 meeting.

STEPS NEEDED TO REMEDY VIOLATIONS

A notice of the meeting needs to be prepared and filed with the city auditor, specifying that detailed minutes will be available.

The draft minutes provided to this office need to be clarified and supplemented as described in this opinion, and then approved by the Commission. Once the draft minutes have been prepared, a copy must be provided to Mr. Jackson.

A written denial of Mr. Jackson's request is no longer required because the violation will be remedied to the greatest extent possible when he receives a copy of this opinion explaining why the City did not grant his request for copies of the minutes, i.e. the minutes did not exist.

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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ATTORNEY GENERAL OPEN RECORDS AND MEETINGS OPINION
Velva City Attorney, Velva City Commission, Velva City Auditor
May 7, 1998
Page 5

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