

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 98-O-13**

DATE ISSUED: June 11, 1998

ISSUED TO: Griggs County Board of Commissioners Chairman Edward Urness

CITIZEN'S REQUEST FOR OPINION

On May 12, 1998, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Griggs County Sheriff Paul Hendrickson asking whether the Griggs County Board of Commissioners violated N.D.C.C. § 44-04-20 by holding a meeting in Bismarck with the North Dakota Insurance Reserve Fund that was not preceded by sufficient public notice. Sheriff Hendrickson also alleges that the minutes of the April 13 meeting were not accurate and therefore violated N.D.C.C. § 44-04-21(2).

FACTS PRESENTED

At the Tuesday, April 7, 1998, regular meeting of the Griggs County Board of Commissioners (Commission), Commission Chairman Edward Urness announced that some of the commissioners would be traveling to Bismarck to meet with the North Dakota Insurance Reserve Fund (NDIRF). Chairman Urness appointed himself and two other members of the five-member Commission to attend the meeting, which had not yet been scheduled for a definite date or time. The following Friday, April 10, Griggs County Auditor Walter Kerbaugh received confirmation that NDIRF would be able to meet with the three commissioners the next Monday, April 13, at 1:00 p.m. in Bismarck. The auditor informed Chairman Urness, who contacted the other two commissioners over the weekend.

On Sunday, April 12, Chairman Urness called Mr. Kerbaugh at his home and confirmed that the three commissioners would be able to attend the meeting. Mr. Kerbaugh agreed to post notice of the special meeting the next morning. According to Griggs County State's Attorney Phyllis Ratcliffe, it is customary for the county auditor to prepare notice of Commission meetings. Although the courthouse opened at 8:00 a.m. the next day (Monday, April 13), notice of the meeting was not posted until that afternoon.

The minutes of the April 13 meeting indicate that NDIRF told the Commission that NDIRF "didn't feel the county was responsible for the bill." However, in a letter to Sheriff Hendrickson's private attorney, NDIRF said it had no legal obligation to pay Sheriff Hendrickson's legal fees, but expressly refrained from making any conclusion on the county's liability for those fees. Sheriff Hendrickson alleges the Commission's minutes of the April 13 meeting are inaccurate in light of NDIRF's subsequent statement to his attorney.

ISSUES

1. Whether the April 13 meeting of the Commission was preceded by sufficient public notice under N.D.C.C. § 44-04-20.
2. Whether the minutes of the April 13 meeting were an accurate summary of that meeting.

ANALYSES

Issue One:

The commissioners' April 13 meeting in Bismarck with NDIRF was a gathering of a "governing body," both as a quorum of the Commission and as a smaller group acting pursuant to authority delegated by the full Commission. N.D.C.C. § 44-04-17.1(6). As such, the gathering was a "meeting" under N.D.C.C. § 44-04-19 and public notice of the meeting was therefore required under N.D.C.C. § 44-04-20.¹

Generally, public notice must be provided in advance of a meeting and at the same time the members of the governing body are informed of the meeting. N.D.C.C. § 44-04-20(1), (5). State's Attorney Ratcliffe indicates that Chairman Urness took all the steps usually necessary to hold a Commission meeting by confirming the commissioners' attendance at the meeting and by asking the auditor to post notice of the meeting the next morning. As the person coordinating the appointment with NDIRF, the auditor was already aware of the date, time, and location of the meeting. The topics to be considered had already been announced in an open meeting on April 7. There is no mandatory minimum notice period in N.D.C.C. § 44-04-20. Thus, had the auditor posted a notice containing all this information immediately when the courthouse opened the next morning, retained a file copy in the auditor's office, and notified the county newspaper,² the notice would have been provided several hours before the Bismarck meeting and would have been sufficient.

¹ This conclusion does not necessarily mean that Sheriff Hendrickson had a right to attend the meeting. Because the meeting pertained to reasonably predictable litigation involving Sheriff Hendrickson's claim for attorney's fees, see N.D.A.G. 98-O-01, the Commission could have closed a portion of the meeting under the open meetings exceptions in N.D.C.C. § 44-04-19.1 for attorney consultation or negotiation strategy sessions. However, the minutes of the meeting indicate that the Commission did not attempt to hold any of its April 13 meeting in executive session.

² The editor of the county newspaper told State's Attorney Ratcliffe that the editor has not requested notice of commission meetings that occur out of town. However, notice

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However, there are two significant problems with the notice provided of the meeting. First, the notice did not contain all the minimum items required in N.D.C.C. § 44-04-20. Specifically, the notice did not indicate the time of the meeting or its location in the city of Bismarck. Second, the notice was not posted until at least Monday afternoon, after the meeting had begun, and possibly not until the next day. Combined, these deficiencies precluded any member of the public from receiving advance notice of the Commission's meeting with NDIRF.³

This office has held that public notice can be provided after a meeting, and still be in substantial compliance with N.D.C.C. § 44-04-20, if providing advance notice of the meeting is not reasonable. See N.D.A.G. 98-O-10 (substantial compliance if notice was filed the following day). If advance notice is not reasonably possible, the governing body should make up for the public's inability to attend the meeting by recording the meeting or at least by making sure that a detailed record is kept of the discussion and actions taken at the meeting.

Here, the meeting was confirmed on Sunday, April 12, for the next day at 1:00 p.m. in Bismarck. There was a reasonable opportunity for notice to be posted and filed on Monday morning, April 13, in time for any interested member of the public to find out about and attend the meeting. Therefore, advance notice was required.

The county auditor must act as clerk of the board of county commissioners and keep an accurate record of the board's official proceedings. N.D.C.C. § 11-13-02(1). This requirement explains the common practice in Griggs County of the county auditor providing notice of all the Commission's meetings. However, providing public notice of a meeting is also the responsibility of the governing body's presiding officer. N.D.C.C. § 44-04-20(5). Therefore, although providing notice of a Commission meeting can properly be delegated to the county auditor, the Commission and its chairman remain ultimately responsible for ensuring that sufficient notice is provided under N.D.C.C. § 44-04-20.

to the county newspaper of special or emergency meetings is a mandatory requirement of N.D.C.C. § 44-04-20(6).

³ The governing body's presiding officer must provide notice of a meeting to anyone who has requested it. Sheriff Hendrickson and Chairman Urness disagree on whether the Sheriff specifically asked to be notified of the date and time of the meeting with NDIRF. Since I am concluding that the notice of the meeting was deficient on other grounds, it is not necessary for me to decide if the notice was deficient on this basis as well.

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It is my opinion that notice of the Commission's April 13 meeting with NDIRF was not provided in substantial compliance with N.D.C.C. § 44-04-20.

Issue Two:

Minutes of meetings must include, at a minimum, a list of topics discussed regarding public business. N.D.C.C. § 44-04-21(2)(c). Whether the Commission's minutes accurately reflect NDIRF's remarks during the April 13 meeting is a question of fact which must be resolved in favor of the public entity. N.D.C.C. § 44-04-21.1. Therefore, it is my opinion that the minutes of the April 13 meeting are sufficient under N.D.C.C. § 44-04-21(2). In any event, the Commission will have an opportunity to consider the alleged inaccuracy in its minutes, and clarify the conflicting statements attributed to NDIRF, when it holds a new meeting to remedy the insufficient notice of its April 13 meeting.

CONCLUSIONS

1. It is my opinion that the April 13 meeting of the Commission was not preceded by sufficient public notice under N.D.C.C. § 44-04-20.
2. It is my opinion that the minutes of the April 13 were an accurate summary of that meeting.

STEPS NEEDED TO REMEDY VIOLATION

The County's failure to provide sufficient notice of the Commission's April 13 meeting cannot be completely remedied because no recording of the meeting was made. To remedy the violations described in this opinion as much as possible, the Board must convene an open meeting, preceded by sufficient public notice, to recreate the discussion that occurred at those meetings. During the meeting, the Board members must describe, to the best of their ability, the discussion and opinion each member expressed during the April 13 meeting. The Board members also must respond to questions from the public regarding their conversations with each other at the meeting. See N.D.A.G. 98-O-05.

Failure to disclose a record, issue a notice of a meeting, or take other corrective measures as 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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