

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 98-O-16**

DATE ISSUED: July 2, 1998

ISSUED TO: Jeff Schneider, Lincoln City Mayor

CITIZEN'S REQUEST FOR OPINION

On May 1, 1998, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Mary Ann Filibeck asking whether the Lincoln City Council violated N.D.C.C. §§ 44-04-19 (the open meetings law) and 44-04-20 (notice of meetings) when the city council met on April 2, 1998, after its regular monthly meeting had adjourned.

FACTS PRESENTED

The Lincoln City Council held a regular meeting on the evening of April 2, 1998. The meeting adjourned at approximately 11:10 p.m. The city of Lincoln has a five-member city council, and the council members present at the regular meeting were Mayor Jeff Schneider, Gerlynn Gabel, Mary Ann Filibeck, and John Kramer. The other council position was vacant as the result of a resignation in March of 1998.

As people were leaving, Mayor Schneider asked council members Gabel, Kramer, and Filibeck to remain for a few minutes. He also asked the city administrator, Marlene Thurn, to remain for a few minutes. Mayor Schneider stated the gathering was impromptu, prompted by the frustration voiced by other members of the council immediately following adjournment of the regular meeting. As various of the council members and the city administrator re-entered the meeting room, Mayor Schneider closed the meeting room door behind them. All members of the public had left the building. A notice of this gathering was not prepared or provided to the public. The persons in the meeting room were Mayor Schneider, council members Gabel, Filibeck, and Kramer, and city administrator Marlene Thurn. The discussion that ensued was not tape-recorded, nor were minutes kept. The Mayor asked the members of the council and the city administrator to remain to discuss the friction and strained working relationships of the city council and city administration, strained due in large part, he stated, to the performance and conduct of council member Filibeck. Mayor Schneider indicated the items of concern regarding council member Filibeck included, but were not limited to, the following:

1. The appearance of repeatedly representing the personal interests of friends in matters relating to a land sale and the removal of trees located on city right of way/setback.

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2. Indicating at public meetings that the city council had acted illegally in disposition of bids received during a land sale. The city has been threatened with litigation over the disposition of bids received during the sale proceedings.
3. Indicating at public meetings that other members of the city council were holding separate, unpublished, unadvertised, illegal meetings.
4. An inability to remember from one meeting to the next the context of discussion and disposition of agenda items, resulting in accusations at the public meetings that other council members were lying to the public.
5. Providing to personal friends copies of information, possibly confidential in nature, relative to the city engineer's dealings with a local contractor and the contractor's financial distress.
6. The appearance of using her elected position to promote the political interests of personal friends at public meetings and in the media.

The Mayor opened the discussion, indicating the above concerns. After discussing some of these concerns for approximately ten minutes, council members Gabel and Filibeck became engaged in a heated discussion. Council member Filibeck rose, indicating that she did not have to take this, and left the building. The three other council members and the city administrator remained and continued discussion for another twenty to thirty minutes. Topics of discussion included:

1. How the council could have better presented their concerns to council member Filibeck, and
2. Items one through six listed above.

No motions were made by council members and no actions were taken by the council. After discussion was ended, those present left.

ISSUES

1. Whether the gathering of the Lincoln City Council members on the evening of April 2, 1998, after the regular city council meeting was a "meeting" under N.D.C.C. § 44-04-19, the open meetings law.
2. Whether notice was provided to the public of this alleged meeting.

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3. Whether this gathering of the Lincoln City Council violated N.D.C.C. § 44-04-19, the open meetings law.

ANALYSES

Issue One:

For purposes of the open meetings law, “[m]eeting’ means a formal or informal gathering . . . of . . . [a] quorum of the members of the governing body of a public entity regarding public business” N.D.C.C. § 44-04-17.1(8)(a). “Quorum” usually means one-half or more of the members of a governing body. N.D.C.C. § 44-04-17.1(14). In this case, four of the five city council members were present, which is clearly a quorum. Also, a city council is a “governing body” of a “public entity.” N.D.A.G. 98-O-10; N.D.A.G. 98-O-08. See also N.D.C.C. § 44-04-17.1(6),(12). The issue is whether the gathering was in regard to “public business.” State law provides:

“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.

N.D.C.C. § 44-04-17.1(11) (emphasis added).

The discussion at this informal gathering related to a performance review of council member Filibeck in her capacity as council member and the effect of her actions in that capacity on the performance of the city council’s governmental functions. Therefore, it is my opinion that this informal gathering related to public business and constituted a “meeting” subject to N.D.C.C. § 44-04-19, the open meetings law.

The fact that no motions were made by council members and no actions were taken by the council is not relevant in determining whether the gathering was a meeting subject to the open meetings law. If a gathering relates to public business, the gathering constitutes a “meeting,” even when no motions are made and no action is taken. N.D.A.G. 98-O-10; N.D.A.G. 98-O-08.

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Issue Two:

State law requires that public notice must be given in advance of all meetings of a public entity. See N.D.C.C. § 44-04-20(1). No notice was prepared or provided to the public of this April 2, 1998, meeting. Therefore, it is my opinion that notice was not provided to the public in the manner required by N.D.C.C. § 44-04-20.

Issue Three:

The open meetings law "is violated when any person is denied access to a meeting under this section, unless such refusal, implicitly or explicitly communicated, is due to a lack of physical space in the meeting room for the person or persons seeking access." N.D.C.C. § 44-04-19(1). Usually, a complete failure to provide public notice of a meeting as required in N.D.C.C. § 44-04-20 is not also a violation of N.D.C.C. § 44-04-19 because there was no effort by the governing body to deny access to the meeting. See, e.g., N.D.A.G. 98-O-08. To the contrary, the governing bodies in those situations have indicated to this office that the door to the meeting was open to anyone who wanted to listen.

Here, however, the door to the meeting was literally and figuratively closed. Rather than announce at the end of the regular meeting that the "impromptu" meeting to review Ms. Filibeck's job performance would follow shortly, the mayor allowed the public to believe the meeting was over and shut the door so that the public would not know that the council was holding another meeting. Unlike the other situations reviewed by this office, the mayor took deliberate action to make sure no member of the public could attend the meeting. Although the door to the meeting was not shut in anyone's face, the result was the same. It is my opinion that the public was constructively denied access to the April 2, meeting, in violation of N.D.C.C. § 44-04-19.

CONCLUSIONS

1. It is my opinion that the gathering of the Lincoln City Council members on the evening of April 2, 1998, after the regular city council meeting, constituted a "meeting," as that term is used in N.D.C.C. § 44-04-19, the open meetings law.
2. It is my further opinion that notice of this meeting was not provided to the public as required by N.D.C.C. § 44-04-20.
3. It is my further opinion that this gathering violated N.D.C.C. § 44-04-19, the open meetings law.

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STEPS NEEDED TO REMEDY VIOLATIONS

Minutes of the meeting that occurred immediately after the regular council meeting of April 2, 1998, are included in the minutes of the April 2, 1998, regular meeting. These minutes meet the requirements of N.D.C.C. § 44-04-21(2).

A notice that the April 2, 1998, meeting at issue occurred needs to be prepared and filed with the city auditor and posted at the city's main office. N.D.C.C. § 44-04-20(4). The notice must also be provided to the city's official newspaper. N.D.C.C. § 44-04-20(6). The notice must contain the date, time, and location of the meeting and the topics that were considered at the meeting. N.D.C.C. § 44-04-20(2). The notice must also specify that minutes are available from the city auditor and copies of statements about what transpired at the meeting that were made available to the Attorney General's Office by each person in attendance at the meeting are available immediately to any member of the public who wants a copy, free of charge. This notice of the occurrence of the April 2, 1998, meeting at issue must be posted, filed, and provided to the city newspaper within seven days of the date this opinion is issued.

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.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: Leah Ann Schneider
Assistant Attorney General

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Enclosures