

**OPEN RECORDS AND MEETINGS OPINION
2017-O-04**

DATE ISSUED: May 12, 2017

ISSUED TO: Cass 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 Dave Roepke asking whether the Cass County Commission violated N.D.C.C. § 44-04-20 by failing to provide proper notice of meetings.

FACTS PRESENTED

During a special meeting on January 30, 2017, the Cass County Commission (Commission) voted to interview four individuals for the County Administrator position.¹ After the meeting, the Commission's Chair, Chad Peterson and Vice Chair, Rick Steen, decided to eliminate one of the four candidates from the interview process without consulting the entire Commission.² Chair Peterson instructed the Human Resources Director (Director) to email the other members of the Commission regarding the decision.³ In an email sent on February 2, 2017, the Director outlined the decision and provided "[i]f you disagree with the decision made by the Commission Chair and Vice Chair please let me know before 5:00 PM today"⁴ No Commissioner responded to the email and the interview was canceled.

The remaining candidates were interviewed during two special meetings on February 6 and 7, 2017. The notice for the special meeting stated, in part:

The interview schedule for the County Administrator position has been changed. Please be advised three or more Cass County Commissioners will be in attendance at one time during interviews with applicants beginning at 8:30 AM, Monday, February 6, 2017, and 9:00 AM, Tuesday,

¹ Minutes, Special Meeting, Cass Cnty. Comm'n (Jan. 30, 2017).

² Letter from Birch Burdick, Cass Cnty. State's Att'y, to Sandra L. DePountis, Asst. Att'y Gen. (Mar. 28, 2017).

³ Id.

⁴ Email from Cindy Stoick, Dir., Human Res., Cass Cnty. (Feb. 2, 2017, 1:25 pm).

February 7, 2017, in the Commission Conference Room, Cass County Courthouse in Fargo.⁵

After the final interview on February 7, the Commission “discussed the attributes of each candidate.”⁶ The Commission then voted to conduct a background check on one candidate and, pending the results, the Interim County Administrator and Director would offer the position to the candidate.⁷

ISSUES

1. Whether the February 2, 2017, email to the Commission was a “meeting” subject to open meeting laws.
2. Whether the notice for the February 7, 2017, special meeting was posted in substantial compliance with N.D.C.C. § 44-04-20.

ANALYSIS

Issue One

Generally, all meetings of a public entity must be open to the public and preceded by public notice in compliance with N.D.C.C. § 44-04-20.⁸ Emails exchanged between a quorum⁹ of members of a governing body involving public business¹⁰ are considered a “meeting” subject to open meeting laws.¹¹ Emails that discuss substantive merits of the suggested agenda topic or a matter of public business, provide opinions including opinions on how to handle public business, attempt to build support and consensus for certain positions, or emails in which a quorum discusses, formulates, or narrows options, are equivalent to a meeting that requires notice.¹² This office has also warned

⁵ Amended Notice, Special Meetings, Cass Cnty. Comm’n (Feb. 2, 2017).

⁶ Minutes, Special Meeting, Cass Cnty. Comm’n (Feb. 7, 2017).

⁷ *Id.*

⁸ N.D.C.C. § 44-04-20.

⁹ N.D.C.C. § 44-04-17.1(15) (“quorum” is defined as “one-half or more of the members of the governing body, or any smaller number if sufficient for a governing body to transact business on behalf of the public entity.”). A quorum is reached if the emails are sent to a quorum of the governing body. N.D.A.G. 2015-O-14; N.D.A.G. 2014-O-12.

¹⁰ N.D.C.C. § 44-04-17.1(12) (definition of “public business” includes “all matters that relate or may foreseeably relate in any way to [t]he performance of the public entity’s governmental functions . . . or [t]he public entity’s use of public funds.”)

¹¹ N.D.A.G. 2015-O-14.

¹² N.D.A.G. 2015-O-14; N.D.A.G. 2014-O-12; N.D.A.G. 2013-O-07.

against emails that request other members to share their thoughts and opinions about certain topics because doing so invites further discussions regarding public business that should be held in an open meeting.¹³

Here, a decision was made by the Chair Peterson and Vice Chair Steen to eliminate a candidate from the upcoming interviews.¹⁴ An email was then sent out to the entire Commission informing them of the decision, but then asking if anyone had a problem with the decision, to email the Director by the end of the day.¹⁵ The lack of response of the Commission,¹⁶ in essence, was a tacit vote to approve the decision made by the Chair and Vice Chair. Consensus was thereby reached that allowed the Chair and Vice Chair to move forward with a matter of public concern outside of a properly noticed public meeting. Many past opinions have explained that such actions circumvent the open meetings law.¹⁷ It is my opinion that the Commission's email exchange violated the open meetings law.

Issue Two

Public notice must be provided in advance of all meetings of a public entity.¹⁸ Section 44-04-20, N.D.C.C., requires notice of all regular meetings be posted at the main office of the public entity, if one such exists, filed with the county auditor for county level entities or posted on the public entities website, posted at the location of the meeting on the day of the meeting, and given to anyone requesting notice of upcoming meetings.¹⁹ For emergency or special meetings, a public entity must also provide notice to its official newspaper.²⁰ The notice must include the date, time, and location of the

¹³ N.D.A.G. 2015-O-14; N.D.A.G. 2015-O-06; N.D.A.G. 2014-O-12.

¹⁴ Letter from Birch Burdick, Cass Cnty. State's Att'y, to Sandra L. DePountis, Asst. Att'y Gen. (Mar. 28, 2017).

¹⁵ Email from Cindy Stoick, Dir., Human Res., Cass Cnty.(Feb. 2, 2017, 1:25 pm).

¹⁶ Letter from Birch Burdick, Cass Cnty. State's Attorney, to Sandra L. DePountis, Asst. Att'y Gen. (Mar. 28, 2017).

¹⁷ N.D.A.G. 2015-O-14 (executive director of licensing board emailing the board members asking for their input and thoughts violated open meetings law); N.D.A.G. 2015-O-06 (auditor reaching out to Commissioners about a decision of the Chair to terminate an employee and relaying the approval of the Commission back to the Chair was a violation of open meetings law); N.D.A.G. 2015-O-04 (series of conversations ultimately involving a quorum of the Commission built consensus that authorized two Commissioners to continue their course of action regarding the resignation of an employee).

¹⁸ N.D.C.C. § 44-04-20(1).

¹⁹ N.D.C.C. § 44-04-20 (4) and (5).

²⁰ N.D.C.C. § 44-04-20(6).

meeting and must include an agenda of the topics to be considered or discussed, along with any executive sessions expected to be held during the meeting.²¹ The topics that may be considered at an emergency or special meeting are limited to those included in the notice.²²

The Commission posted notice of its February 7, 2017, special meeting at its main office, at the location of the meeting on day of the meeting, and provided the notice to the news media and all others requesting to receive notice of the upcoming meeting.²³ The Commission, however, failed to provide notice to the county auditor or on its website.²⁴ Because of this, the Commission did not provide notice in substantial compliance with N.D.C.C. § 44-04-20.²⁵

The notice posted by the Commission for the February 7, 2017, special meeting, included the date, time, and location of the meeting, and provided notice that the Commission would be conducting interviews of applicants for the County Administrator position.²⁶ The notice, however, did not include any reference to discussions on the attributes of the candidates and narrowing the applicants down to one individual who would be offered the job, dependent on a favorable background check.

Although the law does not require a governing body to list every action it may take within the scope of the topic, the agenda must provide “sufficient information to interested members of the public concerning the governing body’s anticipated business in order that they may attend the meeting or take whatever other action they deem appropriate.”²⁷ The importance of identifying what will take place at a meeting is greater for special meetings because they are unpredictable and often scheduled on short notice.²⁸ Failing to include topics to be discussed in the notice prevents the public from obtaining proper advance notice of what will be considered at a special meeting and is a

²¹ N.D.C.C. § 44-04-20(2).

²² N.D.C.C. § 44-04-20(6).

²³ Letter from Birch Burdick, Cass Cnty. State’s Att’y, to Sandra L. DePountis, Asst. Att’y Gen. (Mar. 28, 2017).

²⁴ *Id.*

²⁵ N.D.A.G. 2015-O-02; N.D.A.G. 2005-O-10; N.D.A.G. 2005-O-07; N.D.A.G. 2000-O-03; N.D.A.G. 98-O-11.

²⁶ Amended Notice, Special Meetings, Cass Cnty. Comm’n (Feb. 2, 2017).

²⁷ N.D.A.G. 2011-O-15 (appointment of legal counsel was necessary and specifically related to the grievance hearing listed on the agenda); *but see* N.D.A.G. 2005-O-14 (it was not a violation of open meetings law when the school board took a community vote on proposed item on the agenda when the agenda included the topic voted upon and included requests for community input).

²⁸ N.D.A.G. 2011-O-15.

violation of open meetings law.²⁹ Consequently, topics for special meetings must be specifically stated in the agenda and a governing body may only consider the topics included in the notice.

Here, the agenda topic only referenced that three or more Commissioners would be “in attendance” during the interviews.³⁰ The notice failed to inform the public that the full Commission would be voting on a final applicant to go forward with the hiring process at the end of the interviews. The Commission therefore violated N.D.C.C. § 44-04-20 when it considered a topic at a special meeting that was not included in the notice.³¹

CONCLUSIONS

1. The Commission violated open meetings law when it provided tacit approval for a decision of the Chair and Vice Chair via email on a matter of public business.
2. The Commission violated N.D.C.C. § 44-04-20 when it failed to post notice of the February 7, 2017, special meeting with the county auditor or on its website and when it failed to include all topics to be considered in the agenda.

STEPS NEEDED TO REMEDY VIOLATIONS

The Commission already recognized, in its letter to this office, that the February 2, 2017, email was inappropriate which has resulted in internal discussions about the exercise of care needed within the department to “eliminate any communications with and amongst commissioners that would violate the open meetings laws.”³² No further action needs to be taken on this matter.

The meeting minutes for the February 7, 2017, meeting must be updated to include a detailed recollection of conversations that occurred after the final interview concluded. The updated meeting minutes must be given to Mr. Roepke, and anyone else requesting such minutes, free of charge.

²⁹ N.D.A.G. 2003-O-20.

³⁰ Amended Notice, Special Meetings, Cass Cnty. Comm’n (Feb. 2, 2017).

³¹ I note that the Commission, at its next regularly scheduled meeting on February 21, 2017, made its formal appointment for the County Administrator position. See Minutes, Cass Cnty. Comm’n (Feb. 21, 2017). However, this discussion did not include reference to any other candidate or why it chose to narrow its applicants to the one individual. This is the conversation that the public was not privy to in the improperly noticed February 7, 2017, special meeting.

³² Letter from Birch Burdick, Cass Cnty. State’s Att’y, to Sandra L. DePountis, Asst. Att’y Gen. (Mar. 28, 2017).

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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. § 44-04-21.2.³³ It may also result in personal liability for the person or persons responsible for the noncompliance.³⁴

Wayne Stenehjem
Attorney General

sld

cc: Dave Roepke (via email only)

³³ N.D.C.C. § 44-04-21.1(2).

³⁴ Id.