

**OPEN RECORDS AND MEETINGS OPINION
2017-O-08**

DATE ISSUED: October 27, 2017

ISSUED TO: North Dakota Industrial Commission

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Paul Jurgens asking whether the Industrial Commission violated N.D.C.C. § 44-04-19 by holding a meeting that was not properly noticed.

FACTS PRESENTED

On August 9, 2017, Governor Doug Burgum hosted a roundtable discussion at 9:45 a.m. at North Dakota State University, regarding the Waters of the United States (WOTUS) rule and applicable federal regulations.¹ In attendance were Governor Burgum, United States Environmental Protection Agency (EPA) Administrator Scott Pruitt, North Dakota Attorney General Wayne Stenehjem, and approximately 20 other individuals.² The North Dakota Industrial Commission (NDIC) is composed of three members, Governor Burgum, Attorney General Stenehjem, and the Agricultural Commissioner, Doug Goehring.³ Mr. Jurgens questions whether the August 9, 2017, roundtable discussion was considered a “meeting” of the NDIC, subject to the open meetings law.

ISSUE

Whether the August 9, 2017, 9:45 a.m., discussion was a “meeting” of the NDIC, subject to the open meetings law.

¹ See Letter from Indus. Comm’n to Sandra L. DePountis, Asst. Att’y Gen. (Sept. 7, 2017) and Press Release, N.D. Office of the Governor, Burgum to Host EPA Administrator Scott Pruitt at roundtable discussions in Fargo, Grand Forks (Aug. 2, 2017), on file with that office.

² See Letter from Indus. Comm’n to Sandra L. DePountis, Asst. Att’y Gen. (Sept. 7, 2017).

³ N.D.C.C. § 54-17-02. Commissioner Goehring was not present for the Aug. 9, 2017, 9:45 a.m., discussion.

ANALYSIS

“Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public.”⁴ A “meeting” occurs when a “quorum” of the members of the governing body is present and its “public business” is being considered or discussed.⁵ “Quorum” means “one-half or more of the members of the governing body.”⁶

“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.⁷

Open meetings law requires public notice to be given in advance of all meetings, the public be allowed to attend, and meeting minutes to be taken.⁸

A quorum of the NDIC was present at the August 9, 2017, 9:45 a.m. roundtable discussion.⁹ Therefore, the analysis will focus on whether the NDIC’s public business was considered during this roundtable discussion to determine whether it was a “meeting” subject to open meetings law.

This office has long recognized that it must be the public business *of the public entity* that is being considered or discussed in order for the meeting to be subject to the open

⁴ N.D.C.C. § 44-04-19. The Indus. Comm’n is created by and receives its authority from N.D.C.C. ch. 54-17 and is considered the governing body of a public entity subject to the open record and meeting law. See N.D.C.C. § 44-04-17.1(6) (definition of “governing body”) and (13) (definition of “public entity”).

⁵ N.D.C.C. § 44-04-17.1(9) (definition of “meeting”).

⁶ N.D.C.C. § 44-04-17.1(15) (definition of “quorum”).

⁷ N.D.C.C. § 44-04-17.1(12) (definition of “public business”) (emphasis added).

⁸ N.D.C.C. §§ 44-04-20; 44-04-21(2).

⁹ Attorney General Stenehjem was only present for the 9:45 a.m. discussion, the only time a quorum of the Indus. Comm’n existed. He was not present for further conversations between Gov. Burgum or Adm’r Pruitt, nor for the group discussions which took place later that day.

meetings law.¹⁰ The public business of the NDIC is derived from state statutory authority, found primarily in N.D.C.C. ch. 54-17.

In preparing this opinion, a member of my staff requested a signed statement from Governor Burgum and Attorney General Stenehjem detailing all conversations that took place during the roundtable discussion. Governor Burgum attested that the topic of discussion was WOTUS rules and litigation and its impact on those members in attendance at the roundtable.¹¹ Attorney General Stenehjem reiterates WOTUS litigation was the sole topic of discussion and he attended in his capacity as the Attorney General who initiated and is litigating the lawsuit regarding WOTUS.¹² Attorney General Stenehjem also made a statement at the beginning of the discussion that because two members of the NDIC were present, one member would need to leave the room if any topics were raised regarding matters involving the NDIC.¹³

Nothing in N.D.C.C. ch. 54-17, or any other state statute or regulation, gives the NDIC any supervision, control, or jurisdiction over the WOTUS litigation. The NDIC has no control over the public funds used on the WOTUS litigation.¹⁴ Therefore, because the discussion did not involve the “public business” of the NDIC, it was not a “meeting” of the NDIC subject to the open meetings law.

¹⁰ N.D.C.C. § 44-04-17.1(12) (definition of “public business”); N.D.A.G. 2016-O-23 (“when a quorum of members of a governing body attends a meeting of another group, and the group’s discussion pertains to the public business of the governing body,” it is a meeting subject to open meeting laws); N.D.A.G. 2014-O-13 (even if the Board did not initiate the meeting or set the agenda, a quorum was present and its “public business” was discussed; it was therefore a “meeting”); N.D.A.G. 2013-O-07 (it does not matter whether motions are made or action is taken, the definition of “meeting” is met if a quorum is present and the governing body’s public business is being considered or discussed); N.D.A.G. 2008-O-11 (presentation by an organization related to the public business of the city comm’ners and their attendance was a “meeting”); N.D.A.G. 98-O-18 (when a quorum of the city council attended another entity’s meeting, and public business of the city council was discussed, it was a “meeting” of the city council subject to open meetings law); see also N.D.A.G. 98-L-128 (there must be a connection between the record and the public entity’s public business for it to be subject to the open records law).

¹¹ Certification of Governor Burgum (Sept. 7, 2017).

¹² Statement from Att’y Gen. Wayne Stenehjem (Sept. 5, 2017); Memorandum from Mary Kae Kelsch, Asst. Att’y Gen., to Wayne Stenehjem, Att’y Gen. (Aug. 7, 2017).

¹³ Statement from Att’y Gen. Wayne Stenehjem (Sept. 5, 2017).

¹⁴ Memorandum from Mary Kae Kelsch, Asst. Att’y Gen., to Wayne Stenehjem, Att’y Gen. (Aug. 7, 2017).

CONCLUSION

The August 9, 2017, 9:45 a.m. roundtable discussion Governor Burgum and Attorney General Stenehjem attended was not a “meeting” of the NDIC subject to the open meetings law because the “public business” of the NDIC was not considered or discussed. As a result, no violation of N.D.C.C. § 44-04-19 occurred.

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cc: Paul Jurgens (via email only)