

**OPEN RECORDS AND MEETINGS OPINION  
2019-O-10**

DATE ISSUED: July 1, 2019

ISSUED TO: Beulah Public School

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Bruce W. Neuberger asking whether the Beulah Public School violated N.D.C.C. § 44-04-20 by failing to provide notice of meetings.

**FACTS PRESENTED**

The Beulah Board of Education consists of seven members and holds regular meetings on the second Thursday of every month.<sup>1</sup> Beulah Public School received its 2017-2018 audit from the North Dakota State Auditor's office on February 14, 2019. A regular Board meeting was already scheduled for February 14, so the audit was added to the meeting agenda.<sup>2</sup> During the meeting, the Board voted to table discussion on the audit until its next regular meeting, giving the Board members time to review.<sup>3</sup> The school's superintendent, Travis Jordan, told the Board that they could call him or the school's business manager, Krista Richau, with any questions while reviewing the audit.<sup>4</sup>

On March 10, 2019, Mr. Bruce Neuberger, requestor of this opinion, sent an email to all Board members with his interpretation and concerns of the audit.<sup>5</sup> That same day, Superintendent Jordan spoke by telephone with the Board Chair, Stacey McLaughlin, regarding the audit and email from Mr. Neuberger.<sup>6</sup> After the call, Superintendent Jordan sent the following text message to all Board members:

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<sup>1</sup> Letter from Stacey McLaughlin, Chair, Bd. of Educ., Beulah Sch. Dist., to Att'y Gen.'s Office (Apr. 15, 2019); *see also* Minutes, Bd. of Educ., Beulah Sch. Dist. (July 31, 2018) – setting regular meeting dates and times for the 2018-2019 school year.

<sup>2</sup> Letter from Stacey McLaughlin, Chair, Bd. of Educ., Beulah Sch. Dist., to Att'y Gen.'s Office (Apr. 15, 2019).

<sup>3</sup> *Id.* *See also* Minutes, Bd. of Educ., Beulah Sch. Dist. (Feb. 14, 2019).

<sup>4</sup> Letter from Stacey McLaughlin, Chair, Bd. of Educ., Beulah Sch. Dist., to Att'y Gen.'s Office (Apr. 15, 2019).

<sup>5</sup> *Id.*

<sup>6</sup> Statements from Travis Jordan, Superintendent, Beulah Sch. Dist. (Apr. 15, 2019) and Stacey McLaughlin, Chair, Bd. of Educ., Beulah Sch. Dist. (Apr. 16, 2019).

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You all received an email from Bruce N today. Coincidentally I had a long discussion with Mandan Supt today and they got the same recommendations in their audit – as does most school districts. If you have any individual questions you can give me a call or else I have some thoughts that I will share with you all at the meeting this week. Please don't respond all to this text.

Superintendent Jordan and business manager Richau contacted the State Auditor on March 11, 2019, regarding the audit and concerns raised by Mr. Neuberger's email.<sup>7</sup> Superintendent Jordan called Chair McLaughlin later that day to relay what was discussed with the auditor, who did not have any significant concerns.<sup>8</sup>

Superintendent Jordan had a telephone conversation with Board member Dan Ziman on March 12, 2019, regarding the matrix salary proposed by the Beulah Education Association.<sup>9</sup> Board member Ziman also spoke with the business manager earlier that day about the audit.<sup>10</sup>

The Board's vice chair, Jennifer Steffan, also spoke with the business manager on March 12, 2019, about the Cost Basis of Accounting Method.<sup>11</sup>

The Board discussed the audit at its next regular meeting on March 21, 2019.<sup>12</sup> During the discussion, Superintendent Jordan reiterated that he answered questions from a few board members, and that he also had discussions with the State Auditor about the findings. The Board approved the audit by motion.<sup>13</sup>

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<sup>7</sup> Statement from Travis Jordan, Superintendent, Beulah Sch. Dist. (Apr. 15, 2019).

<sup>8</sup> Statements from Travis Jordan, Superintendent, Beulah Sch. Dist. (Apr. 15, 2019) and Stacey McLaughlin, Chair, Bd. of Educ., Beulah Sch. Dist. (Apr. 16, 2019).

<sup>9</sup> Statements from Travis Jordan, Superintendent, Beulah Sch. Dist. (Apr. 15, 2019) and Daniel Ziman, Member, Bd. of Educ., Beulah Sch. Dist. (Apr. 16, 2019).

<sup>10</sup> Statements from Travis Jordan, Superintendent, Beulah Sch. Dist. (Apr. 15, 2019) and Daniel Ziman, Member, Bd. of Educ., Beulah Sch. Dist. (Apr. 16, 2019). Board member Ziman and the business manager discussed the material weaknesses identified in the audit, "the overall audit process, knowledge from the audit that can be utilized in the future, and the auditor's statements in the report that he encountered no significant difficulties in dealing with management in completing the audit." Statement from Daniel Ziman, Member, Bd. of Educ., Beulah Sch. Dist. (Apr. 16, 2019).

<sup>11</sup> Statement from Jennifer Steffan, Vice-Chair, Bd. of Educ., Beulah Sch. Bd. (Apr. 16, 2019).

<sup>12</sup> Letter from Stacey McLaughlin, Chair, Bd. of Educ., Beulah Sch. Dist., to Att'y Gen.'s Office (Apr. 15, 2019). See *also* Minutes, Bd. of Educ., Beulah Sch. Dist. (Mar. 21, 2019).

<sup>13</sup> Letter from Stacey McLaughlin, Chair, Bd. of Educ., Beulah Sch. Dist., to Att'y Gen.'s Office (Apr. 15, 2019). See *also* Minutes, Bd. of Educ., Beulah Sch. Dist. (Mar. 21, 2019).

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Other than what is noted above, there were no other conversations regarding the audit by any other Board members outside of February and March meetings.<sup>14</sup>

### ISSUE

Whether the Beulah Board of Education held “meetings” through various means without complying with open meeting requirements of posting notice, allowing the public the right to attend, and composing meeting minutes.

### ANALYSIS

Except as otherwise specifically provided by law, all “meetings”<sup>15</sup> of a governing body of a public entity must be open to the public,<sup>16</sup> preceded by sufficient public notice in compliance with N.D.C.C. § 44-04-20, and minutes must be taken in compliance with N.D.C.C. § 44-04-21.

“Meeting” means a formal or informal gathering or a work session, whether in person or through electronic means such as telephone or videoconference, of:

1. A quorum of the members of the governing body of a public entity regarding public business; or
2. Less than a quorum of the members of the governing body of a public entity regarding public business, if the members attending one or more of such smaller gatherings collectively constitute a quorum and if the members hold the gathering for the purpose of avoiding the requirements of section 44-04-19.<sup>17</sup>

There are two things to consider under the definition of “meeting” when looking at the interaction of individual members of a governing body – the number of members

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<sup>14</sup> Statements from Dwight Hatzenbuhler, Member, Bd. of Educ., Beulah Sch. Dist., Doug Moore, Member, Bd. of Educ., Beulah Sch. Dist., Dave Ripplinger, Member, Bd., of Educ., Beulah Sch. Dist., Blake Seibel, Member, Bd. of Educ., Beulah Sch. Dist. Opinions issued under N.D.C.C. § 44-04-21.1 must be based upon the facts of the public entity. N.D.C.C. § 44-04-21.1(1).

<sup>15</sup> N.D.C.C. § 44-04-17.1(9) (definition of “meeting”).

<sup>16</sup> N.D.C.C. § 44-04-19.

<sup>17</sup> N.D.C.C. § 44-04-17.1(9)(a). The law does not require the board intend to violate the law. Rather, the law requires the governing body intentionally meet in groups smaller than a quorum, yet collectively involve a quorum, and intentionally discuss or receive information regarding items of public business. N.D.A.G. 98-O-05.

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involved, which must collectively involve a “quorum,”<sup>18</sup> and the topic of discussion, which must relate to the governing body’s “public business.”<sup>19</sup>

This office recently issued an opinion providing a comprehensive overview of the definition of “meeting” and the application of open meetings law to serial meetings and evolving technology.<sup>20</sup> In that opinion, the office recognized that under the definition of “meeting,” a quorum of a governing body does not need to be present at one time for the “quorum rule” to be met.<sup>21</sup> Instead, when a series of conversations regarding public business between members of a governing body collectively involve a quorum, this is considered a meeting subject to open meetings law, whether such conversations happen in person, via telephone, or other electronic means.<sup>22</sup>

The opinion also recognized that the definition of “public business” covers all stages of the decision making process; however, discussions only involving ministerial matters are not considered “public business” that trigger open meetings law requirements.<sup>23</sup> Ministerial matters include setting a meeting date or time, providing information for a governing body to review before an upcoming meeting, and adding an item to an agenda, as long as no substantive discussion occurs regarding the agenda item between a quorum of members of the governing body.<sup>24</sup> Safeguards should also be put into place when disseminating information to prevent a back and forth discussion, such as warning against the use of “reply all” function.<sup>25</sup>

Here, after receiving correspondence from Mr. Neuberger, Superintendent Jordan sent out a text to the Board, asking them to direct questions to him individually and warning against replying all to the text. No Board member replied to the text and no Board member had a discussion regarding the audit with any other Board member.

Instead, three Board members individually reached out to the superintendent and the business manager. This did not involve a quorum. In addition, reaching out individually to non-board members is permissible as long as the non-board member does not relay the substance of his or her discussion with a Board member to a quorum of other Board

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<sup>18</sup> N.D.C.C. § 44-04-17.1(15) (definition of “quorum”).

<sup>19</sup> N.D.C.C. § 44-04-17.1(12) (definition of “public business”).

<sup>20</sup> N.D.A.G. 2018-O-10.

<sup>21</sup> N.D.A.G. 2018-O-10 (citing numerous other opinions).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> N.D.A.G. 2010-O-09.

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members.<sup>26</sup> The non-board member also is not allowed to build support or consensus through the individual conversations.<sup>27</sup>

In reviewing the substance of the conversations, it appears that the superintendent and business manager answered the individual questions from three Board members, without relaying the substance of those conversations amongst the Board members, suggesting a course of action, or otherwise building support or consensus of a position. Such conversations do not trigger the open meetings law.

### CONCLUSION

The conversations between three members of the Beulah Board of Education individually with the superintendent and business manager regarding an audit did not trigger open meetings law as a quorum did not discuss a matter of public business outside of properly noticed meetings.

Wayne Stenehjem  
Attorney General

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cc: Bruce W. Neuberger (via email only)

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<sup>26</sup> For example, if the superintendent had called a quorum of the board and disseminated the substance of the conversation he had with the chair, the quorum rule would have been met. See N.D.A.G. 2015-O-06 (It was a violation of the open meetings law when the auditor acted as an intermediary or liaison who conveyed and circulated information and the consensus of the entire commission. The commission reached a consensus on a specific matter of public business by using the auditor as an intermediary which resulted in an unnoticed, de facto meeting of the commission.).

<sup>27</sup> N.D.A.G. 2015-O-06; see also N.D.A.G. 2015-O-04 (Even if conversations were one-sided and meant to only provide information, they went beyond ministerial matters because the conversations built a consensus that authorized two commissioners to continue their course of action on a matter of public business.).