

**OPEN RECORDS AND MEETINGS OPINION
2021-O-12**

DATE ISSUED: December 17, 2021

ISSUED TO: Horse Race North Dakota

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Wendy Reuer, on behalf of The Forum of Fargo-Moorhead (The Forum), asking whether Horse Race North Dakota violated N.D.C.C. §§ 44-04-20 and 44-04-19 by failing to properly post and provide notice of meetings and failing to provide requested records.

FACTS PRESENTED

Horse Race North Dakota is a non-profit corporation, governed by a board of directors, which receives grants from the State of North Dakota and is supported, in part, by public funds.¹ Its funding sources include: gaming revenues, public contributions, activity revenues, interest, ATM surcharges, simulcast proceeds, and state grants.² The general purpose of Horse Race North Dakota is to promote non-profit and civic causes by establishing and encouraging horse racing in North Dakota.³ The current Horse Race North Dakota board members are: Jay Alsop (President), John Bubel, Douglas Plummer, Dean Meyers (Secretary), Billy Buchholz, and Leigh Backhaus.⁴

In 2021, Horse Race North Dakota held meetings on March 23, April 15, August 26, and October 12.⁵ All of the 2021 meetings were held virtually.⁶

On July 30, 2021, The Forum requested notice of all upcoming board meetings of Horse Race North Dakota.⁷ A meeting notice for the August 26, 2021, regular

¹ E-mail from Howard Swanson, Att'y, to Att'y Gen.'s Office (Nov. 2, 2021).

² Letter from Howard Swanson, Att'y, to Att'y Gen.'s Office (Oct. 25, 2021).

³*Id.*

⁴*Id.*

⁵*Id.*

⁶*Id.*

⁷ Letter from Wendy Reuer, The Forum of Fargo-Moorhead, to Att'y Gen.'s Office (Sept. 22, 2021).

OPEN RECORDS AND MEETINGS OPINION 2021-O-12

December 17, 2021

Page 2

meeting was posted on Horse Race of North Dakota's website, but notice was not sent to The Forum.⁸

ISSUES

1. Whether Horse Race North Dakota provided sufficient notice of its August 26, 2021, meeting.
2. Whether Horse Race North Dakota properly responded to a records request.
3. Whether Horse Race North Dakota held an unnoticed meeting in July 2021.

ANALYSIS

ISSUE ONE

Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity in substantial compliance with N.D.C.C. § 44-04-20.⁹ Meeting notices must include the date, time, and location of the meeting, and if practicable, the topics to be discussed.¹⁰ If the meeting is held electronically, "the location of the meeting is the electronic address" and the notice must include the information necessary to join the meeting.¹¹ The notice must be posted at the principal office of the governing body holding the meeting, if one exists, at the location of the meeting on the day of the meeting and, for organizations supported in whole or in part by public funds, or expending public funds, filed in the Secretary of State's office, or posted on the public entity's website.¹² The notice must be given to anyone who asks to receive notice of upcoming meetings.¹³ For special meetings, notice must be provided to the public entity's official newspaper and to any representatives of the news media asking to be notified of the special meeting.¹⁴

⁸*Id.*

⁹ N.D.C.C. § 44-04-20(1).

¹⁰ N.D.C.C. § 44-04-20(2).

¹¹ N.D.C.C. § 44-04-20(2).

¹² N.D.C.C. § 44-04-20(4).

¹³ N.D.C.C. § 44-04-20(5).

¹⁴ N.D.C.C. § 44-04-20(6).

OPEN RECORDS AND MEETINGS OPINION 2021-O-12

December 17, 2021

Page 3

To the extent Horse Race North Dakota is supported by public funds,¹⁵ it is a public entity¹⁶ subject to the open records and meetings laws.¹⁷

The August 26, 2021, meeting notice posted on Horse Race North Dakota's website, and provided to this office, included the dates and times of the meetings, identified as "call-in" meetings.¹⁸ The website "provided information to contact the organization by email for 'call-in' info."¹⁹

The meeting notice was posted on Horse Race North Dakota's website but "[n]o other postings of notices occurred."²⁰ Horse Race North Dakota acknowledges it "failed to provide specific notice" of the August 26, 2021, meeting to The Forum.²¹ It explains that recently, two members of the Horse Race North Dakota board resigned.²² One of those members was previously responsible for preparing agendas, minutes, and notices.²³ That responsibility has been assigned to another board member and Horse Race North Dakota retained the Swanson & Warcup law firm to assist them in complying with open meetings and open records laws.²⁴ According to Horse Race North Dakota, failing to provide notice of the meetings as The Forum requested was "an inadvertent oversight" that they have taken steps to remedy.

The Forum further alleges Horse Race North Dakota failed to "post proper notice of meeting agendas."²⁵ The August 26, 2021, notice did not include an agenda. Even if, at the time the notice was posted, an agenda was not ready, N.D.C.C. § 44-04-20(5) requires that "[a]s soon as an agenda is prepared for a meeting with the information required . . . and given to members of the governing body, the agenda must be posted at the locations as required . . . and given to anyone requesting the

¹⁵ E-mail from Howard Swanson, Att'y, to Att'y Gen.'s Office (Nov. 2, 2021); N.D.C.C. § 44-04-17.1(14) (definition of public funds).

¹⁶ N.D.C.C. § 44-04-17.1(13)(c) (definition of public entity); N.D.C.C. § 44-04-17.1(10) (definition of organization or agency supported in whole or in part by public funds).

¹⁷ N.D.A.G. 2006-O-04.

¹⁸ Letter from Howard Swanson, Att'y, to Att'y Gen.'s Office (Oct. 25, 2021).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Letter from Wendy Reuer, The Forum of Fargo-Moorhead, to Att'y Gen.'s Office (Sept. 22, 2021).

OPEN RECORDS AND MEETINGS OPINION 2021-O-12

December 17, 2021

Page 4

information.”²⁶ Therefore, once the agenda was prepared and given to the members, the agenda should have been posted on the website and other required locations.

The August 26, 2021, meeting notice also failed to provide the information necessary to join the remotely held meeting. The notice was not posted at the Board’s principal office, at the location of the meeting on the day of the meeting, or provided to The Forum, as requested.²⁷ Based on the multiple deficiencies in the notice and how it was posted, it is my opinion that the Board failed to provide proper notice of its August 26, 2021, meeting.

ISSUE TWO

When a public entity receives a request for records, it must, within a reasonable time, either provide the records or explain why the records are not being provided.²⁸ A delay may be appropriate for a number of reasons, including the number of records requested, reviewing large volumes of documents to respond to a request, excising closed or confidential information, availability and workload of staff who can respond to the request, or balancing other responsibilities of the public entity that demand immediate attention.²⁹ When determining the reasonableness of a response, this office considers the circumstances of the particular request.³⁰

Horse Race North Dakota received a request for copies of agendas and minutes for meetings held in 2020 and 2021 on Friday, July 30, 2021.³¹ Copies of agendas and

²⁶ N.D.C.C. § 44-04-20(5).

²⁷ The Forum’s opinion request related to the August 26, 2021, and alleged July meetings. In response to inquiries from this office, Horse Race North Dakota provided information about a special meeting held in October. According to the Horse Race North Dakota, “[t]he organization does not have an official newspaper.” Letter from Howard Swanson, Att’y, to Att’y Gen.’s Office (Oct. 25, 2021). It would be prudent for Horse Race North Dakota to review N.D.C.C. § 44-04-20(6) which provides “[i]f the public entity does not have an official newspaper, then it must notify the official newspaper of the county where its principal office or mailing address is located.”

²⁸ N.D.C.C. § 44-04-18(8); N.D.A.G. 2021-O-09; N.D.A.G. 2014-O-06; N.D.A.G. 2013-O-15.

²⁹ N.D.A.G. 2021-O-09; N.D.A.G. 2014-O-06; N.D.A.G. 2013-O-15; N.D.A.G. 2012-O-07; N.D.A.G. 2010-O-04.

³⁰ N.D.A.G. 2014-O-06; N.D.A.G. 2013-O-15; N.D.A.G. 2012-O-07; N.D.A.G. 2010-O-04.

³¹ Letter from Howard Swanson, Att’y, to Att’y Gen.’s Office (Oct. 25, 2021).

OPEN RECORDS AND MEETINGS OPINION 2021-O-12

December 17, 2021

Page 5

minutes for 2021 were provided to The Forum the same day.³² Copies of the 2020 agendas and minutes were provided on Friday, August 6, 2021.³³ Consistent with past opinions,³⁴ and considering that the records that were requested for 2021 were provided the day of the request, the delay of one week to provide a year's worth of agendas and meetings was not an unreasonable delay. Therefore, it is my opinion that Horse Race North Dakota provided the requested records within a reasonable time.

ISSUE THREE

Except as otherwise specifically provided by law, all “meetings”³⁵ of a public entity must be open to the public, 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. When a “quorum”³⁶ of a “governing body of a public entity”³⁷ or committee thereof, is present and its “public business”³⁸ is being considered or discussed, it is a “meeting”³⁹ subject to open meetings law.⁴⁰ Over the years, this office has issued several opinions on the definition of “meeting” which is met when public business is being considered or discussed by a quorum of a governing body or committee through any means, including in-person, telephone, email, and text messaging.⁴¹ The question on whether a governing body of a public entity met without notice to discuss public business is one of fact.⁴² Section 44-04-21.1, N.D.C.C., requires this office to base open meeting opinions on the facts given by the public entity.

³²*Id.*

³³*Id.*

³⁴ N.D.A.G. 2021-O-09 (It was an unreasonable delay when no work was done on responding to a records request for eight days); N.D.A.G. 2011-O-07 (The law does not usually require an immediate response. The delay in providing records generally will be measured in a few hours or a few days rather than several days or weeks.); N.D.A.G. 2007-O-06 (Two weeks to respond to a request for records is too long.); N.D.A.G. 2003-O-21 (Five days to provide records was not unreasonable).

³⁵ N.D.C.C. § 44-04-17.1(9) (definition of “meeting”).

³⁶ N.D.C.C. § 44-04-17.1(15) (definition of “quorum”).

³⁷ N.D.C.C. § 44-04-17.1(6) (definition of “governing body”). The portion of a meeting of the governing body of a public entity as defined in N.D.C.C. § 44-04-17.1(13)(c) which does not regard public business is not required to be open under this section.

³⁸ N.D.C.C. § 44-04-17.1(12) (definition of “public business”).

³⁹ N.D.C.C. § 44-04-17.1(9) (definition of “meeting”).

⁴⁰ N.D.C.C. §§ 44-04-19, 44-04-20.

⁴¹ N.D.A.G. 2019-O-12; N.D.A.G. 2018-O-17; N.D.A.G. 2018-O-10.

⁴² N.D.A.G. 2019-O-12; N.D.A.G. 2016-O-19.

The Forum alleges that Horse Race North Dakota held unnoticed meetings in July while races were being held at the North Dakota Horse Park in Fargo.⁴³ Horse Race North Dakota explains that various board members were present, “at different times and days in July while races were being conducted” at the racetrack because they were directly involved in activities with respect to the horse races taking place.⁴⁴ Horse Race North Dakota further states that “they did not meet as a board” and were “otherwise involved in the horse race activities.”⁴⁵ This office is required to base its opinions on the facts provided by the public entity;⁴⁶ accordingly, it is my opinion that Horse Race North Dakota did not violate the open meeting laws.

CONCLUSION

1. Horse Race North Dakota violated N.D.C.C. § 44-04-20 by failing to give notice of its meetings as requested by the Forum and by failing to give public notice of its meetings in accordance with that section.
2. Horse Race North Dakota properly responded to a record request.
3. Horse Race North Dakota did not violate open meeting laws during the races held in Fargo in July 2021.

STEPS NEEDED TO REMEDY VIOLATION

Horse Race North Dakota should review the resources available on the Attorney General’s website on properly posting notice of upcoming meetings and update its practice to be in compliance with the law. Meeting minutes of the August 26, 2021, meeting must be given to the Forum, and anyone else requesting them, free of charge.

In addition to providing copies of the notice and minutes for the August 26, 2021, meeting, Horse Race North Dakota must, in future, provide notice of its meetings to

⁴³ The 2021 Summer Race Season at the North Dakota Horse Park consisted of seven race days in July and one in August. HRND, <https://www.hrnd.org/events> (last visited Dec. 2, 2021).

⁴⁴ Letter from Howard Swanson, Att’y, to Att’y Gen.’s Office (Oct. 25, 2021).

⁴⁵ *Id.*

⁴⁶ N.D.C.C. § 44-04-21.1(1).

OPEN RECORDS AND MEETINGS OPINION 2021-O-12

December 17, 2021

Page 7

the public and the Forum prior to its meetings, in accordance with N.D.C.C. § 44-04-20.

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. § 44-04-21.2.⁴⁷ It may also result in personal liability for the person or persons responsible for the noncompliance.⁴⁸

Wayne Stenehjem
Attorney General

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cc: Wendy Reuer (via email only)

⁴⁷ N.D.C.C. § 44-04-21.1(2).

⁴⁸ Id.