

**OPEN RECORDS AND MEETINGS OPINION
2001-O-03**

DATE ISSUED: May 3, 2001

ISSUED TO: Paul Koehmstedt, Minto City Mayor

CITIZEN'S REQUEST FOR OPINIONS

In March, my office received two requests for an opinion under N.D.C.C. § 44-04-21.1 from Melvin Tibert questioning whether the Minto City Council violated various sections of the open meetings law.

FACTS PRESENTED

The Minto City Council met on February 5, 2001. At the meeting comments were made by the mayor suggesting to Mr. Tibert that the council had met secretly before the meeting to discuss public business. In response to this office's inquiry, each member of the city council indicated no secret meetings occurred before the February 5, 2001, meeting.

Mr. Tibert also alleges the Minto City Council met immediately before its March 5, 2001, meeting to discuss public business. A regular council meeting was scheduled to begin at 7:00 p.m. Mr. Tibert indicated at least a quorum of the five city council members, including the mayor, were at the city hall for a meeting at 6:10 p.m. When Mr. Tibert arrived at 6:40 p.m. for the meeting, he sat in the room next door and overheard a quorum of the council members discussing public business. He stated the council members present were Mayor Paul Koehmstedt and council members Frank Schiller and Tom Gerszewski. The city auditor was also present. Mr. Tibert stated that, after a while, the city auditor discovered him in the next room and discussion about public business ceased. In response to this office's inquiry, the city council indicated that the mayor arrived at city hall at about 6:15 p.m. or a little later. Frank Schiller arrived some time earlier than 6:45 p.m., and he may have visited with the mayor about public business. City auditor Tami Ulland arrived at about 6:35 p.m. Tami Ulland asked the mayor during this time for an update on a matter of public business. The auditor believes that Tom Gerszewski was not yet present when she discovered Melvin Tibert sitting in the room next door. Tom Gerszewski arrived at approximately 6:45 p.m., and Kevin Schuster arrived at approximately 6:55 p.m. Dexter Sitzler did not attend the meeting. The city council members do not recall discussing any matter of public business except as already indicated.

ISSUES

1. Whether the Minto City Council met secretly to discuss public business before its February 5, 2001.

2. Whether a quorum of the members of the Minto City Council met and discussed public business immediately preceding its March 5, 2001, meeting.

ANALYSES

Issue One:

All "meetings" of the governing body of a public entity are required to be open to the public unless otherwise specifically provided by law (N.D.C.C. § 44-04-19), and must be preceded by sufficient public notice (N.D.C.C. § 44-04-20). The definition of "meeting" is not limited to face-to-face gatherings of a quorum of the members of a governing body. As a result, a meeting could occur by telephone.

The open meetings law also may be violated if a governing body holds one or more meetings attended by less than a quorum of members to discuss public business with the intent of avoiding the open meetings requirements. N.D.C.C. § 44-04-17.1(8)(a)(2). For a series of conversations to fall under this definition, it is not necessary that the council intend to violate the law. N.D.A.G. 98-O-05. The Ebeltoft opinion clarifies the intent requirement by stating:

[W]hat is required is that the Board intentionally met in groups smaller than a quorum, yet collectively involving a quorum, and intentionally discussed or received information regarding items of public business that would have had to occur in an open meeting if any of the gatherings had been attended by a quorum of the Board.

Id.¹

In responding to a request for an opinion under N.D.C.C. § 44-04-21.1, this office is limited to reviewing violations alleged to have occurred within 30 days preceding this office's receipt of the opinion request. Consequently, the request for information from the Minto City Council is limited to any meetings or gatherings that occurred on or after January 31, 2001, through February 5, 2001. For purposes of this opinion, our review started five days before the February 5, 2001, meeting.

The question of whether the city council members met secretly to discuss public business before the February meeting is one of fact. North Dakota law requires me to base open meeting opinions on the facts given by the public entity. N.D.C.C. § 44-04-21.1(1). In response to this office's inquiry, each member of the city council stated no meetings between two or more members of the council in any informal or

¹ *E.g.*, N.D.A.G. 2000-O-08.

OPEN RECORDS AND MEETINGS OPINION 2001-0-03

May 3, 2001

Page 3

formal manner occurred within the week prior to the February 5, 2001, meeting. There was also no evidence to suggest that the Minto City Council held a series of meetings attended by less than a quorum of members in an attempt to circumvent the law. Therefore, it is my opinion the Minto City Council did not meet secretly to discuss public business before its February meeting.

Issue Two:

The second question also involves a factual determination as to whether a quorum of the council met before the March 5, 2001, meeting. As in the prior question, my opinion must be based upon the facts of the situation in question as presented by the council members. N.D.C.C. § 44-04-21.1(1). In response to an inquiry by this office, the council members indicated there may have been a discussion of public business between two members of the city council, and there may have been a discussion between two council members and the auditor.

The council would violate the law if a quorum of its members participated in a discussion of public business without providing proper notice of the meeting. N.D.C.C. § 44-04-17.1(8)(a)(1). It appears, however, that only two members of the council were present for the pre-meeting discussions, and as such no quorum was present for the discussion of public business.

CONCLUSIONS

1. It is my opinion that the Minto City Council did not violate N.D.C.C. §§ 44-04-19 or 44-04-20 in the week before its February 5, 2001, meeting because no board members met during that time to discuss public business.
2. It is my opinion that the Minto City Council did not violate N.D.C.C. §§ 44-04-19 and 44-04-20 during the time immediately preceding its March 5, 2001, meeting because no more than two of the five members of city council were involved in any discussion of public business.

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