

**OPEN RECORDS AND MEETINGS OPINION
2001-O-14**

DATE ISSUED: October 4, 2001

ISSUED TO: Steven McCullough, Kindred City Attorney

CITIZEN'S REQUEST FOR OPINION

On August 29, 2001, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Tim Hill asking whether the Kindred City Council violated N.D.C.C. §§ 44-04-19 and 44-04-20 by holding a meeting that was not open to the public or preceded by sufficient public notice.

FACTS PRESENTED

On August 1, 2001, a letter to the editor was published in the Cass County Reporter from the members of the Kindred City Council. A similar letter was published in the Fargo Forum. The City's letter was in response to a letter to editor from Tim Hill regarding a proposed elevator expansion. See generally N.D.A.G. 2001-O-07. In his request for this opinion, Mr. Hill suggests the City's letter was the product of a meeting which was not open to the public or preceded by public notice.

ISSUE

Whether the Kindred City Council violated N.D.C.C. §§ 44-04-19 and 44-04-20 by holding a meeting that was not open to the public or preceded by public notice to prepare its letter to the editor.

ANALYSIS

As used in N.D.C.C. § 44-04-19, the state open meetings law, the term "meeting" means a formal or informal gathering of a quorum of the members of a governing body of a public entity. N.D.C.C. § 44-04-17.1(8). A series of smaller gatherings that do not individually involve a quorum may nevertheless be a "meeting" if the series of smaller gatherings cumulatively involve a quorum and are held "for the purpose of avoiding the requirements of section 44-04-19." Id. For example, an organized series of on-site investigations by the members of a water resource district board is a meeting. N.D.A.G. 98- F-16. However, the open meetings law does not apply unless there is a gathering or series of smaller gatherings involving a quorum of the members of a governing body.

In the City's response to the request for this opinion, the city attorney states that he drafted the letter to the editor at the request of the mayor. Mr. McCullough sent the

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draft to the city auditor on July 19, 2001, and recommended the letter be reprinted on city letterhead and signed by the entire city council.

After the City Auditor drafted the letter on City letterhead, she contacted each City Council member and asked him or her to come to the City offices at their own convenience to read the letter and sign the same if they agreed to it. She had no conversations with any of the City Council members concerning the substance of the letter.

Letter from Steven McCullough (September 24, 2001). It is beyond my authority in issuing opinions under N.D.C.C. § 44-04-21.1 to resolve disputed facts. For purposes of this opinion, I must assume as true the City's statement that the members of the council did not discuss the letter with the auditor or with each other. The draft prepared by Mr. McCullough was not changed and was signed by all but one of the members of the city council.¹

The role of the city auditor in this situation is similar to that of a board president who contacts the other members of the board to select a meeting date or solicit agenda items. See, e.g., N.D.A.G. 98-O-5. Of primary importance in this situation is the fact the auditor did not talk to the council members about substance of the letter. As a result, the procedure used by the City to review and approve the letter is functionally no different than sending a copy of the letter to each board member in sequence and asking the board member to approve and sign the letter. See, e.g., N.D.A.G. 98-O-05 (series of e-mail messages or letters between board members is not a "gathering"). In either event, there is no "gathering" of the members of the council.

The open meetings law describes how a public entity must conduct its meetings, but does not establish meetings as the exclusive method for a public entity to conduct public business. The members of a governing body may communicate with each other in writing without holding a meeting.² That appears to be what occurred in this case. Because the City did not hold a "meeting" to approve the letter prepared by Mr. McCullough, it is my opinion the City has not violated N.D.C.C. § 44-04-19 or § 44-04-20.

¹ Mr. McCullough notes that two of the members of the city council discussed the letter with each other. This discussion did not involve a "quorum" of the council and was not a meeting.

² When a governing body takes a substantive action at a meeting, a roll call vote is required to make a record of the body's decision. N.D.C.C. § 44-04-21(1). When a governing body conducts business in writing, a recorded vote is unnecessary because the record containing the body's decision is open to the public. N.D.C.C. § 44-04-18.

CONCLUSION

The Kindred City Council approved the letter to the editor without holding a meeting and therefore did not violate N.D.C.C. §§ 44-04-19 and 44-04-20.

Wayne Stenehjem
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