

**OPEN RECORDS AND MEETINGS OPINION
2005-O-01**

DATE ISSUED: January 10, 2005

ISSUED TO: City of Napoleon

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Leona Roehrich asking whether the city of Napoleon (City) violated N.D.C.C. § 44-04-20(2) by discussing a matter that was not listed on the agenda of a regular meeting of the City Council; violated N.D.C.C. § 44-04-21 by failing to vote to maintain an existing policy; violated N.D.C.C. § 44-04-21(2)(c) by failing to list in the minutes of the meeting a topic that was discussed but not acted on; and violated N.D.C.C. § 44-04-18 by unreasonably delaying access to proposed city ordinances.

FACTS PRESENTED

The Napoleon City Council (Council) held a regular meeting on October 4, 2004. During the Council's regular meetings, members of the public are able to address the Council on any topic during the "Requests of Guests" portion of the meeting. On October 4, a letter from Leona Roehrich regarding the cost of copying records was discussed during this portion of the meeting when Ms. Roehrich addressed the Council about copy fees. The "cost of copying records" was not separately listed on the meeting agenda. After listening to Ms. Roehrich's concerns, the Council stated it would continue its current policy regarding copying fees. No motion was made or vote taken regarding the current policy. The October 4 minutes of the Council meeting do not mention the discussion of fees for copying public records. Ms. Roehrich also protested her water bill to the Council. According to the Council, an adjustment was made to Ms. Roehrich's water bill. The minutes from the October 4 meeting reflect the water bill adjustment under the heading "Guests."

On October 6, 2004, Ms. Roehrich went to the city auditor's office and asked to see a copy of proposed ordinances the Council was in the process of reenacting. She was told she could not see the proposed ordinances at that time because they were at the home of a Council member and no other copy existed. Ms. Roehrich stated she would return on Friday, October 22, to view the ordinance and the auditor agreed she would have them available then. On October 22, Ms. Roehrich went to the auditor's office to review the ordinances. She was unable to see the ordinances because both of the employees of the office were on medical leave and the office was closed.¹ Napoleon is

¹ There are two employees available. One is a part-time employee of the City auditor who works one day a week and is generally available to cover the office in the event the

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a relatively small community with a population of 857 people. The auditor's regular business hours are 9 a.m. to noon, and 1 to 3 p.m. on Tuesday, Wednesday, and Friday. The auditor's office was open from 9 a.m. to noon on October 22, and was open during regular business hours the following week of October 25-29. According to the Council, Ms. Roehrich inspected several draft ordinances that week.

ISSUES

1. Whether the City violated N.D.C.C. § 44-04-20(2) by discussing a matter that was not listed in the agenda of a regular meeting of the City Council.
2. Whether the City violated N.D.C.C. § 44-04-21, requiring roll-call votes on all nonprocedural matters, by failing to vote to maintain an existing policy.
3. Whether the City violated N.D.C.C. § 44-04-21(2)(c) by failing to list a topic in the minutes that was discussed but not acted on at a meeting of the City Council.
4. Whether the City violated N.D.C.C. § 44-04-18 by unreasonably delaying access to draft city ordinances.²

ANALYSES

Issue One

Unless otherwise provided by law, all meetings of a public entity must be preceded by written public notice. N.D.C.C. § 44-04-20; N.D.A.G. 2004-O-20. The notice must include all topics the governing body expects to consider at the time the notice is prepared. N.D.C.C. § 44-04-20(2). As long as it does so, "the lack of an agenda in the notice, or a departure from, or an addition to, the agenda at a meeting [other than an emergency or special meeting] does not affect the validity of the meeting or the action taken [at the meeting]." N.D.C.C. § 44-04-20(2). A governing body is free to discuss any topic at a regular meeting, as long as the notice of the meeting listed all the topics the governing body expected to discuss when the notice was prepared. N.D.A.G. 2004-O-18; N.D.A.G. 99-O-08.

auditor is not available. That employee had already worked one day during the week of October 19-22, and also was not available the afternoon of October 22.

² The request also asked for an opinion as to whether the City violated N.D.C.C. § 44-04-18(2) by charging more than the actual cost for copying certain records. Because the alleged violation occurred more than 30 days before the request for an opinion was made, the request was not timely, and therefore this office is unable to issue an opinion on that alleged violation. N.D.C.C. § 44 04 21.1(1).

In this case, the agenda for the Council's October 4 meeting included among other items the topic "REQUESTS OF GUESTS." As stated in the "FACTS," the "Request of Guests" portion of the meeting is open to any member of the public to address the Council about any matter of concern. Members of the public are not required to inform the Council prior to the meeting about the topic they intend to bring up. Therefore, the Council does not know when the agenda is prepared what topics, if any, will be brought before them by members of the public. During this portion of the meeting, Ms. Roehrich presented her concerns regarding the City's policy on fees for copying public records and her water bill. Ms. Roehrich alleges that because the mayor read a letter from her protesting the copying charges during the meeting, the Council anticipated discussing this topic and it therefore should have been on the agenda. According to the mayor, however, he brought the letter to the meeting in case Ms. Roehrich appeared, because she frequently attends the meetings. He did not have an indication from her at the time the agenda was prepared as to whether she would appear or what topics she might raise. Therefore, it is my opinion the agenda adequately described the topics anticipated to be discussed and the City did not violate N.D.C.C. § 44-04-20 when it discussed Ms. Roehrich's concerns about copying fees under the topic of "Requests of Guests" during a regular meeting of the City Council.

Issue Two

All votes taken at a public meeting must be open, public votes and all nonprocedural votes must be recorded roll call votes. N.D.C.C. § 44-04-21. A "nonprocedural" vote "includes all votes that pertain to the merits of the matter before the governing body." Id. Not all matters brought before a public entity, however, must be voted on. Ms. Roehrich raised her concerns regarding the Council's policy on copying costs in the public comment portion of the meeting. The Council had previously addressed and established its policy on copying costs approximately four months earlier. As a result, the Council determined it did not want to revisit its policy. This decision is not a matter upon which the Council must vote. Thus, it is my opinion that the failure to vote to retain the current fee schedule did not violate N.D.C.C. § 44-04-21.

Issue Three

A public entity is required to include in the minutes of a meeting of its governing body a list of the topics discussed at the meeting. N.D.C.C. § 44-04-21(2)(c); see also N.D.A.G. 98-O-09 (minutes are not sufficient when they fail to mention items specified in N.D.C.C. § 44-04-21(2)(c)). "Topic," which is not defined in the open records law, means "[a] subject of discussion or conversation." The American Heritage Dictionary 1278 (2d coll. ed. 1985). See N.D.A.G. 2004-O-20 (cost of copying a record

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considered a “topic” that must be included in the notice of a special meeting).³ In this case, the mayor read the letter from Ms. Roehrich. The Council discussed the City’s policy regarding the fee for copying public records, but did not separately list the discussion as a topic in the minutes of the meeting. Therefore, it is my opinion that the City violated N.D.C.C. § 44-04-21(2)(c).

Issue Four

“Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours.” N.D.C.C. § 44-04-18(1). As used in N.D.C.C. § 44-04-18(1), “reasonable office hours” includes “all regular office hours of a public entity.” A response to a request to review records must not be “unreasonably delayed.” N.D.C.C. § 44-04-18(7).

In this case, Ms. Roehrich requested access to proposed city ordinances on October 6 and was told that they were located at the home of a Council member. Ms. Roehrich indicated she would return on October 22, 2004, to view the ordinances. The auditor agreed to and did have the ordinances available on that date. On Tuesday, October 19, the auditor learned she would not be available the afternoon of October 22 due to a doctor’s appointment. She asked the other employee if she could work that afternoon but she was unavailable due to a scheduled surgery. The office was open until noon, but when Ms. Roehrich arrived the afternoon of October 22, the office was closed and she was unable to view the ordinances. The auditor did not attempt to contact Ms. Roehrich beforehand or make other arrangements for the ordinances to be available. Ms. Roehrich then viewed the ordinances the following week. Generally, even if existing records are not immediately available when requested, a public entity does not violate the open records law if it provides access or copies of the records within a reasonable time. N.D.A.G. 2003-O-19. See also N.D.A.G. 2001-O-12 (public entity violated N.D.C.C. § 44-04-18 by not responding to a request for access to records within a reasonable time). In this case, however, the parties had agreed upon a date for Ms. Roehrich to view the ordinances. The auditor knew she would not be available for the afternoon of the agreed-upon date, but she did not attempt to contact Ms. Roehrich to make alternate arrangements. It is my opinion that because the auditor did not make the records available as agreed upon, access to the records was unreasonably delayed.

³ “Under N.D.C.C. § 44-04-20(2), a regular meeting need not be restricted to the agenda topics included in the notice. Rather, from the time a regular meeting is convened until the meeting is adjourned, a governing body of a public entity is free to discuss any item of public business regarding that entity.” N.D.A.G. 99-O-08. But, the governing body is required to list the topics discussed in the minutes of its meeting.

CONCLUSIONS

1. It is my opinion the City did not violate N.D.C.C. § 44-04-20(2) by discussing a matter that was not listed in the agenda of a regular meeting of the City Council.
2. It is my opinion the City did not violate N.D.C.C. § 44-04-21 by failing to vote to maintain an existing policy.
3. It is my opinion the City violated N.D.C.C. § 44-04-21(2)(c) by failing to list in the minutes a topic that was discussed at a meeting of the City Council.
4. It is my opinion the City violated N.D.C.C. § 44-04-18(1) by unreasonably delaying access to draft ordinances.

STEPS NEEDED TO REMEDY VIOLATIONS

The City must revise the minutes of its October 4, 2004 meeting to reflect the topic it discussed regarding the City's policy regarding the fee for copying public records, and make a copy of the revised minutes available to Leona Roehrich. Ms. Roehrich has now been provided access to the requested ordinances, so there is no remedy in that regard.

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. N.D.C.C. § 44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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