

**OPEN RECORDS AND MEETINGS OPINION
2005-O-02**

DATE ISSUED: January 12, 2005

ISSUED TO: Cass County Historical Society

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Lou Ziegler, editor of The Fargo Forum, asking whether the Cass County, North Dakota, Historical Society (Society) and its executive committee violated the state's open meetings laws in the process of firing its executive director.¹

FACTS PRESENTED

The Society receives about 15 percent of its annual funding from Cass County. Cass County also pays certain special assessments for the Society. The Society is a nonprofit county historical society affiliated with the North Dakota State Historical Society under N.D.C.C. § 11-11-53. It promotes historical work, including historical preservation, which qualifies it to receive county tax support. The Society has a nine-member board of directors (Board) and an executive committee comprised of the president, Howard Barlow; first vice president, Kim Baird; and second vice president, Duane Rogne. According to the Board, the executive committee handles business that must be dealt with between monthly Board meetings.

Beginning in November 2003, the president individually and as part of the executive committee met with the Society executive director, Steve Stark, regarding his job performance. From November 2003 through October 2004, there were discussions by individual Board members with each other and with members of the Society staff, regarding Mr. Stark's job performance.

On October 6, 2004, the executive committee met with certain staff members who had requested the meeting to discuss Mr. Stark's job performance. No public notice of the meeting was given and only the executive committee members were notified. Notes of the meeting were kept. Before the October 6 meeting, Ms. Baird and Mr. Barlow, based on contacts with other board members during the summer and fall months, had

¹ The request for an opinion dated October 27, 2004, was timely regarding the meeting on October 26, 2004, and executive committee meetings in October of 2004, because it was made within 30 days of the alleged violations. N.D.C.C. § 44-04-21.1(1).

OPEN RECORDS AND MEETINGS OPINION 2005-O-02

January 12, 2005

Page 2

determined that the Board would support a motion to terminate Mr. Stark's employment. Following the October 6 meeting, Ms. Baird telephoned Mr. Barlow and asked him to call a special Board meeting to consider a motion to terminate Mr. Stark. Mr. Barlow decided not to call a Board meeting during that conversation. He later decided he would notify Mr. Stark that his employment was terminated and discussed with Ms. Baird the procedure he would follow in a subsequent telephone conversation.

On October 21, 2004, the executive committee met with Mr. Stark at his Bonanzaville office. The president of the Society fired Mr. Stark for not conforming to performance goals and expectations of the Board. No minutes or notes were kept of this meeting.

After the termination and before the regularly scheduled October Board meeting other Board members were called and informed of the termination by Mr. Barlow or Ms. Baird. One Board member resigned before the regular Board meeting held October 26, 2004. During that meeting, a motion was made to affirm the firing of Mr. Stark. The motion passed unanimously 7-0 on a voice vote, with one board member absent. Minutes of the meeting were prepared.

The Board regularly meets the fourth Thursday of each month. The date and time of the next regular meeting is contained in the minutes of each meeting, which are available to the public at the Bonanzaville office or upon request by mail, telephone or e-mail. Notices of Board meetings are filed with the county auditor or posted at the office or location of the meetings.² No notice was given of the executive committee meetings in October 2004.

ISSUES

1. Whether proper notice was given of the October 26, 2004, Society Board meeting and the October 2004 meetings of the executive committee in accordance with N.D.C.C. § 44-04-20.
2. Whether the executive committee held improperly closed meetings to consider personnel matters and failed to take minutes of those meetings.

² The Board recently discovered that although Stark had received a request from the county auditor for a schedule of Society meetings early in 2004, no schedule had been sent to the auditor. Since the October 26 Board meeting, however, the auditor has received meeting notices, according to the Board. In addition to filing the annual meeting schedule with the county auditor, notice of each meeting must be filed with the county auditor unless all of the information in the meeting notice is included in the annual meeting schedule already filed with the county auditor. N.D.C.C. § 44-04-20(3) and (4).

OPEN RECORDS AND MEETINGS OPINION 2005-O-02

January 12, 2005

Page 3

3. Whether there were voting irregularities at executive committee meetings and the October 26, 2004, meeting of the Board.
4. Whether the Board violated the open meetings law by improperly polling its members concerning a personnel matter.

ANALYSES

Issue One - Whether proper notice was given of the October 26, 2004, Society Board meeting and the October meetings of the executive committee in accordance with N.D.C.C. § 44-04-20.

Unless otherwise provided by law, public notice must be given in advance of all meetings of a governing body of a public entity. N.D.C.C. § 44-04-20, N.D.A.G. 2004-O-22. A “public entity” includes organizations or agencies supported in whole or in part by public funds, or expending public funds, N.D.C.C. § 44-04-17.1(12)(c), or organizations created or recognized by state law to exercise public authority or perform a governmental function, N.D.C.C. § 44-04-17.1(12)(b). The Society is a public entity because it is supported by public funds and it expends public funds. It is also a public entity because it is recognized by state law, N.D.C.C. § 11-11-53, as a county historical society. It promotes historical work, including historical preservation, which is a governmental function. N.D.C.C. § 44-04-17.1(12)(b). See also N.D.A.G. 99-O-02 (discussing the criterion which make a non-governmental organization subject to the open records and meetings laws); N.D.C.C. § 55-10-01 (stating it is public policy to provide for historical preservation); N.D.A.G. 98-O-23 (finding a nonprofit corporation recognized by a city housing authority resolution to develop a housing development to be performing a governmental function). Therefore, the Society is subject to the open meetings laws and must give public notice of its governing body’s meetings.

“Governing body also includes any group of persons . . . acting collectively pursuant to authority delegated to that group by the governing body.” N.D.C.C. § 44-04-17.1(6). As a result, committees created by a public entity’s main governing body are also governing bodies subject to the open meetings laws. N.D.A.G. 2003-O-13 (meeting of the employee relations committee of a city council), N.D.A.G. 2003-O-15 (meeting of a committee of an airport authority). The Board authorized the executive committee to act on its behalf between Board meetings. It is therefore a governing body whose meetings regarding public business are subject to the open meetings laws. See N.D.A.G. 98-O-05 fn.5 (conversations of less than a quorum of board members would not constitute a “meeting” unless those members have been delegated authority to act as a group and therefore are a governing body).

“Meeting” is defined as “a formal or informal gathering, whether in person or . . . telephone. . . conference . . . of . . . [a] quorum of the members of the governing body of

OPEN RECORDS AND MEETINGS OPINION 2005-O-02

January 12, 2005

Page 4

a public entity regarding public business” N.D.C.C. § 44-04-17.1(8)(a)(1). Public business includes “all matters that relate . . . in any way to . . . any matter over which the public entity has supervision, control, jurisdiction, or advisory power; or . . . [its] use of public funds.” N.D.C.C. § 44-04-17.1(11).

This office has previously determined that the gathering of the members of a governing body or a committee is a meeting “even when no motions are made and no action is taken.” N.D.A.G. 98-O-16. See also N.D.A.G. 98-O-11, N.D.A.G. 98-F-16 (a gathering simply to gather information regarding public business is a meeting). Thus, an on-site inspection by a quorum of a water resource district board of an area that was the subject of a complaint was found to be a meeting. N.D.A.G. 98-F-16. Attendance of a quorum of the city council members at the meeting of another public entity to hear presentations by sanitation companies was determined to be a meeting. N.D.A.G. 98-O-18. See also N.D.A.G. 98-O-08 (“public business” includes all stages of the decision-making process from information gathering to final action).

Under these definitions, a committee delegated authority to perform any function, including fact gathering, reporting, or recommending action, as well as taking action, on behalf of a governing body is subject to the state’s open meetings laws, including the requirements to notice its meetings and prepare minutes. See N.D.A.G. 2003-O-15, N.D.A.G. 2003-O-13.

According to the Society, the three members of the executive committee met with Society staff members on October 6, 2004, at the home of one of the executive members to hear staff express their concerns with the executive director’s job performance. The gathering was a meeting of the executive committee and notice of the meeting should have been given in accordance with N.D.C.C. § 44-04-20.

Subsequent to the October 6 meeting, Mr. Barlow called Ms. Baird to share the comments a previous Board member made to Mr. Barlow about the executive director’s management problems. During this telephone conversation, Ms. Baird asked Mr. Barlow to call a special board meeting at which she said she would make a motion to terminate the executive director’s employment. Mr. Barlow declined to call a special meeting. As noted, meetings may take place by telephone. This meeting involved two members of the three-member executive committee, and consequently constituted a meeting of a quorum of the executive committee. Therefore, notice should have been given in accordance with N.D.C.C. § 44-04-20.

Subsequently, Mr. Barlow and Ms. Baird participated in another telephone call to discuss the procedure to dismiss the executive director. During the telephone call, Mr. Barlow told Ms. Baird he had decided he would go to Bonanzaville and give the executive director the option of being dismissed or resigning. This meeting involved two members of the three-member executive committee regarding public business. Again,

OPEN RECORDS AND MEETINGS OPINION 2005-O-02

January 12, 2005

Page 5

a quorum of the executive committee was involved and notice of the meeting should have been given in accordance with N.D.C.C. § 44-04-20.

On October 21, 2004, Mr. Barlow, Ms. Baird, and Mr. Rogne met the executive director in his office at Bonanzaville and Mr. Barlow informed him his employment was terminated. There was a discussion about the matter during the meeting. At the end of the meeting, the executive director turned over his keys, picked up his personal belongings, and left. This gathering involved all three members of the executive committee, and again, was a meeting subject to the notice requirements of N.D.C.C. § 44-04-20.

The notice of all public meetings must contain the date, time, location and, if practicable, the topics to be considered. N.D.C.C. § 44-04-20(2). In the case of a special meeting, the public entity must also give notice to the entity's official newspaper, if any, and to any news representative who has requested notice. N.D.C.C. § 44-04-20(6). The notice must be posted at the principal office of the governing body, the meeting place, and filed with the county auditor in the case of a county-level organization. N.D.C.C. § 44-04-20(4).

As noted above, notice of the October 26, 2004, meeting containing the time, date, location and topics to be considered was not filed with the county auditor's office, was not posted at the Society's principal office at Bonanzaville, and was not posted at the place of the meeting. This violated N.D.C.C. § 44-04-20. The executive committee did not give notice of any of the meetings it held in October. This also violated N.D.C.C. § 44-04-20.

Issue Two - Whether the executive committee held improperly closed meetings to consider personnel matters and failed to take minutes of those meetings.

The allegations relating to violations of the open meetings laws in question all concern personnel matters relating to the director of the Society and his firing. Section 44-04-19, N.D.C.C., provides that meetings of the governing body of a public entity are open "[e]xcept as otherwise specifically provided by law."

A governing body is authorized to meet in an executive session to discuss confidential or exempt records. N.D.C.C. § 44-04-19.2(1). See N.D.C.C. § 44-04-17.1(3) (defining confidential record and meeting as one that "is either expressly declared confidential or is prohibited from being open to the public."). As this office has previously concluded, no matter how uncomfortable it might be for a governing body to discuss an employee's job performance in public, there is no exception to the open meetings laws for

OPEN RECORDS AND MEETINGS OPINION 2005-O-02

January 12, 2005

Page 6

personnel matters. N.D.A.G. 2004-O-21. See also N.D.A.G. 2004-O-19 and 98-F-11 (same).³

All of the executive committee meetings described above were meetings subject to the open meetings laws. As such, the executive committee violated N.D.C.C. § 44-04-19 by holding closed meetings to discuss personnel matters.

Section 44-04-21, N.D.C.C., requires governing bodies to keep minutes of all open meetings. At a minimum, the minutes must include:

- a. The names of the members attending the meeting;
- b. The date and time the meeting was called to order and adjourned;
- c. A list of topics discussed regarding public business;
- d. A description of each motion made at the meeting and whether the motion was seconded;
- e. The results of every vote taken at the meeting; and
- f. The vote of each member on every recorded roll call vote.

....

N.D.C.C. § 44-04-21(2).

Because these gatherings were meetings subject to the open meetings laws, minutes should have been taken as required by N.D.C.C. § 44-04-21(2). Although notes of the October 6, 2004, meeting were taken, they did not include all of the requirements of meeting minutes including specifically stating the members in attendance, and the time the meeting was called to order and adjourned. Therefore the executive committee violated N.D.C.C. § 44-04-21 by failing to include information required by law in the minutes of the October 6, 2004, meeting, and by failing to take minutes at the other October 2004 meetings.

³ But see, N.D.C.C. § 44-04-18.1(3) (providing personnel records of an organization supported by public funds are exempt, that is, they may be disclosed in the discretion of such a public entity). However, N.D.A.G. 2001-O-11 concluded the exception under N.D.C.C. § 44-04-18.1(3) regarding personnel records does not apply if the supported organization is also a public entity for reasons other than support.

OPEN RECORDS AND MEETINGS OPINION 2005-O-02

January 12, 2005

Page 7

Issue Three - Whether there were voting irregularities at executive committee meetings and the October 26, 2004, meeting of the Board.

Because the Society Board and its executive committee are governing bodies subject to the open meetings laws, they are subject to the voting requirements in N.D.C.C. § 44-04-21(1). That section provides:

Unless otherwise specifically provided by law, all votes of whatever kind taken at any public meeting governed by the provisions of section 44-04-19 must be open, public votes, and all nonprocedural votes must be recorded roll call votes, with the votes of each member being made public at the open meeting. Procedural votes must be recorded roll call votes upon the request of any member of a governing body holding a meeting subject to this section. As used in this section, "nonprocedural" should be broadly interpreted and includes all votes that pertain to the merits of the matter before the governing body.

(Emphasis added.)

No votes were taken during the executive committee meetings in October 2004. The vote at the October 26 meeting of the Board to ratify the firing of Mr. Stark was held in an open session. The Board should have taken a roll call vote because the vote pertained to a substantive matter. N.D.C.C. § 44-04-21(1). The fact there was a unanimous voice vote, minutes were taken reflecting attendance, and the result of the vote was therefore ascertainable does not suffice. Failure to take a roll call vote, even though there is a record of the result, violates N.D.C.C. § 44-04-21(1). See N.D.A.G. 2004-O-17.

Issue Four - Whether the Board violated the open meetings law by improperly polling its members concerning a personnel matter.

The requester asserts that the Board president polled the Board members after the executive committee met with Mr. Stark to find out if they would support a motion to ratify Mr. Stark's termination at the scheduled October 26 Board meeting. According to the Board, the president did not poll the Board members. Rather, after Mr. Barlow fired Mr. Stark, Mr. Barlow and Ms. Baird called each board member to inform them of the action taken. The Attorney General's opinion must be based on the facts provided by the public entity. N.D.C.C. § 44-04-21.1(1). Thus, there was no violation in that regard.

CONCLUSIONS

The Board did not give proper notice of its October 26, 2004, Board meeting or its October 2004 executive meetings and therefore violated N.D.C.C. § 44-04-20.

OPEN RECORDS AND MEETINGS OPINION 2005-O-02

January 12, 2005

Page 8

The executive committee held improperly closed meetings to consider personnel matters and failed to take minutes of those meetings, thereby violating N.D.C.C. §§ 44-04-19 and 44-04-21 respectively.

The Board violated N.D.C.C. § 44-04-21(1) by not taking a roll call vote on a personnel matter at its October 26, 2004, Board meeting.

The executive committee did not improperly poll the Board members after Mr. Stark was fired.

STEPS NEEDED TO REMEDY VIOLATION

To remedy the lack of notice of the October 26, 2004, Board meeting, a notice listing the time, date, location and topics which were considered at that meeting should be posted at the Board's principal office, filed in the county auditor's office, and given to the Board's official newspaper, if any, and any representative of the news media who has requested to receive notices of its meetings. The Board should also amend the minutes of the October 26, 2004, Board meeting to expressly state the names of each Board member voting to ratify the firing.

The multiple meetings of the executive committee or a quorum of the executive committee in October 2004 regarding public business were particularly unwarranted violations of the open meetings laws. Simply providing minutes of the meetings, after the fact, is not sufficient to remedy the violations. To remedy the violations the executive committee must convene an open meeting, preceded by public notice given in accordance with N.D.C.C. § 44-04-20, and recreate the discussions that occurred at the meetings held October 6 and 21 and the two telephone conference meetings between Mr. Barlow and Ms. Baird regarding Mr. Stark, his job performance, and any action to be taken. The committee should hold the meeting within a reasonable time and give notice of the special meeting within seven days of the date of this opinion. Minutes of this special meeting must be prepared in accordance with N.D.C.C. § 44-04-21.

The notices should also reflect that copies of the minutes of the Board meeting of October 26, 2004, are available upon request at the Society office. The notices should also state that copies, with attachments, of the Society's response to this office dated November 12, 2004, are available at the Society office upon request. No charge should be made for copies of the minutes or the response and its attachments.

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.

Wayne Stenehjem
Attorney General

Assisted by: Thomas A. Mayer
Assistant Attorney General

vkk