

**OPEN RECORDS AND MEETINGS OPINION  
2007-O-08**

DATE ISSUED: June 8, 2007

ISSUED TO: Ward County Commission

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Terry Narum asking whether the Ward County Commission's appointment of Darlene Watne as chairperson, appointment of county commissioners to standing committees, discussions concerning funding shortfalls, and involvement by commission members with the County Vision Committee public forums violated North Dakota's open meetings laws.

**FACTS PRESENTED**

The Ward County Commission ("Commission") is comprised of five commissioners. Before the November 2006 election, the Commission consisted of Molla Romine, Darlene Watne, Carroll Erickson, Jim Lee, and Chairperson Jerome Gruenberg. John Fjeldahl replaced Molla Romine on the Commission following the 2006 election.

Appointment of Darlene Watne:

After the election, Commissioner Gruenberg told Commissioner Watne in a private conversation that he planned on nominating her to be the chairperson of the Commission for 2007 because she was the previous vice-chairperson. Commissioner Watne was elected the chairperson of the Commission on December 5, 2006.

Appointment of Commissioners to Standing Committees:

One of the roles of the chairperson is to assign county commissioners to various committees. Assignments are at the discretion of the Commission's chairperson. Following the November election but before the December 5, 2006, Commission meeting, Commissioner Watne began working on committee assignments. During this time-period Commissioner Lee called her to ask what committees she planned on assigning to him and Commissioner Watne discussed his assignment with him. Commissioner Watne also called the remaining commissioners before the December 5, 2006, meeting, to inform each of them what committees she intended to assign them to and explaining the reasoning behind the assignments.

### Funding Shortfall

In May 2006 the Commission received a letter from the Department of Transportation ("DOT") regarding a decrease in Ward County's federal aid allotment. The Commission discussed the letter at a meeting held on May 16, 2006, and later at a September 19, 2006, meeting. In October, during the North Dakota Association of Counties<sup>1</sup> ("NDACO") annual convention,<sup>2</sup> three out of the five commissioners and Roger Kluck, the Ward County Highway Engineer, met with DOT to review the funding shortfall and upcoming projects for Ward County.

Ward County did not provide notice of this meeting with the DOT as a Commission meeting because it occurred during the NDACO convention and because the county did not know when the meeting would take place until the commissioners arrived at the convention and DOT scheduled a time for a meeting.

The funding shortfall was later discussed at a Commission meeting on November 8, 2006.

### County Vision Committee:

Between October 9 and October 30, 2007, several public forums were held to provide information about an upcoming bond issue on the November 2006 ballot involving expansion of county office space near the Ward County courthouse. The forums were sponsored by a privately funded committee named the County Vision Committee which consisted of interested county commissioners and Ward County department heads and employees.<sup>3</sup> The public forums were announced in the Minot Daily News, at Commission meetings, by posters, public service announcements, and local talk shows. An example of a news release for the October 2006 County Vision Committee meeting states:

This briefing given by members of the County Commission, includes a history of Ward County government, a review of current conditions within

---

<sup>1</sup> Ward County is a member of the North Dakota Association of Counties.

<sup>2</sup> NDACO holds an annual convention in October.

<sup>3</sup> N.D.C.C. § 44-04-21.1 authorizes this office to look back 90 days from an alleged violation in instances where the allegation is that a meeting occurred without public notice. Nothing has been provided to this office that indicates that within the 90 day timeframe, a quorum of the Ward County Commission created the County Vision Committee at a meeting that was not properly noticed.

the county courthouse and jail, challenges now facing the county, and a presentation of the proposed plan to meet these challenges.<sup>4</sup>

Commissioner Watne explained that the forums were always attended by at least two commissioners, who gave the presentation, and at least two of the forums were attended by five commissioners.

The public forums were not noticed as meetings of the Commission. According to Commissioner Watne this was because the public forums were sponsored by a group that was privately funded and the Commission did not consider the public forums to be Ward County business as the meetings were for information only and the bond issue would be decided by a vote of the public, not a vote of the Commission.

#### ISSUE

Whether a quorum of commissioners discussed public business at meetings not noticed to the public in substantial compliance with N.D.C.C. § 44-04-20 regarding the nomination of the commission chairperson, standing committee appointments, DOT funding shortfalls, and a bond issue.

#### ANALYSIS

For a gathering to be considered a “meeting,” two primary elements must be considered: whether a quorum was present and the topic of discussion.<sup>5</sup> As defined by North Dakota’s open records and meetings law, a meeting includes formal or informal gatherings whether in person or through electronic means such as telephone or video conference.<sup>6</sup> A formal or informal gathering constitutes a meeting when a quorum<sup>7</sup> of the members of the governing body is present at the gathering regarding public business.<sup>8</sup> However, the presence of less than a quorum at a formal or informal gathering regarding public business may also constitute a meeting if the “members attending one or more of such smaller gatherings collectively constitute a quorum and if the members hold the gathering for the purpose of avoiding the requirements of section 44-04-19.”<sup>9</sup>

---

<sup>4</sup> News Release from the County Vision Committee, October 6, 2006.

<sup>5</sup> N.D.C.C. § 44-04-17.1(8)(a)(1); N.D.A.G. 98-O-05.

<sup>6</sup> N.D.C.C. § 44-04-17.1(8)(a).

<sup>7</sup> A “quorum” means one-half or more of the members of the governing body, or any smaller number if sufficient for a governing body to transact business on behalf of the public entity. N.D.C.C. § 44-04-17.1(14).

<sup>8</sup> N.D.C.C. § 44-04-17.1(8)(a)(1).

<sup>9</sup> N.D.C.C. § 44-04-17.1(8)(a)(2).

The second element required for a formal or informal gathering to be a meeting is that public business be considered at the meeting.<sup>10</sup> "Public business" is defined as:

All matters that relate or may foreseeably relate in any way to:

- a. the performance of the public entity's governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power; or
- b. the public entity's use of public funds.<sup>11</sup>

#### Nomination of Chairperson

Commissioner Gruenberg's discussion with Commissioner Watne about his intention to nominate her as Commission chairperson did not involve a quorum of the Commission. Thus, no violation of the open meetings law occurred. As previous opinions have explained, individual members of a governing body are generally not prohibited from talking to another member, even regarding public business as long as the members talking do not constitute a quorum of the governing body or a committee of the governing body.<sup>12</sup>

#### Committee appointments

Commissioner Watne's conversations with the other commissioners regarding the committee appointments, however, did collectively involve a quorum. In the case of Commissioner Lee, he called Commissioner Watne and asked about his assignments. Because no quorum was involved and the call was initiated by Commissioner Lee, that conversation was not an open meetings violation. The subsequent telephone calls to the remaining three board members were initiated by Commissioner Watne and all related to each commissioner's committee appointments.

In a 1998 opinion issued to the State Board of Higher Education, this office concluded that a series of smaller gatherings that collectively involved a quorum of the board was a violation because the gatherings were held for the purpose of avoiding the open meetings law.<sup>13</sup> In that opinion, the series of smaller gatherings took place by telephone and clearly went beyond identifying agenda items because the board discussed its course of action, possible options, and appropriate timelines.<sup>14</sup>

---

<sup>10</sup> N.D.C.C. § 44-04-17.1(8)(a)(1).

<sup>11</sup> N.D.C.C. § 44-04-17.1(11).

<sup>12</sup> N.D.A.G. 98-O-05; N.D.A.G. 2006-O-11; N.D.C.C. § 44-04-17.1(6).

<sup>13</sup> N.D.A.G. 98-O-05; N.D.C.C. § 44-04-17.1(8)(a)(2).

<sup>14</sup> N.D.A.G. 98-O-05.

In this instance, Commissioner Watne called three commissioners about committee assignments, but her conversation with each commissioner was limited to the specific committees to which each was assigned. Commissioner Watne stated that she did not straw poll the commissioners, she did not individually deliberate with each commissioner about the assignments, nor did she intend to form a consensus among the commissioners.

A presiding officer of a governing body may contact other members of the governing body to determine which items to include on the agenda of the next meeting as long as the conversations do not include information-gathering or discussion regarding the substance of the issues on the agenda.<sup>15</sup> Members of a governing body who missed a meeting may contact other members if the conversations are limited to finding out what happened at the meeting.<sup>16</sup> It is only when those conversations become steps in the decision-making process of information gathering, discussion, formulating or narrowing of options, or action regarding public business that the open meeting law is triggered.<sup>17</sup>

Although Commissioner Watne's calls to the three commissioners about their individual committee assignments concerned public business, the calls were ministerial and analogous to the calls a chairperson may make to set the agenda. The conversations were limited to informing each individual commissioner of that particular commissioner's assignments and did not rise to the level triggering the notice requirements for a meeting. Therefore, it is my opinion that the open meetings law was not violated when Commissioner Watne called three commissioners to inform them of what committees they would be assigned to in 2007.

#### Funding shortfall

A governing body may attend meetings of an association without providing public notice because a "meeting . . . does not include the attendance of members of a governing body at meetings of any national, regional, or state association to which the public entity, the governing body, or individual members belong."<sup>18</sup>

A quorum of the Commission met with the DOT and specifically discussed Ward County funding shortfalls. The exception within the definition of "meetings" for national, regional, or state association meetings allows members of a governing body to receive general training information and participate in association activities. It is not an

---

<sup>15</sup> N.D.A.G. 98-O-05.

<sup>16</sup> See N.D.A.G. Letter to Atkinson (Mar. 5, 1976).

<sup>17</sup> N.D.A.G. 98-O-05.

<sup>18</sup> N.D.C.C. § 44-04-17.1(8)(b).

opportunity for a quorum of a governing body to circumvent the open meeting law by discussing specific public business without providing proper notice.

The meeting the county commissioners had with the DOT was subject to the notice requirements of N.D.C.C. § 44-04-20 because the topic of the meeting was Ward County public business and a quorum of the governing body was present. Therefore, it is my opinion that the Commission violated N.D.C.C. § 44-04-20 when it failed to provide proper notice of the meeting with the DOT held during the NDACO annual convention.

### County Vision Committee

Advance public notice is a requirement for all meetings of a public entity.<sup>19</sup> The definition of “governing body” includes any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.<sup>20</sup> As a result, committees created by a public entity’s main governing body are also governing bodies subject to the open meetings law, which includes the notice requirements.<sup>21</sup>

The notices for the public forums indicated that the county commissioners would be attending in their capacities as county commissioners. During the public forums, the county commissioners briefed the attendees on the upcoming bond issue, which was clearly public business. For the purposes of the open meetings law, the private funding for the County Vision Committee is irrelevant. Therefore, in the instances where a quorum of the Commission attended the public forums, or where less than a quorum attended at the direction of the Commission, the meeting notices should either have stated that they were also Commission meetings or the Commission should have posted separate notices.

It is clear that there was no intent by the county commissioners involved with the public forums sponsored by the County Vision Committee to keep the forums, or their participation, a secret. To the contrary, each public forum was preceded by multiple notices and advertisements. Nonetheless, the meeting notices for the meetings of the County Vision Committee were not adequate substitutes for notices of Commission meetings. Even though the County Vision Committee notices contained the time, date, and location of the meetings and the notices were posted in compliance with N.D.C.C. § 44-04-20, the heading of the release states that it is a meeting of the County Vision Committee, not the Ward County Commission. The notice required to be given prior to public meetings necessitates that the name of the public entity holding the meeting be

---

<sup>19</sup> N.D.C.C. § 44-04-20.

<sup>20</sup> N.D.C.C. § 44-04-17.1(6).

<sup>21</sup> N.D.A.G. 2005-O-07.

on the notice.<sup>22</sup> Thus, it is my opinion that the Commission did not provide notice in substantial compliance with N.D.C.C. § 44-04-20 when public forums sponsored by the County Vision Committee were attended by a quorum of the Commission.

### CONCLUSION

The individual telephone conversations the chairperson of the Commission had with three other members regarding committee appointments did not constitute a meeting required to be noticed. However, the meeting between the Commission and the DOT at the NDACO convention was a meeting subject to the notice requirements, as was any County Vision Committee meetings that were attended by a quorum or committee of the Commission.

### STEPS NEEDED TO REMEDY VIOLATION

Minutes must be created regarding the meeting the county commissioners had with the DOT during the NDACO convention and provided to Mr. Narum. In the future, the Commission should notice the annual meeting with the DOT that takes place during the convention as required by 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.<sup>23</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>24</sup>

Wayne Stenehjem  
Attorney General

Assisted by: Mary Kae Kelsch  
Assistant Attorney General

vkk

---

<sup>22</sup> N.D.A.G. 2006-O-09.

<sup>23</sup> N.D.C.C. § 44-04-21.1(2).

<sup>24</sup> Id.