

**OPEN RECORDS AND MEETINGS OPINION
2009-O-17**

DATE ISSUED: September 11, 2009

ISSUED TO: McClusky City Council

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Allan Tinker asking whether the McClusky City Council ("Council") violated N.D.C.C. § 44-04-20 by holding a meeting that was not noticed to the public.

FACTS PRESENTED

On May 12, 2009, Orville Rhoads asked the McClusky city assessor for information pertaining to the recent tax assessment. Rather than pay for copies of the records, Mr. Rhoads asked to inspect the records personally.¹ The information was on the city tax assessor's field cards so the assessor informed Mr. Rhoads by letter that the property cards would be available for his review at the McClusky city hall on May 26 at 7:00 p.m.²

Mr. Rhoads went to view the records at the agreed upon time and brought along Ms. Allan Tinker, the local newspaper editor.³ The records were located in the Council chambers on a table. City Auditor Andrea Kluck, Mayor Theresa Jorgenson, and all of the Council members were present when they arrived. The city assessor, Sherril Houser, arrived later. The Council members, auditor and assessor talked among themselves while Mr. Rhoads looked through the records. If there was a record he wanted to copy, Ms. Tinker took a photograph of both sides of the tax field card for him. Mr. Rhoads and Ms. Tinker left about 9:00 p.m.

The McClusky City Council did not provide notice of the gathering as a meeting.

¹ Letter from Orville Rhoads to Sherril Houser, city tax assessor (May 26, 2009).

² A public entity must provide access to records during all regular office hours, if the entity has regular office hours. N.D.C.C. § 44-04-18(1). However, the city has no regular office hours, so offering to provide access to the records at 7:00 p.m. was reasonable.

³ Ms. Tinker is the editor of the McClusky Gazette and offered to make copies for Mr. Rhoads by taking digital photos of the records.

ISSUE

Whether the Council violated N.D.C.C. § 44-04-20 by holding a meeting for which notice was not provided to the public.

ANALYSIS

Except as otherwise provided by law, public notice must be given in advance of all meetings of a public entity.⁴ A “meeting” is defined as a formal or informal gathering of a quorum of the members of the governing body of a public entity regarding public business.⁵ “Public business” is defined as:

- [A]ll 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.⁶

Although a public entity cannot unduly restrict access to public records, it may require that an employee or official be present when access is permitted as a security measure to protect important city records.⁷

Rather than have just one employee or official be at city hall while Mr. Rhoads reviewed the records, the assessor asked the entire Council to be present while Mr. Rhoads and Ms. Tinker reviewed and photographed the assessor’s field notes. The tax assessor stated that because of Mr. Rhoad’s past behavior towards her, she was intimidated by him, so the Council wanted to show support for her and ensure that the review of records occurred without incident.⁸

The Council engaged in casual conversation, but did not discuss city business, during the two hours Mr. Rhoad’s inspected and copied records. The Council was under the impression that if public business was not discussed, the gathering was not a “meeting”

⁴ N.D.C.C. § 44-04-20.

⁵ N.D.C.C. § 44-04-17.1(8)(a)(1); N.D.A.G. 98-O-16 (informal gathering of city council related to public business and therefore, constituted a meeting subject othe open meetings law).

⁶ N.D.C.C. § 44-04-17.1(11).

⁷ N.D.A.G. Letter to Tomac (July 17, 1991).

⁸ See Letter from Sherrill Houser, city assessor, to Mary Kae Kelsch, Assistant Attorney General (July 2, 2009). The assessor’s explanation for inviting the council to observe the inspection of records was confirmed by the city attorney. Interview with Walter Lipp, city attorney (July 2009).

under the open meetings law. This office, however, has previously determined that gatherings of governing board members are meetings “even when no motions are made and no action is taken.”⁹ 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.¹⁰ Attendance of a quorum of city council members at the meeting of another public entity to hear presentations by sanitation companies was considered to be a meeting because the city council’s sanitation contract was about to expire.¹¹ These opinions demonstrate that a “meeting” may occur even under circumstances where the governing body is performing public business, not just discussing public business.

The definition of “public business” is broad, and encompasses “performance of the public entity’s governmental functions . . .”¹² Providing access to public records is a governmental function of the Council.¹³ Even though public business was not discussed, the Council was performing a governmental function when it met to monitor a person’s access to public records under the open records law. Because the Council was acting in its official capacity when a quorum met to monitor the review of the public records, it is my opinion the gathering was a “meeting” and further, that failing to publicly notice the meeting was a violation of N.D.C.C. § 44-04-20.

CONCLUSION

Even though public business was not discussed, a gathering of a quorum of Council members was a “meeting” subject to the notice requirements of N.D.C.C. § 44-04-20 because the purpose of the gathering was to be present while public records were reviewed.

STEPS NEEDED TO REMEDY VIOLATION

At its next regular meeting following the issuance of this opinion, the Mayor of McClusky must explain what happened at the meeting on May 26, 2009. The Council explanation should include who attended the May 26 meeting, why they attended, and what occurred.

⁹ N.D.A.G. 98-O-16.

¹⁰ N.D.A.G. 98-F-16.

¹¹ N.D.A.G. 98-O-18; see also N.D.A.G. 2008-O-28 (bus tour by a quorum of members of a city commission to view area for possible flood control project was a public meeting).

¹² N.D.C.C. § 44-04-17.1(8) (definition of meeting); see also N.D.C.C. § 44-04-17.1(11) (definition of public business).

¹³ See N.D.C.C. § 44-04-17.1(11) (definition of public business).

The agenda for the next meeting should include an agenda item that describes to the public the topic the Council will be addressing; specifically that there will be an explanation regarding what happened at the meeting on May 26. Also, the minutes should include a summary of the explanation provided.

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. § 44-04-21.2.¹⁴ It may also result in personal liability for the person or persons responsible for the noncompliance.¹⁵

Wayne Stenehjem
Attorney General

mkk/vkk

¹⁴ N.D.C.C. § 44-04-21.1(2).

¹⁵ Id.