

**OPEN RECORDS AND MEETINGS OPINION
2010-O-14**

DATE ISSUED: November 12, 2010

ISSUED TO: Mercer County Ambulance Board

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Marianne Schmitt asking whether the Mercer County Ambulance Board violated N.D.C.C. § 44-04-20 by holding meetings without providing public notice in substantial compliance with the open meetings law.¹

FACTS PRESENTED

The Mercer County Ambulance Board (Board) is comprised of ten members.² The Board holds monthly meetings on the fourth Monday of the month at the Mercer County Ambulance building.

At a June 1, 2010, special meeting, the Board fired its executive director.³ It appeared to the executive director that her termination was preplanned.

¹ In responding to a request for an opinion under N.D.C.C. § 44-04-21.1, this office is limited to reviewing violations alleged to have occurred within ninety days preceding this office's receipt of the opinion request, if the allegation is that a meeting occurred without the notice required by N.D.C.C. § 44-04-20. For allegations of a denial of access to a meeting or other alleged violation of sections 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21, the request must be made within thirty days of the alleged violation. Consequently, this office may only review whether notice was provided for meetings that occurred on or after April 25, 2010.

² During the time of the events discussed in this opinion, there was one vacancy on the Board.

³ The requester alleges that the special meeting was improper because the Board violated a bylaw of the Mercer County Ambulance Service requiring the president or vice president of the Board to attend a meeting. The violation of a governing body's bylaws does not by itself constitute a violation of the open meetings law; therefore, the issue will not be further addressed.

On June 16, 2010, Board member Brad Zimmerman e-mailed the Board members and asked “to have commitments from at least several of the board members to [attend the squad meeting] in case there are some questions.”⁴ The squad meeting was scheduled for June 21, 2010. Six members of the Board, a quorum,⁵ attended the squad meeting, but notice of the meeting was not provided to the public.

ISSUES

1. Whether the Board met secretly to discuss public business before its June 1, 2010, meeting.
2. Whether the Board violated N.D.C.C. § 44-04-20 when a quorum of its members attended a squad meeting that was not publicly noticed.

ANALYSIS

Issue One

The open meetings law applies to rural ambulance service districts and the boards that serve them because the districts are created by statute to exercise public authority or perform a governmental function.⁶ They are therefore public entities subject to the state’s open records and meetings laws.⁷

Unless otherwise provided by law, public notice must be provided in advance of all meetings governed by N.D.C.C. § 44-04-19.⁸ The notice, including the topics expected to be considered at the meeting, must be posted in the governing body’s main office and at the meeting location on the meeting day.⁹ The notice must also be filed with the county auditor unless all the notice information, including the agenda items, was

⁴ E-mail from Brad Zimmerman, Board President, to Board members (June 16, 2010, 9:20 PM).

⁵ The term “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).

⁶ See N.D.C.C. §§ 11-28.3-06, 11-28.3-07.

⁷ See N.D.C.C. § 44-04-17.1(12)(b); see also N.D.A.G. 2005-O-10 (rural ambulance service districts are public entities subject to the open records and open meetings laws).

⁸ N.D.C.C. § 44-04-20(1).

⁹ N.D.C.C. § 44-04-20(4).

previously included in the governing body's annual schedule.¹⁰ Notice must be provided to anyone requesting such information.¹¹ In addition, for special or emergency meetings, the public entity must notify its official newspaper, if any, and all representatives of the media who have requested to be notified.¹²

Here, the requester alleges that a quorum of Board members discussed termination of the ambulance service's executive director by e-mail or telephone prior to the Board's special meeting on June 1. The definition of "meeting" is not limited to face-to-face gatherings of a quorum of the members of a governing body.¹³ As a result, a meeting could occur by telephone or by other electronic means such as e-mail.¹⁴

The question of whether the Board met secretly to discuss public business before the June meeting is one of fact. North Dakota law requires me to base open meeting opinions on the facts given by the public entity.¹⁵ In response to this office's inquiry, the Board denies that a quorum of the Board discussed firing the executive director prior to the June 1, 2010, meeting. Consequently, I conclude that the Board did not meet secretly to discuss public business before its June 1 meeting.

Issue Two

For a gathering of a governing body to be considered a "meeting," two primary elements must be considered: whether a quorum was present and the topic of discussion.¹⁶ The Board admits that a quorum was present and that they discussed public business at the June 21 squad meeting; however, the Board did not realize that the meeting needed to be noticed because the Board did not take any action. Whether a governing body takes action during a meeting is not a prerequisite for determining that a gathering constitutes a "meeting."¹⁷ Thus, even if no action is taken, as long as the topic is one of public business and a quorum of a governing body is present, the meeting must be publicly noticed.¹⁸

¹⁰ Id. State entities must file notice with the Secretary of State's office and city level entities must file with the city auditor.

¹¹ N.D.C.C. § 44-04-20(5).

¹² N.D.C.C. § 44-04-20(6).

¹³ N.D.A.G. 2001-O-03.

¹⁴ N.D.A.G. 2001-O-03; N.D.A.G. 2007-O-14.

¹⁵ N.D.C.C. § 44-04-21.1(1).

¹⁶ N.D.C.C. § 44-04-17.1(8)(a)(1); N.D.A.G. 2007-O-08.

¹⁷ N.D.A.G. 2008-O-13.

¹⁸ See generally N.D.A.G. 2004-O-02; N.D.A.G. 98-O-18; N.D.A.G. 98-O-16.

Based on the foregoing, it is my opinion that the Board held a "meeting" as defined by N.D.C.C. § 44-04-17.1(8) that was not publicly noticed in substantial compliance with N.D.C.C. § 44-04-20.

CONCLUSIONS

1. The Board did not meet secretly to discuss public business before its June 1, 2010, meeting.
2. The Board violated N.D.C.C. § 44-04-20 by failing to provide public notice of a meeting that took place on June 21, 2010, when a quorum of the Board attended a squad meeting and discussed public business.

STEPS NEEDED TO REMEDY VIOLATIONS

With respect to the June 21, 2010, squad meeting, the Board must prepare minutes that meet the requirements of N.D.C.C. § 44-04-21(2) indicating what transpired. Minutes of the meeting must be made available to the general public and a free copy must be provided to the requester.

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. § 44-04-21.2.¹⁹ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁰

Sincerely,

Wayne Stenehjem
Attorney General

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¹⁹ N.D.C.C. § 44-04-21.1(2).

²⁰ Id.