

**OPEN RECORDS AND MEETINGS OPINION
2011-O-10**

DATE ISSUED: August 10, 2011

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 Rich Asleson asking whether the Cass County Historical Society violated N.D.C.C. §§ 44-04-18, 44-04-19, and 44-04-20 by failing to provide requested records, improperly noticing meetings, and by convening an illegal executive session.¹

FACTS PRESENTED

The Cass County Historical Society is a nonprofit county historical society affiliated with the North Dakota State Historical Society under N.D.C.C. § 11-11-53. It receives a portion of its annual funding from Cass County. Regular meetings of the Cass County Historical Society Board of Directors (Board) are held on the fourth Tuesday of each month at 4:30 p.m. at Bonanzaville located in West Fargo, North Dakota.

The Board held a special meeting by teleconference on Thursday, December 30, 2010. The Board's executive committee met on Saturday, January 1, 2011, by teleconference and voted to terminate the employment of Bonanzaville director, Steve Backson.² The executive committee also held a short meeting by teleconference on Saturday, January 15, 2011. At the March 22, 2011, regular meeting, the Board entered an executive session where they discussed, in part, the hiring of a new director of Bonanzaville.

On February 12, 2011, Rich Asleson, the former maintenance and grounds supervisor who had resigned in mid-January, e-mailed the following to the Cass County Historical Society:

¹ Mr. Asleson made two separate requests to this office for opinions regarding the actions taken by the Cass County Historical Society. Both requests are addressed in this opinion.

² Minutes, Executive Board, Cass County Historical Society (Jan. 1, 2011).

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In accordance with the ND Century Code I request any and all meeting minutes and emails relating to the Veterans Event, my resignation and Steve's termination. This includes emails between individual board members concerning these topics. If I am denied access or you do not provide these records I request a written explanation to include the reason for the refusal.

He followed up with a telephone call to the office on February 14. No records or explanation were ever provided to him.

ISSUES

1. Whether meetings held December 30, 2010, January 1, 2011, and January 15, 2011, were noticed in substantial compliance with N.D.C.C. § 44-04-20.
2. Whether the Board violated the open records law when it failed to provide copies of meeting minutes and e-mails.
3. Whether the executive session held on March 22, 2011, was authorized by law.

ANALYSIS

Issue one

Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity as defined in N.D.C.C. § 44-04-17.1, including executive sessions, conference call meetings, and videoconferences.³ A "public entity" includes organizations or agencies supported in whole or in part by public funds, or expending public funds, or organizations created or recognized by state law to exercise public authority or perform a governmental function.⁴

As determined in 2005, the Cass County Historical Society is a public entity because it is supported by public funds and it expends public funds.⁵ It is also recognized by state law as a county historical society.⁶ It promotes historical work including historical preservation, which is a governmental function.⁷

³ N.D.C.C. § 44-04-20(1).

⁴ N.D.C.C. § 44-04-17.1(13)(b), (c).

⁵ N.D.A.G. 2005-O-02.

⁶ See N.D.C.C. § 11-11-53.

⁷ See N.D.A.G. 2005-O-02.

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The written public notice of a meeting must contain the date, time, agenda, and location of the meeting.⁸ Notice must be provided at the same time the members of the governing body are notified and is available to anyone requesting such information.⁹

Meeting notices for a public entity of a county must be posted at the principal office of the governing body holding the meeting, if one exists, at the location of the meeting on the day of the meeting, filed with the county auditor.¹⁰ Additionally, if the meeting is a special meeting, notice must also be provided to the official newspaper, but it is not required to be published.¹¹

According to Sylvan Melroe, President of the Board, notice of the meetings was posted outside the door of the meeting room but not filed with the county auditor. Additionally, notice of the special meetings was not provided to the official newspaper.¹² Although the Board made some effort to comply with the notice requirements, it is my opinion that the Board did not substantially comply with N.D.C.C. § 44-04-20 because it failed to file the notices with the county auditor and failed to notify the official newspaper.

Issue two:

Mr. Asleson alleges that the Board did not provide copies of e-mails and minutes he requested within a reasonable time.

“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.”¹³ Upon a request for a copy of specific public records, any public entity shall furnish the requester one copy of the public records requested.¹⁴ When a request for records is denied by the public entity, the public entity must describe the legal authority for the denial and must put the denial in writing, if requested.¹⁵ A request for copies must be granted or denied within a reasonable time.¹⁶

⁸ N.D.C.C. § 44-04-20(2).

⁹ N.D.C.C. § 44-04-20(5).

¹⁰ N.D.C.C. § 44-04-20(4). This section was amended by adding the additional option of posting the notice on the public entity’s website. See S.B. 2232, 2011 N.D. Leg.

¹¹ N.D.C.C. § 44-04-20(6); N.D.A.G. 2009-O-18; N.D.A.G. 2009-O-03; N.D.A.G. 2007-O-02; N.D.A.G. 2003-O-13.

¹² See N.D.C.C. § 44-04-20(6).

¹³ N.D.C.C. § 44-04-18(1).

¹⁴ N.D.C.C. § 44-04-18(2); N.D.A.G. 2008-O-12.

¹⁵ N.D.C.C. § 44-04-18(7); N.D.A.G. 2008-O-12.

¹⁶ See N.D.C.C. § 44-04-18(8); N.D.A.G. 2008-O-12.

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Whether records have been provided within a reasonable time will depend on the facts of a given situation.¹⁷ In this instance, Mr. Asleson asked for meeting minutes and certain e-mails on February 12, 2011, and never received a response. The Board admits that it did not provide Mr. Asleson the meeting minutes, the e-mails or a written explanation for why the records were not provided other than a statement made to this office that the e-mails did not exist.

The Board has a duty under the open records law to provide access, copies, or a denial of records within a reasonable time.¹⁸ Since the Board did not provide the requested records or an explanation as to why records were not provided, it is my opinion that the Board violated N.D.C.C. § 44-04-18.

Issue three:

“Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public.”¹⁹ “A governing body may hold an executive session to consider or discuss closed or confidential records.”²⁰

The executive session was tape recorded in compliance with N.D.C.C. § 44-04-19.2(5), although the tape seems to have ended prematurely leaving part of the meeting unrecorded. The tape was reviewed by this office and reveals that the Board discussed two things: a potential executive director candidate and a letter from this office asking the Board to answer questions regarding Mr. Asleson’s initial request for an Attorney General’s opinion.

During the executive session, three Board members described a conversation they had with a potential executive director of Bonanzaville. The Board then had a general discussion about the executive director’s position and how it planned to fulfill the duties until a new person was hired. Next, the Board discussed the questions asked by this office regarding the facts surrounding “Issue one” and “Issue two,” above.

It is well-established that a governing body may not hold an executive session to discuss personnel issues.²¹ The Board’s discussion held in executive session did not involve exempt or confidential information and, therefore, the entire executive session was an unauthorized closed meeting. Accordingly, it is my opinion that the Commission violated N.D.C.C. § 44-04-19 when it held an executive session that was not authorized by law.

¹⁷ N.D.A.G. 2008-O-12; N.D.A.G. 2007-O-11.

¹⁸ See N.D.A.G. 2007-O-06.

¹⁹ N.D.C.C. § 44-04-19.

²⁰ N.D.C.C. § 44-04-19.2(1).

²¹ N.D.A.G. 2008-O-02.

CONCLUSIONS

1. The meetings held December 30, 2010, January 1, 2011, and January 15, 2011, were not noticed in substantial compliance with N.D.C.C. § 44-04-20.
2. The Board violated the open records law when it failed to provide copies of meeting minutes and e-mails that were requested by Mr. Asleson.
3. The executive session held during the March 22, 2011, meeting was not authorized by law.

STEPS NEEDED TO REMEDY VIOLATIONS

The executive session must be recreated by the Board during an open meeting that is noticed at least 10 days in advance. In addition to posting meeting notices at the meeting location and main office, the Board must start providing notice to the Cass County Auditor or post the notices on its official website, if available. Notices must be posted for all regular and special meetings of the Board and of Board committees. Copies of the minutes requested by Mr. Asleson must be provided to him at no cost. Although the tape recording of the executive session is of poor quality, it is an open record and may be provided to Mr. Asleson, or anyone else, if requested.

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. § 44-04-21.2.²² It may also result in personal liability for the person or persons responsible for the noncompliance.²³

Wayne Stenehjem
Attorney General

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²² N.D.C.C. § 44-04-21.1(2).

²³ Id.