

**OPEN RECORDS AND MEETINGS OPINION
2011-O-17**

DATE ISSUED: December 22, 2011

ISSUED TO: Minto 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 Melvin Tibert asking whether the Minto City Council (Council) violated N.D.C.C. §§ 44-04-19 and 44-04-20 by holding a meeting that was not preceded by public notice.

FACTS PRESENTED

On June 2, 2011, a Summons and Complaint regarding Melvin Tibert's legal action for quiet title was served on the city of Minto (City). On June 3, the mayor contacted all but one Council member. The mayor explained to each member that Mr. Tibert had commenced a quiet title action for property in the city limits. He also told the Council members that the city attorney and the city's liability insurance fund would respond to the action on behalf of the city. No public notice was provided regarding these telephone conversations. After being contacted by this office, however, the Council did prepare minutes and a meeting notice.

ISSUE

Whether the Council violated N.D.C.C. § 44-04-19 when the mayor made a series of telephone calls to a quorum of the Council members regarding public business without providing public notice in substantial compliance with N.D.C.C. § 44-04-20.

ANALYSIS

All "meetings" of the governing body of a public entity are required to be open to the public unless otherwise specifically provided by law and must be preceded by sufficient public notice.¹ The definition of "meeting" is not limited to face-to-face gatherings of a

¹ N.D.C.C. § 44-04-19; N.D.C.C. § 44-04-20.

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quorum of the members of a governing body, thus, a “meeting” could occur via telephone conversations.²

The open meetings law may be violated if a governing body holds one or more meetings attended by less than a quorum of members to discuss public business for the purpose of avoiding the open meetings requirements.³ For a series of conversations to fall under this definition, it is not necessary that the Council intended to violate the law.⁴ A 1998 opinion to the State Board of Higher Education clarifies the intent requirement by stating:

However, intent to violate the law is not required; what is required is that the Board intentionally met in groups smaller than a quorum, yet collectively involving a quorum, and intentionally discussed or received information regarding items of public business that would have had to occur in an open meeting if any of the gatherings had been attended by a quorum of the Board.⁵

Here, the mayor admits that the conversations were not accidental and that he intentionally contacted three members, a quorum of the Council, in order to inform them that a lawsuit had been filed and the steps he took on behalf of the City.⁶ The mayor explains that he believed the calls were acceptable because he did not seek a consensus from the council members when making the telephone calls. He did, however, discuss the steps he took on behalf of the City, which goes to the substance of the issue.⁷

As this office has explained in past opinions, information gathering is a step in the decision making process comparable to discussion, formulating or narrowing of options, or action regarding public business.⁸ Thus, a meeting can take place even if the purpose is not to build a consensus or take a vote. Information gathering, like consensus building, is considered public business, regardless of how brief it may have

² N.D.A.G. 2000-O-08.

³ N.D.C.C. § 44-04-17.1(9)(a)(2)

⁴ See N.D.A.G. 98-O-05.

⁵ Id.

⁶ He attempted, but was unable to contact the fourth council member.

⁷ See N.D.A.G. 98-O-05. (A presiding officer may contact other members 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).

⁸ N.D.A.G. 98-O-05. See also, N.D.A.G. 2008-O-11; N.D.A.G. 98-O-16 N.D.A.G.; 98-O-08.

been.⁹ The public has a right to know what steps were taken by the mayor and that the steps were endorsed by the governing body. If the discussions take place outside of an open meeting, the governing body is, essentially, operating in a vacuum without the public's knowledge.

If a quorum of the Council had gathered to receive the information, rather than receiving the information through a series of telephone calls, the gathering would have had to occur in an open meeting.¹⁰ The Council could have held a short meeting by a properly noticed conference call and received the information in a manner consistent with the law. Thus, it is my opinion that the multiple conversations constituted a "meeting" of the Council. It is my further my opinion that because this "meeting" took place without public notice, the Council violated N.D.C.C. §§ 44-04-19 and 44-04-20.

CONCLUSION

The Council violated N.D.C.C. § 44-04-19 when the mayor made a series of telephone calls to a quorum of the Council members regarding public business without providing public notice in substantial compliance with N.D.C.C. § 44-04-20.

STEPS NEEDED TO REMEDY VIOLATION

As stated above, the Council has already posted a notice to inform the public that a special meeting took place on June 3, 2011, regarding the lawsuit. Minutes were created and a copy of both the notice and minutes were furnished to Mr. Tibert. No further action need be taken.

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⁹ See Id.

¹⁰ See N.D.A.G. 98-O-05.