

**OPEN RECORDS AND MEETINGS OPINION
2013-O-03**

DATE ISSUED: March 13, 2013

ISSUED TO: Metro Flood Diversion Board of Authority

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from The Fargo Forum (Forum) asking whether the Metro Flood Diversion Board of Authority violated N.D.C.C. § 44-04-20 by holding a meeting that was not preceded by public notice.

FACTS PRESENTED

The U.S. Army Corps of Engineers (Corps) is operating the “Fargo-Moorhead Metropolitan Area Flood Risk Management Project, North Dakota and Minnesota” (Flood Project). Customarily, the Corps collaborates with a single non-federal entity on projects, but because the Flood Project has impacts and benefits for North Dakota and Minnesota, the Flood Project has two non-federal sponsors, the cities of Fargo and Moorhead. The Corps looks only to the non-federal sponsors for input and will only enter into binding agreements with the non-federal sponsors. One method of communication between the Corps and the non-federal sponsors is the Corps’ “Executive Committee” comprised of the mayors of both cities and the Corps’ Deputy for Programs and Project Management.

In the case of this Flood Project, the Corps did allow some input from a larger group of interested parties from the affected area. In order to work together on the Flood Project, several political subdivisions entered into a limited joint powers agreement that created a nine-member Metro Flood Diversion Board of Authority (Diversion Authority Board). Participants in the joint powers agreement are North Dakota’s Cass County, Minnesota’s Clay County, the City of Moorhead in Minnesota, the City of Fargo in North Dakota, the Buffalo Red River Watershed District, and the Cass County Joint Water Resource District.¹

The engineering firm hired by the Diversion Authority Board negotiated a commitment from the Corps to create a “Leadership Council” comprised of the Fargo Mayor, the

¹ See Ltd. Joint Powers Agreement, Metro Flood Diversion Project.

Moorhead Mayor, the chairman of the Diversion Authority Board, and three Army Corps of Engineers officials.² This “Leadership Council” is an extension of the previously established “Executive Committee.”

On April 3, 2012, the Leadership Council met by teleconference. At the meeting, the Leadership Council approved and signed an agreement, called a “Charter,” which detailed its permanent members and its purpose to set the strategic course for the Fargo Moorhead Diversion project.³ The meeting was not noticed pursuant to the North Dakota open meetings requirements. Two of the members of the Leadership Council who attended the meeting were also members of the Diversion Authority Board: Fargo Mayor Walaker and Diversion Authority Board Chair Darrell Vanyo.

ISSUES

1. Whether the Diversion Authority Board is a public entity subject to the open records and meetings laws.
2. Whether a committee of the Diversion Authority Board violated N.D.C.C. § 44-04-20 by holding a meeting that was not preceded by public notice.

ANALYSIS

Issue one

All records and meetings of a public entity are open and accessible to the public unless otherwise specifically provided by law.⁴ The definition of “public entity” includes any agency of a political subdivision.⁵ A joint enterprise created by a joint powers agreement of several political subdivisions whereby the subdivisions delegate their performance of a governmental function to the joint enterprise is an “agency” of those subdivisions and a “public entity” subject to the open records and meetings laws.⁶ The management of water resources is a governmental function. Therefore, it is my opinion that the Diversion Authority Board created in the joint powers agreement performs a governmental function and is a governing body required to comply with N.D.C.C. § 44-04-19. The Diversion Authority Board has operated under the assumption that it is subject to these laws.

² Although the Corps allowed representation from the Diversion Authority Board, it is not an official co-sponsor of the project.

³ See Exec. Leadership Council Charter, at §1; see also Exec. Leadership Council Meeting Summary, Apr. 3, 2012.

⁴ N.D.C.C. §§ 44-04-18, 44-04-19; N.D. Const. art. XI, §§ 5, 6.

⁵ N.D.C.C. § 44-04-17.1(13)(b).

⁶ N.D.A.G. 2002-O-02; N.D.A.G. 98-O-04.

Issue two:

The open meetings law requires that all meetings of a governing body of a public entity be open to the public and preceded by public notice.⁷ 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.”⁸ A governing body also includes any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body, often called a committee.⁹ Committees created by a public entity’s main governing body are also governing bodies subject to the open meetings law.¹⁰

The Leadership Council is created by the U.S. Army Corps of Engineers for the purpose of allowing local participants in a Corps of Engineers’ project to provide input into the decision making process of the Flood Project. As a federal agency, the Corps of Engineers does not meet the definition of a “public entity” in N.D.C.C. § 44-04-17.1(13) and is not subject to the North Dakota open meetings law.¹¹ However, numerous past opinions have explained that if a governing body attends a meeting of another group and the group’s discussion pertains to the public business of the governing body, the attendance of the members of the governing body is a “meeting.”¹² Therefore, if Mayor Walaker and Chairman Vanyo attended the Leadership Council meeting as a committee of the Diversion Authority Board, then that committee would have had to notice its participation in the Leadership Council meeting pursuant to the open meetings law.

The Diversion Authority Board, in response to inquiries from this office, explains that the U.S. Army Corps of Engineers created the Leadership Council and chose its members. At no time did the Diversion Authority Board delegate authority to Darrell Vanyo and Dennis Walaker to sit on the Leadership Council as a committee on its behalf. For opinions issued under N.D.C.C. § 44-04-21.1, this office does not resolve questions of fact but rather bases the opinion on the facts provided by the public entity.¹³

⁷ N.D.C.C. §§ 44-04-19, 44-04-20.

⁸ N.D.C.C. § 44-04-17.1(9)(a).

⁹ N.D.C.C. § 44-04-17.1(6).

¹⁰ N.D.A.G. 2005-O-03; N.D.A.G. 2003-O-13.

¹¹ See N.D.C.C. § 44-04-13(a)(b)(c) (the definition of public entity is limited to entities created or recognized by the state, political subdivisions of the state, or supported by state funds).

¹² N.D.A.G. 2008-O-10; N.D.A.G. 2008-O-11.

¹³ N.D.C.C. § 44-04-21.1(1).

I have explained in past opinions that all the elements of a “meeting” must be present in order for the meeting to be subject to the open meetings law.¹⁴ For a gathering to be considered a “meeting,” two primary elements must be considered; the presence of a quorum of a governing body or its committee and the topic of discussion.¹⁵ Here, both the Corps of Engineers and the Diversion Authority Board share the goal of flood management so the topic of the Corps of Engineers’ Leadership Council meeting relates to the public business of the Diversion Authority Board.¹⁶ However, without a delegation by the Diversion Authority Board to Mr. Vanyo and Mayor Walaker to act on its behalf, it cannot be concluded that a “governing body,” as defined in the statute, attended the meeting of the Leadership Council.¹⁷ Without the presence of a quorum or committee of the Diversion Authority Board, one element required for a meeting as defined in N.D.C.C. § 44-04-17.1(9) was missing. Therefore, it is my opinion that the Diversion Authority Board was not required to provide public notice of the meeting.¹⁸

CONCLUSION

The Diversion Authority Board did not delegate authority to a committee and therefore it did not violate N.D.C.C. § 44-04-20 when two of its members attended a U.S. Army Corps of Engineers Leadership Council meeting without providing public notice.

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¹⁴ N.D.A.G. 2011-O-01.

¹⁵ N.D.A.G. 2011-O-01.

¹⁶ See, N.D.C.C. § 44-04-17.1(12) (public business means all matters that relate or may foreseeably relate in any way to the performance of the public entity’s governmental function and use of public funds).

¹⁷ See generally, N.D.C.C. § 44-04-17.1(6) (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).

¹⁸ The Corps have since agreed to open the Leadership Council meetings to the public and comply with the requirements of the North Dakota open meetings law.