

**OPEN RECORDS AND MEETINGS OPINION
2014-O-12**

DATE ISSUED: September 9, 2014

ISSUED TO: Mott-Regent School Board

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Dustin Gawrylow asking whether the Mott-Regent School Board violated N.D.C.C. § 44-04-19 by holding meetings by email.

FACTS PRESENTED

On May 20, 2014, the Mott-Regent School District held a special election to determine whether the school district could build a new school. Prior to the election, Dustin Gawrylow made open records requests to the Mott-Regent School Board (Board). In response to the record requests, he received several emails sent and received by the Board regarding the school bond issue. Mr. Gawrylow asked this office to determine whether the discussions among the Board members by email violated open meetings law.¹

ISSUE

Whether emails exchanged among a quorum of the Mott-Regent School Board were "meetings" subject to open meetings law.

ANALYSIS

Generally, all meetings of a public entity must be open to the public and notice must be provided.²

"Meeting" means a formal or informal gathering or a work session, whether in person or through electronic means such as telephone or videoconference, of:

¹ See Email from Dustin Gawrylow to Att'y Gen.'s Office (May 8, 2014; 2:52 PM).

² N.D.C.C. §§ 44-04-19 and 44-04-20.

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1. A quorum of the members of the governing body of a public entity regarding public business; or
2. Less than a quorum of the members of the governing body of a public entity regarding public business, if the members attending one or more of such smaller gatherings collectively constitute a quorum and if the members hold the gathering for the purpose of avoiding the requirements of section 44-04-19.³

A meeting can occur in person or through electronic means, such as by telephone or email. The analysis of whether a meeting took place by email is no different than that of other meetings.⁴ As long as the exchange occurs among a quorum⁵ of members of a governing body⁶ of a public entity and public business⁷ is discussed, it is a meeting subject to notice requirements.⁸

In past opinions, this office has recognized email can be used to provide information to members of a governing body or to set an agenda topic, “as long as there are safeguards to protect against communication that may trigger the open meetings law. In other words, members of a governing body should be careful not to use the “reply all” functions when responding to the information they receive by email.”⁹ Ministerial use of email, such as requesting items be placed on an agenda or distributing information for members to review independently before a meeting, is comparable to sending information by mail, and is appropriate.¹⁰ However, there is a threshold at which conversations by email trigger the open meetings law.¹¹ Emails that go beyond mere ministerial matters and delve into the substantive merits of the suggested agenda topic,

³ N.D.C.C. § 44-04-17.1(9)(a).

⁴ See N.D.A.G. 2013-O-07; N.D.A.G. 2007-O-14.

⁵ N.D.C.C. § 44-04-17.1(15) (“quorum” is defined as “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”). A quorum is reached if the emails are sent to a quorum of the governing body. See N.D.A.G. 2013-O-07.

⁶ N.D.C.C. § 44-04-17.1(6) (definition of “governing body” includes committees delegated authority by the governing body).

⁷ N.D.C.C. § 44-04-17.1(12) (definition of “public business”).

⁸ N.D.A.G. 2013-O-07; N.D.A.G. 2007-O-14.

⁹ N.D.A.G. 2013-O-07.

¹⁰ N.D.A.G. 2007-O-14.

¹¹ Id.; see also N.D.C.C. § 44-04-17.1(9)(a) (definition of “meeting”).

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provide opinions regarding public business, or attempt to build support and consensus for certain positions, are equivalent to having a meeting that requires notice.¹²

This office reviewed hundreds of emails provided by Mr. Gawrylow and the Board. The Board has a practice of sharing and disseminating information by email. In most cases, the manner by which the Board uses email does not trigger the open meetings law because the emails are ministerial in nature.¹³ For example, in many emails, a Board member gathers information for the Board and disseminates the information by email so that the Board may review before the next meeting. Providing information, without commentary, prior to a Board meeting does not violate open meetings law. Other emails suggest agenda topics for the next Board meeting. Requesting an agenda topic be added to a Board meeting does not violate the open meetings law.¹⁴

There are emails, however, that go beyond merely providing information or taking care of ministerial matters because they include Board members' thoughts, opinions, positions, and suggested courses of action. For example, after a Board committee meets, an email is sent to the entire Board reporting what was discussed during the committee meeting. The email includes thoughts and opinions and requests courses of action from the entire Board in order to proceed with further committee work.¹⁵ Such reporting should be done before the full Board at an open meeting so the public can be kept apprised of what was discussed during the committee meetings. In addition, instead of having safeguards in place to protect against communication that may trigger the open meetings law, the emails often request others to share their thoughts and opinions about certain topics. Such a practice invites further discussions regarding public business that should be held in an open meeting.

Therefore, although it does not appear to be a widespread problem, it is my opinion that the Board violated the open meetings law in those emails where members shared thoughts, opinions, positions, reports on committee meetings, and suggested courses of action because such discussions were "meetings" subject to open meetings law and N.D.C.C. §§ 44-04-19 and 44-04-20.

¹² N.D.A.G. 2013-O-07; N.D.A.G. 2010-O-09; N.D.A.G. 2007-O-14; N.D.A.G. 98-O-05.

¹³ See N.D.A.G. 2007-O-08 (calls a chairperson makes to set an agenda are ministerial).

¹⁴ Id.

¹⁵ See Email from Board Member Lucas Greff to Board members Ben Auch, William Gion, Kevin Roth, Stacey Hertz, Mark Wonser, and Jody Messmer (Mar. 21, 2014, 2:33 PM). The email reports the proceedings of a Public Relations Committee meeting to the entire Board and requests to Board to approve "a few things as we move forward."

CONCLUSION

The Mott-Regent School Board violated the open meetings law when it discussed public business by email.

STEPS NEEDED TO REMEDY VIOLATION

Copies of email exchanges by the Mott-Regent School Board that took place since February 2014 must be retained by the Board and provided, free of charge, to anyone requesting them.

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. § 44-04-21.2.¹⁶ It may also result in personal liability for the person or persons responsible for the noncompliance.¹⁷

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¹⁶ N.D.C.C. § 44-04-21.1(2).

¹⁷ Id.