

**OPEN RECORDS AND MEETINGS OPINION
2014-O-23**

DATE ISSUED: December 26, 2014

ISSUED TO: City of Wyndmere

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from James Riffel asking whether the City of Wyndmere violated N.D.C.C. §§ 44-04-19 and 44-04-20 by holding a meeting not preceded by public notice.

FACTS PRESENTED

The auditor of the City of Wyndmere was offered a job by the school district on October 7, 2014, and the school district wanted a response to the job offer by noon on October 8, 2014.¹ On the morning of October 8, the mayor of Wyndmere individually called each member of the Wyndmere City Council (Council), informing them of the auditor's job offer.² The mayor discussed the Council's options of either letting the auditor go and attempting to fill the position, or considering increasing the auditor's salary in an attempt to retain her.³ Through the series of conversations, a consensus was reached by the Council to match the school's offer in order to entice the auditor to stay.⁴ The decision was confirmed during a regular meeting of the Council on November 3, 2014, in which it was moved and approved that the auditor's salary would increase, with a retroactive start date of October 8, 2014.⁵

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 a 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

¹ See Letter from Nathan Brandt, mayor, City of Wyndmere, to Sandra DePountis, Ass't. Att'y Gen. (Nov. 25, 2014).

² Id.

³ Id.

⁴ Id.

⁵ Id., see also Minutes, Wyndmere City Council (Nov. 3, 2014).

public notice.⁶ “Meeting” means a formal or informal gathering, whether in person or through other means such as a telephone or video conference, involving a “quorum” of the members of the governing body⁷ regarding “public business.”⁸ A “meeting” also includes a series of smaller gatherings collectively involving a quorum if the members discuss “public business” and hold the gatherings for the purpose of avoiding the open meetings law.⁹ As explained in numerous opinions, the definition of “meeting” covers all stages of the decision-making process, including information gathering, consensus building, formulating or narrowing of options, and action regarding public business.¹⁰

Here, the mayor contacted each Council member individually to discuss, formulate, and narrow options on whether, and through what means, to retain the auditor. Through the series of telephone conversations, it was determined that the Council would increase the auditor’s pay. These conversations collectively involved a quorum of the Council and a consensus was reached regarding a matter of public business without holding a properly noticed public meeting.

The Council argues that due to the short time frame between the job offer on October 7 and the request for a decision by noon on October 8, there was not enough time to hold a properly noticed special meeting.¹¹ Special or emergency meetings are often called

⁶ N.D.C.C. §§ 44-04-19, 44-04-20.

⁷ The governing body of Wyndmere is the City Council, formed by the mayor and four council members. See N.D.C.C. § 40-08-01 (“The governing body of a city operating under the council form of government is the city council, which is composed of the mayor and council members”).

⁸ N.D.C.C. §§ 44-04-17.1(9) (definition of “meeting”); 44-04-17.1(12) (definition of “public business” includes all matters that relate to a public entity’s performance of its governmental functions or use of public funds); and 44-04-17.1(15) (definition of “quorum” includes “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”).

⁹ N.D.C.C. § 44-04-17.1(9)(a)(2). For a series of conversations to fall under this definition, it is not necessary that the Council intends to violate the law. See N.D.A.G. 2012-O-02; N.D.A.G. 2011-O-17; N.D.A.G. 98-O-05.

¹⁰ N.D.A.G. 2014-O-19; N.D.A.G. 2012-O-02; N.D.A.G. 2011-O-04; N.D.A.G. 2006-O-02; N.D.A.G. 98-O-08.

¹¹ See Letter from Nathan Brandt, mayor, City of Wyndmere, to Sandra DePountis, Asst. Att’y Gen. (Nov. 25, 2014). Mayor Brandt argues that there was not enough time to meet the minimum 24-hour notice requirement of holding a special meeting. Under the open meetings law, there is no such minimum time frame for notice of special meetings; rather, what is required by law is that as soon as the members of the governing body are notified of a special meeting, the public should also be notified. N.D.C.C. § 44-04-20(5).

on very short notice to respond to urgent matters, but such situations do not obviate the notice requirements of N.D.C.C. § 44-04-20.¹² Occasionally, there are circumstances where it is not feasible to provide prior notice of a meeting, but in those unusual situations, this office advises the public entity to provide notice immediately following the meeting in order to substantially comply with the law.¹³ However, in this situation, the Council had several hours to convene in a properly noticed meeting before the noon deadline on October 8, 2014. Instead of contacting the Council members to discuss public business, the members should have been contacted to find a workable time to meet and discuss the situation.¹⁴ The Council could have held a short meeting by a properly noticed conference call or other means, received the information, and discussed the situation in a manner consistent with the law.

Thus, it is my opinion that the multiple conversations constitute a “meeting” of the Council. It is my further 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

Each member of the Council, including the mayor, should provide a written, signed statement of the conversation he/she had with the mayor regarding this topic. Meeting minutes of the October 8 conversations should be prepared from the statements. The statements and minutes should be provided to Mr. James Riffel, and any other requesting member of the public, free of charge.

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

¹² N.D.A.G. 2011-O-13; N.D.A.G. 2009-O-03.

¹³ N.D.A.G. 2011-O-13; N.D.A.G. 2009-O-04; N.D.A.G. 2007-O-02.

¹⁴ A presiding officer may contact other members to determine a date and time to hold a meeting and 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. See N.D.A.G. 2011-O-17, N.D.A.G. 98-O-05.

under N.D.C.C. § 44-04-21.2.¹⁵ It may also result in personal liability for the person or persons responsible for the noncompliance.¹⁶

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¹⁵ N.D.C.C. § 44-04-21.1(2).

¹⁶ Id.