

**OPEN RECORDS AND MEETINGS OPINION  
2015-O-06**

DATE ISSUED: April 17, 2015

ISSUED TO: Foster County Commission

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Cheryl Fettig asking whether the Foster County Commission violated N.D.C.C. §§ 44-04-19 and 44-04-20 by meeting without providing public notice.

**FACTS PRESENTED**

The governing body of Foster County is the Foster County Commission (Commission) which consists of three members: Commissioners James Carr, Pat Copenhaver, and Chairman Bill Bauer. Chairman Bauer terminated a custodian who worked at the Foster County Courthouse on February 2, 2015, after Bauer noticed timecard discrepancies.<sup>1</sup> The custodian's employment was not previously discussed during an open meeting and she questions whether such a decision occurred in a secret meeting of the Commission.<sup>2</sup>

**ISSUE**

Whether the Commission violated N.D.C.C. §§ 44-04-19 and 44-04-20 by holding a meeting to terminate a public employee that was not open to the public or preceded by public notice.

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<sup>1</sup> See Letter from Paul Murphy, Foster Cnty. State's Att'y, to Sandra L. Depountis, Asst. Att'y Gen. (Feb. 27, 2015); see Statement of Bill Bauer, Chairman, Foster Cnty. Comm'n (Mar. 6, 2015); see also Statement of Casey Cables, Auditor, Foster Cnty. (Feb. 12, 2015).

<sup>2</sup> Letter from Paul Murphy, Foster Cnty. State's Att'y, to Sandra L. Depountis, Asst. Att'y Gen. (Feb. 27, 2015); see Email from Cheryl Fettig to Att'y Gen.'s office (Feb. 3, 2015 2:15 PM). At the next regularly scheduled meeting of the Commission on Feb. 3, 2015, the Commission did not vote to approve the termination, but did discuss advertising and hiring for the custodian position. Minutes, Foster Cnty. Comm'n (Feb. 3, 2015).

## 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 public notice.<sup>3</sup> “Meeting” means a formal or informal gathering, whether in person or through other means such as a telephone or video conference, involving a “quorum”<sup>4</sup> of the members of the “governing body”<sup>5</sup> regarding “public business.”<sup>6</sup> 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.<sup>7</sup> The “quorum” requirement is met when members of a governing body engage in a series of smaller gatherings or conversations regarding a particular topic of its public business, in person or over the telephone, each involving two or more members of the governing body that collectively constitute a quorum.<sup>8</sup> When these conversations go beyond ministerial matters but rather delve into the substantive merits of an issue or suggested agenda topic, provide opinions regarding public business, or build support and consensus for certain positions, open meetings law are triggered.<sup>9</sup>

In preparing this opinion, I asked each Commissioner to individually submit a signed, written statement documenting conversations with any other Commission member and the Foster County Auditor regarding the custodian’s employment. According to Chairman Bauer, he decided to terminate the custodian on the morning of February 2, 2015, after discovering discrepancies in the custodian’s timecard. He directed the

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<sup>3</sup> N.D.C.C. §§ 44-04-19, -20.

<sup>4</sup> N.D.C.C. § 44-04-17.1(15) (definition of a “quorum” includes “one-half or more of the members of a governing body, or any smaller number if sufficient for a governing body to transact business on behalf of the public entity”).

<sup>5</sup> 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”).

<sup>6</sup> N.D.C.C. §§ 44-04-17.1(9) (definition of a “meeting” includes “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”); 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).

<sup>7</sup> N.D.A.G. 2014-O-23; N.D.A.G. 2014-O-19; N.D.A.G. 2012-O-02; N.D.A.G. 2011-O-04.

<sup>8</sup> N.D.A.G. 2014-O-23; N.D.A.G. 2012-O-02; N.D.A.G. 2006-O-11; N.D.A.G. 2005-O-04; N.D.A.G. 2005-O-02; N.D.A.G. 98-O-05.

<sup>9</sup> N.D.A.G. 2012-O-02.

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Foster County Auditor to call the other two commissioners and inform them of his findings and intent to terminate the custodian.<sup>10</sup>

The Auditor explains that she reached Commissioner Carr the morning of February 2, 2015, and relayed information about Chairman Bauer's findings and decision to terminate the custodian's employment.<sup>11</sup> Commissioner Carr agreed with Chairman Bauer's actions.<sup>12</sup> The Auditor relayed Commission Carr's approval to Chairman Bauer.<sup>13</sup> Chairman Bauer then terminated the custodian.<sup>14</sup> After the termination took place, Commissioner Copenhaver contacted the Auditor who informed Commissioner Copenhaver that Chairman Bauer terminated the custodian.<sup>15</sup> The Auditor called Chairman Bauer to inform him that Commissioner Copenhaver also approved.<sup>16</sup>

As the above illustrates, the decision to terminate Fettig's employment was decided by Chairman Bauer with the approval of the entire Commission. Although the Commission members did not directly speak with each other, the Auditor acted as an intermediary or liaison who conveyed and circulated information and the consensus to the entire Commission.<sup>17</sup>

I have explained in past opinions that a special meeting can occur on very short notice.<sup>18</sup> After discovering the discrepancy in the timesheets, Chairman Bauer could have instructed the Auditor to schedule a special meeting to be held by conference

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<sup>10</sup> Statements, Bill Bauer, Chairman, Foster Cnty. Comm'n (Feb. 2 and Mar. 6, 2015); and Statements, Casey Cables, Auditor, Foster Cnty. (Feb. 12 and Mar. 5, 2015).

<sup>11</sup> Statements, Casey Cables, Auditor, Foster Cnty. (Feb. 12 and Mar. 5, 2015); Statement, Jim Carr, Comm'r, Foster Cnty. Comm'n (Mar. 6, 2015).

<sup>12</sup> Statements, Casey Cables, Auditor, Foster Cnty. (Feb. 12 and Mar. 5, 2015); Statement, Jim Carr, Comm'r, Foster Cnty. Comm'n (Mar. 6, 2015).

<sup>13</sup> Statements, Casey Cables, Auditor, Foster Cnty. (Feb. 12 and Mar. 5, 2015); Statement, Bill Bauer, Chairman, Foster Cnty. Comm'n (Mar. 6, 2015).

<sup>14</sup> Statements, Bill Bauer, Chairman, Foster Cnty. Comm'n (Feb. 2 and Mar. 6, 2015).

<sup>15</sup> Statement, Pat Copenhaver, Comm'r, Foster Cnty. Comm'n (Mar. 6, 2015); Statements, Casey Cables, Auditor, Foster Cnty. (Feb. 12 and Mar. 5, 2015).

<sup>16</sup> Statement, Casey Cables, Auditor, Foster Cnty. (Mar. 5, 2015); Statement of Commissioner Bill Bauer, Chairman, Foster Cnty. Comm'n (Mar. 6, 2015).

<sup>17</sup> The Auditor did not merely convey information of a ministerial nature to the other Commission members, but instead sought consensus and approval after delving into a substantive issue regarding public business, which was then relayed back to Chairman Bauer. The public has a right to know what steps the Commission Chair took and that the steps were endorsed by the Commission. See N.D.A.G. 2012-O-02.

<sup>18</sup> N.D.A.G. 2011-O-13.

call.<sup>19</sup> In the same amount of time it took the Auditor to relay information about the custodian, a meeting could have been scheduled and noticed. Instead, the Commission reached a consensus by using the Auditor as an intermediary which resulted in an unnoticed, de facto meeting of the Commission.<sup>20</sup>

It is my opinion that the Commission<sup>21</sup> reached a decision regarding public business<sup>22</sup> without holding a properly notice meeting in violation of N.D.C.C. §§ 44-04-19 and 44-04-20.<sup>23</sup>

### CONCLUSION

The Commission violated N.D.C.C. §§ 44-04-19 and 44-04-20 when the Chairman of the Commission asked the Auditor to act as a liaison, conveying information and building consensus regarding a matter of public business, without holding a properly noticed public meeting.

### STEPS NEEDED TO REMEDY VIOLATION

Meeting minutes of the February 2, 2015, conversations should be prepared from the signed statements of the Commission and Auditor. The statements and minutes should be provided to Ms. Fettig, and any other member of the public, free of charge.

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<sup>19</sup> I have also explained that if prior notice of a meeting is not feasible a notice should be provided immediately following the meeting in order to substantially comply with the law. See Id.

<sup>20</sup> See N.D.A.G. 2006-O-11 (“any device, including using a non-Board member to act as an intermediary or agent to convey or circulate information or opinions to the rest of the Board, could result in a violation of the open meetings law”).

<sup>21</sup> Since the Commission is comprised of only three members, any communication from one member to another about the substance of an issue relating to its public business outside of a properly noticed meeting is a violation of the open meetings law. N.D.A.G. 2008-O-22.

<sup>22</sup> As this office previously concluded, no matter how uncomfortable it might be for a governing body to discuss an employee’s job performance in public, there is no exception of the open meetings law for personnel matters. N.D.A.G. 2005-O-02.

<sup>23</sup> The Commission held a regular meeting the next day. Minutes, Foster Cnty Comm’n (Feb. 3, 2015). During the open meeting, the Commission did not discuss or take any further action to approve the termination, but rather only discussed advertising and hiring a replacement. The public was not privy to any discussions regarding the Commission’s decision to terminate the custodian.

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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.<sup>24</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>25</sup>

Wayne Stenehjem  
Attorney General

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cc: Cheryl Fettig (via email only)

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<sup>24</sup> N.D.C.C. § 44-04-21.1(2).

<sup>25</sup> Id.