

**OPEN RECORDS AND MEETINGS OPINION
2015-O-12**

DATE ISSUED: August 6, 2015

ISSUED TO: Garrison-Max Ambulance District Board of Directors:

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Sara Odden asking whether the Garrison-Max Ambulance District Board of Directors violated N.D.C.C. §§ 44-04-19 and 44-04-20 by failing to properly notice meetings and holding meetings that were not preceded by public notice.

FACTS PRESENTED

The Garrison-Max Ambulance District Board of Directors (Board) holds monthly meetings on the first Wednesday of every month at the Garrison ambulance bay.¹ Due to scheduling conflicts with three of the seven board members, the May meeting, originally scheduled for May 6, was moved to May 5.² The decision to move the meeting date was decided and announced at the April 1, 2015, regular meeting. The Board also held a special meeting on May 11, 2015. Sara Odden claims the notices for the meetings were not properly posted. Odden also alleges the Board meets outside of properly noticed meetings.

ISSUES

1. Whether the Board provided notice of its May 5, 2015, regular meeting and May 11, 2015, special meeting, in substantial compliance with N.D.C.C. § 44-04-20.
2. Whether a quorum of the Board held meetings without providing public notice.

¹ Letter from Kerry Seidler, Pres., Garrison-Max Ambulance Bd., to Att'y Gen.'s office (June 12, 2015).

² Id.

ANALYSIS

Issue One

Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity.³ For regularly scheduled meetings, the notice must be posted at the principal office of the governing body, if such exists, at the location of the meeting on the day of the meeting, and, for city-level bodies, either filed with the city auditor's office or posted on the public entity's website.⁴ For emergency or special meetings, notice must also be given to the public entity's official newspaper, if any, and to any representatives of the news media who requested to be notified of the special meetings.⁵ If the public entity does not have an official newspaper, then it must notify the official newspaper of the county where its principal office or mailing address is located.⁶ Finally, notice must be given for all regular or special meetings to anyone requesting such information.⁷

The Board posted notice of the May 5, 2015, regular meeting at the ambulance bay, which is the main office of the Board and the location of the meeting.⁸ The Board did not however post notice with either the Garrison or Max city auditors.⁹

³ N.D.C.C. § 44-04-20; see also N.D.C.C. § 44-04-17.1(13) (definition of "public entity"). The open meetings law applies to rural ambulance service districts and the boards that serve them because the districts are created by statute to exercise public authority or perform a governmental function. N.D.A.G. 2013-O-01. They are therefore public entities subject to the state's open records and meetings law. Id.

⁴ N.D.C.C. § 44-04-20(4).

⁵ N.D.C.C. § 44-04-20(6).

⁶ Id.

⁷ N.D.C.C. § 44-04-20(5). No one requested to receive any such notice from the Board. Letter from Kerry Seidler, Pres., Garrison-Max Ambulance Bd., to Att'y Gen.'s office (received June 23, 2015).

⁸ Letter from Kerry Seidler, Pres., Garrison-Max Ambulance Bd., to Att'y Gen.'s Office (June 12, 2015); Letter from Kerry Seidler, Pres., Garrison-Max Ambulance Bd., to Att'y Gen.'s office (received June 23, 2015). Normally, the local newspaper, The McLean County Independent, posts notice of the meetings in the community calendar section each month, however, due to an oversight, they did not receive or post notice of the May 5, 2015, regular meeting. Letter from Kerry Seidler, Pres., Garrison-Max Ambulance Bd., to Att'y Gen.'s Office (June 12, 2015). Because this was a regular meeting, the Board was not required to notify the official newspaper.

⁹ Letter from Kerry Seidler, Pres., Garrison-Max Ambulance Bd., to Att'y Gen.'s office (received June 23, 2015). The Board does not have an official website.

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The Board posted notice of the May 11, 2015, special meeting at the ambulance bay and also notified the official newspaper of the counties in which Garrison and Max are located, The McLean County Independent.¹⁰ However, the Board again failed to notify either city auditor of the special meeting.

It appears that the Board was not trying to hold secret meetings because it did provide some of the notice required by law. However, the Board twice failed to file notice with the city auditors. The purpose of requiring the notice to be filed with the auditor is to have a central location for people to find out about public meetings affecting the city.¹¹

Therefore, it is my opinion that the Board violated N.D.C.C. § 44-04-20 when it failed to file either the May 5 or May 11, 2015, meeting notices with the Garrison and Max city auditors.¹²

Issue Two

Odden alleges that the Board meets outside of publicly noticed meetings, including allegations that the Board converses on matters of public business via text messaging.

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.¹³ The definition of “meeting” under N.D.C.C. § 44-04-17.1(9)(a) includes formal or informal gatherings, whether in person or through other electronic means, involving a “quorum”¹⁴ of members of the “governing body”¹⁵ regarding “public

¹⁰ Letter from Kerry Seidler, Pres., Garrison-Max Ambulance Bd., to Att’y Gen.’s Office (June 12, 2015); Letter from Kerry Seidler, Pres., Garrison-Max Ambulance Bd., to Att’y Gen.’s office (received June 23, 2015).

¹¹ N.D.A.G. 2005-O-07.

¹² Odden did not ask this office to review the adequacy of the agenda or the minutes of the meetings. However, I urge the Board to review N.D.C.C. § 44-04-20, addressing what the notice/agenda should include as well as N.D.C.C. § 44-04-21, addressing roll call votes and what should be included in the meeting minutes. Specifically, an agenda must contain the meeting location. Also, the Board should review the requirements of N.D.C.C. § 44-04-21.

¹³ N.D.C.C. §§ 44-04-19; 44-04-20.

¹⁴ N.D.C.C. § 44-04-17.1(15) (definition of “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”).

¹⁵ N.D.C.C. § 44-04-17.1(6) (definition of “governing body”).

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business.”¹⁶ A quorum can engage in ministerial discussions, such as requesting an item be placed on the agenda, providing information for the Board to review before an upcoming meeting, or confirming a date or time of a meeting, without having such discussions trigger open meetings law.¹⁷ However, when these discussions go beyond ministerial matters and 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, the open meetings law is triggered and notice is required before the “meeting.”¹⁸

In preparing this opinion I asked each member of the Board to individually submit a signed, written statement documenting conversations with any other Board member that occurred outside of a public meeting. Some of the Board members recall receiving emails with reminders for upcoming meeting times. However, all of the Board members reported receiving text messages from other Board members.¹⁹ An analysis on whether a meeting took place by text message is no different than that of any other meetings - as long as the exchange involved a quorum of the Board members and public business is discussed, a meeting occurs subject to notice requirements.²⁰ Similar to email exchanges, when Board members text each other, the public is not able to be part of the real time exchange occurring in the text messages among the members of the governing body, and thus any such meetings occurring by text message or email will violate open meetings law because the public is denied meaningful access.²¹

The written statements from the Board members reveal that most of the text messages were to set upcoming meeting times and dates or to provide reminders of meeting dates

¹⁶ N.D.C.C. § 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).

¹⁷ N.D.A.G. 2013-O-01; N.D.A.G. 2007-O-08.

¹⁸ N.D.A.G. 2015-O-06; N.D.A.G. 2012-O-02. 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. 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 through electronic means, each involving two or more members of the governing body that collectively constitute a quorum.

¹⁹ Statements from Kerry Seidler (undated), Sandra Nelson (June 15, 2015), Jodi Bendickson (June 14, 2015), Sandy Crawford (June 14, 2015), Jessica Seidler (June 12, 2015), Jody Gullickson (June 15, 2015), and Terri Torgerson (undated).

²⁰ N.D.A.G. 2014-O-12; N.D.A.G. 2013-O-07.

²¹ N.D.C.C. § 44-04-19.

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or to ask Board members if there was anything they wished to add to the agenda.²² In addition, a few Board members reported receiving text messages giving general directions on where to pick up or drop off supplies for a fundraiser, providing the new building door code, thanking members for their help in fundraisers, and wishing them a Happy EMS Week.²³ Finally a text message was sent by the president before a meeting stating that there was a premier ambulance in the bay for the members to come check out if they wanted to before the meeting.²⁴

I find the general discussions outlined above to be ministerial in nature with no substantive discussions on public business taking place, no attempt at building support or consensus, and no opinions being shared. There is no evidence that a string of text messages or emails ensued after the initial communication or that “reply all” functions were utilized.²⁵ The bulk of the messages appear to be setting or reminding members of meeting dates which is a permissible use of text messages and emails. It is therefore my opinion that the Board did not violate open meetings law in its use of text messages and emails.

CONCLUSIONS

1. The Board violated N.D.C.C. § 44-04-20 when it Board failed to file notices with the Garrison or Max city auditors of its May 5, 2015, regular meeting, and May 11, 2015, special meeting.
2. The Board did not violate open meeting laws in its use of text messaging and emails utilized for ministerial purposes.

STEPS NEEDED TO REMEDY VIOLATIONS

The minutes of the May 5 and May 11, 2015, meetings must be provided to Sara Odden, free of charge.

I also urge the Board to review the resources available on the Attorney General’s website on open meeting laws. The Board should immediately begin posting notice of its upcoming meetings with both the Garrison and Max city auditors.

²² N.18.

²³ Statements from Sandy Crawford (June 14, 2015), Jessica Seidler (June 2, 2015), Jody Gullickson (June 15, 2015) , and Terri Torgerson (undated).

²⁴ Statements from Jessica Seidler (June 12, 2015) and Terri Torgerson (undated).

²⁵ Opinions issued by this office must be based on the facts given by the public entity. N.D.C.C. § 44-04-21.1(1).

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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. § 44-04-21.2.²⁶ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁷

Wayne Stenehjem
Attorney General

sld

cc: Sara Odden (via email only)

²⁶ N.D.C.C. § 44-04-21.1(2).

²⁷ Id.