

**OPEN RECORDS AND MEETINGS OPINION
2016-O-04**

DATE ISSUED: March 15, 2016

ISSUED TO: North Dakota Department of Health - State Health Council

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Don Morrison and Darrell Dorgan asking whether the State Health Council violated N.D.C.C. § 44-04-20 by failing to provide sufficient notice of a public meeting.

FACTS PRESENTED

The North Dakota Department of Health (DOH) – State Health Council (Health Council) held a meeting on August 11, 2015.¹ It was “around April 20, 2015” that the Health Council set the meeting date, but did not set or discuss possible agenda topics at this time.²

The agenda for the August 11, 2015, meeting was prepared and finalized around July 27 or 28 and was made available in the State Health office as of July 30, 2015.³ Notice was posted on the Secretary of State’s website on August 6, 2015, and was also posted under “NEWS RELEASES” on the Health Department’s website.⁴ Notice was posted at the location of the meeting on the day of the meeting.⁵ The Health Department also provided a list of several individuals who asked to receive notice of any upcoming meeting and those individuals received a copy of the meeting agenda on July 30, 2015.⁶ In addition, individuals can sign up to be a recipient of the DOH’s news

¹ Letter from Wade Peterson, Chairman of State Health Council, to Sandra L. DePountis, Asst. Att’y Gen. (Oct. 19, 2015).

² Id.

³ Id. The Department of Health, located in Bismarck, houses administrative staff and the office of the State Health Officer, which is also the central office for the Health Council. See www.nd.health.gov.

⁴ Letter from Wade Peterson, Chairman of State Health Council, to Sandra L. DePountis, Asst. Att’y Gen. (Oct. 19, 2015).

⁵ Id.

⁶ Id.

releases and those individuals were emailed notice of the meeting on August 6, 2015.⁷ Included in this list were several media outlets, including The Bismarck Tribune.⁸

Don Morrison, Executive Director of the Dakota Resource Council, and Darrell Dorgan, North Dakota Energy Industry Waste Coalition, question whether the notice of the August 11, 2015, meeting was noticed in substantial compliance with N.D.C.C. § 44-04-20.⁹

ISSUES

1. Whether the Health Council's August 11, 2015, meeting notice was posted at the required locations and given to anyone requesting to receive notice in compliance with N.D.C.C. § 44-04-20(4) and (6).
2. Whether notice of the Health Council's August 11, 2015, meeting was timely in compliance with N.D.C.C. § 44-04-20(5).

ANALYSIS

Issue One

Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity.¹⁰ For regularly scheduled meetings, the notice must be posted at the principal office of the governing body, if one exists, at the location of the meeting on the day of the meeting, and, for state-level bodies, either filed with the Secretary of State's office or posted on the public entity's website.¹¹ For emergency or

⁷ Id.

⁸ Id.

⁹ Letter from Don Morrison, Dakota Res. Council, and Darrell Dorgan, N.D. Energy Indus. Waste Coal., Wayne Stenehjem, N.D. Att'y Gen. (Oct. 2, 2015). Mr. Morrison and Mr. Dorgan make several other allegations and request specific remedies that are outside this office's authority to review or implement under N.D.C.C. § 44-04-21.1. The issue this office is authorized to review under N.D.C.C. § 44-04-21.1 is whether the Aug. 11, 2015, meeting was noticed in substantial compliance with N.D.C.C. § 44-04-20.

¹⁰ N.D.C.C. § 44-04-20; see also N.D.C.C. § 44-04-17.1(13) (definition of "public entity"). The Health Council serves as the Department of Health's governing and advisory body, created under N.D.C.C. ch. 23-01, and is therefore a "public entity" subject to open record and meeting laws.

¹¹ N.D.C.C. § 44-04-20(4).

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special meetings, notice must also be given to the public entity's official newspaper,¹² if any, and to any representatives of the news media who requested to be notified of the special meeting.¹³ Finally, notice must be given for all regular or special meetings to anyone requesting that information.¹⁴

As outlined, the Health Council provided notice at its principal office, on the Secretary of State's website, on its own website, at the location of the meeting, to the official newspaper,¹⁵ and to anyone requesting to receive such notice.¹⁶

Mr. Morrison and Mr. Dorgan assert that they did not receive "personal" notice of the August 11, 2015, meeting as they had requested.¹⁷ In support of their position, they provided a string of emails between themselves and Dave Glatt, Environmental Health Section Chief, arguing that the string of emails show that they requested to be notified of any upcoming meetings.¹⁸ Upon review, however, the string of emails relate to

¹² 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. N.D.C.C. § 44-04-20(6).

¹³ N.D.C.C. § 44-04-20(6). Regular meetings are those meetings in which the public entity has filed a schedule of in January with either the Secretary of State's office or on the public entity's website. N.D.C.C. § 44-04-20(3). The Health Council does not file an annual schedule of upcoming meetings and therefore all meetings of the Health Council are considered "special" meetings that must comply with laws governing special meetings. See N.D.A.G. 2005-O-17 ("When a board does not hold regularly scheduled meetings, the board should treat its meetings as emergency or special meetings and provide notice accordingly."); N.D.A.G. 2005-O-10 (monthly meeting of ambulance board treated as a special meeting because board does not file an annual schedule of regular meetings with the county auditor); see also Letter from Wade Peterson, Chairman, State Health Council, to Sandra L. DePountis, Asst. Att'y Gen.'s Office (Oct. 19, 2015).

¹⁴ N.D.C.C. § 44-04-20(5). A public entity should provide notice in whatever way is agreed upon by the person and the public entity or in a manner that is practical. N.D.A.G. 2009-O-04.

¹⁵ The Health Council's principal office is with the Dep't of Health in Bismarck and therefore the official newspaper is The Bismarck Tribune, which received notice as a recipient of the Dep't of Health's news releases.

¹⁶ Attorney General opinions under N.D.C.C. § 44-04-21.1 must be based on the facts given on the public entity.

¹⁷ Letter from Don Morrison, Dakota Res. Council, and Darrell Dorgan, N.D. Energy Indus. Waste Coal., Wayne Stenehjem, N.D. Att'y Gen. (Oct. 2, 2015).

¹⁸ Id., see also, Exhibit H, attached to Oct. 2, 2015, letter.

requests for certain records made in February, April, and May of 2015, and do not request notification of any upcoming meeting.¹⁹

Although Mr. Morrison failed to ask for personal notice by email, he did receive personal notice of the August 11, 2015, meeting because he signed up to receive DOH news releases.²⁰ The news releases were emailed on August 6, 2015.²¹ Mr. Dorgan, on the other hand, was not entitled to personal notice because he did not request it.²²

The Health Council provided notice of its August 11, 2015, meeting to everyone requesting or required to receive such notice and posted notice at the locations required by N.D.C.C. § 44-04-20(4) and (6).

Issue Two

Although notice must be given in advance of all meetings governed by N.D.C.C. § 44-04-19, there is no mandatory minimum notice period in N.D.C.C. § 44-04-20.²³ Rather, notice must be given at the same time as the governing body's members are notified.²⁴

The members of the Health Council determined that it would hold its August 11, 2015, meeting, "around April 20, 2015."²⁵ Even though the date was determined over three months in advance, the notice was only posted thirteen days before the meeting.²⁶ The

¹⁹ Exhibit H to Oct. 2, 2015, letter.

²⁰ Sufficient notice is given if the individual is in some way personally notified before the meeting, even if such notification is not received exactly as requested by the individual. N.D.A.G. 2009-O-13.

²¹ Letter from Wade Peterson, Chairman of State Health Council, to Sandra L. DePountis, Asst. Att'y Gen. (Oct. 19, 2015).

²² Mr. Dorgan did, however, know about the meeting because he called the Dep't of Health's Envtl. Health Section on Aug. 10, 2015, requesting information regarding the Aug. 11 Health Council meeting, and was emailed the web address where he could access the public notice of the meeting. Letter from Wade Peterson, Chairman of State Health Council, to Sandra L. DePountis, Asst. Att'y Gen. (Oct. 19, 2015).

²³ N.D.C.C. § 44-04-20; N.D.A.G. 2003-O-07; N.D.A.G. 98-O-13.

²⁴ N.D.C.C. § 44-04-20(5); N.D.A.G. 2005-O-08.

²⁵ Letter from Wade Peterson, Chairman of State Health Council, to Sandra L. DePountis, Asst. Att'y Gen. (Oct. 19, 2015).

²⁶ Because the members of the Health Council knew on April 20, 2015, the date it would be holding an upcoming meeting, it should have provided notice at this time. Although an agenda was not yet prepared, the Health Council could have provided a generic notice, posted in compliance with N.D.C.C. § 44-04-20, of the upcoming meeting date and a reference of "agenda to come" in order to satisfy this requirement.

law requires the notice of a meeting to be provided to the public at the same time as the members of the governing body.²⁷ Here, the Health Council knew of the meeting for a significantly longer time than the public did, which is in violation of N.D.C.C. § 44-04-20(5).

CONCLUSIONS

1. The Health Council provided notice of its August 11, 2015, meeting to those requesting it and posted the required notice at the locations required by N.D.C.C. § 44-04-20 (4) and (6).
2. The Health Council violated N.D.C.C. § 44-04-20(5) by failing to provide notice of an upcoming meeting at the same time Health Council members were notified.

STEPS NEEDED TO REMEDY VIOLATION

The Health Council must provide a copy of minutes of the August 11, 2015, meeting to Mr. Morrison and Mr. Dorgan, and anyone else requesting them, 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 under N.D.C.C. § 44-04-21.2.²⁸ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁹

Wayne Stenehjem
Attorney General

sld
cc: Don Morrison (via email only)
Darrell Dorgan (via email only)

²⁷ N.D.C.C. § 44-04-20(5).

²⁸ N.D.C.C. § 44-04-21.1(2).

²⁹ Id.