

**OPEN RECORDS AND MEETINGS OPINION
2018-O-06**

DATE ISSUED: March 20, 2018

ISSUED TO: State Board of Higher Education

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Rob Port asking whether the State Board of Higher Education violated N.D.C.C. § 44-04-19 by discussing items of public business not listed on the notice.

FACTS PRESENTED

On November 29, 2017, the night before a regular meeting, the State Board of Higher Education (SBHE) held a social event at Bismarck State College (BSC).¹ The SBHE does not consider the socials it holds to be "meetings" subject to open meetings law, alleging that no "public business" is considered or discussed during the socials.² However, the SBHE does post notice of the socials, which are open to the public.³ For the November 29, 2017, social, the notice did not contain any agenda items, but merely referenced its date, time, and location.⁴

¹ The SBHE provides that socials are "generally hosted by the North Dakota University System (NDUS) institution where the following day's SBHE meeting will be held. The socials are open to the public and notice of each social is publicly posted ahead of the event, but specific invitations are also sent out to the campus community of the host institution as well as to local legislators." Letter from Nick Vaughn, Asst. Att'y Gen. for SBHE, to Sandra L. DePountis, Asst. Att'y Gen. (Dec. 19, 2017).

² Letter from Nick Vaughn, Asst. Att'y Gen. for SBHE, to Sandra L. DePountis, Asst. Att'y Gen. (Dec. 19, 2017).

³ *Id.*, see also Notice, SBHE Social (Nov. 29, 2017).

⁴ Notice, SBHE Social (Nov. 29, 2017). This notice was posted on the SBHE's website, emailed to those signed up on the SBHE's listserv, at the main office of the SBHE, and at the site of the event. Letter from Nick Vaughn, Asst. Att'y Gen. for SBHE, to Sandra L. DePountis, Asst. Att'y Gen. (Dec. 19, 2017).

At the social, Don Morton, chair of the SBHE, at the request of the President of BSC, gave welcoming remarks to those in attendance. The SBHE provided a summary of the remarks made by Mr. Morton as follows:

- Appreciation for the work done by the institutions and his belief that they are strongest working together. Mr. Morton shared some of his past experiences as a football coach at North Dakota State University and how he likes to empower people with subject matter expertise to make decisions.
- Mr. Morton briefly reviewed the agenda for the meeting the next day which included two executive sessions and how he looked forward to working with his colleagues and legal counsel to resolve pending issues.⁵

SBHE mentioned that, except for one remark from the president of the University of North Dakota that he "supported the proposed meeting schedule," no back and forth discussions took place.⁶ A quorum of the SBHE was present at the social and heard the remarks made by Mr. Morton.⁷

ISSUE

Whether the welcoming remarks by the chair of the SBHE at a social event were considered "public business" of the SBHE thereby making the social subject to open meetings law.

ANALYSIS

"Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public"⁸ and preceded by public notice in compliance with N.D.C.C. § 44-04-20.⁹ A "meeting" does not include a "chance or social gathering at which public business is not considered."¹⁰

⁵ See Summary of November 29th SBHE Social, signed by Mr. Morton and other members of the SBHE as a "fair, complete, and accurate recollection of Don Morton's remarks at the SBHE social on November 29, 2017, at the BSC Energy Center."

⁶ *Id.*

⁷ Letter from Nick Vaughn, Asst. Att'y Gen. for SBHE, to Att'y Gen.'s office (Dec. 19, 2017).

⁸ N.D.C.C. § 44-04-19.

⁹ N.D.C.C. § 44-04-20.

¹⁰ N.D.C.C. § 44-04-17.1(9)(b)(1).

OPEN RECORDS AND MEETINGS OPINION 2018-O-06

March 20, 2018

Page 3

"Public business" means all matters that relate or may foreseeably relate in any way to:

- a. The performance of the public entity's governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power; or
- b. The public entity's use of public funds.¹¹

In 2013, this office found that the SBHE violated the open meetings law when it held a "dinner social" in the home of the chancellor without public notice and also when board members discussed public business during a "dinner social" held in a private room in a restaurant.¹² After these opinions, the SBHE started posting notice of the socials and inviting members of the public to attend even though the board did not consider the socials to be meetings of the SBHE, with continued assurances that no "public business" is discussed during the socials.¹³

Here, Mr. Morton provided opening remarks, welcoming those in attendance and expressing gratitude regarding the work done by the institutions. Mr. Morton briefly reiterated what was on the agenda for the next meeting which had already been posted for the public to view, but did not go into the substance of the agenda items.¹⁴

In previous opinions, this office explained that discussions involving ministerial matters are not considered "public business" that trigger open meetings law.¹⁵ Ministerial matters include setting a meeting date or time, providing information for a governing body to review before an upcoming meeting, and adding an item to an agenda as long as no substantive discussion occurs regarding the agenda item among a quorum of members of a governing body.¹⁶ It is only 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, build support and consensus for certain positions, or otherwise become steps in the decision making process of information

¹¹ N.D.C.C. § 44-04-17.1(12).

¹² N.D.A.G. 2013-O-06 and N.D.A.G. 2013-O-07.

¹³ N.D.A.G. 2013-O-17.

¹⁴ Opinions issued by the Office of Att'y Gen. must be based on the facts of the public entity pursuant to N.D.C.C. § 44-04-21.1.

¹⁵ N.D.A.G. 2015-O-12, N.D.A.G. 2014-O-12, N.D.A.G. 2013-O-07, N.D.A.G. 2013-O-01, N.D.A.G. 2012-O-02, N.D.A.G. 2007-O-14, N.D.A.G. 2007-O-08.

¹⁶ N.D.A.G. 2015-O-12, N.D.A.G. 2014-O-12, N.D.A.G. 2013-O-07, N.D.A.G. 2013-O-01, N.D.A.G. 2012-O-02, N.D.A.G. 2007-O-14, N.D.A.G. 2007-O-08.

gathering, discussion, formulating or narrowing of options or actions regarding public business, that open meetings law are triggered and notice containing agenda items is required.¹⁷

It is my opinion that these general comments by Mr. Morton were ministerial and because no public business was discussed,¹⁸ there was no violation of the open meetings law.¹⁹

CONCLUSION

The opening remarks made by the chair of the SBHE at a social event were ministerial in nature and thus did not trigger open meetings law.

Wayne Stenehjem
Attorney General

sld

cc: Rob Port (via email only)

¹⁷ N.D.A.G. 2015-O-12, N.D.A.G. 2014-O-12, N.D.A.G. 2013-O-07, N.D.A.G. 2013-O-01, N.D.A.G. 2012-O-02, N.D.A.G. 2007-O-14, N.D.A.G. 2007-O-08.

¹⁸ I do, however, caution Mr. Morton and the SBHE about such remarks at the socials. The definition of "meeting" excludes social gatherings only if public business is not considered. Thus, the board cannot discuss matters of public business at an event intended to be a social. I would urge the SBHE to stick to general welcoming remarks at the socials to avoid the perception that the socials are used as a means to discuss matters of public business outside of properly noticed meetings.

¹⁹ Therefore, it was not a violation of the open meetings law to omit agenda items in the notice.