

**OPEN RECORDS AND MEETINGS OPINION
2020-O-01**

DATE ISSUED: February 6, 2020

ISSUED TO: North Dakota State Board of Accountancy

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Mark Larson asking whether the North Dakota State Board of Accountancy violated N.D.C.C. §§ 44-04-18 and 44-04-20 by failing to properly notice a meeting and withholding requested records.

FACTS PRESENTED

The North Dakota State Board of Accountancy (NDSBA) held a special meeting on November 5, 2019, to receive a litigation update and provide input on moving forward with a disciplinary case.

In order to schedule the meeting, the Board's executive director sent an email to all Board members on October 22, 2019, asking for availability and proposing some meeting dates and times.¹ Board members responded to the email with their availability² and a meeting was ultimately scheduled for November 5, 2019, at 1:00 PM. The meeting notice was posted at the Board's office, which was also the location of the

¹ Email from Mandy Harlow, NDSBA Exec. Dir., to all NDSBA Board members and Tara Brandner, Asst. Att'y Gen., (Oct. 22, 2019, 1:06 PM).

² Emails from Michael Schmitz, NDSBA member, to Mandy Harlow, NDSBA Exec. Dir. (Oct. 22, 2019, 1:34 PM and 2:29 PM); Email from Tara Brandner, Asst. Att'y Gen., to all NDSBA Board members (Oct. 22, 2019, 1:23 PM); Email from Mandy Harlow, NDSBE Exec. Dir. to all NDSBA Board members and Tara Brandner, Asst. Att'y Gen. (Oct. 22, 2019, 1:38 PM); Email from Faye Miller, NDSBA member, to Mandy Harlow, NDSBA Exec. Dir. (Oct. 22, 2019, 1:40 PM); Email from Laura Adair, NDSBA member, to Mandy Harlow, NDSBA Exec. Dir. (Oct. 22, 2019, 1:41 PM); Email from Tara Brandner, Asst. Att'y Gen., to Mandy Harlow, NDSBE Exec. Dir. (Oct. 22, 2019, 1:41 PM); Email from Nici Meyer, Asst. Att'y Gen., to all NDSBA Board members (Oct. 22, 2019, 2:37 PM).

meeting, with a single agenda item of “discussion of disciplinary case 2017-10.”³ The notice on the Secretary of State’s website, however, failed to list any topics or agenda and listed an incorrect meeting date of November 15, 2019.⁴

On November 19, 2019, Mr. Mark Larson made an open records request to the Board for “all emails or other correspondence referencing the November 4[sic] meeting. This should be anything between the Board members and any employee or agent of the Board.”⁵ The Board responded the next day providing emails regarding the November 5 meeting, but withheld some emails as “attorney work product pursuant to N.D.C.C. § 44-04-19.1.”⁶ Mr. Larson questions whether the emails were properly withheld.

ISSUES

1. Whether the North Dakota State Board of Accountancy’s use of email to set a special meeting date violated open meetings law.
2. Whether the North Dakota State Board of Accountancy properly noticed its November 5, 2019, special meeting.
3. Whether the North Dakota State Board of Accountancy properly withheld records as attorney work product.

ANALYSIS

Issue One

All meetings of a governing body of a public entity must be open to the public with notice provided in substantial compliance with N.D.C.C. § 44-04-20. A “meeting” occurs when a “quorum” of a governing body is present and its “public business” is considered

³ Notice, Special Meeting, NDSBA (Nov. 5, 2019).

⁴ ND Sec’y of State, Public Meeting Notice for NDSBA.

⁵ Email from Mark Larson, Att’y at Law, to Mandy Harlow, NDSBA Exec. Dir. (Nov. 19, 2019, 3:32 PM).

⁶ Email from Mandy Harlow, NDSBA Exec. Dir., to Mark Larson, Att’y at Law (Nov. 20, 2019, 4:47 PM).

or discussed, through any medium including emails.⁷ However, ministerial uses of email, such as setting a meeting date and time, are permissible and not considered a meeting, as long as no other public business is considered or discussed.⁸ It was, therefore, not a violation of the open meetings law for Board members to exchange ministerial emails to set its November 5, 2019, special meeting, without reference or discussion of any other public business.

Issue Two

Meetings must be noticed in substantial compliance with N.D.C.C. § 44-04-20. An agenda must be prepared with the date, time, location, topics to be considered, and notice of any executive session.⁹ The agenda must be posted at the entity's principal office, the appropriate central location of either the Secretary of State's Office or the entity's website for state level entities, the location of the meeting on the day of the meeting, and given to anyone who asks to receive personal notice.¹⁰ For special meetings, the agenda must be specific and not use catch-all phrases, and must also be given to the official newspaper.¹¹

The Board posted its agenda with the date, time, location, and topic to be considered at its principal office and also at the location of the meeting.¹² No one had asked the Board to receive individual notice of upcoming meetings.¹³ The notice on the Secretary of State's website, however, failed to list any topics and listed the wrong meeting date.¹⁴ No notice was given to the official newspaper.¹⁵ It is therefore my opinion that the

⁷ N.D.C.C. § 44-04-17.1 (9) (definition of "meeting"); (12) (definition of "public business"); and (15) (definition of "quorum"). It is a violation of the law when "meetings" occur by email because the public does not have the ability to attend and there is no notice of the meeting. N.D.A.G. 2018-O-19; N.D.A.G. 2018-O-12; N.D.A.G. 2015-O-14; N.D.A.G. 2015-O-12; N.D.A.G. 2014-O-12.

⁸ N.D.A.G. 2019-O-10; N.D.A.G. 2018-O-19; N.D.A.G. 2018-O-12; N.D.A.G. 2015-O-14; N.D.A.G. 2015-O-12; N.D.A.G. 2014-O-12.

⁹ N.D.C.C. § 44-04-20(2).

¹⁰ N.D.C.C. § 44-04-20(4).

¹¹ N.D.C.C. § 44-04-20(6).

¹² Letter from Mandy Harlow, NDSBA Exec. Dir., to Att'y Gen.'s Office (Dec. 19, 2019); see also Notice, Special Meeting, NDSBA (Nov. 5, 2019).

¹³ Letter from Mandy Harlow, NDSBA Exec. Dir., to Att'y Gen.'s Office (Dec. 19, 2019). Individuals had signed up to receive notice of Board meetings on the Secretary of State's website, but no one made a specific request to the Board for individual, personal notice.

¹⁴ ND Sec'y of State, Public Meeting Notice for NDSBA.

¹⁵ Letter from Mandy Harlow, NDSBA Exec. Dir., to Att'y Gen.'s Office (Dec. 19, 2019).

Board failed to give notice of its November 5, 2019, special meeting in substantial compliance with N.D.C.C. § 44-04-20.

Issue Three

“Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours.”¹⁶ One such exception to the open records law is for “attorney work product” which is any document or record that:

- a. Was prepared by an attorney representing a public entity or prepared at such an attorney’s express direction;
- b. Reflects a mental impression, conclusion, litigation strategy, or legal theory of that attorney or the entity; and
- c. Was prepared exclusively for civil or criminal litigation, for adversarial administrative proceedings, in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings, or for guidance on the legal risks, strengths, and weaknesses of an action of a public entity.¹⁷

In order to be considered “attorney work product,” all three of the above elements must exist.¹⁸

The Board withheld records regarding the disciplinary action at issue at the November 5, 2019, special meeting, saying it constituted attorney work product prepared for a pending adversarial administrative proceeding meeting under N.D.C.C. § 44-04-19.1(6)(c). These records were provided to this office, as authorized under N.D.C.C. § 44-04-21.1, which allows this office to “request and obtain information claimed to be exempt or confidential for the purpose of determining whether the information is exempt or confidential.”¹⁹

The initial email in the string is from the Board’s litigation attorney to the Board’s general counsel providing a recitation of her discussion with opposing counsel who represented the individual subject to the disciplinary proceeding. The email requested input on moving forward with the case, specifically relaying opposing counsel’s request for a

¹⁶ N.D.C.C. § 44-04-18(1).

¹⁷ N.D.C.C. § 44-04-19.1(1), (6).

¹⁸ N.D.A.G. 2010-O-08.

¹⁹ N.D.C.C. § 44-04-21.1(1).

settlement. The Board's general counsel responded with her mental impression and legal theory of the case. This exchange was forwarded to the Board's president who requested a special meeting. The email chain was then sent to the Board members for review before the special meeting with a warning of "Do Not Respond All."

Only the email from the Board's general counsel to the litigation attorney met all three elements of "attorney work product" under N.D.C.C. § 44-04-19.1. Although the email was in a chain, the Board has a duty to review and redact exempt or confidential information and turn over the remaining portions of the record that are not protected.²⁰ It was therefore a violation of the open records law when the Board failed to redact the protected information, and instead denied the entire requested record.

CONCLUSIONS

1. The North Dakota State Board of Accountancy's ministerial use of email to set a special meeting date did not violate open meetings law.
2. The North Dakota State Board of Accountancy failed to provide proper notice of its November 5, 2019, special meeting.
3. The North Dakota State Board of Accountancy violated open records law when it failed to redact attorney work product and turn over the remaining portions of the record that contained public information.

STEPS NEEDED TO REMEDY VIOLATION

The North Dakota State Board of Accountancy acknowledged its oversight regarding its notice and thereafter updated its internal policies regarding meeting notices and sought training on the open records and meetings law. Therefore, the only other corrective measure to be taken is for the Board to review its November 5, 2019, meeting minutes and update them to reflect the detailed recollections of any conversations held during the meeting. The updated meeting minutes must be provided to Mr. Larson, and anyone else requesting them, free of charge.

The North Dakota State Board of Accountancy already provided the redacted records to Mr. Larson.²¹ Therefore, no further action is necessary to remedy Issue Three.

²⁰ N.D.C.C. § 44-04-18.10; N.D.A.G. 2010-O-08.

²¹ Email from Mandy Harlow, NDSBA Exec. Dir., to Att'y Gen.'s Office (Dec. 31, 2019, 11:01 AM).

OPEN RECORDS AND MEETINGS OPINION 2020-O-01

February 6, 2020

Page 6

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. § 44-04-21.2.²² It may also result in personal liability for the person or persons responsible for the noncompliance.²³

Wayne Stenehjem
Attorney General

sld

cc: Mark Larson (via email only)

²² N.D.C.C. § 44-04-21.1(2).

²³ *Id.*