



STATE OF NORTH DAKOTA  
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**OPEN RECORDS AND MEETINGS OPINION**  
**2022-O-16**

DATE ISSUED: December 22, 2022

ISSUED TO: Billings County Commission

**CITIZEN'S REQUEST FOR OPINION**

Jim Fuglie and Elizabeth Loos requested opinions from this office under N.D.C.C. § 44-04-21.1 asking whether the Billings County Commission violated N.D.C.C. §§ 44-04-19 and 44-04-20 by holding a meeting that was not preceded by public notice.

**FACTS PRESENTED**

In late September 2021, Bill Panos, then Director of the North Dakota Department of Transportation (NDDOT), and H. Patrick Weir, the Billings County State's Attorney, met with each of the three Billings County Commissioners separately.<sup>1</sup> At each meeting, Mr. Weir "introduced Mr. Panos and his role with the NDDOT and invited the Commissioners to ask [Mr. Panos] any questions they had about the [Little Missouri] bridge, its history, the involvement of the County, the [environmental impact study] done by Kadrmas Lee and Jackson."<sup>2</sup> The next Commission meeting was held on October 7, 2021, during which the Commissioners generally discussed the "topics each of them had discussed with Mr. Panos" and "the information each was concerned with."<sup>3</sup>

**ISSUE**

Whether the Commission held a meeting that was not preceded by public notice.

**ANALYSIS**

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.<sup>4</sup> A "meeting" occurs when a

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<sup>1</sup> Letter from H. Patrick Weir, Billings Cnty. State's Atty, to Annique M. Lockard, Asst. Atty Gen., Atty Gen.'s Office (Oct. 26, 2021).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> N.D.C.C. § 44-04-19; N.D.C.C. § 44-04-20; *see also*, N.D.A.G. 2016-O-11, N.D.A.G. 2015-O-04, N.D.A.G. 2012-O-02.

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“quorum” of a governing body is present, and its “public business” is considered or discussed.<sup>5</sup> A “quorum” means “one-half or more of the members of the governing body, or any smaller number if sufficient for a governing body to transact business on behalf of the public entity.”<sup>6</sup>

If there is “a series of smaller gatherings collectively involv[ing] a quorum and a particular topic of public business is discussed, it is considered a meeting subject to open meetings law.”<sup>7</sup> Further, “[t]here is a threshold in which multiple conversations, that collectively involve a quorum, have the effect of forming consensus or furthering the [Fargo City] Commission’s decision-making process on that subject.”<sup>8</sup> Open meetings law is “triggered when conversations go beyond ministerial matters and delve into the substantive merits of an issue.”<sup>9</sup>

Past opinions have made clear that “information gathering” is “a step in the decision-making process comparable to discussion . . . .”<sup>10</sup> “Information gathering, like consensus building or voting, is considered public business, regardless of how brief.”<sup>11</sup> Meetings “can take place even if there is no intent to build a consensus or take a vote.”<sup>12</sup>

Here, individual commissioners met with the director of NDDOT about a potential county project.<sup>13</sup> According to the State’s Attorney, “[n]o Commissioner met with any of the other Commissioners either before, at, or after each of the meetings.”<sup>14</sup> The Commissioners did not

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<sup>5</sup> 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. 2020-O-01; 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.

<sup>6</sup> N.D.C.C. § 44-04-17.1(15); *see also* N.D.A.G. 2016-O-11.

<sup>7</sup> N.D.A.G. 2016-O-11, citing N.D.C.C. § 44-04-17.1(9)(a)(2) (the definition of “meeting” includes a gathering of “[l]ess 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. . . .”).

<sup>8</sup> N.D.A.G. 2015-O-04, citing N.D.A.G. 2012-O-02; N.D.A.G. 2011-O-17; N.D.A.G. 2007-O-08; N.D.A.G. 2004-O-18; N.D.A.G. 98-O-05.

<sup>9</sup> N.D.A.G. 2015-O-04, citing N.D.A.G. 2014-O-12; N.D.A.G. 2013-O-07; N.D.A.G. 2010-O-09; N.D.A.G. 2007-O-14; N.D.A.G. 98-O-05.

<sup>10</sup> N.D.A.G. 2012-O-02, citing N.D.A.G. 2011-O-17; N.D.A.G. 98-O-05. *See also* N.D.A.G. 2008-O-11; N.D.A.G. 98-O-16; N.D.A.G. 98-O-08.

<sup>11</sup> N.D.A.G. 2012-O-02, citing N.D.A.G. 2011-O-17.

<sup>12</sup> *Id.*

<sup>13</sup> Letter from H. Patrick Weir, Billings Cnty. State’s Atty, to Annique M. Lockard, Asst. Atty Gen., Atty Gen.’s Office (Oct. 26, 2021).

<sup>14</sup> *Id.*

discuss their individual conversations with Mr. Panos among themselves until they were convened in an open meeting.<sup>15</sup>

The Commission states there was no intent to circumvent the open meeting laws, and the record before me contains no evidence to the contrary.<sup>16</sup> Notably, however, the Commission purposefully scheduled the individual meetings with Mr. Panos on the same day in Medora. The State's Attorney explained a noticed meeting wasn't scheduled because of the timing and "because I was and still am convinced that the Commissioners have every legal right to seek out information from whatever source as long as there isn't a quorum nor any intent to use the 'third' person as a conduit to accomplish what the law forbids . . . ."<sup>17</sup> However, accepting as I do the State's Attorney's representation as to "intent," the law also forbids a governing body from meeting in groups of less than a quorum to discuss public business while avoiding the open meetings law.<sup>18</sup> Here, the Commissioners mutually decided to collect specific information in a manner that allowed them to speak privately to one person about a contentious matter of public business. As this office has explained:

Intent to violate the law is not required; what is required is that the Board intentionally met in groups smaller than a quorum, yet collectively involving a quorum, and intentionally discussed or received information regarding items of public business that would have had to occur in an open meeting if any of the gatherings had been attended by a quorum of the Board.<sup>19</sup>

If a quorum of the Commission had gathered to receive the information from Mr. Panos, rather than meeting with him separately, the gathering would have had to occur in an open meeting.<sup>20</sup> It is my opinion that the multiple conversations candidly acknowledged by the State's Attorney constituted a meeting of the Commission, which required notice pursuant to N.D.C.C. §§ 44-04-19 and 44-04-20.

#### CONCLUSION

I commend the Billings County State's Attorney, Commissioners, and Mr. Panos for their candor during the assessment of this situation, without which our advancement of open meetings decision-making would be hampered. That said, the facts of this matter lead me to conclude the Billings County Commission violated N.D.C.C. § 44-04-19 when a quorum of the Commission

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<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup> N.D.A.G. 98-O-05.

<sup>19</sup>*Id.*

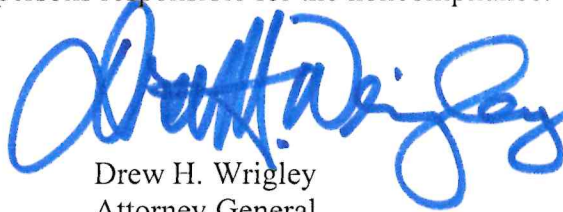
<sup>20</sup> *See* N.D.A.G. 2012-O-02.

was involved in a series of smaller gatherings on the same day about the same item of public business without providing notice in compliance with N.D.C.C. § 44-04-20.

STEPS NEEDED TO REMEMDY VIOLATION

The Commissioners must draft minutes of the meetings with Mr. Panos and provide them to Jim Fuglie, Elizabeth Loos, and anyone else requesting them, free of charge.

While I have every reason to expect the Billings County Commission will remedy this situation, I note that failure to take the corrective measures described in this opinion within seven days of its date 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>21</sup> It also may result in personal liability for the person or persons responsible for the noncompliance.<sup>22</sup>



Drew H. Wrigley  
Attorney General

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cc: Jim Fuglie  
Elizabeth Loos

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<sup>21</sup> N.D.C.C. § 44-04-21.1(2).

<sup>22</sup> *Id.*