



STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

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OPEN RECORDS AND MEETINGS OPINION
2024-O-11

DATE ISSUED: December 20, 2024

ISSUED TO: Emmons County Historical Society

CITIZEN'S REQUEST FOR OPINION

Dr. Clarence Herz requested an opinion from this office under N.D.C.C. § 44-04-21.1 asking whether the Emmons County Historical Society violated N.D.C.C. §§ 44-04-18 and 44-04-21 by failing to create meeting minutes and by not providing copies of meeting minutes and financial statements within a reasonable time.

FACTS PRESENTED

The Emmons County Historical Society (Society) is a nonprofit corporation that operates a museum located in Linton, North Dakota.¹ The Society receives a portion of its funding from Emmons County and accepts donations, grants, and membership fees.² The Society uses the public funds, donations, grants, and fees to operate its museum.³ The Society is composed of a seven-member executive council consisting of a president, vice president, treasurer, secretary, and three board members.⁴

The Society held a regular meeting on July 1, 2022.⁵ According to Dr. Herz, during the meeting, he requested copies of meeting minutes for the last three meetings held in April, May, and June of 2022, and financial statements for the same time period.⁶ Dr. Herz alleges the president refused to provide the records, became agitated, and asked him to leave the meeting.⁷ According to the president, Dr. Herz was asked to leave the meeting after he began to bully her and other members.⁸

¹ Letter from Jacqueline Wald and Kimberly Heitz, 2022 Co-Presidents, Emmons Cnty. Hist. Soc'y, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Aug. 26, 2022).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ E-mail from Dr. Clarence Herz to Off. of Att'y Gen (July 11, 2022, 12:29 PM).

⁶ *Id.*

⁷ *Id.*

⁸ Letter from Jacqueline Wald and Kimberly Heitz, 2022 Co-Presidents, Emmons Cnty. Hist. Soc'y, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Aug. 26, 2022).

In response to inquiries from this office, the Society stated it had not provided the records because Dr. Herz had “only attended one meeting and demanded, and yelled that he would shut [the Society] down.”⁹ The Society generally admits to receiving Dr. Herz’s records request but claims he did not clearly request records for the last three months and has not contacted the Society since requesting the records at the July 2022 meeting.¹⁰

The Society confirmed it held three monthly meetings in the Spring of 2022.¹¹ However, the Society was unable to provide Dr. Herz with official meeting minutes for the April, May, and June meetings.¹² Rather, on May 22, 2023, the president provided her “personal notes” from the three meetings and the financial statements from the same time frame to Dr. Herz.¹³

ISSUES

1. Whether the Emmons County Historical Society violated N.D.C.C. § 44-04-21 by failing to create meeting minutes.
2. Whether the Emmons County Historical Society violated N.D.C.C. § 44-04-18 by failing to respond to a records request within a reasonable time.

ANALYSIS

Issue One

The definition of “public entity” includes organizations or agencies created or recognized by state law to “exercise public authority or perform a governmental function.”¹⁴ An organization can also be a public entity if it is “supported in whole or in part by public funds, or if it expends public funds.”¹⁵ This office has previously determined that the Cass County Historical Society was a public entity because it was supported by public funds and expended those funds.¹⁶ The Cass County Historical Society was also a public entity because it was recognized under N.D.C.C. § 11-11-53 as a county historical society and exercised a governmental function by

⁹ *Id.*

¹⁰ *Id.*; *see also* Letter from Jacqueline Wald and Kimberly Heitz, 2022 Co-Presidents, Emmons Cnty. Hist. Soc’y, to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Sept. 7, 2022).

¹¹ Letter from Jacqueline Wald and Kimberly Heitz, 2022 Co-Presidents, Emmons Cnty. Hist. Soc’y, to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Aug. 26, 2022).

¹² Letter from Kimberly Heitz, 2023 President, and Lorraine Weber, 2023 Sec’y/Treasurer, Emmons Cnty. Hist. Soc’y, to Dr. Clarence Herz (May 22, 2023).

¹³ *Id.*

¹⁴ N.D.C.C. § 44-04-17.1(13)(b).

¹⁵ N.D.C.C. § 44-04-17.1(13)(c).

¹⁶ N.D.A.G. 2011-O-10; N.D.A.G. 2005-O-02.

promoting historical work including historical preservation.¹⁷ Likewise, the Society here is subject to the open meetings and records law because it receives a portion of its funding from Emmons County and spends public funds. Additionally, the Society is recognized as a county historical society under N.D.C.C. § 11-11-53 and exercises a governmental function by operating a museum aimed at promoting historical work.

Except as otherwise specifically provided by law, all meetings of a governing body of a public entity must be open to the public, preceded by sufficient public notice, and minutes must be taken.¹⁸ A meeting is defined as “a formal or informal gathering or a work session, whether in person or through electronic means, of [a] quorum of the members of the governing body of a public entity regarding public business.”¹⁹

Minutes must be kept of all public meetings which must include, at a minimum:

- a. The names of the members attending the meeting;
- b. The date and time the meeting was called to order and adjourned;
- c. A list of topics discussed regarding public business;
- d. A description of each motion made at the meeting and whether the motion was seconded;
- e. The results of every vote taken at the meeting; and
- f. The vote of each member on every recorded roll call vote.²⁰

All nonprocedural votes “must be recorded roll call votes, with the votes of each member being made public at the open meeting.”²¹ A “nonprocedural vote” includes “all votes that pertain to the merits of the matter before the governing body.”²²

The Society admits it held meetings in April, May, and June of 2022, but no “official” minutes were taken for any of the three meetings. Rather, the president took “personal notes” for the meetings and provided them to Dr. Herz. These notes do not qualify as meeting minutes because they do not comply with applicable state law. These notes omit the names of the members attending the meeting and fail to state the date and time the meeting was called to order and adjourned. Additionally, the April 2022 notes fail to list the vote of each member when they

¹⁷ N.D.A.G. 2011-O-10; N.D.A.G. 2005-O-02; *see also* N.D.C.C. § 11-11-53 (a board of county commissioners of any county may appropriate funds and levy a tax to a county historical society for the promotion of historical work).

¹⁸ N.D.C.C. §§ 44-04-19, 44-04-20, 44-04-21.

¹⁹ N.D.C.C. § 44-04-17.2(9)(a)(1).

²⁰ N.D.C.C. § 44-04-21(2).

²¹ N.D.C.C. § 44-04-21(1).

²² *Id.*

voted to replace the president.²³ Accordingly, it is my opinion the Society violated N.D.C.C. § 44-04-21 by failing to create minutes for the three meetings held in April, May, and June of 2022.

Issue Two

A public entity must respond to an open records request within a reasonable time by either providing the requested records or by explaining the legal authority for not granting the request.²⁴ The law does not usually require an immediate response, however, the delay permitted will usually be measured in a few hours or days rather than weeks.²⁵ A delay may be reasonable for a number of reasons, including “the number of records requested, reviewing large volumes of documents to respond to a request, excising closed or confidential information, availability and workload of staff who can respond to the request, or balancing other responsibilities of the public entity that demand immediate attention.”²⁶ A public entity may seek clarification from the requester if a request is unclear.²⁷

At the July 2022 meeting, Dr. Herz requested financial statements and meeting minutes for April, May, and June 2022. On May 22, 2023, the Society provided the financial statements and, in lieu of minutes, the president’s personal notes to Dr. Herz. In its response to this office regarding Dr. Herz’s request for an opinion, the Society reasons the records were not provided because it was not clear which records Dr. Herz was specifically requesting, and the Society had not heard from him since the July 2022 meeting. However, even when a requester’s behavior is discourteous, “it is the responsibility of the public entity to respond to the request within a reasonable time and the requester is not required to contact the entity again to find out when the records will be provided or made available.”²⁸ The Society also did not provide any records indicating it sought clarification from Dr. Herz about his records request. Thus, the Society has not offered a justification for the ten-month delay in providing only six records. An inexplicable

²³ Even though the meeting notes here indicate that the result was an “unanimous vote” to replace the president, this office has previously determined that a roll call vote was required when a public entity fired its executive director and minutes reflecting a unanimous voice vote as the result was insufficient and violated N.D.C.C. § 44-04-21(1). *See* N.D.A.G. 2005-O-02.

²⁴ N.D.C.C. § 44-04-18.

²⁵ N.D.A.G. 2011-O-07, *citing* N.D.A.G. 2009-O-07; N.D.A.G. 2008-O-08; N.D.A.G. 2004-O-07; N.D.A.G. 2002-O-06; *see also* N.D.A.G. 2007-O-10.

²⁶ N.D.A.G. 2021-O-09, *citing* N.D.A.G. 2014-O-06; N.D.A.G. 2013-O-15; N.D.A.G. 2012-O-07; N.D.A.G. 2010-O-04.

²⁷ N.D.C.C. § 44-04-18(2).

²⁸ N.D.A.G. 2016-O-08, *citing* N.D.A.G. 2014-O-07; N.D.A.G. 2005-O-05; N.D.A.G. 2004-O-20; *see also* N.D.A.G. 2011-O-07; N.D.A.G. 2006-O-15; N.D.A.G. 2003-O-09; N.D.A.G. 2001-O-12.

ten-month delay is an egregious violation of the open records law.²⁹ Accordingly, it is my opinion the Society did not respond to Dr. Herz's records request within a reasonable time.

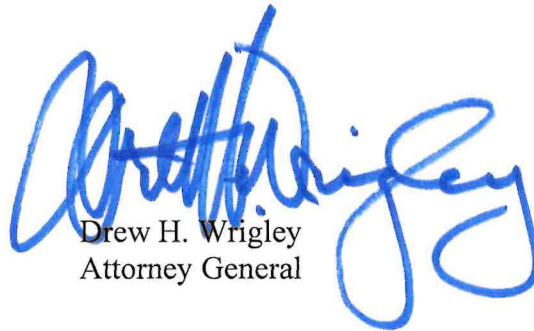
CONCLUSIONS

1. The Society violated N.D.C.C. § 44-04-21 by failing to create minutes.
2. The Society violated N.D.C.C. § 44-04-18 by failing to respond to a records request within a reasonable time.

STEPS NEEDED TO REMEDY VIOLATION

The Society must create minutes for the April, May, and June 2022 meetings, in compliance with N.D.C.C. § 44-04-21(2) and provide the minutes to Dr. Herz free of charge.

While I have every reason to expect the Society will comply with the directives in this opinion, failure by the Society to take the corrective measures described in this opinion within seven days of the date this opinion 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. § 44-04-21.2.³⁰ Such inaction may also result in personal liability for the person or persons responsible for the noncompliance.³¹



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cc: Dr. Clarence Herz

²⁹ See N.D.A.G. 2021-O-11 (finding a delay of over six months to provide meeting minutes and agendas was a blatant violation of the open records laws).

³⁰ N.D.C.C. § 44-04-21.1(2).

³¹ *Id.*