



STATE OF NORTH DAKOTA  
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**OPEN RECORDS AND MEETINGS OPINION**  
**2025-O-02**

DATE ISSUED: January 10, 2025

ISSUED TO: Metro Flood Diversion Authority Board

**CITIZEN'S REQUEST FOR OPINION**

Ingrid Harbo, with Forum Communications Company, requested an opinion from this office under N.D.C.C. § 44-04-21.1 asking whether the Technical Dispute Review Board is subject to open meeting laws.

**FACTS PRESENTED**

On June 16, 2016, the cities of Fargo, North Dakota, and Moorhead, Minnesota, and the counties of Cass, North Dakota, and Clay, Minnesota, and the Cass County Joint Water created the Metro Flood Diversion Authority<sup>1</sup> through a Joint Powers Agreement.<sup>2</sup> The Metro Flood Diversion Authority (MFDA)<sup>3</sup> is managed by a Board of Authority (MFDA Board).<sup>4</sup> On August 9, 2021,<sup>5</sup> the MFDA entered into an agreement (Project Agreement) with the developer, the Red River

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<sup>1</sup> The Metro Flood Diversion Authority is “responsible for ensuring the safe and timely construction of the Stormwater Channel Diversion Channel and Associated Infrastructure[(SWDCAI)], land acquisition, mitigation efforts, environmental permit compliance and administrative coordination” of the Fargo-Moorhead Metropolitan Area Flood Risk Management Project. Metro Flood Diversion Authority, <https://fmdiversion.gov/about/> (last visited Jan. 10, 2025).

<sup>2</sup> Letter from Christopher M. Caparelli, Att’y, Red River Valley All., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (July 31, 2024); *See* N.D.A.G. 2015-O-07 and N.D.A.G. 2013-O-03.

<sup>3</sup> Funding for the Comprehensive Project comes from federal appropriations (\$750 million), state grants (\$850 million from North Dakota; \$86 million from Minnesota), and \$1.514 billion from “local revenues.” MFDA, <https://fmdiversion.gov/about/how-it-is-funded/> (last visited Jan. 10, 2025). City of Fargo voters approved City 3-21 Sales Tax of 0.5% and City 3-22 Sales Tax of 0.5% and dedicated 0.25% of the City 3-20 Sales Tax to the FM Area Diversion. Additionally, Cass County collects 0.5% sales and use tax (County 2010-2 Sales Tax) that will contribute at least 94% of what is collected. The project also relies on financing, such as loans that will be repaid using sales tax revenues that come from the U.S. Environmental Protection Agency (\$569 million Water Infrastructure Finance and Innovation Act loan), the North Dakota Public Finance Agency (\$55 million in State Revolving Fund loans) and the U.S. Department of Transportation Private Activity Bonds (\$280 million). MFDA, <https://fmdiversion.gov/about/how-it-is-funded/> (last visited Jan. 10, 2025).

<sup>4</sup> N.D.A.G. 2015-O-07 and N.D.A.G. 2013-O-03.

<sup>5</sup> Project Agreement for the Fargo-Moorhead Metro. Area Flood Risk Mgmt. Project – Diversion Channel & Associated Infrastructure, Dated Aug. 19, 2021, between Metro Flood Diversion Auth., as Auth. & Red River Valley All., LLC, as Dev.

Valley Alliance, LLC (RRVA),<sup>6</sup> to “design, construct, partially finance, maintain, and operate . . . one of the major components of the Fargo-Moorhead Metropolitan Area Flood Risk Management Project (the Comprehensive Project).”<sup>7</sup>

The Project Agreement was reviewed, and approved through a formal motion by the MFDA Board, in an open meeting of the MFDA Board on August 9, 2021.<sup>8</sup> The Project Agreement allowed for the establishment of a three-member technical dispute review board, in the event the MFDA and the RRVA encounter a technical dispute during construction and are unable to reach an agreement after a good faith consultation.<sup>9</sup> According to the Project Agreement the purpose of a technical dispute review board is “to provide special expertise and assist in and facilitate the timely and equitable resolution of Disputes between the [MFDA] and the [RRVA].”<sup>10</sup>

The Project Agreement provided the three following pertinent provisions for the purposes of this opinion. First, the Project Agreement requires the following procedures: (1) “The [RRVA] and the [MFDA] will each be afforded a reasonable opportunity to be heard by the Relevant Dispute Review Board and to offer evidence” at the hearing;<sup>11</sup> (2) “[t]he Relevant Dispute Review Board’s recommendation for resolution . . . will be given in writing to both the [MFDA] and the [RRVA] . . . ;”<sup>12</sup> (3) “[t]he recommendations of the Relevant Dispute Review Board will be final and binding only to the extent that Parties accept (or are deemed to have accepted) such recommendations;”<sup>13</sup> and “[e]ach party shall bear its own attorneys’ fees and costs in any

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<sup>6</sup> The RRVA is a “consortium of three private sector companies.” Letter from Christopher M. Caparelli, Att’y, Red River Valley All., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (July 31, 2024).

<sup>7</sup> Letter from John T. Shockley, Gen. Couns., Metro Flood Diversion Auth., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Aug. 20, 2024). The SWDCAI is one of four major components of the Comprehensive Project and includes “a 30-mile stormwater diversion channel, a diversion outlet, and aqueducts on the Maple and Sheyenne Rivers.” (<https://fmdiversion.gov/about/project-components/> (last visited Jan. 10, 2025)). The Comprehensive Project “consists of (i) the Southern Embankment and Associated Infrastructure, (ii) the in-town City of Fargo/City of Moorhead flood walls/levees/lift stations; (iii) the upstream storage area and associated environmental mitigation; and (iv) the SWDCAI.” Letter from John T. Shockley, Gen. Couns., Metro Flood Diversion Auth., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Aug. 20, 2024). The SWDCAI, in construction costs and effort, is “about one-third of the Comprehensive Project.” *Id.* The requester did not ask this office to review the RRVA as a public entity; however, to the extent the RRVA contracts with the MFDA, and receives public funds, they may be subject to open records and open meetings laws.

<sup>8</sup> Letter from John T. Shockley, Gen. Couns., Metro Flood Diversion Auth., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Aug. 20, 2024); Resolution Authorizing Execution Of The Project Agreement For The Fargo-Moorhead Metropolitan Area Flood Risk Management Project-Diversion Channel And Associated Infrastructure Of The D&C Contractor Direct Agreement, Aug. 9, 2021.

<sup>9</sup> Project Agreement, § 54.4.

<sup>10</sup> Project Agreement, Exhibit 21, Part 2, § 1.1.

<sup>11</sup> Project Agreement § 54.4(e)(iii).

<sup>12</sup> Project Agreement § 54.4(e)(iv).

<sup>13</sup> Project Agreement, § 54.4(e)(vi).

Dispute arising out of or pertaining to this Agreement and neither party may seek or accept an award of attorneys' fees or costs, except as otherwise expressly provided in this agreement."<sup>14</sup>

Second, the Project Agreement provides for the selection process for the three dispute review board members.<sup>15</sup> The MFDA selects one member; the RRVA selects the second member, and the third member is selected by the first two members.<sup>16</sup> The third member serves as chair.<sup>17</sup> The dispute review board is intended to "remain active and in full force and effect" until all disputes submitted to the Dispute Review Board have been decided.<sup>18</sup> The members selected by the MFDA and the RRVA "must be . . . nationally recognized expert[s] in matters pertinent to the technical nature of the Project."<sup>19</sup> The chair "must be a nationally recognized expert in matters pertinent to the resolution of commercial disputes outside of litigation and must have previous experience serving on one (1) or more dispute review boards, preferably as chair."<sup>20</sup> The MFDA, the RRVA, and all three members of any dispute review board are required to execute a Dispute Review Board Agreement, applicable to that dispute review board.<sup>21</sup>

Third, the Dispute Review Board Procedures portion of the Project Agreement also specifically set out how the dispute review board members and expenses are paid.<sup>22</sup> The MFDA and the RRVA "are each responsible for paying the fees and expenses of any Dispute Review Board member it selected without recourse to the other Party."<sup>23</sup> The RRVA pays the fees and expenses of the third member then invoices the MFDA for 50% of the payment.<sup>24</sup> The MFDA is required to pay for<sup>25</sup> and "arrange or provide conference facilities in Fargo, North Dakota, and provide secretarial and copying services for any Dispute Review Board."<sup>26</sup> "[S]pecial services, such as legal consultation, accounting or data research" must be agreed upon by the MFDA and the RRVA, "and the costs will be shared by them as mutually agreed."<sup>27</sup>

On December 11, 2023,<sup>28</sup> the MFDA,<sup>29</sup> the RRVA, and the three Technical Dispute Review Board (TDRB) members, Edward P. Penscock, Jr., Charles Boland, and, chair, Mark E. Alpert,

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<sup>14</sup> Project Agreement, § 54.10.

<sup>15</sup> Project Agreement, Exhibit 21, Part 2.

<sup>16</sup> Project Agreement, Exhibit 21, Part 2, § 1.2(a).

<sup>17</sup> Project Agreement, Exhibit 21, Part 2, § 1.2(b).

<sup>18</sup> Project Agreement, Exhibit 21, Part 2, § 1.2(c).

<sup>19</sup> Project Agreement, Exhibit 21, Part 2, § 1.4(a).

<sup>20</sup> Project Agreement, Exhibit 21, Part 2, § 1.4(c).

<sup>21</sup> Project Agreement, Exhibit 21, Part 2, § 1.9.

<sup>22</sup> Project Agreement, Exhibit 21, Part 2, § 3.

<sup>23</sup> Project Agreement, Exhibit 21, Part 2, § 3.1.

<sup>24</sup> *Id.*

<sup>25</sup> Project Agreement, Exhibit 21, Part 2, § 3.2.

<sup>26</sup> Project Agreement, Exhibit 21, Part 2, § 2.2(b)(ii).

<sup>27</sup> Project Agreement, Exhibit 21, Part 2, § 3.2.

<sup>28</sup> Letter from Paul V. Franke, Att'y, Tech. Disp. Rev. Bd. members, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (July 31, 2024); Dispute Review Board Agreement (Technical) (Dec. 11, 2023).



signed a Dispute Review Board Agreement (DRB Agreement).<sup>30</sup> The executed DRB Agreement created the following requirements for the TDRB: “act independently in the consideration of the facts and conditions regarding any dispute,”<sup>31</sup> not “seek advice from or consult with any Board Member, on an ex parte<sup>32</sup> basis,”<sup>33</sup> only “seek advice from or consult with the entire [TDRB] during any Board meeting, after first giving notice to all interested parties,”<sup>34</sup> “keep matters related to the this DRB Agreement confidential,”<sup>35</sup> “the right to establish its own procedures and time limits” with regard to its hearings and disputes.<sup>36</sup> A TDRB board member that has contact with the MFDA or the RRVA outside of a board meeting or hearing is subject to removal “for cause.”<sup>37</sup> Lastly, the DRB Agreement states “[t]his DRB Agreement will be governed by and construed in accordance with the laws of North Dakota.”<sup>38</sup>

On Friday, May 31, 2024, the TDRB held its first meeting for approximately one hour.<sup>39</sup> According to the TDRB, the “meeting was to discuss procedural issues related to the parties’ dispute.”<sup>40</sup> No notice was posted.<sup>41</sup> No minutes were taken.<sup>42</sup> No recordings were made.<sup>43</sup> As a result, it should come as no surprise that the TDRB was “not aware of any member of the public requesting to attend the meeting, or any member of the public being denied access to the meeting.”<sup>44</sup> The meeting was attended by attorneys for the MFDA, the CEO, CFO, and Commercial Manager of RRVA; attorneys for the RRVA; Project Manager for ASN (“ASN [Contractors] is the Design & Construction Contractor to [RRVA]”); attorneys for ASN, from and the chair of the Financial Dispute Review Board (FDRB).<sup>45</sup>

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<sup>29</sup> The Dispute Review Board Agreement (Technical) (Dec. 11, 2023) specifically calls the MFDA “a permanent North Dakota political subdivision and joint powers entity” which was “formed through the Joint Powers Agreement, dated June 1, 2016, by and among the City of Moorhead, the City of Fargo, Clay County, Cass County and the Cass County Joint Water Resources District.”

<sup>30</sup> Dispute Review Board Agreement (Technical) (Dec. 11, 2023). The Dispute Review Board Agreement was signed by Dr. Timothy J. Mahoney, Chair of the MFDA and Mayor of the City of Fargo; Joel Paulson, the then Executive Director of the MFDA; Javier Velasco Zabalza, Developer Representative for RRVA; and the three selected TDRB members.

<sup>31</sup> Dispute Review Board Agreement (Technical) (Dec. 11, 2023) § 2.3.

<sup>32</sup> Ex parte communication, BLACK'S LAW DICTIONARY (12th ed. 2024).

<sup>33</sup> Dispute Review Board Agreement (Technical) (Dec. 11, 2023), § 2.4.

<sup>34</sup> *Id.*

<sup>35</sup> Dispute Review Board Agreement (Technical) (Dec. 11, 2023), § 2.10.

<sup>36</sup> Dispute Review Board Agreement (Technical) (Dec. 11, 2023), § 3.2.

<sup>37</sup> Dispute Review Board Agreement (Technical) (Dec. 11, 2023), § 2.4.

<sup>38</sup> Dispute Review Board Agreement (Technical) (Dec. 11, 2023) § 6.6.

<sup>39</sup> Letter from Paul V. Franke, Att’y, Tech. Disp. Rev. Bd. members, to Annique M. Lockard, Assistant Atty’ Gen. Off. of Att’y Gen. (July 31, 2024).

<sup>40</sup> Letter from Paul V. Franke, Att’y, Tech. Disp. Rev. Bd. members, to Annique M. Lockard, Assistant Att’y Gen. Off. of Att’y Gen. (July 31, 2024).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

On June 7, 2024, the TDRB held its second meeting.<sup>46</sup> The meeting lasted approximately an hour and was held “to discuss scheduling issues related to the parties’ dispute in advance of a planned hearing. . . .”<sup>47</sup> No notice was created or posted for this meeting.<sup>48</sup> No minutes were taken.<sup>49</sup> No recordings were created.<sup>50</sup> The TRDB did prepare an agenda for the meeting which stated: “Fargo Moorhead Metropolitan Area Flood Risk Management Project [/] Meeting of the Technical Dispute Resolution Board [/] Continued Pre-Hearing on Dispute Regarding Epoxy-Coated Reinforcing Steel.”<sup>51</sup> The agenda items were:

- I. Introductions
- II. Interim Operating Procedures – Comments from the Parties
- III. The Dispute between the Parties – Additional Documentation
- IV. Proposed Hearing date – August timeframe I
- V. Open Records Act legal option by the parties - status
- VI. Inquiry from the Press to the TDRB Members
- VII. Site Visit by Technical and Financial DRB Members
- VIII. Other matters<sup>52</sup>

The TDRB was “not aware of any member of the public requesting to attend the meeting, or any member of the public being denied access to the meeting.”<sup>53</sup> However, they further stated that, “[i]n early June, a reporter, Ingrid Harbo, contacted members of the TDRB ” to inquire about the project and was referred to the MFDA and the RRVA.<sup>54</sup> The same individuals attended the June 7 meeting as the May meeting, with the addition of, legal staff for the MFDA, the deputy director, chief engineer, and project manager for the MFDA and the exception of the CEO of the RRVA and the chair of the FDRB.<sup>55</sup>

## ISSUES

1. Whether the Technical Dispute Review Board is subject to open meetings law.
2. Whether the Technical Dispute Review Board violated the open meetings law by failing to notice two special meetings.

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Letter from Paul V. Franke, Att’y, Tech. Disp. Rev. Bd. members, to Annique M. Lockard, Assistant Atty’ Gen. Off. of Att’y Gen. (July 31, 2024); Agenda, TDRB (June 7, 2024).

<sup>52</sup> *Id.*

<sup>53</sup> Letter from Paul V. Franke, Att’y, Tech. Disp. Rev. Bd. members, to Annique M. Lockard (July 31, 2024).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*



## ANALYSIS

### Issue One

“Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public.”<sup>56</sup> A meeting is “a formal or informal gathering or a work session, whether in person or through any electronic means” of “[a] quorum of the members of the governing body of a public entity regarding public business.”<sup>57</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>58</sup> Governing body means “the multimember body responsible for making a collective decision on behalf of a public entity.”<sup>59</sup> The definition of a “[g]overning body” includes “any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.”<sup>60</sup> “Under this definition, ‘any group of persons’ delegated authority to perform any function on behalf of a governing body, is subject to the state's open meetings law.”<sup>61</sup> “Examples of delegated functions include fact gathering, reporting, recommending, or taking action.”<sup>62</sup>

Public notice is required for “all meetings of a public entity.”<sup>63</sup> Meeting notices “must contain the date, time, and location of the meeting and, if practicable, the topics to be considered.”<sup>64</sup> Notice of meetings held “by electronic means” must include “the electronic address and any other information necessary to allow the public to join or view the electronic meeting.”<sup>65</sup> Meeting notices “must be posted at the principal office of the governing body holding the meeting, if such exists, and at the location of the meeting on the day of the meeting.”<sup>66</sup> Notice must also be filed with the secretary of state or appropriate auditor, or its designee, if the notice was not previously filed.<sup>67</sup> “If the public entity has a website, notice also must be posted on the public entity's website.”<sup>68</sup> The public entity's official newspaper must be notified of special or emergency meetings.<sup>69</sup>

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<sup>56</sup> N.D.C.C. §44-04-19 (emphasis added); *see also* N.D.A.G. 2022-O-07.

<sup>57</sup> N.D.C.C. §44-04-17.1(9)(a); *see also* N.D.A.G. 2022-O-07.

<sup>58</sup> N.D.C.C. §44-04-17.1(15).

<sup>59</sup> N.D.C.C. §44-04-17.1(6).

<sup>60</sup> *Id.*

<sup>61</sup> N.D.A.G. 2022-O-07, *citing* N.D.A.G. 2021-O-07; N.D.A.G. 2016-O-05; N.D.A.G. 2014-O-05; N.D.A.G. 2013-O-12; N.D.A.G. 2009-O-12; N.D.A.G. 2009-O-05; N.D.A.G. 2007-O-13; N.D.A.G. 2006-O-03.

<sup>62</sup> *Id.*

<sup>63</sup> N.D.C.C. § 44-04-20(1).

<sup>64</sup> N.D.C.C. § 44-04-20(2).

<sup>65</sup> *Id.*

<sup>66</sup> N.D.C.C. § 44-04-20(4).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> N.D.C.C. § 44-04-20(6). “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.”

For over 40 years this office has consistently held that committees created by governing bodies are subject to the same open meetings laws as the governing body itself.<sup>70</sup> “Meetings of groups connected with public agencies or institutions or groups assuming quasi-public functions should, as a matter of policy, be open to the public except in the most unusual circumstances.”<sup>71</sup> If the reason for the establishment of a committee, by a public entity, is “to serve [a] public purpose,” open meetings laws must be followed.<sup>72</sup>

TDRB raises multiple arguments to support its position that it is not subject to the open meetings law. It argues that “[i]t is not a governmental or public entity[;] [i]t is not an agent of a governmental or public entity, nor did a governmental or public entity delegate it any authority.”<sup>73</sup> TDRB stated it “does not receive any public funds or manage any direct appropriation.”<sup>74</sup> It is merely “a neutral dispute resolution board created by contract for an alternative dispute resolution process . . . which . . . is not acting on behalf of a public entity.”<sup>75</sup> TDRB believes it “was not created by . . . any action of a political subdivision, nor was it delegated [any] authority by a governing body or a public entity, to exercise authority or perform a governmental function on behalf of a public entity.”<sup>76</sup> I disagree.

In accord with what this office has long held, the MFDA is a public entity subject to the open records laws and the MFDA Board is a “governing body” subject to the open meetings law.<sup>77</sup>

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<sup>70</sup> N.D.A.G. 81-O-10, *citing* N.D.A.G. 79-O-116. *See* N.D.A.G. 2006-O-03, (“ . . . committees created by a public entity's main governing body are also governing bodies subject to the open meetings laws.” *citing* N.D.A.G. 2005-O-03; N.D.A.G. 2003-O-13 (meeting of the employee relations committee of a city council); N.D.A.G. 2003-O-15 (meeting of a committee of an airport authority); N.D.A.G. 2005-O-02 (meeting of a committee of a county historical society. *See also* N.D.A.G. 98-O-13 (announcement at commission meeting by commission chairman that certain of the commissioners would meet with NDIRF constituted delegation to a committee by the commission); N.D.A.G. 96-F-09 (if a public body delegates authority to act on its behalf to a group of its employees, the group assumes the color of a public body because of the delegation of such authority)). *See also* N.D.A.G. 2021-O-07 (“any group of persons’ delegated authority to perform any function on behalf of a governing body, including fact gathering, reporting or recommending action, as well as taking action, is subject to the state's open meetings law.” *citing* N.D.A.G. 2016-O-05; N.D.A.G. 2014-O-05; N.D.A.G. 2013-O-12; N.D.A.G. 2009-O-12; N.D.A.G. 2009-O-05; N.D.A.G. 2007-O-13; N.D.A.G. 2006-O-03).

<sup>71</sup> N.D.A.G. 81-O-10, *citing* N.D.A.G. 67-O-244.

<sup>72</sup> *See* N.D.A.G. 81-O-10.

<sup>73</sup> Letter from Paul V. Franke, Att’y, Tech. Disp. Rev. Bd. members, to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (July 31, 2024).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> N.D.A.G. 2013-O-13; N.D.A.G. 2015-O-07; Letter from John T. Shockley, Gen. Couns., Metro Flood Diversion Auth., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Aug. 20, 2024); Letter from Christopher M. Caparelli, Att’y, Red River Valley All., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (July 31, 2024). I note that the MFDA the RRVA, and the members of this TDRB agreed to be governed by North Dakota law, which



The MFDA has authority to make construction decisions.<sup>78</sup> The option to use dispute review boards was agreed to by the MFDA when it entered into the Project Agreement.<sup>79</sup> The MFDA Board reviewed and approved the Project Agreement in an open meeting.<sup>80</sup> When the underlying dispute arose in this matter, it delegated its authority to the TDRB in the Dispute Review Board Agreement.<sup>81</sup> The TDRB may recommend requested or directed changes to the technical plan, which must go back to the MFDA Board for final approval, which according to the MFDA's legal counsel, would also occur in an open meeting.<sup>82</sup> The TDRB has the option to receive staff services from the MFDA.<sup>83</sup> Additionally, the MFDA pays for one and a half of the TDRB members and additional expenses as agreed upon with the RRVA.<sup>84</sup> As the Project Agreement makes clear, the TDRB inarguably receives public funds from the MFDA. The TDRB would not exist without the delegated authority of the MFDA Board.

I am unpersuaded that the TDRB could not function as a committee under the open meetings law because of the sensitive nature of the proceedings. The TDRB, like any other committee of a governing body, has all the provisions available within the law to protect negotiations, attorney consultations<sup>85</sup> commercial, technical, and proprietary information through the use of executive sessions.<sup>86</sup>

The MFDA argues that applying the open meetings law to the alternative dispute resolution process would impact the ability of political subdivisions to participate in mediations, arbitrations, and other forms of alternative dispute resolution."<sup>87</sup> This office has recognized that advisory arbitration panels formed by a governing body (a school board) and a private entity (a teachers' organization) to do something within the governing body's duties (assist in contract negotiations) was subject to open meeting laws.<sup>88</sup> The work the advisory arbitration panel was doing in that opinion – conducting negotiation sessions – was, by statute and case law,<sup>89</sup> within the duties of the school board. While the arbitration panel was not a negotiating committee, the

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includes the open meeting provisions of N.D.C.C. ch. 44-04. Dispute Review Board Agreement (Technical) (Dec. 11, 2023) § 6.6.

<sup>78</sup> Letter from John T. Shockley, Gen. Couns., Metro Flood Diversion Auth., to Annique M. Lockard, Assistant Att'y Gen., Office of Att'y Gen. (Aug. 20, 2024).

<sup>79</sup> Project Agreement, Exhibit 21.

<sup>80</sup> Resolution Authorizing Execution Of The Project Agreement For The Fargo-Moorhead Metropolitan Area Flood Risk Management Project-Diversion Channel And Associated Infrastructure Of The D&C Contractor Direct Agreement, Aug. 9, 2021.

<sup>81</sup> Dispute Review Board Agreement (Technical) (Dec. 11, 2023).

<sup>82</sup> Letter from John T. Shockley, Gen. Couns., Metro Flood Diversion Auth., to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Aug. 20, 2024).

<sup>83</sup> Project Agreement, Exhibit 21, Part 2 § 3.2.

<sup>84</sup> Project Agreement, Exhibit 21, Part 2 § 3.1.

<sup>85</sup> N.D.C.C. § 44-04-19.2.

<sup>86</sup> N.D.C.C. §§ 44-04-18.4, 44-04-19.2.

<sup>87</sup> Letter from John T. Shockley, Gen. Couns., Metro Flood Diversion Auth., to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Aug. 1, 2024).

<sup>88</sup> N.D.A.G. 81-O-10.

<sup>89</sup> *Dickinson Educ. Ass'n v. Dickinson Pub. Sch. Dist. No. 1*, 252 N.W.2d 205, 212 (N.D. 1977).



facts in the opinion “suggest[ed] that an entity vested in part by a school board is a public body.”<sup>90</sup> The arbitration panel was found to be a public body under N.D.C.C. §§ 44-04-19 and 44-04-20, and subject to open meetings law. Likewise, here, the TDRB is created by the MFDA Board to review highly technical construction disputes and make recommendations back to the Board.<sup>91</sup> This is a function that the MFDA Board could do themselves. Delegating such functions to another entity does not nullify or modify the requirements of North Dakota’s open meeting laws. Accordingly, it is my opinion that the TDRB is subject to the open meetings law because it is a committee of the MFDA Board, which is a governing body of a public entity.

#### Issue Two

The meetings at issue in this opinion were held by the TDRB on May 31 and June 7, 2024. The record does not establish that any of the items discussed at the two meetings are related to arbitration or the technical aspects of any on-going disputes.<sup>92</sup> No notice of the meetings were provided because the TDRB incorrectly claims that they are not subject to the open meetings law. This is not surprising because the provisions of the various agreements that control the TDRB in effect prevent them from seeking legal counsel from someone familiar with North Dakota law. As a committee of the MFDA Board, the MFDA Board is responsible to ensure that the TDRB provides notice of its meetings and knows how to navigate their work within North Dakota’s open records and meetings law. It is my opinion that the MFDA Board violated the open meetings law when it failed to notice the Technical Dispute Review Board’s special meetings.

#### CONCLUSION

1. The Technical Dispute Review Board is a committee of the Metro Flood Diversion Authority Board.
2. The Metro Flood Diversion Authority Board violated N.D.C.C. §44-04-20 when it failed to notice the Technical Dispute Review Board’s special meetings.

#### STEPS NEEDED TO REMEDY VIOLATION

The TDRB must create notices of its past meetings, post the past meeting notices on the MFDA website, and provide copies of, re-created, if necessary, meeting minutes to Ingrid Harbo, with Forum Communications Company, and anyone else requesting them, free of charge.

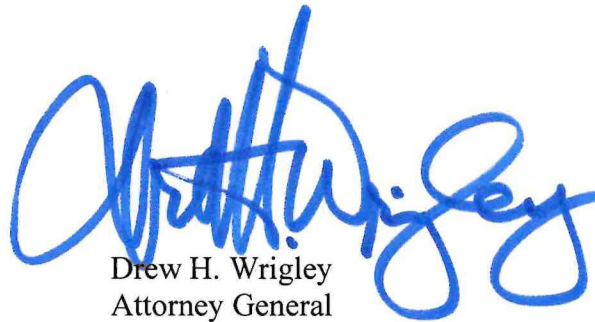
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<sup>90</sup> N.D.A.G. 81-O-10.

<sup>91</sup> If the application of the open meetings law to alternative dispute resolutions is unworkable, then that is a policy decision best left to the legislative body.

<sup>92</sup> Agenda, TDRB (June 7, 2024) (procedural issues related to the parties’ dispute and continued pre-hearing, and a site visit).

While I have every reason to expect the MFDA Board and the TDRB will remedy this situation, 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.<sup>93</sup> Failure to take these corrective measures may also result in personal liability for the person or persons responsible for the noncompliance.<sup>94</sup>



Drew H. Wrigley  
Attorney General

AML/mjh

cc: Ingrid Harbo

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<sup>93</sup> N.D.C.C. § 44-04-21.1(2).

<sup>94</sup> *Id.*