

**OPEN RECORDS AND MEETINGS OPINION
2007-O-02**

DATE ISSUED: February 14, 2007

ISSUED TO: Nome City Council

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Randy Peterson asking whether the Nome City Council ("Council") violated N.D.C.C. § 44-04-20 by failing to post a notice of its October 17, 2006, emergency meeting at city hall on the day of the meeting; failing to publish notice of the meeting in the city's official newspaper; and failing to provide Mr. Peterson with notice of that meeting after he had requested to receive notices of all the Council's meetings. Mr. Peterson also alleges the Council violated N.D.C.C. § 44-04-20 by continuing to discuss public business after the Council adjourned its regular November 1, 2006, meeting.

FACTS PRESENTED

On October 17, 2006, the mayor of Nome received a document dated October 10, 2006, demanding the Council take action within 10 days of the date of the document. Because the document requested the Council to take action before the next regularly scheduled meeting, the mayor contacted the Council members between 4 and 5 p.m. that day and determined they were all available for an emergency meeting that night.

In a March 6, 2006, letter to the Council, Mr. Peterson had asked to receive notices of all regular, special, and emergency Council meetings. Before 5 p.m. the mayor called directory assistance and attempted to obtain Mr. Peterson's telephone number so that he could notify him of the emergency meeting. Directory assistance would not disclose the number because it was unlisted. Also, at approximately 5 p.m. the mayor called the city newspaper to inform the newspaper of the emergency meeting, but no one answered the telephone. The mayor explained that he attempted to give notice to Mr. Peterson and to the newspaper at the same time and in the same manner in which he gave notice to the Council members.

An agenda for the emergency meeting was prepared; the agenda was posted at city hall approximately one hour prior to the meeting; the meeting was held; and minutes were prepared.

With respect to the Council's meeting of November 1, an audiotape Mr. Peterson made after the November 1 Council meeting adjourned contains 7.5 minutes of conversations of the Council members. The statements include a discussion of the citizen complaints about lack of enforcement of city ordinances relating to property cleanup, which was a major topic of the meeting, and other public business. According to the mayor, a quorum of the members of the council was present.

ISSUES

1. Whether the Council violated N.D.C.C. § 44-04-20 by failing to post a notice of its October 17, 2006, emergency meeting at the location of the meeting on the day of the meeting, failing to publish the notice in the city's official newspaper, and failing to notify Mr. Peterson after he made a request to receive notice of all Council meetings.
2. Whether the Council violated N.D.C.C. § 44-04-20 by continuing to discuss public business after the Council's November 1, 2006, meeting was adjourned.

ANALYSIS

Issue One

Unless otherwise provided by law, written public notice must be given in advance of all meetings of a public entity.¹ The notice for a regular, special, or emergency meeting must include the date, time, and location of the meeting, and all topics the governing body expects to consider.² The notice must be posted at the principal office of the governing body holding the meeting and at the location of the meeting on the day of the meeting.³ Topics that may be considered at an emergency or special meeting are limited to those included in the notice.⁴ For emergency or special meetings, the presiding officer of the governing body must assure that notice is given to the public entity's official newspaper, as well as any representatives of the news media who have requested notice, at the same time the notice is given to members of the governing body.⁵

In addition to the public notice that must be made in connection with each meeting of a public entity, a governing body must also give notice of its meetings to anyone

¹ N.D.C.C. § 44-04-20(1); N.D.A.G. 2004-O-20.

² N.D.C.C. § 44-04-20(2).

³ N.D.C.C. § 44-04-20(4).

⁴ N.D.C.C. § 44-04-20(6).

⁵ N.D.C.C. § 44-04-20(6). According to the mayor, no other media requested notice of Council meetings.

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requesting this information.⁶ The request for notice is effective for one year unless a different time period is specified.⁷ In this case, Mr. Peterson specifically requested that he be provided "through the United States Mail [notice] of the upcoming regular, special or emergency City Council meetings."⁸

Mr. Peterson alleged that the Council failed to post a notice of the October 17 meeting at city hall on the day of the meeting. The mayor advised my office that notice of the meeting was posted on the front door of city hall approximately one hour prior to the meeting. In an open records opinion I am required to base my opinion on the facts stated by the public entity.⁹ Accordingly, it is my opinion that the Council did not violate N.D.C.C. § 44-04-20(4) because notice of the October 17 meeting was properly posted at the location of the meeting.

Mr. Peterson also asserts the Council violated the law because the notice was not published in the newspaper. There is no requirement to publish notices of meetings in the newspaper.¹⁰ Therefore, the Council did not violate N.D.C.C. § 44-04-20 by not publishing notice in the newspaper.¹¹

As stated in the Facts Presented, the mayor attempted to give Mr. Peterson notice of the emergency meeting in the same manner and at the same time the Council members were notified. Because Mr. Peterson had an unlisted telephone number, it was not reasonably possible for the mayor to provide notice in advance of the meeting. In prior opinions, I have concluded that if it is not reasonably possible to provide notice in advance of an emergency meeting, providing notice immediately following the meeting

⁶ N.D.C.C. § 44-04-20(5); N.D.A.G. 2004-O-09.

⁷ Id.

⁸ Letter from Randy Peterson to Ms. Margaret Ourenhagen, city auditor (March 6, 2006). The Council's obligation to provide notice was in effect on October 17, 2006, because unless otherwise agreed, a request to receive notice is effective for one year. N.D.C.C. § 44-04-20(5).

⁹ N.D.C.C. § 44-04-21.1(1); N.D.A.G. 2006-O-11; N.D.A.G. 2004-O-18.

¹⁰ N.D.A.G. 2003-O-12.

¹¹ The law requires public entities to notify the entity's official newspaper of special or emergency meetings. N.D.C.C. § 44-04-20(6). Notifying the official newspaper in cases where meetings are called on short notice is important because it compensates for the possibility that the public may not be aware of the emergency or special meeting. N.D.A.G. 2005-O-20. If it was not possible to give notice because no one answered the telephone, the notice should be given afterwards so that, at the very least, the newspaper would be aware that a meeting took place and could follow-up if it so chose. N.D.A.G. 2005-O-20. Because Mr. Peterson did not allege this as a potential violation, this opinion does not address it as such.

constitutes substantial compliance with the notice requirements of the open meetings law.¹²

Providing notice after the meeting would not have informed Mr. Peterson in time for him to attend the special meeting, but it would have advised him of the meeting and topics discussed so that he could ask for a copy of the minutes and followed-up if he desired. Accordingly, it is my opinion that the Council violated N.D.C.C. § 44-04-20 by failing to provide notice of the special meeting to Mr. Peterson.

Issue Two

For purposes of the open meetings law, a "meeting" means a formal or informal gathering of a quorum of members of the governing body regarding public business.¹³ "Public business" under the open meetings law "means all matters that relate or may foreseeably relate in any way... to the performance of the public entity's governmental functions... or... the public entity's use of public funds."¹⁴ This office has previously determined that the gathering of the members of a governing body or committee is a meeting, "even when no motions are made and no action is taken."¹⁵ Under these definitions, a quorum of a governing body performing any function, including discussing public business, is subject to the state's open meetings laws, including the requirements to give notice of its meetings and prepare minutes.¹⁶

In this case, a quorum of the Council remained for a period of time after the November 1 regular meeting adjourned. A tape recording of this gathering provided to my office indicates that Council members continued to discuss the complaints about the enforcement of ordinances to clean up property, and other public business, including the expenditures of funds for sidewalk repairs. Because a quorum was present and because the discussion concerned public business, the discussion constituted a meeting of the governing body for which public notice was required. Accordingly, it is my opinion that the Council violated N.D.C.C. § 44-04-20 by failing to give proper notice of a meeting.

¹² N.D.A.G. 98-O-13 ("public notice can be provided after a meeting, and still be in substantial compliance with N.D.C.C. § 44-04-20, if providing advance notice of the meeting is not reasonable"); see also N.D.A.G. 2005-O-20.

¹³ N.D.C.C. § 44-04-17.1(8)(a); N.D.A.G. 98-O-16; N.D.A.G. 98-O-08.

¹⁴ N.D.C.C. § 44-04-17.1(11).

¹⁵ N.D.A.G.98-O-16; see also N.D.A.G.98-O-08.

¹⁶ N.D.A.G. 2003-O-13; see also N.D.A.G. 2003-O-15; N.D.A.G. 2001-O-11.

CONCLUSIONS

1. The Council violated N.D.C.C. § 44-04-20 because it did not give proper notice to Randy Peterson. The Council did not violate N.D.C.C. § 44-04-20 because it posted the notice of the October 17, 2006, special meeting at the meeting location, and did not violate N.D.C.C. § 44-04-20 by failing to publish notice of an emergency meeting in the city's official newspaper.
2. The Council violated N.D.C.C. § 44-04-20 by continuing to discuss public business after the Council's meeting of November 1, 2006, was adjourned.

STEPS NEEDED TO REMEDY VIOLATIONS

The Council must prepare detailed minutes of the October 17, 2006, emergency meeting and provide a copy to Mr. Peterson free of charge.

The Council must also prepare a notice for the meeting it held after its November 1, 2006, meeting adjourned. The notice must specify that the minutes of the meeting will be available upon request. The notice must be posted and filed with the city auditor. A copy must be given to the city's official newspaper, to Mr. Peterson, and to any representatives of the news media who have requested notice of special meetings of the Council. The Council must prepare detailed minutes of the meeting that occurred after the November 1, 2006, regular meeting adjourned, and provide a copy to Mr. Peterson and anyone requesting a copy free of charge.

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. § 44-04-21.2.¹⁷ It may also result in personal liability for the person or persons responsible for the noncompliance.¹⁸

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¹⁷ N.D.C.C. §44-04-21.1(2).

¹⁸ Id.