

**OPEN RECORDS AND MEETINGS OPINION
2007-O-11**

DATE ISSUED: August 3, 2007

ISSUED TO: City of Mandan

CITIZEN'S REQUEST FOR OPINION

Susan Beehler alleges that the Mandan City Commission violated the open records law because it failed to provide her with a copy of records she requested within a reasonable time as required under N.D.C.C. § 44-04-18. Ms. Beehler also alleges that the Commission violated the open meetings law because the Commission stopped her testimony at a public hearing; because three separate executive sessions held by the Commission failed to comply with the law; and because the Commission failed to provide her with personal notice of a special meeting the Commission held on March 23.

FACTS PRESENTED

Request for feasibility reports

At a November 21, 2006, meeting of the Mandan City Commission (Commission), Mayor Ken LaMont referred to the feasibility of a proposed project called Library Square II. Ms. Beehler emailed City Administrator Jim Neubauer after the meeting and requested copies of the feasibility reports. Shortly after her request, Mr. Neubauer informed her that feasibility reports did not exist and that Mayor LaMont was only referring to conversations about the feasibility of the project.

Request for remediation records

At that same November meeting, Commissioner Helbling stated that the state would pick up the tab if the city of Mandan ran out of funds for the remediation of the diesel fuel spill in downtown Mandan. Ms. Beehler requested a copy of the record documenting the state's commitment. She repeated her request in November, December, and again in January. According to Mr. Neubauer, the city did not have a record that reflected the statement made by Commissioner Helbling in its possession, but rather than tell this to Ms. Beehler, he attempted to get a record from another public

entity which he believed would supply her with the necessary information. Sometime in February, Mr. Neubauer gave a copy of an agreement between Burlington Northern Santa Fe (BNSF) and the State of North Dakota as documentation of the state's commitment regarding the remediation.

Request for Collins street project cost estimates

About March 1, 2007, Ms. Beehler requested the estimated costs for a project known as the Collins Project Street Improvement District No. 145 ("Collins Project") from Mandan City Engineer Tom Little. The cost estimate for the Collins Project was in the City's possession at the time Ms. Beehler requested the records. However, the special assessment estimates were not complete at the time of Ms. Beehler's request and Mr. Neubauer did not want to release them separately. Mr. Neubauer worried that without the special assessment estimates, Ms. Beehler might misinterpret the cost estimates for the street project. The cost estimate was provided to Ms. Beehler on March 16, when the special assessment figures were also available.

Removal from public hearing

During its regular meeting on January 30, 2007, the Commission held a public hearing regarding a Community Development Block Grant (CDBG) application to the State of North Dakota. The public was invited to express views related to the proposed CDBG application. Ms. Beehler gave comments at that meeting, but was asked to sit down when Mayor LaMont concluded that she was disrupting the meeting by making comments not relevant to the topic of the public hearing. When she refused to stop addressing the Commission, the Commission recessed and the police chief was asked to intervene. Ms. Beehler submitted written comments and returned to her seat.

Authority for executive session

The Commission held an executive session at the end of its regular February 6 meeting. The executive session was referenced in the meeting agenda which said: "Consider moving into Executive Session (N.D.C.C. § 44-04-17.1(4); § 44-04-19.2(7)) [sic], relative to consultation with legal counsel regarding potential contract negotiations." The oral announcement made prior to the executive session stated the reason as contracts. During the executive session, the Commission gave instructions to its negotiator regarding an agreement to purchase certain buildings.

Executive session announcements and necessity for motions

The Commission held executive sessions during its meetings on March 6 and March 20. The oral announcement made at the meeting prior to the executive session on March 6

described the purpose as “in regard to contracts.” The oral announcement made at the meeting prior to the March 20 executive session described the purpose as “for contract negotiations.” After the executive sessions were over, no motions were made by the Commission.

Notice March 23 special meeting

The Commission held a special meeting by conference call on March 23 wherein it entered into an agreement to demolish two buildings. The Commission did not notify Ms. Beehler of the conference call meeting even though she had previously requested to be notified of all regular and special Commission meetings.

ISSUES

1. Whether the City violated N.D.C.C. § 44-04-18 by not providing copies of feasibility reports, documents acknowledging the state of North Dakota’s responsibility to provide additional remediation money, and records relating to the Collins Project Street Improvement District No. 145 within a reasonable time.
2. Whether the Commission violated the open meetings law, N.D.C.C. § 44-04-19, by refusing to let Ms. Beehler continue to speak at a public hearing held during the Commission’s meeting on January 30, 2007.
3. Whether an executive session of the Commission held February 6 was authorized by law and limited to the topics and legal authority announced during the open portion of the meeting.
4. Whether the Commission’s oral announcements made prior to the March 6 and March 20 executive sessions adequately announced the topics to be discussed and the legal authority for the executive sessions as required by N.D.C.C. § 44-04-19.2.
5. Whether the Commission violated N.D.C.C. § 44-04-19.2 when it did not make any motions to take final action after the executive sessions held March 6 and March 20.
6. Whether the Commission violated N.D.C.C. § 44-04-20 by failing to provide Ms. Beehler with personal notice of the Commission’s March 23 meeting after she asked to be notified of all regular and special meetings of the Commission.

ANALYSES

Issue One

Ms. Beehler alleges that the City of Mandan ("City") did not provide copies of records she requested within a reasonable time.

The open records law is violated when a public entity does not provide access to or copies of a record within a reasonable time.¹ "Whether a response has been provided within a reasonable time will depend on the facts of a given situation."²

Ms. Beehler requested feasibility reports relating to the Library Square II development. According to Mr. Neubauer, he replied to Ms. Beehler's request shortly after getting her email and informed her that the feasibility reports did not exist. Because a public entity does not have to create or compile a record that does not exist, Mr. Neubauer's response was appropriate and made within a reasonable time.³

A similar response would have been appropriate to Ms. Beehler's request for records related to Commissioner Helbling's claim that the State would "pick up the tab" if Mandan ran out of remediation money, because such a record was not in the City's possession. Instead of explaining that the city did not have the record, Mr. Neubauer did not respond to her request for months while he attempted to get a copy of the agreement between BNSF and the state from the State Department of Health. When a public entity receives a request for records, it must either provide those records or explain why the records are not being provided within a reasonable time.⁴ Here the request was for records that were not in the city's possession and therefore the city did not have to provide them, but that explanation was not given to Ms. Beehler. While it may be commendable that Mr. Neubauer attempted to obtain the records for Ms. Beehler from another source, nonetheless, the delay was unreasonable and constituted a violation of N.D.C.C. § 44-04-18.

Finally, the city's response to Ms. Beehler with respect to the Collins Street Project was not provided within a reasonable time. The records were available on the date that she requested them but she was not provided the records for over two weeks. The delay was due to the City's fear that Ms. Beehler would misinterpret the records unless she also received the special assessment estimates. Fear that a record may be

¹ N.D.A.G. 2006-O-15. See N.D.C.C. § 44-04-18(8).

² N.D.A.G. 2003-O-09.

³ N.D.C.C. § 44-04-18(4).

⁴ N.D.A.G. 98-O-20.

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misinterpreted is not a legitimate reason to delay providing a copy of a record. Therefore, it is my opinion that it was an unreasonable delay and a violation of N.D.C.C. § 44-04-18 to hold the cost estimates for over two weeks before giving them to Ms. Beehler.

Issue Two

Ms. Beehler alleges that the Commission violated the open meetings law when it prevented her from finishing her comments made at a public hearing.

The open meetings law in N.D.C.C. § 44-04-19 does not expressly prohibit or allow public participation during an open meeting.⁵ This office has concluded in several opinions that “the purpose of the open meetings law is to give members of the public access to meetings of the governing board of a public entity, but that access does not give members of the public the right to participate or speak at the public meeting.”⁶ Past opinions of this office have also said that a public entity “is given a certain amount of leeway in setting the agenda at a regular public meeting.”⁷ Attorneys general and courts in other states have also recognized the importance of public participation in open meetings, and the authority of a public body to adopt reasonable rules and policies to ensure the orderly conduct of a public meeting including the orderly behavior of those attending.⁸

In this case, Ms. Beehler was prevented from continuing her testimony at a public hearing, rather than a regular commission meeting. The notice for the public hearing specifically requested input from the public. Ms. Beehler was allowed to speak at the hearing and submit written testimony. According to the city, only when Ms. Beehler started arguing with the Mayor and making comments that were not relevant to the subject of the public hearing, did Mayor LaMont ask her to refocus her testimony. When she failed to do so, Mayor LaMont interrupted her and asked the police chief to intervene.

Because this was a public hearing where the Commission asked for public input, it was necessary to allow any member of the public who took the time to attend the hearing to

⁵ N.D.A.G. 98-F-11.

⁶ N.D.A.G. 2003-O-07; N.D.A.G. 99-O-07; N.D.A.G. 98-O-17; N.D.A.G. 98-F-11.

⁷ N.D.A.G. 2003-O-07.

⁸ Florida Attorney General AGO 2004-53. See also Jones v. Heyman, 888 F.2d 1328, 1333 (11th Cir. 1989), stating that “to deny the presiding officer the authority to regulate irrelevant debate and disruptive behavior at a public meeting-would cause such meetings to drag on interminably, and deny others the opportunity to voice their opinions.”

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speak if he or she so desired. The Commission, however, has the authority to control the decorum of a public hearing by keeping the testimony focused on the topic noticed for the hearing and limiting the speaking time. Whether a member of the public is disrupting a public meeting is for the public body and its presiding officer to determine in their discretion. This office generally will not interfere with such a determination in an opinion regarding the open meetings law. Accordingly, it is my opinion that the Commission did not violate the open meetings law when it refused to allow Ms. Beehler to continue speaking at the public hearing.

Issue Three

Ms. Beehler alleges that at its February 6, 2007, regular meeting, the Commission held an executive session not authorized by law.

A governing body may hold an executive session to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiators regarding current contract negotiations if discussing the strategy or instruction in an open meeting would adversely affect the bargaining position of the entity.⁹ Any such executive session must be limited to the topics announced during the open portion of the governing body's meeting.¹⁰

The executive session held during the February 6 Commission meeting was related to negotiation strategy and negotiation instructions regarding the demolition of two buildings in Mandan. The portion of the executive session that related to providing negotiation instructions and authority regarding a demolition contract was properly held in executive session.¹¹ The discussion, if held in public, could have caused an adverse fiscal effect on the bargaining position of the city.¹²

During the same executive session the Commission discussed the sale of another property not subject to any negotiations and had an extraneous discussion about a new title insurance business being established in Mandan. As explained above, discussions that do not involve negotiation strategy or instructions or fall within any other category that permits a closed session, may not be properly closed to the public under the open meetings law.¹³ Based on the foregoing, the discussion related to pending contract negotiations in the February 6 executive session was properly held in executive session. However, once the negotiation instructions were given to the attorney, the

⁹ N.D.C.C. § 44-04-19.1(9).

¹⁰ N.D.C.C. § 44-04-19.2(2)(d).

¹¹ See N.D.C.C. § 44-04-19.1(9).

¹² Id.

¹³ N.D.A.G. 2000-0-05.

open meeting should have reconvened. It is my opinion that the discussion held during the closed portion of the February 6 meeting was not limited to that authorized by law to be held in executive session.

Issue Four

Ms. Beehler alleges that at the March 6 and March 20, 2007 meetings, the Commission failed to sufficiently announce the topics of the executive sessions.

A notice of a public meeting must include notice of any executive sessions.¹⁴ In addition, prior to entering an executive session, a governing body must orally announce during the open portion of the meeting the topics to be discussed or considered during the executive session and the body's legal authority for holding an executive session on those topics.¹⁵ An announcement is sufficient if it uses the phrases "negotiation strategy" or "negotiation instruction," or similar language, and identifies the particular contract or contracts for which the governing body was discussing negotiation strategy or providing negotiation instructions under N.D.C.C. § 44-04-19.1(9).¹⁶ The description of the "general subject matter" must be "sufficient to provide information about the topic or purpose of the executive session to a member of the public."¹⁷

The announcements prior to the March 6 and March 20 executive sessions did not provide the public with sufficient information because the announcements failed to identify the particular contract or contracts the governing body was planning to discuss in the closed sessions. This office has previously concluded that an announcement of a closed session to discuss the conclusion of negotiations was insufficient because, although the word "negotiation" indicated which exemption in N.D.C.C. § 44-04-19.1 was being used, it failed to identify the particular contract or contracts under consideration.¹⁸ In this instance, the announcement did not give any indication as to what contracts were being discussed, let alone that those contracts were in reference to buildings that may be demolished.¹⁹ Accordingly, it is my opinion that the Commission's announcements did not sufficiently describe the topics to be considered during the

¹⁴ N.D.C.C. § N.D.C.C. § 44-04-20(1).

¹⁵ N.D.C.C. § 44-04-19.2(2)(b).

¹⁶ N.D.A.G. 2003-O-22.

¹⁷ N.D.A.G. 2004-O-19; N.D.A.G. 2003-O-22; see also N.D.A.G. 2005-O-04.

¹⁸ N.D.A.G. 2003-O-22 citing N.D.A.G. 2000-O-05. See also N.D.A.G. 99-O-04 (announcement of a closed session for "attorney consultation" is not sufficient if the announcement fails to identify the pending or reasonably predictable litigation to be discussed by the governing body.)

¹⁹ See N.D.A.G. 2004-O-13.

executive sessions because it failed to identify the particular contract or contracts considered by the Commission.

Issue Five

Ms. Beehler alleges that the Commission took no final action after the March 6 and March 20 executive sessions.

Generally, any final action concerning the topics discussed or considered during the executive session is taken at a meeting open to the public, unless final action is otherwise required or allowed by law to be taken during a closed or confidential meeting.²⁰ The March 6 and March 20 executive sessions, however, were for negotiations, and under N.D.C.C. § 44-04-19.2(e), “final action’... does not include guidance given by members of the governing body to legal counsel or other negotiator in a closed session authorized under section 44-04-19.1.”²¹ Therefore, because the executive sessions were held to give negotiation instructions to legal counsel, final action was not required to be held in open meeting.

Issue Six

Ms. Beehler asserts that the Commission failed to provide her with individual notice of the March 23 Commission meeting after she made a request to receive this information.

A governing body must provide notice of a meeting to any person requesting notice at the same time other members of the governing body are given notice.²² Unless a different time period is agreed to, a request for notice of meetings is effective for one year.²³

The Commission concedes that it failed to give Ms. Beehler notice of the March 23 meeting. Therefore, it is my opinion that the Commission violated N.D.C.C. § 44-04-20(5) by failing to give notice of the March 23 meeting to Ms. Beehler pursuant to her request to receive notice of all such meetings.

²⁰ N.D.C.C. § 44-04-19.2(2)(e).

²¹ Id.

²² N.D.C.C. § 44-04-20(5); N.D.A.G. 2005-O-20; N.D.A.G. 2005-O-17; N.D.A.G. 2004-O-09.

²³ Id.

CONCLUSIONS

1. The city properly responded to a request for copies of feasibility reports that did not exist, but did not provide documents acknowledging the State of North Dakota's responsibility to provide additional remediation money and records relating to the Collins Project Street Improvement District No. 145 within a reasonable time in violation of N.D.C.C. § 44-04-18.
2. It was not a violation of N.D.C.C. § 44-04-19 when the Commission refused to let Ms. Beehler continue speaking at a January 30, 2007, public hearing after the Mayor determined she had stopped talking about the topic of the hearing.
3. The Commission violated the open meetings law, N.D.C.C. § 44-04-19 by holding an executive session on February 6 which went beyond the scope of "negotiation strategy" or "negotiation instruction" under N.D.C.C. § 44-04-19.1(9).
4. The Commission violated N.D.C.C. § 44-04-19.2 when its oral announcements prior to the March 6 and March 20 executive session failed to sufficiently provide information about the topic or purpose of the executive sessions.
5. The Commission did not violate N.D.C.C. § 44-04-19.2 by failing to take final action in open meeting after an executive sessions held March 6 and March 20 to give negotiation instructions to a negotiator.
6. The Commission violated N.D.C.C. § 44-04-20 by failing to provide Ms. Beehler with personal notice of the Commission's March 23 meeting after she asked to be notified of all regular and special meetings of the Commission.

STEPS NEEDED TO REMEDY VIOLATIONS

The Commission must prepare revised notices for its meetings of February 6, March 6, and March 20, 2007, properly describing the executive sessions held during those meetings and post the revised agendas in the City Hall for one week. The Commission also must provide Ms. Beehler with a copy of the revised agendas free of charge. The Commission must make a transcript or copy of the portion of its February 6 executive session during which it discussed the sale of the Iverson Building and the new title insurance company, which lasts about 7 minutes of the session and provide the transcript or copy to Ms. Beehler free of charge. The minutes of the Commission's minutes for this meeting also must be amended to summarize this discussion. In addition, the Commission must provide Ms. Beehler with a copy of the agenda and minutes of its March 23 special meeting.

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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. § 44-04-21.2.²⁴ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁵

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²⁴ N.D.C.C. §44-04-21.1(2).

²⁵ Id.