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~ Secretary Training ~
~ Open Meetings Issues ~

Requirements

► Every “meeting” requires:

1. preparation of an agenda (meeting notice);
2. filing/posting/circulation of an agenda; and
3. preparation of minutes.

What is a “meeting”?

1. N.D. Cent. Code § 44-04-17.1(9)(a):
 - a. “Meeting” means a formal or informal gathering or a work session, whether in person or through any electronic means, of:
 - i. A quorum of the members of the governing body of a public entity regarding public business; or
 - ii. Less 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 the smaller gatherings collectively constitute a quorum and if the members hold the gathering for the purpose of avoiding the requirements of section 44-04-19.

Quorum

2. Meeting of a quorum

- 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. N.D. Cent. Code § 44-04-17.1(15).

Quorum (cont.)

- b. Attendance at another entity's meeting
 - i. When a quorum of the members of a governing body of a public entity attends the meeting of another group, and the group's discussion pertains to the public business of the governing body, the attendance of the members of the governing body is a "meeting." N.D.A.G. 98-O-08; N.D.A.G. 1996-F-09. This conclusion applies even if the members merely listen and do not participate in the meeting. NDAG 2008-O-11.
 - ii. E.g., WRD quorum attends a County Commission meeting.
 - 1. Even if they do not sit together, even if they do not talk, even if they do not discuss any WRD business, even if they are not aware other WRD members are present.
 - iii. Quorum or committee testifying in front of the Legislature.

Quorum (cont.)

3. Series of smaller gatherings collectively involving a quorum
 - a. N.D. Cent. Code § 44-04-17.1(9)(a): Less 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 and if the members hold the gathering for the purpose of avoiding the requirements of section 44-04-19.
 - b. E.g., WRD member calls other members, one-at-a-time.
 - c. E.g., site inspection (e.g., drainage complaint) conducted at different times (e.g., five-member WRD; two members conduct site visit at 8:00 a.m.; two others conduct site visit at 9:00 a.m.). NDAG 2015-O-06.
 - d. The law does not require any intention by the WRD to violate public meetings laws. Rather, the law requires the governing body intentionally meet in groups smaller than a quorum, yet collectively involve a quorum, and intentionally discuss or receive information regarding items of public business. N.D.A.G. 98-O-05.

Communications

4. Electronic Communications

- a. Emails and Texts -- N.D. Cent. Code § 44-04-17.1(9)(a): ...“Meeting” means a formal or informal gathering or a work session, whether in person **or through any electronic means....**
- b. A series of texts or emails regarding the same topic, sent individually or to less than a quorum, but collectively involving a quorum, is a “meeting.”
- c. Emails exchanged between a quorum of members of a governing body involving public business are considered a “meeting” subject to open meeting laws. NDAG 2017-O-04.
- d. In NDAG 2019-O-10, a Mayor texted the other members of the City Commission. The Attorney General concluded: “...when a series of conversations regarding public business between members of a governing body collectively involve a quorum, this is considered a meeting subject to open meetings law, whether such conversations happen in person, via telephone, or other electronic means.”

Communications (cont.)

- e. In NDAG 2017-O-04, a County Commission administrator sent an email to the full Commission:
 - i. The Chair and Vice-Chair made a human resources/hiring decision and “[i]f you disagree with the decision made by the Commission Chair and Vice Chair please let me know before 5:00 PM today”
 - ii. Attorney General: “The lack of response of the Commission, in essence, was a tacit vote to approve the decision made by the Chair and Vice Chair. Consensus was thereby reached that allowed the Chair and Vice Chair to move forward with a matter of public concern outside of a properly noticed public meeting.”

Communications (cont.)

- f. Information Provided by Staff:
 - i. Board Meeting Packets -- mail vs. email.
 - ii. Attorney General: "...This is not to say that every e-mail will be a "meeting" under the open meetings law. Although previous Attorney General opinions have stated that a quorum of a governing body may not meet to receive information regarding public business without proper notice, it is my opinion that a city administrator may provide information to city commission members by e-mail as long as a copy of the e-mail is kept for a reasonable period of time so that the public may have access to it. Mayor LaMont explains that it is "customary for [City Auditor] Mr. Neubauer to communicate to the commissioner [sic] via e-mail. Mr. Neubauer does this in a manner which enables him to keep commissioners informed on developments pertinent to city business." Such a ministerial use of e-mail, is comparable to sending information by mail, and is appropriate. NDAG 2007-O-14.

Communications (cont.)

- iii. There is a threshold at which multiple conversations (whether in person, over the telephone, or by e-mail) on a particular subject, each involving a commissioner, collectively involve enough commissioners (a quorum) that the conversations have the effect of forming a consensus or furthering the decision-making process on that subject. NDAG 2007-O-14.
 - 1. E.g., WRD Secretary-Treasurer calls or emails a quorum, individually, to seek direction.
- iv. When using e-mail as a means to provide information to a governing body in lieu of the mail, safeguards should be in place to protect against the communication triggering the open meetings law. For example, when in receipt of information by e-mail, it would be a good practice for members of a governing body, if they respond at all, to reply to the sender of the information without copying the response to the other governing body members by using the “reply all” function. NDAG 2007-O-14.
 - 1. Include the following on any emails: **Managers, please do not reply to this email (to ensure compliance with ND open meetings laws).**
 - 2. Send emails by bcc.

Committees

5. Committees

a. Define a committee:

- i. A “governing body” includes any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body. Under this definition, when a governing body delegates authority to two or more people to perform any function on its behalf, including gathering information, reporting, or recommending or taking action, a “committee” is formed that is subject to open meetings law. When a quorum of the committee gathers to perform the function delegated, it is holding a “meeting” that must be noticed in compliance with N.D.C.C. § 44-04-20. NDAG 2018-O-19.
- ii. A governing body does not need to make a formal motion to create a committee. Rather, if the governing body of a public entity consents, authorizes, or otherwise delegates authority to a group of people to perform any function on behalf of the governing body, a committee is formed. N.D.A.G. 2016-O-15.

b. Committees are subject to the same requirements as the full WRD (e.g., agendas, filing/posting/notice to the public, minutes, etc.).

Tours



- 6. Tours
 - a. Drain Tours: See SMF Agenda Example.
 - b. Bus Tour.
 - i. Prepare for Public Participation.

Tours (cont.)

- ii. 2008-O-28: Fargo Southside Flood Control Project bus tour. Only one bus reserved, not open to the public, limited space for media. The Attorney General concluded the tour violated open meetings laws:

Subsections (1) and (2) of N.D.C.C. § 44-04-19 must be read together. Thus, a governing body may not deny access based upon space limitations unless it has first attempted to make reasonable accommodations. Here, Fargo's attempt to accommodate the public was a decision to exclude them altogether. This is not reasonable. The right of the public to attend public meetings cannot be so easily dismissed due to inconvenience. To condone Fargo's effort to exclude the public could provide an incentive to governing bodies to hold meetings in the smallest space available in order to deny access to the public.

Tours (cont.)

When meetings are held outside the regular meeting room, the possible participation of the public must be considered. There may not be a perfect solution to meetings that take place in unconventional settings, but even a little effort and creativity would have resulted in better access to this meeting. Thus it is my opinion that the Commission violated N.D.C.C. § 44-04-19 by participating in a meeting that was not open and accessible to the public.

CONCLUSION: There is no legal authority to exclude the public, which includes the media, from a bus tour of flood projects attended by a quorum of the Fargo City Commission. Before a governing body excludes the public from a meeting based on lack of physical space, it must first attempt to make reasonable public accommodations.

Open Meeting Exemptions

7. Open Meeting Exemptions

- a. Social gathering exemption (N.D. Cent. Code § 44-04-17.1(b)(1)).
 - i. WRD Holiday Party.
- b. Association meetings (N.D. Cent. Code § 44-04-17.1(b)(3))
 - i. ND WRD Association, ND Water Users Association, annual water convention.
- c. Training seminars (N.D. Cent. Code § 44-04-17.1(b)(4)).

Public Right to Access

8. Public Right to Access

- a. Access to meetings (N.D. Cent. Code § 44-04-19).
- b. Meeting room must be accessible to, and the size of the room must accommodate, the number of persons reasonably expected to attend the meeting.
- c. Access “includes the right to photograph, to record on audiotape or videotape, and to broadcast live on radio or television the portion of the meeting that is not held in executive session, provided there is no active interference with the conduct of the meeting ... the governing body may impose reasonable limitations on recording activity to minimize the possibility of disruption of the meeting.”

Public Right to Access (cont.)

- d. Virtual Meetings (without physical location available):
 - i. N.D. Cent. Code § 44-04-19(4): For meetings subject to this section, if the meeting is held through any electronic means, the information necessary to join or view the meeting electronically must be included in the notice issued under section 44-04-20.
 - ii. N.D. Cent. Code § 44-04-20(2): For meetings to be held by electronic means, the location of the meeting is the electronic address and any other information necessary to allow the public to join or view the electronic meeting as required under section 44-04-19.

Public Right to Access (cont.)

- e. Generally, the public has a right to access to a public meeting but no right to speak at a meeting.
 - i. NDAG 2013-O-05: This office has concluded in several opinions that the purpose of the open meetings law is to give members of the public access to the meetings of a governing board of a public entity, but that access does not give members of the public the right to participate in or speak at the public meeting.
 - ii. HOWEVER, SB 2180 from 2025 session:
 - 1. N.D. Cent. Code § 44-04-20.1: Every regular meeting of a governing body of a city, county, township, school district, park district, or water resource district must include an opportunity for an individual to provide public comment.
 - 2. See SMF RESOLUTION OF POLICY.

Executive Sessions

9. Executive Sessions

- a. Avoiding Discomfort is not a Permissible Rationale for an Executive Session.
- b. N.D. Cent. Code § 44-04-19.1(2): Attorney consultation is exempt from section 44-04-19. That portion of a meeting of a governing body during which an attorney consultation occurs may be closed by the governing body under section 44-04-19.2.
- c. N.D. Cent. Code § 44-04-19.1(5): “Attorney consultation” means any discussion between the members of a governing body and its attorney in instances in which the governing body seeks or receives the attorney’s advice regarding and in anticipation of reasonably predictable or pending civil or criminal litigation or adversarial administrative proceedings or to receive its attorney’s advice and guidance on the legal risks, strengths, and weaknesses of an action of a public entity which, if held in public, would have an adverse fiscal effect on the entity.

Executive Sessions (cont.)

- d. NDAG 2015-O-13: “Reasonably predictable” requires a realistic and tangible threat of litigation or proceedings, and not a mere fear or potential of being a party to litigation or an administrative proceeding.
- e. For an executive session to be authorized, the mere presence of the public entity’s attorney at the meeting is not enough and the meeting cannot be closed to merely receive an update on status of litigation or to receive information from its attorney on applicable law or process and procedure, because such discussions do not adversely affect the public entity’s litigation position. NDAG 2015-O-01.
- f. Rather, to properly hold an executive session for attorney consultation, the public entity must be receiving and discussing the attorney’s advice regarding pending or reasonably predictable civil or criminal litigation or adversarial administrative proceedings.

Executive Sessions (cont.)

- g. Employee Reviews: Executive Sessions are not permissible for purposes of performing employee evaluations.

NDAG 2017-O-03:

This section does not authorize an executive session for all discussions involving contract and litigation negotiations. Rather, the discussions must be in the context of negotiation strategy or providing instructions to its negotiator and, even then, the discussions are only protected if disclosure of the remarks would have an adverse fiscal effect on the bargaining position of the governing body.

Executive Sessions (cont.)

A member of my staff reviewed the recording of the April 3, 2017, executive session. For most of the executive session, the Commission reviewed and discussed the Operations Assessment Report with the Human Resource Consultant. Prior to the meeting, the Consultant reviewed the report with the Police Chief Schroeder and Police Captain Barnett and relayed their impressions and remarks to the Commission during the executive session. The Commission shared stories of personal experience and other things they had heard in the community regarding Chief Schroeder and Captain Barnett. A brief discussion referenced the Chief and Captain's medical information. The Commission discussed personnel policies and how to proceed within the confines of city ordinances and policies, including conversations about how a similar situation was handled by the City of West Fargo. Finally, the Commission discussed who would take on the Chief and Captain duties during the interim. The Commission ultimately decided to suspend Chief Schroeder and Captain Barnett, with pay, while it continued to investigate the matter and determine what ultimate course of action it would take.

Executive Sessions (cont.)

Except for the brief reference to medical information, which is protected under N.D.C.C. § 44-04-18.1, the discussions during the executive session were all related to personnel issues and job performance and duties. This office and the North Dakota Supreme Court have repeatedly recognized that personnel issues and records, including discussions on termination of a public employee and job performance and evaluation, are not protected under the open records and meetings law and a governing body may not hold an executive session to discuss them even though they may be unpopular or controversial topics. “Regardless of how uncomfortable it might be to discuss the termination of an employee on grounds for misconduct in an open meeting, the public has a right to hear the deliberations and reasoning of the [governing body], and there is no exception to the open meetings law for personnel matters.”

Executive Sessions (cont.)

- h. An Executive Session must be included on the WRD's meeting agenda, with specificity (N.D. Cent. Code § 44-04-20(1)).
- i. Example of Agenda Language:
 - i. Executive Session for purposes of attorney consultation regarding ongoing litigation, in accordance with N.D. Cent. Code §§ 44-04-19.1(2), (5), and (9), regarding the following matter: *Joe Farmer v. Corn County Water Resource District*, Corn County Civ. No. 99-2025-CV-00001.

Executive Sessions (cont.)

- j. NDAG 2015-O-13: No executive session item was included on the Board's agenda and did not include any legal authority for holding the executive session. The Attorney General concluded failure to properly include the executive session on the agenda was an open meeting violation under N.D. Cent. Code § 44-04-20.
- k. Executive Session Meeting Process:
 - i. Include proper, specific agenda item.
 - ii. Record the Executive Session proceedings.
 - iii. Provide the legal authority for going into Executive Session and the topics for discussion (must match your agenda).
 - iv. Pass a motion to conduct the Executive Session.
 - v. Take final action once back in open session.

Agendas

1. N.D. Cent. Code § 44-04-20(2): The notice required in this section must contain the date, time, and location of the meeting and, if practicable, the topics to be considered. However, the lack of an agenda in the notice, or a departure from, or an addition to, the agenda at a meeting, does not affect the validity of the meeting or the actions taken thereat. The notice also must contain the general subject matter of any executive session expected to be held during the meeting....
2. A WRD can depart from the agenda at a regular meeting. However, at the time you prepare the agenda, you must include all matters you reasonably expect the WRD to discuss. NDAG 2010-O-12.
3. Again, must include specific Executive Session items.

Agendas (cont.)

4. NDAG 2010-O-12:

City Council Agenda:

City Council Meeting

June 1, 2009 - Nome City Hall

7PM - Bring the meeting to order

Old Business

New Business

Agendas (cont.)

At the June 1 meeting, the Council discussed a resident with unlicensed vehicles, miscellaneous correspondence, a padlock for the basement of City Hall, equipment left on city property, dog licenses, a building project, and preparation for the Fourth of July.

Attorney General: The meeting agenda for a regular meeting can be amended on the day of the meeting or during the meeting. At the time the notice was posted, the auditor had no specific topics to put on the agenda. New agenda items not anticipated at the time the agenda was prepared may be added to the agenda during a regular meeting.

Filing/Posting/Circulation of Agendas

1. Regular Meetings: Post agenda at your WRD office; Post agenda at the meeting location on the day of the meeting; “file” the agenda with the County Auditor; post the agenda on your WRD website (if you have one); provide notice to everyone who has requested meeting notices (email list). Not required for regular meetings, but you should also notify the WRD’s official newspaper (County’s official paper if the WRD does not select an official paper every year).
2. Under N.D. Cent. Code § 44-04-20(3), must post the schedule of regular meetings with the County Auditor or post on the WRD website (do both).
3. At the WRD’s December meeting, approve a motion to set the next year’s meetings. Then, file the schedule with the County Auditor and post on your WRD website (if you have one).

Filing/Posting/Circulation of Agendas (cont.)

4. Special Meetings
 - a. Same filing/posting/circulation requirements as above.
 - b. Any meeting that varies from the schedule you filed with the County Auditor.
 - c. If your meeting schedule on file with the Auditor shows your WRD meets the third Wednesday of every month at 9:00 a.m., and you decide to meet at 8:00 a.m. during harvest, that is a “special meeting.”
 - d. Cannot vary from the agenda at a special meeting (no “Other Business” agenda item).
5. Must provide public notice of a meeting at the same time as WRD Board (N.D. Cent. Code § 44-04-20(5)).

Minutes

1. N.D. Cent. Code § 44-04-21(2):

Minutes must be kept of all open meetings and are records subject to section 44-04-18. The minutes 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.

Minutes (cont.)

2. Minutes are your “record” on appeal.
 - a. Verbatim account is not required (and not advised).
 - b. Include enough to succeed on appeal (arbitrary and capricious standard).
3. Since 2023 Legislative Session, WRDs have had an obligation to generate draft minutes within 10 days of each meeting:
 - a. N.D. Cent. Code § 61-16.1-04: The unofficial minutes of the meeting must be provided to the official newspaper of the county for publication or, if applicable, posted to the water resource board's website or the official county website within **ten days**.

Minutes (cont.)

4. Roll call vs. voice vote:

- a. N.D. Cent. Code § 44-04-21. Open voting at public meetings required - Results recorded in minutes. 1. Unless otherwise specifically provided by law, all votes of whatever kind taken at any public meeting governed by the provisions of section 44-04-19 must be open, public votes, and all nonprocedural votes must be recorded roll call votes, with the votes of each member being made public at the open meeting. Procedural votes must be recorded roll call votes upon the request of any member of a governing body holding a meeting subject to this section. As used in this section, "nonprocedural" should be broadly interpreted and includes all votes that pertain to the merits of the matter before the governing body....
- b. Nonprocedural votes pertain to the merits or substance of an issue before the governing body, and any doubt whether a vote is substantive or procedural should be resolved in favor of a recorded roll call vote. N.D.A.G. 98-O-09.

Q&A

Thank you for attending!