

2006 N.D. Op. Atty. Gen. No. O-09, 2006 WL 1386586 (N.D.A.G.)

Office of the Attorney General
State of North Dakota

Open Records and Meetings Opinion No. 2006-O-09

May 15, 2006

City of Grand Forks

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under [N.D.C.C. § 44-04-21.1](#) from Kyle Braaten asking whether the City of Grand Forks violated [N.D.C.C. § 44-04-18](#) by failing to provide records he requested and [N.D.C.C. § 44-04-20](#) by failing to properly notice a meeting of the City Council.

FACTS PRESENTED

On January 9, 2006, Mr. Braaten e-mailed a request for records to Grand Forks Mayor Michael Brown and the city attorney, Howard Swanson. He requested “documents that will comply with the underlined sections of the North Dakota Century Code below, regarding the City of Grand Forks engaging in business with City Council member Doug Christensen's law firm, ‘Pearson Christensen.’” [\[FN1\]](#) Both Century Code sections were copied into the e-mail. Those sections require that unanimous findings be entered into official minutes of a governing body when it enters into a contract with an officer of a political subdivision or municipality. [\[FN2\]](#)

On January 11, before Mr. Swanson replied to his initial January 9 request, Mr. Braaten clarified the request by saying:

I am not looking for every document that complies with the code, one or two relating to a proposed new landfill will suffice. If none specifically mention the landfill or waste management, I'd like a copy of one dated around the time that Mr. Christensen joined the Council. I felt I should further clarify and simplify my request to allow you to fill the request in a timely fashion. Again, if no document exists, please let me know. [\[FN3\]](#)

Mr. Swanson responded to Mr. Braaten's January 11 e-mail, stating “[i]f I understand your request correctly, there are no documents regarding action taken by the City Council with regard to representation of the City by Mr. Fiedler or Mr. Fischer in the landfill matters.” [\[FN4\]](#)

Mr. Braaten responded to Mr. Swanson by asking him three questions that he referred to as clarifications. The clarifications were framed in such a way as to require a “yes” or “no” response from Mr. Swanson. Rather than answer the questions, Mr. Swanson referred to his initial response because he says he felt if he answered the questions, he would be giving Mr. Braaten his legal opinion.

On January 17, Mr. Braaten e-mailed Mr. Swanson and said he would “be happy to receive any documents in-

dicating that the Grand Forks City Council has ever made any unanimous finding, that has been entered into any official minutes, that any services of Pearson Christensen are necessary because they are not otherwise obtainable at equal cost.” [FN5] Mr. Swanson responded that same day, referring Mr. Braaten to minutes of a December 14, 2005, meeting of the Committee of the Whole that had already been provided to Mr. Braaten. The minutes reflected action taken by the City Council regarding representation by the Pearson Christensen law firm.

*2 Mr. Braaten asserts that the City has never responded to his request for a record of a unanimous vote by the City Council regarding legal representation and that the City attempted to limit his request to legal representation in landfill matters.

Mr. Braaten also asked for a copy of the legal notice for the Grand Forks City Council meeting that took place after the Committee of the Whole meeting on December 14, 2005.

The Grand Forks City Council holds meetings on the first and third Mondays of the month. Rather than have traditional standing committees, the entire City Council meets as the “Committee of the Whole” on the second and fourth Mondays of each month. Committee of the Whole meetings are noticed and televised. According to Grand Forks, the Committee of the Whole allows the City Council to discuss issues and receive input from staff and the public rather than have lengthy discussions take place during the City Council meetings. The distinction, however, is general and not absolute because discussion takes place at City Council meetings and action occasionally is taken at Committee of the Whole meetings.

Mr. Braaten contends that when the City Council took action at the end of the December 14, 2005, special meeting of the Committee of the Whole, it should have been noticed as a City Council meeting.

ISSUES

1. Whether the City of Grand Forks violated [N.D.C.C. § 44-04-18](#) by failing to provide Mr. Braaten with records he requested.
2. Whether the City of Grand Forks violated [N.D.C.C. § 44-04-20](#) by failing to properly notice a December 14, 2005, meeting of the City Council.

ANALYSES

Issue One:

Once a request for records is made to a public entity under [N.D.C.C. § 44-04-18](#), the public entity must either provide the records or explain why the request is not being fulfilled. [FN6]

In the January 9 and 11 e-mails, Mr. Braaten asked for records containing motions that complied with two statutes that require a unanimous finding by a governing body when it enters into a contract with an officer of a political subdivision or municipality. On January 11, he narrowed his request to records referring to the two statutes in the context of the landfill matter. Mr. Swanson replied that no such records existed. Mr. Braaten then broadened his request by asking for records reflecting any action taken by the City Council regarding representation by the Pearson Christensen law firm. Mr. Swanson referred Mr. Braaten to minutes of a meeting, which had been previously provided to him, that reflected a motion made by the City Council regarding legal representation.

Mr. Braaten contends that Mr. Swanson did not provide the records containing a unanimous vote of the City

Council due in part because Mr. Swanson limited his response to records regarding the landfill and Mr. Fiedler and Mr. Fischer.

Mr. Swanson's response on January 11, that no documents exist, referred to the landfill issue because Mr. Braaten's January 11 request asked for records referring to the landfill. It was not a unilateral decision by Mr. Swanson. Mr. Swanson's reference to Mr. Fiedler and Mr. Fischer was reasonable because those were the two attorneys from the Pearson Christensen law firm who represented the City in landfill issues.

*3 Mr. Swanson refused to answer Mr. Braaten's three questions that required a "yes" or "no" answer, because Mr. Braaten was asking for a legal opinion rather than making a request for records. Mr. Swanson was not required to give his opinion to Mr. Braaten. [FN7]

Mr. Swanson promptly responded to Mr. Braaten's request for records indicating action the City Council took regarding representation by the Pearson Christensen law firm by referring him to the December 14, 2005, minutes. The minutes containing the relevant motion had already been provided to Mr. Braaten.

Based on Mr. Swanson's responses to Mr. Braaten's record requests discussed above, it is my opinion that the City of Grand Forks did not violate N.D.C.C. § 44-04-18.

Issue Two:

A "meeting" means a formal or informal gathering of a quorum of the members of a governing body of a public entity regarding public business. [FN8] Public notice must be given in advance of all meetings of a public entity. [FN9] This necessitates that the name of the public entity holding the meeting be on the notice. Notice of a special meeting must contain the date, time, location of the meeting, and the topics to be discussed. [FN10]

The heading for the notice of the December 14, 2005, meeting stated:

City of Grand Forks Special Committee of the Whole Agenda

Wednesday, December 14, 2005

5:00 p.m.

Council Chambers [FN11]

At the end of the Committee of the Whole meeting, a motion was made to "convene as City Council ... for the purpose of taking action" after which the City Council took action on several motions. [FN12]

Although, according to the City, there is a distinction between the functions of the "Committee of the Whole" and the "City Council," the membership of each committee is the same. Thus, whenever the Committee of the Whole meets, the City Council is also meeting. Whenever a quorum of a governing body gathers to discuss public business, it must be noticed as a meeting of that governing body. [FN13]

Here, the Grand Forks City Council holds meetings under the title of either "Committee of the Whole" or "City Council" depending on the primary purpose of the meeting. Under either title, a quorum of the City Council has the power to take action regarding its public business. As long as the notice clearly indicates that the City Council is meeting, the public is on notice that official action may take place.

The notice for the December 14, 2005, meeting contains the date, time, and location of the meeting, but it fails to announce that it is a meeting of the City Council. If the notice had said "the Grand Forks City Council meeting as the Committee of the Whole," it would have provided notice to the public that a quorum of the City Council

cil was meeting and, additionally, that City Council action may be taken.

*4 Therefore, in my opinion, the Grand Forks City Council violated [N.D.C.C. § 44-04-20\(1\)](#) by failing to include in its notice the fact that the City Council was meeting on December 14, 2005.

CONCLUSIONS

1. The City of Grand Forks did not violate [N.D.C.C. § 44-04-18](#) by failing to provide Mr. Braaten with copies of records he requested.
2. The City of Grand Forks violated the open meetings law by failing to properly notice a December 14, 2005, meeting by omitting the name of the governing body holding the meeting.

STEPS NEEDED TO REMEDY VIOLATIONS

Grand Forks must add language that indicates that the City Council is meeting either as the Committee of the Whole or as the City Council on future notices.

Wayne Stenehjem
Attorney General

Assisted by: Mary Kae Kelsch
Assistant Attorney General

[FN1]. January 9, 2006, e-mail from Kyle Braaten to Howard Swanson and Michael Brown.

[FN2]. See [N.D.C.C. §§ 12.1-13-03](#) and [40-13-05](#).

[FN3]. January 11, 2006, e-mail from Kyle Braaten to Howard Swanson.

[FN4]. January 11, 2006, e-mail from Howard Swanson to Kyle Braaten. Mr. Fischer and Mr. Fiedler (deceased) were the partners in the Pearson Christensen law firm hired by the City as outside counsel.

[FN5]. January 17, 2006, e-mail from Kyle Braaten to Howard Swanson.

[FN6]. N.D.A.G. 1998-O-20; [N.D.C.C. § 44-04-18\(7\)](#).

[FN7]. See generally N.D.A.G. 97-O-01 (the law requires open records, not open minds).

[FN8]. [N.D.C.C. § 44-04-1 7.1\(8\)\(a\)](#).

[FN9]. [N.D.C.C. § 44-04-20](#).

[FN10]. [N.D.C.C. § 44-04-20\(6\)](#).

[FN11]. The notice also contained a detailed agenda.

[FN12]. December 14, 2005, minutes of the Grand Forks City Council "Committee of the Whole" meeting.

[FN13]. See N.D.A.G. 2005-O-07 (even though the meeting was noticed as the Employee Relations Committee,

when a quorum of the Rolla City Council attended the meeting, it violated the law by failing to give notice of a city council meeting).

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