

**OPEN RECORDS AND MEETINGS OPINION
2015-O-14**

DATE ISSUED: August 14, 2015

ISSUED TO: North Dakota State Board of Dental Examiners

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Rod St. Aubyn, on behalf of the North Dakota Dental Hygienists' Association, asking whether the North Dakota State Board of Dental Examiners violated N.D.C.C. § 44-04-18 by failing to produce all records responsive to a request and N.D.C.C. § 44-04-19 by holding meetings by email.

FACTS PRESENTED

On February 3, 2015, Judy Bernat, president-elect of the North Dakota Dental Hygienists' Association (NDDHA), sent a records request to Rita Sommers, Executive Director of the North Dakota State Board of Dental Examiners (NDSBDE), for electronic copies of: (1) Jack McDonald's signed Lobbyist contract; (2) any payment drafted from NDSBDE to Mr. McDonald for lobbying services as well as the future schedule of payments and amounts; (3) minutes reflecting specific board approval of those payments; (4) approved board minutes for the September 18, 2014, October 21, 2014, and January 10, 2015, board meetings; (5) email threads with subject lines "Collaborative Practice," "Bill Draft," "Shawnda Schroeder: ND needs action to boost access to dental care," and "Meeting this weekend"; and (6) an electronic copy of the public notice for the December 11, 2014, special meeting.¹

¹ Email from Judy Bernat, Pres.-Elect, N.D. Dental Hygienists' Ass'n to Rita Sommers, Exec. Dir., N.D. State Bd. of Dental Exam'rs (Feb. 3, 2015, 7:15 AM). This request was in follow up to a records request sent from Ms. Bernat to Ms. Sommers on Jan. 14, 2015, which requested the lobbyist contract, Dec. meeting minutes, emails from board members and Ms. Sommers from Nov. 1, 2014, through Jan. 12, 2015, and emails and correspondence between board members, the executive director, and the Dental Asst's Bd. regarding a Jan. 10, 2015, board meeting. Letter from Judy Bernat, Pres.-Elect, N.D. Dental Hygienists' Ass'n, to Rita Sommers, Exec. Dir., N.D. State Bd. of Dental Exam'rs (Jan. 14, 2015).

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In a follow-up email on February 19, 2015, Ms. Sommers explained to Ms. Bernat that the NDSBDE did not retain a signed copy of the lobbyist contract, but would be attempting to obtain a copy from McDonald.² Ms. Sommers sent a copy of Mr. McDonald's payment to Ms. Bernat. At the time of the open record request, there was no board approval to hire Mr. McDonald reflected in the minutes so no record existed in response to such a request, but Ms. Sommers did provide copies of the other requested meeting minutes. Ms. Sommers forwarded her emails responsive to Ms. Bernat's request and informed Ms. Bernat that she requested members of the NDSBDE to do the same. An electronic copy of the public meeting notice was not provided because the notice failed to post to the Secretary of State's website.³

On March 3, 2015, Ms. Sommers sent Ms. Bernat an email stating that all records requested that were available had been sent.⁴

Ms. Bernat followed up with Ms. Sommers regarding the signed lobbying contract and subsequent payments for lobbying services.⁵ Ms. Sommers replied that she did not retain a signed copy of the contract and open records law does not obligate the NDSBDE to produce or create a record it does not have.⁶ Ms. Sommers further explained that no subsequent payments were made, just the one-time fee represented by the bank statement previously sent.

Ms. Bernat also followed up on the requested emails. Ms. Bernat acknowledge receipt of the "Bill Draft" and "Schawnda Schroeder" email strings, but alleges she never

² Email from Rita Sommers, Exec. Dir., N.D. State Bd. of Dental Exam'rs, to Judy Bernat, Pres.-Elect, N.D. Dental Hygienists' Ass'n (Feb. 19, 2015, 5:44 PM).

³ In its request for an opinion, the NDDHA did not ask for this office to review whether notice was properly posted for the Dec. 11, 2014, meeting. Although this opinion will therefore not address this issue, I urge the NDSBDE to review its obligations under N.D.C.C. § 44-04-20 in posting notice even for emergency meetings called to order on short notice.

⁴ Email from Rita Sommers, Exec. Dir., N.D. State Bd. of Dental Exam'rs, to Judy Bernat, Pres.-Elect, N.D. Dental Hygienists' Ass'n (Mar. 3, 2015, 5:52 PM).

⁵ Email from Judy Bernat, Pres.-Elect, N.D. Dental Hygienists' Ass'n to Rita Sommers, Exec. Dir., N.D. State Bd. of Dental Exam'rs (Mar. 3, 2015, 10:11 PM). Ms. Bernat received an unsigned copy of the contract in a previous records request. See Email from Judy Bernat, Pres.-Elect, N.D. Dental Hygienists' Ass'n, to Rita Sommers, Exec. Dir., N.D. State Bd. of Dental Exam'rs (Mar. 6, 2015, 8:01 PM).

⁶ See Email from Rita Sommers, Exec. Dir., N.D. State Bd. of Dental Exam'rs, to Judy Bernat, Pres.-Elect, N.D. Dental Hygienists' Ass'n (Mar. 4, 2015, 4:53 AM).

received the “Meeting this weekend” emails.⁷ She also amended her request for “Collaborative Practice” and instead asked for emails relating to “Collaborative Agreement.”⁸ Ms. Sommers replied that the email thread “Meeting this weekend” was submitted to Ms. Bernat in a previous open records request, and all requested emails pursuant to the February 3, 2015, record requests were provided.⁹

NDDHA claims that it did not receive all records requested including board emails and the signed lobbyist contract pursuant to the February 3, 2015, request.¹⁰ The NDDHA also claims the NDSBDE was conducting meetings via email.

ISSUES

1. Whether the NDSBDE produced all records responsive to the February 3, 2015, records request.
2. Whether emails exchanged among the NDSBDE and its executive director were “meetings” subject to open meetings law.

ANALYSIS

Issue One

“Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours.”¹¹ Upon receiving a request for public records, a public entity must provide legal authority for a denial of the requested records or provide a copy of the records within a reasonable time.¹²

The NDSBDE did not provide a copy of the signed lobbyist contract arguing that the contract is in the possession of the lobbyist and it does not have to produce a record it does not have in its possession. Although a public entity does not have to provide a copy of a record that does not exist, here, the copy was in the possession of the lobbyist

⁷ Email from Judy Bernat, Pres.-Elect, N.D. Dental Hygienists’ Ass’n, to Rita Sommers, Exec. Dir., N.D. State Bd. of Dental Exam’rs (Mar. 6, 2015, 8:01 PM).

⁸ Id.

⁹ Email and Letter from Rita Sommers, Exec. Dir., N.D. State Bd. of Dental Exam’rs, to Judy Bernat, Pres.-Elect, N.D. Dental Hygienists’ Ass’n (Mar. 15, 2015, 8:38 PM).

¹⁰ Email from Rod St. Aubyn, Lobbyist, N.D. Dental Hygienists’ Ass’n, to Att’y Gen.’s office (Mar. 12, 2015, 6:49 AM).

¹¹ N.D.C.C. § 44-04-18(1).

¹² N.D.C.C. § 44-04-18.

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hired by the public entity. The application of the open records law is not limited to the public entity itself; it also applies to recorded information regarding public business which is in the possession of an “agent” of the public entity.¹³ Under open records law, the terms “agent” or “agency” refers to an arrangement in which a public entity delegates the transaction of some lawful business to another.¹⁴

Here, Mr. McDonald was hired to perform the public business of lobbying the NDSBDE’s position to the Legislature on behalf of and in place of the NDSBDE. Thus, Mr. McDonald is an “agent” of the NDSBDE when he performs contractual lobbying services for the NDSBDE. Accordingly, the open records law applies to the records relating to those contractual duties. It was therefore a violation of the open records law when the NDSBDE failed to produce a signed copy of the lobbyist contract in the possession of its agent.¹⁵

NDDHA next claims it did not receive all emails related to “Collaborative Practice” or “Meeting this weekend.”¹⁶ The NDDHA also claims that, although it received Ms. Sommers’ emails, it did not receive any follow up or additional emails from members of the NDSBDE, and it therefore did not receive all records responsive to the request.

According to the NDSBDE, all requested records, including all records in possession of the members of the NDSBDE, were provided.¹⁷ Emails with the subjects “meeting this weekend” or “collaborative practice/agreement” were provided to the NDDHA pursuant

¹³ N.D.C.C. § 44-04-17.1(16) (the definition of “record” includes records in the possession or custody of a public entity or its agent).

¹⁴ Grand Forks Herald v. Lyons, 101 N.W.2d 543, 546 (ND 1960); Forum Publ’g Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986) (The North Dakota Supreme Court held that the open records law cannot be circumvented by delegating a public duty to a third party and documents in possession of the third party connected with public business are public records); N.D.A.G. 2014-O-24; N.D.A.G. 2009-O-08; N.D.A.G. 2001-O-04.

¹⁵ The lobbying contract is a public record that the NDSBDE has the responsibility to ultimately produce. If the agent holding the record on behalf of the NDSBDE fails to produce a public record relating to the public services it performs on behalf of the entity, the public entity has the responsibility to produce the record.

¹⁶ Email from Rod St. Aubyn, Lobbyist, N.D. Dental Hygienists’ Ass’n, to Att’y Gen.’s office (Mar. 12, 2015, 6:49 AM).

¹⁷ Letters from Rita Sommers, Exec. Dir., N.D. Bd of Dental Exam’rs, to Sandra DePountis, Asst. Att’y Gen. (Mar. 30, 2015 and Apr. 3, 2015).

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to a previous request.¹⁸ The NDSBDE denies it has any other emails in its possession related to the requested records that were not already provided to the requestor.¹⁹ The NDSBDE also denies it deleted any emails responsive to the request in the time between receiving the request and the time it provided the requested records.²⁰ Opinions issued under N.D.C.C. § 44-04-21.1 must be based on the facts given by the public entity. Because the NDSBDE produced all emails responsive to the records request in its possession, no further violation of the open records law occurred.

Issue Two

Generally, all meetings of a public entity must be open to the public and notice must be provided.²¹ A meeting can occur in person or through electronic means, such as through email.²² Emails exchanged between a quorum²³ of members of a governing body²⁴ involving public business²⁵ is a meeting subject to notice requirements.

Ministerial use of email, such as requesting items be placed on an agenda or distributing information for members to review independently before a meeting, is comparable to sending information by mail, and is appropriate, as long as there are safeguards in place to protect against communication that may trigger the open

¹⁸ Letters from Rita Sommers, Exec. Dir., N.D. Bd of Dental Exam'rs, to Sandra DePountis, Asst. Att'y Gen. (Mar. 30, 2015 and Apr. 3, 2015); see also Emails from Rita Sommers, Exec. Dir., N.D. State Bd. of Dental Exam'rs, to Judy Bernat, Pres.-Elect, N.D. Dental Hygienists' Ass'n (Feb. 19, 2015 at 6:34 PM and 6:32 PM). Under open records law, a public entity only has to provide one copy of a requested record once to the requestor. N.D.C.C. § 44-04-18(2); N.D.A.G. 2014-O-10 ("A public entity is not required to provide more than one copy of a record to the same requestor."). Therefore, Ms. Sommers does not need to produce email records that have already been provided to Ms. Bernat under a previous record request.

¹⁹ Letters from Rita Sommers, Exec. Dir., N.D. Bd of Dental Exam'rs, to Sandra DePountis, Asst. Att'y Gen. (Mar. 30, 2015 and Apr. 3, 2015).

²⁰ Letters from Rita Sommers, Exec. Dir., N.D. Bd of Dental Exam'rs, to Sandra DePountis, Asst. Att'y Gen. (Mar. 30, 2015 and Apr. 3, 2015).

²¹ N.D.C.C. §§ 44-04-19, 44-04-20.

²² N.D.C.C. § 44-04-17.1(9)(a) (definition of "meeting").

²³ N.D.C.C. § 44-04-17.1(15) ("quorum" is defined as "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"). A quorum is reached if the emails are sent to a quorum of the governing body. N.D.A.G. 2014-O-12.

²⁴ N.D.C.C. § 44-04-17.1(6) (definition of "governing body").

²⁵ N.D.C.C. § 44-04-17.1(12) (definition of "public business").

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meetings law.²⁶ Members are warned to not use the “reply all” function when responding to the information received by email.²⁷ However, there is a threshold at which conversations by email trigger the open meetings law. Emails that delve into the substantive merits of the suggested agenda topic or a matter of public business, provide opinions including opinions on how to handle public business, attempt to build support and consensus for certain positions, or emails in which a quorum discusses, formulates, or narrows options, are equivalent to having a meeting that requires notice.²⁸ This office has further warned against emails that request other members to share their thoughts and opinions about certain topics because doing so invited further discussions regarding public business that should be held in an open meeting.²⁹

This office reviewed hundreds of emails provided by Ms. Sommers and members of the NDSBDE. In most emails, Ms. Sommers, as executive director, disseminated information to the NDSBDE for their review that related to public business. The emails contained information about upcoming meetings, legislative information regarding bills and hearing times, information on new HIPAA laws, and upcoming conferences that may be of interest. Board members responded individually to Ms. Sommers asking for further information or proposing additional agenda topics. In most cases, the manner by which the NDSBDE disseminated information by email did not trigger open meetings law because the emails were ministerial in nature.

However, there are a few emails in which Ms. Sommers asks the board a question, expresses her opinion to the board, or suggests a course of action to the board and then asks the board members to provide their thoughts or feedback.

For example, Ms. Sommers forwarded an email containing a lobbying proposal to all the board members and included her thoughts on the upcoming legislative session and the need to hire a lobbyist.³⁰ She ended the email by asking for the members of NDSBDE to share their thoughts.³¹ A board member replied to Ms. Sommers and the rest of the NDSBDE indicating his approval for such a course of action.³² In doing so, consensus

²⁶ N.D.A.G. 2014-O-12; N.D.A.G. 2007-O-14.

²⁷ N.D.A.G. 2014-O-12; N.D.A.G. 2013-O-07; N.D.A.G. 2007-O-14.

²⁸ N.D.A.G. 2014-O-12; N.D.A.G. 2013-O-07; N.D.A.G. 2010-O-09; N.D.A.G. 2007-O-14; N.D.A.G. 98-O-05.

²⁹ N.D.A.G. 2014-O-12

³⁰ Email from Rita Sommers, Exec. Dir., N.D. Bd of Dental Exam'rs, to members of the N.D. State Bd. Of Dental Exam'rs (Dec. 22, 2014; 8:45 AM).

³¹ Id.

³² Email from Rob Lauf to Rita Sommers, Exec. Dir., N.D. Bd of Dental Exam'rs, (Dec. 22, 2014; 8:55 AM).

was being built regarding public business.³³ When Ms. Sommers provided her opinion and requested input, which resulted in a member of the board expressing approval for the suggested course of action and hitting the “reply all” to include a quorum, the NDSBDE violated the open meetings law.

Although not a widespread problem, it is my opinion that the NDSBDE violated the open meetings law when emails disseminated to a quorum of the members shared thoughts, opinions, and suggested courses of action because such discussions were “meetings” subject to the open meetings law and N.D.C.C. §§ 44-04-19 and 44-04-20.³⁴

CONCLUSIONS

1. The NDSBDE violated the open records law when it failed to produce a signed copy of a contract in the possession of its agent.
2. The NDSBDE violated the open meetings law when it discussed public business by email.

STEPS NEEDED TO REMEDY VIOLATIONS

A signed copy of the NDSBDE’s lobbyist contract with Mr. McDonald must be provided to Rod St. Aubyn, free of charge. Further, copies of email exchanges by the NDSBDE sent to this office in response to the opinion request must be provided to Rod St. Aubyn, free of charge.

³³ Although Ms. Sommers is not a member of the NDSBDE, if Ms. Sommers solicits and obtains the consensus of the board and thereafter performs some action or relays a position based on the consensus, it is a circumvention of the open meetings law and a violation occurs.

³⁴ N.D.C.C. § 44-04-21.1 authorizes this office to review only those violations for alleged meetings held without proper notice which may have occurred within the 90 days preceding this office’s receipt of the opinion request. In its request for an opinion, received by this office on Mar. 12, 2015, the NDDHA also alleged the NDSBDE was conducting “straw polling” via email. The straw polling referred to appears to be in reference to email exchange which occurred on Dec. 9, 2014, which is beyond the 90 days of authorized review. This office therefore cannot address the Dec. 9, 2014, email exchange, but urges the NDSBDE to review its responsibilities under the open meetings law and the requirements of open voting under N.D.C.C. § 44-04-21. The NDDHA also requests this office review alleged violations for “hiring a lobbyist for a public regulatory board using public funds.” This is not a reviewable issue for this office to address under the authority granted by N.D.C.C. § 44-04-21.1.

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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. § 44-04-21.2.³⁵ It may also result in personal liability for the person or persons responsible for the noncompliance.³⁶

Wayne Stenehjem
Attorney General

sld

cc: Rod St. Aubyn (via email only)

³⁵ N.D.C.C. § 44-04-21.1(2).

³⁶ Id.