

October 2, 2015

Wayne Stenehjem
Attorney General of North Dakota
600 W. Boulevard Ave.
Bismarck, ND 58501

Re: Request for Open Meeting Opinion

Dear Mr. Stenehjem:

The Dakota Resource Council and the North Dakota Energy Industry Waste Coalition hereby request a formal Attorney General opinion as to whether the Health Department and Health Council complied with the Open Meetings law of North Dakota with regard to the Radioactive Waste handling and storage rules that were adopted at an August 11, 2015 meeting of the State Health Council.

Background: Based on our organizations' strong belief that the Open Meetings law has been violated by the Health Council and Health Department with respect to the August 11, 2015 meeting, we submitted a request for records regarding this meeting on August 31, 2015. See Exhibit A. The Health Department through Colleen Reinke, Public Information Officer, submitted a response that was mailed on September 2, 2015 to the Dakota Resource Council.¹ Exhibit B.

For ease of your analysis, the pertinent pages of Exhibit B are separately provided and identified as Exhibits C, D, E, and F and a copy of the notice as printed on the Secretary of State's website is provided as Exhibit G. These key exhibits are as follows:

Exhibit C: An email from Londa R. Rodahl, an employee of the Health Department dated April 22, 2015 and setting the next meeting of the Health Council for August 11, 2015.

¹ Please be aware that we believe that this open records response was far from complete. We are going to send a follow up demand for a full open records response under separate cover in the near future. Despite the fact that the September 2 response was incomplete (for example, the postcards referenced in the Check Sheet were not furnished, Attachment A to the Draft Minutes for the August 11, 2015 meeting is missing, and it is improbable that a major meeting involving many people and many issues was accomplished with only one email), the evidence that the Open Meetings law was violated is so overwhelming, we are not waiting for further records before requesting this opinion.

Exhibit D. A "State Health Council Check Sheet for meeting on August 11, 2015.

Exhibit E: State Health Council Agenda, North Department of Health, AV Room 212, Bismarck, North Dakota, August 11, 2015-9:00 am.

Exhibit F: DRAFT minutes of the August 11, 2015 State Health Council Meeting (missing Exhibit A, List of Others Present, which was not provided by Ms. Reinke).

Exhibit G: Printout of the Secretary of State's website showing that the notice of the August 11, 2015 State Health Council meeting was posted on August 6, 2015 at 9:50 AM.²

Exhibit H: Copies of requests for notification of meetings regarding TENORM that were submitted by DRC and NDEIWC.³

Exhibit I and J. Declarations of Nicole Donaghy and Darrell Dorgan.

We have attached proof that our organizations had open records requests pending (Exhibit H), plus two declarations (Exhibits I and J).

Summary of violations.

1. The Health Department set the August 11, 2015 meeting of the Health Council on or before April 22, 2015 and notified a "group" of all DOH Directors/Chiefs of the date of the August 11 meeting on April 22, 2015. See Exhibit C. The Health Department did not notify the public of the date of the meeting until August 6, 2015. See Exhibit G. This is a violation of NDCC Section 44-04-20 which requires that notice of a public meeting be provided to the public at the same time the governing body's members are notified of a meeting. See also, Attorney General Open Records Manual, page 24.
2. The Health Department set the August 11, 2015 meeting of the Health Council on or before April 22, 2015 and notified a "group" of all DOH Directors/Chiefs of the date of the August 11 meeting on April 22, 2015. See Exhibit C. DRC and NDEIWC had previously filed open records requests to the Health Department. Exhibit H. They were not informed of the meeting date in April nor thereafter. Exhibit I. The Open Records law requires that persons who request notice of a meeting be informed of the time of the

² Exhibit G was not part of the documents turned over by the Health Department; rather our organizations obtained it from the Secretary of State's website.

³ Exhibit H is a selection of documents regarding the standing requests of the DRC and NDEIWC to be notified of any meetings concerning radioactive waste. These documents should be on file at the Department of Health.

- meeting. These requests were active and made within one year of the August 11, 2015 meeting.
3. The Health Department set the August 11, 2015 meeting of the Health Council on or before April 22, 2015 and notified a “group” of all DOH Directors/Chiefs of the date of the August 11 meeting on April 22, 2015. See Exhibit C. The State Health Department did not post at the Secretary of State until August 6, 2015. See Exhibit G. The law requires that when the notice of a public meeting must be filed in the office of the Secretary of State at the same time. See NDCC Section 44-04-20; See also Attorney General’s Manual, p. 24.
 4. The Health Department sent the agenda of the August 11 meeting, a “packet of material” and the provisional minutes of the last meeting to the members of the Health Council on July 30, 2015. They gave an agenda to every Department of Health employee who had an item listed in the agenda on July 31, 2015. They gave the agenda and a “packet of material and a copy of the provisional minutes of the last meeting” to the Health Officer and to Legal Counsel, Attorney General’s office on July 31, 2015. See Exhibit D. The Health Department did not post the agenda of the August 11, 2015 meeting on the Secretary of State’s website until August 6, 2015. See Exhibit G. The law requires that the notice of a public meeting must be filed in the office of the Secretary of State at the same time. See NDCC Section 44-04-20; See also Attorney General’s Manual, p. 24.
 5. The Health Department did not provide the same material to the Secretary of State that it provided to employees of the Department and members of the Health Council. The Secretary of State’s website provided only the agenda, and did not disclose the regulations that were being considered at the August 11 meeting. Compare Exhibit G to Exhibit D.
 6. Apparently, the Department sent the agenda on or about late July via email to five persons on an “inside mail” list and eleven persons on an “outside mail” list. See Exhibit D, which does not include either Dakota Resource Council or NDEIWC, who had specifically requested that they be notified of a meeting that addressed Radioactive subject matter and all Health Council meeting dates and agendas. See Exhibits H and I. Further, it did not send the agenda to the Secretary of State at the same time it notified Department and Health Council employees and selected “inside mail” and “outside mail” recipients who received preferential treatment. Compare Exhibit D to Exhibit G.

As can be seen by the public record and public hearings on the subject of Radioactive Waste handling and storage, there is a very strong interest in this subject. The rules allow a 10-fold increase in radioactivity of oil waste that can be stored in North Dakota. Our groups and many other groups in this state and nationally strongly oppose this plan to allow North Dakota to become a depository of Radioactive material.

The violations of the open meetings law by the Health Department and Health Council prevented concerned parties, including but not limited to the DRC and

NDEIWC, from recording the meeting, broadcasting the meeting, requesting time to be heard by the Health Council, and otherwise exercising their Constitutional and statutory rights under North Dakota's laws. Had they known the date of the August 11 meeting earlier (either in April or late July), they would have been able to more fully express their rights to express their views.

The flagrant disregard of the public's rights is illustrated in the Draft Minutes of the meeting. Darrell Dorgan appeared at the meeting and objected and questioned the notice provided. He stated "he formally objected to the meeting as being illegal until it was determined whether it was properly publicized." In response, Mr. Myerchin assured him that his objection would be "...noted in the record, however, the meeting would continue." Exhibit F, p. 2. Further, later in the meeting, Marie Hoff and Nicole Donaghy of DRC expressed their objections to this meeting due to the fact that they felt it was an illegal meeting since they didn't feel ample meeting notice was given. Again, Mr. Myerchin "duly noted their objections." But, as shown by the balance of the draft minutes, he did not request any further information on adequacy of the notice but simply proceeded to a final vote. A press release (no doubt prepared by the Health Department before the meeting) was issued after the meeting.

A further factor indicating a deliberate disregard of the Open Meetings law is that Mr. Dorgan was confronted in the hallway outside the meeting room immediately following the discussion and vote on Radioactive issues by a person who identified himself as an attorney for the Health Council, demanding to know who Mr. Dorgan was and whom he represented -- a demand that sought (quite unsuccessfully) to intimidate Mr. Dorgan. This person further asserted that Mr. Dorgan was entitled to "three days notice" and no more. See Exhibit I (Declaration of Darrell Dorgan).

Further, Ms. Donaghy had earlier been misled by an official of the Health Department that the Radioactive Waste handling and storage rules would not be acted on until much later in the year. See Exhibit J (Declaration of Nicole Donaghy)⁴

CONCLUSION:

We request that this Attorney General Opinion be prepared and provided to us with the utmost of speed. We further request that the process of review and approval of

⁴ Frankly, we find it extraordinarily disappointing that agencies and officers of the state would act in so dismissive a manner when faced with citizens and organizations seeking to exercise their rights under the Constitution and laws of this state. It appears quite clear that the Department of Health and Health Council had determined to rubber stamp these regulations, and evade and avoid participation by the members of the public who sought to articulate the threats to the safety of North Dakota citizens and potentially catastrophic consequences to the environment of North Dakota.

the rules regarding the handling and storage of Radioactive Waste by the Attorney General's office and the Administrative Rules Committee of the Legislative Council be suspended immediately and held in abeyance until the Opinion is issued. If the opinion finds a violation, we request that all actions taken with regard to Radioactive Waste handling and storage (at a minimum) be declared void.

As you are aware, NDCC Section 44-04-21 provides a very short deadline for filing of any civil action for a violation of the Open Meetings law and an opinion of the Attorney General is a necessary condition precedent for recovery of attorney fees in a successful civil action. Accordingly, we believe that time is of the essence.⁵

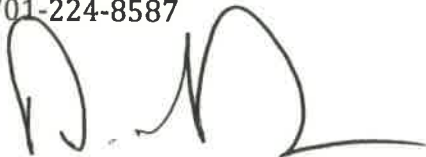
Because of the clarity of the record provided to us from the Health Department's September 2, 2015 response to the Open Records request regarding the public notice of the August 11, 2015 meeting, we anticipate that this opinion will take days, not weeks, to prepare and issue.

We are happy to cooperate with you in any manner that your office would deem helpful.

Sincerely,



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701-224-8587



Darrell Dorgan
North Dakota Energy Industry Waste Coalition
701-226-4431

⁵ We wish to preserve all of our options provided under state law. However, at this time, we have no plans to file an action and we are not using this request as a substitute for discovery pursuant to the Rules of Civil Procedure.