

**OPEN RECORDS AND MEETINGS OPINION  
2008-O-02**

DATE ISSUED: February 4, 2008

ISSUED TO: Burke County Board of County Commissioners

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Barry Jager asking whether the Burke County Board of County Commissioners violated N.D.C.C. §§ 44-04-19, 44-04-20 and 44-04-19.2, by holding a meeting without proper notice, by failing to follow proper procedures for conducting an executive session and by holding an executive session that was not authorized by law.

**FACTS PRESENTED**

The Burke County Commission (Commission) is composed of three people and it holds regular meetings twice a month. On September 17, 2007, the chairman of the Commission, Terry Nelson, called the county auditor requesting that she add an executive session<sup>1</sup> to the notice and agenda of the regular meeting scheduled for Tuesday, September 18 at 8:30 a.m. The Commission wanted to hold an executive session to discuss differences of opinions regarding the county budget. The county auditor suggested that the chairman consult with the state's attorney who advised the chairman that an executive session was proper and advised the chairman to add the executive session after the start of the regular meeting.

Commissioner Marlow Nelson, however, wanted the executive session to begin before the regular meeting. Commissioner M. Nelson believed the executive session would be a continuation of the last meeting because regular meetings were only recessed and adjourned quarterly, thus the executive session would not have to be part of the upcoming meeting. The Commission subsequently held an executive session before the regular meeting scheduled for 8:30 a.m. without any notice to the public.

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<sup>1</sup> "Executive session" means all or part of a meeting that is closed or confidential. N.D.C.C. § 44-04-17.1(4).

## ISSUES

1. Whether the Commission violated N.D.C.C. §§ 44-04-19.2(a), (b) and 44-04-20 by meeting in executive session without posting public notice, convening in an open meeting, and announcing the legal authority and general topics of the executive session.
2. Whether the Commission violated N.D.C.C. § 44-04-19 by conducting an executive session that was not authorized by law.

## ANALYSES

### Issue One

Unless otherwise provided by law, written public notice must be given in advance of all meetings of a public entity including executive sessions.<sup>2</sup> A notice must contain the date, time, location, and topics to be considered.<sup>3</sup> It must also include the general subject matter of any executive session expected to be held during a meeting.<sup>4</sup> The notice must be posted at the public entity's main office, if any; in the case of a county public entity, with the county auditor; and on the day of the meeting posted at the meeting location.<sup>5</sup> Before going into executive session, the governing body must convene in an open meeting and announce both the legal authority for the session and the general topics that will be discussed or considered.<sup>6</sup>

The Commission admits that it held an executive session prior to its regularly scheduled meeting on September 18, 2007, without providing public notice. Additionally, the Commission admits that it failed to convene in an open meeting and announce the legal authority and general topics of the executive session.

The Commission cannot avoid the notice requirements of the open meeting law by claiming that its meetings are only adjourned quarterly. The fact that a governing body is holding a meeting or an executive session cannot be kept secret.<sup>7</sup> Therefore, it is my opinion that the Commission violated N.D.C.C. § 44-04-20 when it held a meeting without notice and violated N.D.C.C. § 44-04-19.2 when it failed to convene in an open meeting and announce the legal authority and topics of the executive session.

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<sup>2</sup> N.D.C.C. § 44-04-20(1).

<sup>3</sup> N.D.C.C. § 44-04-20(2).

<sup>4</sup> Id.

<sup>5</sup> N.D.C.C. § 44-04-20(4).

<sup>6</sup> N.D.C.C. § 44-04-19.2(2)(a), (b).

<sup>7</sup> N.D.A.G. 99-O-04.

### Issue Two

"Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public."<sup>8</sup> "A governing body may hold an executive session to consider or discuss closed or confidential records."<sup>9</sup>

The executive session was tape recorded in compliance with N.D.C.C. § 44-04-19.2(5), and the tape has been reviewed by this office. The tape reveals that the Commission discussed a wide range of subjects including county budget issues and personnel matters relating to county employees. It is well-established that a governing body may not hold an executive session to discuss personnel issues.<sup>10</sup> The Commission's discussion of the county's budget priorities is the exact kind of public business that should be discussed in an open meeting because "public business" includes "all matters that relate or may foreseeably relate in any way to . . . [t]he public entities use of public funds."<sup>11</sup> The commissioner's discussion held in executive session was not limited to exempt or confidential information and, therefore, the entire executive session was an unauthorized closed meeting.

Accordingly, it is my opinion that the Commission violated N.D.C.C. § 44-04-19 when it held an executive session that was not authorized by law.

### CONCLUSIONS

1. The Commission violated N.D.C.C. § 44-04-20 when it held a meeting without notice and violated § 44-04-19.2(a), (b) when it failed to convene in an open meeting and announce the legal authority and topics of the executive session.
2. The Commission violated N.D.C.C. § 44-04-19 by conducting an executive session that was not authorized by law.

### STEPS NEEDED TO REMEDY VIOLATIONS

The Commission must prepare detailed minutes that meet the requirements of N.D.C.C. § 44-04-21, indicating what transpired at its executive session of September 18, 2007. The Commission also must prepare a notice of the special meeting including proper notice of the executive session and the detailed minutes of

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<sup>8</sup> N.D.C.C. § 44-04-19.

<sup>9</sup> N.D.C.C. § 44-04-19.2(1).

<sup>10</sup> See, e.g., N.D.A.G. 2003-O-22; N.D.A.G. 2000-O-09.

<sup>11</sup> N.D.C.C. § 44-04-17.1(11)(b).

this meeting must be available at no cost. The notice must be posted at the Commission's main office for one week, filed with the county auditor, and given to the county newspaper. The Commission must also provide a free copy of the tape from the executive session and a free copy of the detailed minutes to Sheriff Jager. The Commission must, in the future, provide proper notice in advance of all special and emergency meetings, in accordance with N.D.C.C. § 44-04-20 and follow the procedures in N.D.C.C. § 44-04-19.2 when holding an executive session.

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.<sup>12</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>13</sup>

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<sup>12</sup> N.D.C.C. § 44-04-21.1(2).

<sup>13</sup> Id.