

**OPEN RECORDS AND MEETINGS OPINION
2011-O-05**

DATE ISSUED: March 25, 2011

ISSUED TO: Fargo City Commission

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Steven W. Stremick asking whether the Fargo City Commission violated the open meetings law when it held an executive session and separately met at a restaurant the same evening.

FACTS PRESENTED

The Fargo City Commission (Commission) held an executive session during its October 4, 2010, meeting. Although there was no mention of the executive session in the main body of the meeting agenda, there was one sentence typed on the top of the first page stating: "**Please note** earlier time due to an Executive Session regarding the Sign Code."¹ There was no indication in the itemized agenda that the executive session would take place before, during, or after the open portion of the meeting.

During the open portion of the meeting, the Mayor and the city attorney explained that the executive session was to be held to discuss the proposed Sign Code in view of threatened or reasonably anticipated litigation over the proposed Sign Code, and that the executive session was appropriate under N.D.C.C. § 44-04-19.2.² Upon a unanimous vote, four members of the Commission entered into executive session for nearly an hour to consult with the city attorney and the city's outside special counsel about the sign code.³ The meeting was adjourned at 6:48 p.m.

After the October 4 meeting, Commissioners Mahoney, Wimmer, and Williams along with Mayor Walaker attended a dinner hosted by Williston officials at a West Fargo

¹ Agenda, Fargo City Comm'n, Oct. 4, 2010 (emphasis in original). The normal starting time for a regular meeting is 5 p.m. This meeting started at 4 p.m.

² Letter from Erik R. Johnson, Fargo City Attorney, to Mary Kae Kelsch, Assistant Attorney General (Oct. 22, 2010). The executive session was recorded.

³ At the time of the announcement, Commissioner Mahoney was absent, but he joined the meeting during the executive session.

restaurant.⁴ The Commission notified the media of the dinner meeting by e-mail on October 1. An article in The Forum newspaper subsequently reported on the meeting. The Commission also made an announcement about the planned dinner meeting during its October 4 meeting. The Williston representatives discussed the needs of Williston and western North Dakota related to the impact of the oil boom. The Fargo City Commission members also briefly explained the need for a Red River diversion project.

ISSUES

1. Whether the Commission's executive session held October 4, 2010, met the procedural requirements of N.D.C.C. § 44-04-19.2.
2. Whether the executive session held October 4, 2010, was authorized by law.
3. Whether the dinner meeting at a private restaurant that followed the October 4, 2010, Commission meeting was preceded by public notice in substantial compliance with N.D.C.C. § 44-04-20.

ANALYSIS

Issue one

All meetings of the governing body of a public entity must be open to the public unless otherwise specifically provided by law.⁵ A governing body may hold an executive session "authorized by law" if:

- a. The governing body first convenes in an open session and, unless a confidential meeting is required, passes a motion to hold an executive session;
- b. The governing body announces during the open portion of the meeting the topics to be discussed or considered during the executive session and the body's legal authority for holding an executive session on those topics;⁶

Attorney consultation pursuant to N.D.C.C. § 44-04-19.1 is one of the legally authorized exemptions to the open meetings law.

⁴ The Williston officials made a presentation at the Commission meeting before the dinner.

⁵ N.D.C.C. § 44-04-19.

⁶ N.D.C.C. § 44-04-19.2.

When an executive session is held for attorney consultation, an announcement is sufficient if it indicates: 1) attorney consultation as the reason for the executive session; 2) reasonably predictable or pending litigation or adversarial administrative proceedings as the purpose; and 3) the names of the other parties to the litigation or proceeding, the purpose of the executive session, or other information about the topic of the executive session that does not reveal closed or confidential information.⁷ However, a citation to a specific statute is not required as long as the announcement includes statements such as “consulting with its attorney” or “attorney consultation.”⁸ Thus, the requirements for the announcement of an executive session are conjunctive: a governing body must announce the legal authority and the topic to be considered during the executive session.

In this case, the agenda, minutes, and the recording of the meeting itself do not indicate that the announcement included an explanation that the governing body was going to consult with or receive advice from its attorney nor did the announcement contain the appropriate statutory reference. The city attorney only announced that the proposed sign code was to be discussed in an executive session because it is the subject of reasonably anticipated or threatened litigation.⁹

According to the city attorney, the phrase “attorney consultation” was not used, but it was presumed that the purpose of the executive session was to meet with an attorney.

There is no presumption in the law that an executive session will include attorney consultation, or that a session will include attorney consultation if the announcement is made by the governing body’s attorney. It is a technical requirement with a practical purpose: the public should clearly understand why citizens cannot attend that portion of the meeting.¹⁰ In addition, the statute cited by the city attorney, N.D.C.C. § 44-04-19.2, does not provide a governing body with the legal authority to exempt attorney consultation from the open meeting law; section 44-04-19.2 provides the procedural requirement for an executive session. Section 44-04-19.2 itself, cannot be relied upon for the legal authority to enter into an executive session.

Without any reference to the legal authority for “attorney consultation” or any mention that the Commission would be consulting with its attorney, I cannot presume that the public clearly understood why the Commission was meeting in executive session and thus, it is my opinion the Commission’s announcement did not sufficiently explain that the session was closed to receive legal advice from an attorney.

⁷ N.D.A.G. 2000-O-10. See also N.D.A.G. 2000-O-05 and N.D.A.G. 99-O-04.

⁸ Id. See also N.D.A.G. 2001-O-15.

⁹ Minutes, Bd. of City Comm’ns, Fargo, Oct. 4, 2010.

¹⁰ See N.D.A.G. 2000-O-10.

Issue two

If a governing body conducts an executive session to review or discuss exempt information, the governing body must first convene in open session, approve a motion to conduct the executive session, and make a proper announcement of the topics to be discussed and the legal authority for the executive session.¹¹ The portion of a meeting during which “attorney consultation” occurs may be closed to the public.¹² “Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation.”¹³ For “attorney consultation” to occur in an executive session, the attorney’s involvement must pertain to litigation or an adversarial administrative proceeding that is “pending” or “reasonably predictable.”¹⁴ The use of the phrase “reasonably predictable” in N.D.C.C. § 44-04-19.1 requires more than a simple possibility or fear of litigation or adversarial administrative proceedings.¹⁵ The possibility of litigation or a proceeding by or against the governing body must be realistic and tangible.¹⁶

Here, the Commission states that a representative of the “on-premise” sign industry had repeatedly threatened to sue the city of Fargo if the draft Sign Code was adopted. The threats were specific to multiple parts of the proposed sign code and they were made to several city officials, including the city attorney.¹⁷

The law does not require a governing body to wait until the moment before a lawsuit is filed before obtaining its attorney’s advice in an executive session.¹⁸ Also, the Commission did not have to wait until the sign code was adopted in order to meet with an attorney.¹⁹ Under the facts presented by the Commission, it was reasonable for the

¹¹ N.D.A.G. 44-04-19.2(2)(a) and (b). A motion is not necessary if the purpose of the executive session is to discuss or review confidential information.

¹² N.D.C.C. § 44-04-19.1(2).

¹³ N.D.C.C. § 44-04-19.1(5).

¹⁴ N.D.C.C. § 44-04-19.1(5); N.D.A.G. 2001-O-15.

¹⁵ N.D.A.G. 2001-O-15.

¹⁶ Id.

¹⁷ Letter from Erik R. Johnson, Fargo City Attorney, to Mary Kae Kelsch, Assistant Attorney General (Oct. 22, 2010).

¹⁸ N.D.A.G. 2001-O-15.

¹⁹ See generally, Washington State Atty. Gen.’s Open Gov’t Internet Deskbook (Public Records and Open Meetings), § 4.3(i), Grounds for holding an Executive session include discussing the attorney’s opinion as to the constitutionality of the proposed ordinance and the legal risks of adopting the ordinance, found at - www.atg.wa.gov/OpenGovernment/InternetManual/Chapter4.aspx (last viewed in February 24, 2011). See also, Tex. Atty. Gen. Op. No. JC-0057 (1999) (city council met

Commission to conclude that there was a “reasonably predictable,” if not almost certain, threat of litigation.

Having concluded that an executive session for “attorney consultation” was authorized in this situation, the remaining question is whether the discussion that occurred during the executive session was limited to receiving and discussing the attorney’s advice regarding the reasonably predictable litigation. The discussion involved advice on how to draft a sign policy that would place the Commission in a strong legal position if the ordinance is challenged in court. As the Supreme Court and prior opinions of this office have noted, the Legislature enacted N.D.C.C. § 44-04-19.1 to allow this type of consultation.²⁰ The recording indicates the discussion was limited to the attorney’s advice regarding specific parts of the draft ordinance that were criticized as unconstitutional and responses to the Commissioner’s questions regarding the legal advice. Therefore it is my opinion that the executive session was authorized by law.

Issue three

All meetings of a public entity’s governing body must be open to the public and preceded by public notice in substantial compliance with N.D.C.C. § 44-04-20.²¹

The requester alleges that the Commission met at a restaurant without providing any notice to public. However, the Commission did provide notice of the meeting on October 1, 2010, to 101 members of the media. In addition, an article about the upcoming dinner meeting ran in The Forum newspaper on October 3 and it was also announced at the Commission meeting. The Commission, however, did not post the notice at the location of the meeting, at the city’s main office, or file it in the city auditor’s office. According to the Commission, it did not notice the meeting as it normally would because Williston officials invited them to the dinner. The Commission did not consider the dinner to be its meeting.

As I explained in 2008, when the Dickinson City Commission, the South Heart City Council, and two Stark County governing bodies attended a luncheon hosted by a private company that included a presentation about a proposed power plant, each

with its attorney in a closed session on a proposed fireworks ordinance, which was subject to numerous threats of litigation; the opinion presumes that an executive session to consult with the council’s attorney would have been lawful).

²⁰ See Edinger v. Governing Auth. of Stutsman Cnty Corr. Ctr., 695 N.W.2d 447, 451 (N.D. 2005) (“statute does not say, however, that there has to be either pending or threatened litigation. . . [statutory] language indicates the governing body may consult its attorney if there is a reasonable probability of some form of legal action”); See also N.D.A.G. 2004-O-10 (cited with approval in Edinger).

²¹ N.D.C.C. §§ 44-04-19 and 44-04-20.

governing body has the responsibility to provide notice of a gathering of its members if the elements of the definition of “meeting” under N.D.C.C. § 44-04-17.1(8) are present.²² Here, the Commission correctly recognized that the elements of a meeting would be present and informed the media by email and the public by newspaper of the dinner.

The law does not provide alternative notice requirements for meetings held in unconventional locations or when multiple governing bodies are involved; therefore a public entity must notice such meetings in a manner consistent with N.D.C.C. § 44-04-20. Here, even though the invitation was from the Williston officials, notice should have been posted at the main city office building and filed with the city auditor. Notice also should have been posted at the location of the meeting even though the meeting took place at a private restaurant. The location of a meeting generally does not create an exception to the notice requirements of the open meetings law.

Although the Commission did not attempt to keep the dinner meeting with the Williston officials a secret and, in fact took steps to provide public notice, the Commission did not follow all of the legal notice requirements. Therefore, it is my opinion that notice was not provided in substantial compliance with N.D.C.C. § 44-04-20.

CONCLUSIONS

1. The Commission failed to provide the correct legal authority for holding the October 4, 2010, executive session because the Commission failed to explain the discussion was an “attorney consultation” and thus exempt from the open meetings law.
2. The executive session held October 4, 2010, was authorized by law.
3. The dinner meeting at a private restaurant that followed the October 4, 2010, Commission meeting was not preceded by public notice in substantial compliance with N.D.C.C. § 44-04-20.

STEPS NEEDED TO REMEDY VIOLATION

The October 4, 2010, meeting minutes must be amended at the next meeting to include language clarifying that the executive session was held in order to receive an attorney consultation, and to include notice information about the dinner meeting held in West Fargo.

²² See N.D.A.G. 2008-O-10 and N.D.A.G. 2008-O-11.

Failure to take the corrective measures described in this opinion 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. § 44-04-21.2.²³ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁴

Wayne Stenehjem
Attorney General

mkk/vkk

²³ N.D.C.C. § 44-04-21.1(2).

²⁴ Id.