

**OPEN RECORDS AND MEETINGS OPINION
2015-O-16**

DATE ISSUED: October 19, 2015

ISSUED TO: Stark County

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Stacy Dufault asking whether Stark County violated N.D.C.C. § 44-04-18 by requiring a requestor to provide an appropriate medium to receive a copy of an audio recording of a public meeting and by failing to provide requested records. Ms. Dufault also asks whether the Stark County Commissioners violated N.D.C.C. §§ 44-04-19.2 and 44-04-20 by failing to properly post notice of a meeting and not following proper procedure for entering into an executive session.

FACTS PRESENTED

The Stark County Commissioners held a regular meeting on May 5, 2015.¹ The agenda did not include notice of an executive session.² During the meeting, the Commissioners proceeded into an executive session with its attorney, Tom Henning, to discuss a letter received from attorneys representing a former County Veteran's Service Officer alleging civil defamation and wrongful termination.³ The executive session lasted approximately five minutes. Upon reconvening in open session, Mr. Henning addressed the public informing those present that a letter was received that would be shared with the North Dakota Insurance Reserve Fund (NDRF) for appointment of counsel to advise the Commission and address the allegations in the letter.

¹ Letter from Tom Henning, Stark Cnty. State's Att'y, to Sandra DePountis, Asst. Att'y Gen. (June 24, 2015); see also May 5, 2015, Minutes, Stark Cnty. Comm'n.

² Minutes, Stark Cnty. Comm'n (May 5, 2015).

³ Letter from Tom Henning, Stark Cnty. State's Att'y, to Sandra DePountis, Asst. Att'y Gen. (June 24, 2015); see also May 5, 2015, Minutes, Stark Cnty. Comm'n.; Letter from Ward K. Johnson, Att'y at Law, to Stark Cnty. Bd. Of Comm'rs (Apr. 28, 2015). (The letter requested a cash settlement or threatened suit would follow.)

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Ms. Dufault alleges that the executive session should have been noticed and that the Commission failed to properly go into executive session during the May 5, 2015, meeting.

On May 13, 2015, Linda Krebs, deputy auditor and human resources coordinator for Stark County, acknowledged receipt of an email from Ms. Dufault⁴ requesting the following records:

1. The job announcement and posting both internal and external for the last two positions at the Sheriff's Department.
2. The applications of those who were not selected for both positions.
3. The names of those who were interviewed and their scores.
4. The application and scores of the two individuals hired.
5. The audio and the agenda of the May 5th County Commission meeting.⁵

After forwarding the request to Mr. Henning for his review, Ms. Krebs provided copies of the job announcements and a list of the applicants for the respective positions to Ms. Dufault on May 15, 2015.⁶ Ms. Krebs attempted to attach the audio recording of the May 5 Commission meeting, but the file was too large to send by email.⁷ Instead, Ms. Krebs and Mr. Henning informed the requester that if she still wanted a copy of the

⁴ Ms. Dufault submitted copies of the emails described in this opinion but erased all references to who sent the emails. When Stark County provided the same emails, all the information was included and it was revealed that the emails were sent by Harper Lee. Harper Lee appears to be a pseudonym. In her letter to this office, Ms. Dufault references the emails as "my e-mails to Stark County." Thus, for the purposes of this opinion, this office will assume that Harper Lee and Ms. Dufault are one and the same.

⁵ Email from Linda Krebs, Deputy Auditor and Human Res. Coordinator, Stark Cnty., to Harper Lee (May 13, 2015, 7:54 AM). (Ms. Dufault sent the first request for records on May 8, 2015, however an incorrect email address for Ms. Krebs was used. Through follow up emails requesting a read receipt, Ms. Dufault realized the mistake and corrected the email address and modified the records request. See Email exchanges between Harper Lee and Linda Krebs, Deputy Auditor and Human Res. Coordinator, Stark Cnty. (May 8, 2015, 4:40 PM; May 11, 2015, 10:09 AM, May 12, 2015, 5:47 PM)).

⁶ Email from Linda Krebs, Deputy Auditor and Human Res. Coordinator, Stark Cnty., to Harper Lee (May 15, 2015, 2:29 PM).

⁷ Id.

recording, she needed to provide Stark County with a “new, sealed and packaged device such as a jump drive or thumb drive.”⁸ Ms. Krebs also informed the requester that scores and applications were “omitted from this request.”⁹ Ms. Dufault disagreed that it was her responsibility to provide a jump drive to receive the recording and alleged it was a violation of open records law to deny a request for records without citation to any legal authority.¹⁰ Eventually a jump drive was provided to Stark County and the recording of the May 5 meeting, absent the executive session, was loaded onto the drive and given back to the requester along with a copy of the May 5, 2015, meeting agenda.¹¹

Ms. Dufault alleges it was not proper for the Commission to require her to provide a thumb drive in order to receive a recording of the May 5, 2015, meeting and requested records not received were improperly denied to her.

ISSUES

1. Whether the Commission properly posted notice of its May 5, 2015, regular meeting.
2. Whether the Commission followed proper procedure before convening in executive session during the May 5, 2015, regular meeting.
3. Whether the Commission violated open records law by requiring a requestor provide the medium for receiving a copy of a recording of a public meeting.
4. Whether the Commission violated open records law by failing to provide requested records.

⁸ Id., see also, Email from Tom Henning, Stark Cnty. State’s Att’y, to Harper Lee (May 15, 2015, 3:34 PM).

⁹ Email from Linda Krebs, Deputy Auditor and Human Res. Coordinator, Stark Cnty., to Harper Lee (May 15, 2015, 2:29 PM).

¹⁰ Email from Harper Lee to Linda Krebs, Deputy Auditor and Human Res. Coordinator, Stark Cnty. (May 15, 2015, 3:07 PM).

¹¹ Letter from Tom Henning, Stark Cnty. State’s Att’y, to Sandra DePountis, Asst. Att’y Gen. (June 24, 2015).

ANALYSIS

Issue One

Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity.¹² The notice must include all topics the governing body expects to consider at the time the notice is prepared, including notice of any executive session expected or anticipated to be held.¹³ As long as it does so, “the lack of an agenda in the notice, or a departure from, or an addition to, the agenda at a [regular] meeting, does not affect the validity of the meeting or the action taken [at the meeting].”¹⁴ A governing body is free to discuss any topic at a regular meeting.¹⁵ However, a regular meeting notice should include any topics the governing body expects to discuss when the notice was prepared.¹⁶

The Commission relies on the Stark County Auditor to prepare its notice and meeting agenda.¹⁷ Prior to the May 5, 2015, regular meeting, Mr. Henning remembers conversing with the Commission chair about the letter and decided to address the entire Commission during its meeting.¹⁸ Although Mr. Henning believes he left a message for the auditor to include reference to the letter and executive session in the agenda, the auditor never received the message and the topic and executive session were not added to the agenda.¹⁹ Because the auditor did not know about the topic and executive session prior to posting notice of the regular meeting, the fact that the topic and executive session did not appear on the agenda but was later discussed by the Commission during its regular meeting, was not a violation of the open meetings law.

¹² N.D.C.C. § 44-04-20(1).

¹³ N.D.C.C. § 44-04-20(1), (2); N.D.A.G. 2005-O-18.

¹⁴ N.D.C.C. § 44-04-20(2); N.D.A.C. 2004-O-18.

¹⁵ N.D.C.C. § 44-04-20(2).

¹⁶ N.D.A.C. 2004-O-18; see also N.D.A.C. 2013-O-09 (Unlike special or emergency meetings, regular meetings of a governing body need not be restricted to the agenda topics included in the notice. If the governing body expects to discuss a topic when the notice is prepared, it is required to be included in the notice).

¹⁷ Letter from Tom Henning, Stark Cnty. State’s Att’y to Sandra DePountis, Asst. Att’y Gen. (June 24, 2015).

¹⁸ Id.

¹⁹ Id.

Issue Two

“Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public.”²⁰ A governing body may hold an executive session for an “attorney consultation” if such discussions meet the requirements of N.D.C.C. § 44-04-19.1(1) and (5). Even if an executive session is authorized, open meetings law require the following procedures be followed unless a different procedure is provided by law:

- 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;
- c. The executive session is recorded under [N.D.C.C. § 44-04-19.2(5)];
- d. The topics discussed or considered during the executive session are limited to those for which an executive session is authorized by law and that have been previously announced under this subsection; and
- e. Final action concerning the topics discussed or considered during the executive session is taken at a meeting open to the public, unless final action is otherwise required by law to be taken during a closed or confidential meeting. For purposes of this subsection, “final action” means a collective decision or a collective commitment or promise to make a decision on any matter, including formation of a position or policy, but does not include guidance given by members of the governing body to legal counsel or other negotiator in a closed attorney consultation or negotiation preparation session authorized in section 44-04-19.1.²¹

Ms. Dufault does not allege that the executive session held during the May 5, 2015, regular meeting was unauthorized by law, rather, she alleges proper procedure was not

²⁰ N.D.C.C. § 44-04-19.

²¹ N.D.C.C. § 44-04-19.2(2).

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followed before convening in executive session and alleges final action was taken during the executive session.

The audio recording of the Commission's May 5, 2015, regular meeting, including the open meeting and executive session, was provided and reviewed by this office. Before proceeding into an executive session, Mr. Henning announced that he reviewed a letter presented on behalf of a former Veteran Service Officer and there were things in the letter that needed to be addressed and understood by the Commission and therefore asked to hold an executive session.²² The announcement sufficiently described the topics to be considered during the executive session but did not include the legal authority, such as "attorney consultation," for closing the meeting.²³ Further, no motion was made or passed before proceeding into the executive session.

During the executive session, which lasted approximately five minutes, Mr. Henning reviewed the letter with the Commission. It was his recommendation that he pass the letter on to North Dakota Insurance Reserve Fund, (NDIRF), in order for them to appoint counsel to represent the Commission in the matter. No vote was taken and the Commission reconvened in open session. After inviting the public to return to the room, Mr. Henning explained that he would be sending a letter received by the Commission to NDIRF and requesting the assignment of counsel to represent the Commission. The communication between the Commission and its attorney was not "final action" because "final action" does not include "guidance given by members of the governing body to legal counsel...in a closed attorney consultation...authorized in section 44-04-19.1."²⁴

It is my opinion that the Commission violated open meetings law when it failed to pass a motion before holding an executive session for attorney consultation and when it failed

²² Recording, Stark Cnty. Comm'n (May 5, 2015). Although in its letter to this office Mr. Henning states that he believes a member of the Commission moved to adjourn into the executive session, the recording reveals no such motion was made and no vote taken before proceeding into the executive session. Further, although Mr. Henning believes he made an announcement that the executive session was for attorney consultation, a review of the recording reveals that no announcement was made that specifically referenced "attorney consultation" or N.D.C.C. § 44-04-19.1.

²³ See N.D.A.C. 2011-O-05 ("There is no presumption in the law that an executive 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." Thus, to close a meeting for "attorney consultation" statements such as "consulting with its attorney" or "attorney consultation" or reference to N.D.C.C. § 44-04-19.1(2), (5), should be used.)

²⁴ N.D.C.C. § 44-04-19.2(2)(e).

to announce its legal authority to the public for holding the executive session. However, no violation occurred when the Commission gave guidance to its counsel to send a letter to NDIRF during an executive session.

Issue Three

The May 5, 2015, regular Commission meeting was recorded and the recording was requested in an open record request. Because the recorded file was too big to forward via email, Stark County required the requestor to provide a medium for the recording to be uploaded upon before it would provide a copy of the open record.

“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.”²⁵ After the request is made, it is the responsibility of the public entity to provide copies of the public records. Public entities may charge for copies of records, including electronic records, in compliance with law.²⁶ One such allowable charge is that the entity may charge a “reasonable fee” for any copy of a record that is not a paper copy.²⁷ A “reasonable fee” is defined as “the actual cost to the public entity of making the copy, including labor, materials, and equipment.”²⁸

If the audio recording cannot be forwarded electronically, Stark County must provide the record in another available medium. The cost of the thumb drive or other device given to the requestor, may be passed along to the requester, but it is the responsibility of Stark County to provide such a device.

It is my opinion that Stark County violated open records law when it required a requestor to provide a thumb drive before it would release a public record.

Issue Four

All records of a public entity are open to the public unless otherwise specifically provided by law.²⁹ A public entity must describe the legal authority for denial of a request for records and the denial must be in writing if requested.³⁰

²⁵ N.D.C.C. § 44-04-18(1).

²⁶ N.D.C.C. § 44-04-18(2), (3).

²⁷ N.D.C.C. § 44-04-18(2).

²⁸ Id.

²⁹ N.D.C.C. § 44-04-18(1).

³⁰ N.D.C.C. § 44-04-18(7).

Initially, Stark County did not provide requested applications and interview scores to Ms. Dufault and gave no legal reason for withholding the requested records.³¹ Rather, Stark County merely informed the requester that “[s]cores, applications, and interview scores were to be omitted from this request.”³²

It is my opinion that Stark County violated open records law when it failed to provide legal reasoning for denying a request for records and when it failed to produce copies of requested public records.

CONCLUSIONS

1. The Stark County Commissioners did not violated open meetings law when it failed to include notice of an executive session in its agenda because it was not known at the time the notice was posted that such topic and executive session would be held during the May 5, 2015, regular meeting.
2. The Stark County Commissioners violated open meetings law when it failed to pass a motion before convening in executive session and failed to announce, during the open portion of the meeting, its legal authority for holding an executive session.
3. Stark County violated open records law when it required a requestor to provide an available medium before it would release a public record.
4. Stark County violated open records law when it failed to provide a legal reason for withholding certain records and when it failed to produce copies of requested public records.

STEPS NEEDED TO REMEDY VIOLATIONS

The Stark County Commissioners should amend its May 5, 2015, agenda and meeting minutes to reveal the correct authority for its executive session.

Because all records were ultimately provided, no further measures need to be taken in regards to the open record violations noted above. However, I urge Stark County to

³¹ Stark County, after discussions with this office, eventually released the requested interview scores and applications, with redactions pursuant to N.D.C.C. § 44-04-18.1, to Ms. Dufault. Email from Linda Krebs, Deputy Auditor and Human Res. Coordinator, Stark Cnty., to Harper Lee (July 27, 2015, 4:52 PM).

³² Email from Linda Krebs, Deputy Auditor and Human Res. Coordinator, Stark Cnty., to Harper Lee (May 15, 2015, 2:29 PM).

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review N.D.C.C. § 44-04-18 and other applicable law on its responsibilities under open records law.

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. § 44-04-21.2.³³ It may also result in personal liability for the person or persons responsible for the noncompliance.³⁴

Wayne Stenehjem
Attorney General

sld

cc: Stacy Dufault (via email only)

³³ N.D.C.C. § 44-04-21.1(2).

³⁴ Id.