

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 98-O-25**

DATE ISSUED: November 24, 1998

ISSUED TO: Douglas Schauer, Chairman, Board of Hearing Instrument Dispensers

CITIZEN'S REQUEST FOR OPINION

On October 22, 1998, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from John Skowronek asking whether the State Board of Hearing Instrument Dispensers (Board) violated N.D.C.C. §§ 44-04-18 and 44-04-19.2(4) by denying his request for the minutes and recording of an executive session held by the Board on March 30, 1998, and by failing to keep sufficient minutes of the Board's meeting.

FACTS PRESENTED

On September 22, 1998, Mr. Skowronek wrote a letter to the Board asking for all records of its mediation meeting on March 30, 1998. In response, the Board provided some records, including unapproved minutes of the parts of its March 30 meeting that were open to the public, but voted unanimously to refuse to release the recording or minutes of its executive session.

The Board has given this office the following explanation of its March 30, 1998, executive session:

The Board met at 8:15 a.m. on March 30, 1998, with the Audiology Board, Mr. Larry Martin and his attorney, Mr. John Skowronek, and a mediator, Mr. Steve Marquart. Both the Board of Hearing Instrument Dispensers and the Audiology Board had previously begun procedures to revoke or suspend Mr. Martin's licenses issued by each of those boards as the result of complaints received from a parent and a hospital about Mr. Martin's treatment of two different children's hearing problems. The purpose of the March 30, 1998, meeting was to mediate separate settlements between Mr. Martin and these two [b]oards.

The Board's minutes of the open portions of its meeting on March 30, 1998, state that three mediation groups (the Board of Hearing Instrument Dispensers, the Audiology Board, and Mr. Martin and his attorney Mr. Skowronek) retired to different rooms at approximately 11:15 in the morning. The minutes indicate that the Board's attorney quoted N.D.C.C. § 44-04-19.1 as authority for the Board to hold an executive session for attorney consultation and to give negotiating instructions to its negotiator.

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The minutes also describe, immediately following the attorney's reference to the Board's authority to hold an executive session, the actions the Board took after the mediation groups split up:

Doug Schauer entertained a motion to close the meeting of the Board of Examiners for Hearing Instrument Dispensers. Dave Kruse moved the meeting be closed, seconded by Bill Barnes. Motion passed unanimously. There followed a closed Board meeting of the Hearing Instrument Board.

At approximately 1:05 p.m. the mediation meeting re-convened without the Audiology Board to present the final settlement offer. . . .

The minutes conclude with the mediator's presentation of the settlement offer, and a statement that the offer was agreeable to both parties. A settlement agreement was subsequently executed and filed of record in the Board's administrative proceeding against Mr. Martin.

ISSUES

1. Whether the Board violated N.D.C.C. § 44-04-18 by denying Mr. Skowronek's request for the recording and minutes of the executive session the Board held on March 30, 1998.
2. Whether the Board's minutes of its March 30, 1998, executive session contain all the information required under N.D.C.C. § 44-04-19.2 for executive sessions.

ANALYSES

Issue One:

All records of a public entity must be open to the public unless otherwise specifically provided by law. N.D.C.C. § 44-04-18. The Board is a "public entity" as defined in N.D.C.C. § 44-04-17.1(12)(a). The term "record" is defined as recorded information in the possession of a public entity regarding its public business, N.D.C.C. § 44-04-17.1(15), which would include the minutes and recording of the Board's mediation meeting regarding Mr. Martin. Therefore, the minutes and recording of the executive session are open unless otherwise specifically provided by law.

The open records law (N.D.C.C. § 44-04-18), the open meetings law (N.D.C.C. § 44-04-19), and other related provisions in N.D.C.C. chapter 44-04 were substantially revised in 1997. 1997 N.D. Sess. Laws ch. 381. A new requirement under

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the 1997 revisions is that closed meetings or executive sessions be recorded electronically or on audiotape or videotape. N.D.C.C. § 44-04-19.2(5); 1998 N.D. Sess. Laws ch. 381, § 14. Disclosure of the recording is limited:

The recording must be disclosed pursuant to court order under subsection 2 of section 44-04-18.11 or to the attorney general for the purpose of administrative review under section 44-04-21.1. The attorney general may not disclose to the public any recording received under this subsection and must return the recording to the governing body upon completion of the administrative review. The recording may be disclosed upon majority vote of the governing body unless the executive session was required to be confidential. Disclosure of the recording by a public servant except as provided in this subsection is a violation of section 12.1-13-01.

N.D.C.C. § 44-04-19.2(5).

Although the opinion request primarily challenges the Board's legal authority for its executive session on March 30, 1998,¹ the requester also argues that the attorney consultation and negotiation instruction exceptions to the open meetings law, which are the Board's authority for denying access to the minutes and recording of the executive session, should not apply to a discussion of an adversarial administrative proceeding which continues to be pending before a different state agency but no longer involves the Board.

Current state law is very clear on when a recording of an executive session may be disclosed. Any disclosure of the recording to the public, unless approved by the Board or ordered by a court, is a felony. See N.D.C.C. §§ 44-04-19.2(5), 12.1-13-01. N.D.C.C. § 44-04-19.2(5) gives public entities discretion over whether to disclose a recording of an executive session. The Board has voted not to disclose the recording of its March 30 executive session because the Audiology Board's disciplinary action is still pending. In this case, that is a reasonable decision and is not an abuse of discretion.

Unlike the provisions in N.D.C.C. § 44-04-19.2 for recordings of executive sessions, there is no statute which expressly closes minutes of all executive sessions. However, beginning in 1978, this office has held on several occasions that a meeting may be

¹ The thirty-day time period in N.D.C.C. § 44-04-21.1 for reviewing the legal basis for the executive session and the procedures used to close the meeting has expired. Accordingly, this office must assume for the purpose of this opinion that the Board complied with the open meetings law, properly invoked its authority to hold an executive session under N.D.C.C. § 44-04-19.1, and followed the procedures required in N.D.C.C. § 44-04-19.2.

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closed to discuss closed or confidential records, even if there is no specific statute authorizing the meeting to be closed. Letter from Chief Deputy Attorney General Gerald VandeWalle to Thomas Clifford (May 3, 1978). See also N.D.A.G. 94-F-28. This office observed:

We do not believe the Legislature, in enacting statutes providing for the confidentiality of student records, intended that those records could be made public indirectly through the open meeting statute but not directly by virtue of the open records statute. Such a result would . . . subvert the policy of the Legislature.

Letter to Clifford at pp. 3, 4. This principle was codified in 1997 as subsection one of N.D.C.C. § 44-04-19.2.

It is my opinion that the inverse of the conclusion in the 1978 letter is also true: unless another law specifically provides otherwise, the minutes of an executive session are not an open record. As one court recently observed:

It makes little sense to permit governmental bodies to meet in private under clearly defined circumstances only to subsequently allow the minutes of those private meetings to be publicly accessed under [the state open records law].

. . .

In our view, memorialized discussion at duly convened executive sessions . . . are not the type of governmental records to which the public has to be given access.

Kline and Sons Inc. v. County of Hamilton, 663 N.Y.S.2d 339, 341 (N.Y. App. Div. 1997). See also Cooper v. Bales, 233 S.E.2d 306, 308 (S.C. 1977) (statute authorizing executive session "would be rendered meaningless if [open records law] was construed to publicize all matters discussed in executive sessions"); but see Orford Teachers Assoc. v. Watson, 427 A.2d 21, 24 (N.H. 1981) (minutes of an executive session containing additional, non-required information are nevertheless open to the public).

The more difficult question is whether the minutes of an executive session are closed indefinitely, or only for as long as necessary to preserve the purpose of the executive session. There is some merit to the requester's argument that the recording and any minutes of an executive session should be open when the underlying exception to the open meetings law would no longer apply. That argument is the law in some states.

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See Del. Code. Ann. Tit. 29, § 10004(f) (minutes of an executive session are an open record unless disclosure would defeat the purpose of the executive session); N.H. Rev. Stat. Ann. § 91-A:3 III; N.J. Stat. Ann. § 10:4-14. In another state, the minutes of all executive sessions are open to the public, but the contents of those minutes are very similar to the general information that N.D.C.C. § 44-04-19.2(4) requires be included in the minutes of any meeting during which an executive session is held. N.Y. Public Officers Law § 106(2).

The question of how long the minutes of an executive session may be closed to the public will only arise in circumstances in which the Legislature has already acknowledged, by enacting an exception to the open meetings law, that the interests of closing a particular meeting outweigh the important public interest in open government. Accordingly, despite the broad interpretation usually given to the open records and meetings laws, the open records exception for minutes of an executive session must be interpreted carefully to avoid defeating the purpose of the statute closing the meeting in the first place. The candid and full discussion that the Legislature intended to promote by enacting an open meetings exception should not be chilled by an unduly narrow interpretation of how long minutes of those sessions may be closed to the public. A governing body also should not be deterred from voluntarily keeping an accurate summary of comments made during an executive session.

A conclusion that the minutes of an executive session are closed indefinitely would not remove the subject of that meeting from public scrutiny. The governing body holding the meeting must announce, and the minutes of the meeting must indicate, the reason and legal basis for the executive session. N.D.C.C. § 44-04-19.2(2), (4). Any agreement or order, including a payment of public funds, which concludes the litigation or proceeding will be an open record. Finally, the governing body has discretion to release the recording and the minutes, unless they contain confidential information, and an interested member of the public may ask the Board at any time to exercise its discretion.

When interpreting statutes, laws on the same or similar subjects may be considered. N.D.C.C. § 1-02-39. The limited and exclusive ways to disclose the recording of an executive session under N.D.C.C. § 44-04-19.2(5) are evidence of legislative intent to protect records of executive sessions from public disclosure. Whether the minutes of an executive session are a vague outline or a verbatim transcript of the discussion at the executive session, the same reasons for withholding the recording from the public under N.D.C.C. § 44-04-19.2(5) apply to any minutes that are kept of the same executive session.

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In at least one instance, the Legislature has adopted a provision requiring disclosure of certain executive session minutes when disclosure will not defeat the purpose of closing the meeting. N.D.C.C. § 15-29-08(27). Except for those instances where a statute specifically addresses executive session minutes, current law allows public entities to balance the reason for the applicable open meetings exception or exceptions and the public's interest in open government. It is my opinion that, unless a statute provides otherwise, the minutes of executive sessions should be treated in substantially the same way as the recording of the executive session: the records are not required to be open to the public, the records continue to be closed even if disclosure would no longer defeat the purpose of the executive session, and the records may be released to a court or by majority vote of the governing body. As a result, the Board did not violate N.D.C.C. § 44-04-18 by denying Mr. Skowronek's request for the recording and minutes of the Board's executive session on March 30, 1998.

Issue Two:

The second issue raised by the requester is the sufficiency of the minutes of the Board's meeting on March 30, 1998. N.D.C.C. § 44-04-21(2) describes the general requirements for all meetings that are subject to N.D.C.C. § 44-04-19. In addition:

The minutes of an open meeting during which an executive session is held must indicate the names of the members attending the executive session, the date and time the executive session was called to order and adjourned, a summary of the general topics that were discussed or considered that does not disclose any closed or confidential information, and the legal authority for holding the executive session.

N.D.C.C. § 44-04-19.2(4). Mr. Skowronek alleges that the minutes of the March 30, 1998, meeting, which are described and quoted in the Facts Presented portion of this opinion, fail to indicate when the executive session was called to order and adjourned, and do not summarize the general topics discussed during the executive session.

The draft minutes of the March 30, 1998, meeting were prepared before the Board's October 1998 meeting, and were reviewed at that meeting, but have not yet been approved. Generally, draft minutes should be prepared shortly after a meeting and approved at the governing body's next meeting. Because the Board did not approve the minutes at its October meeting, and its next regular meeting may not be held for several more months, I urge the Board to convene a meeting in the near future, perhaps by teleconference, to approve the minutes of the meeting. However, because the minutes have not yet been approved, alleged deficiencies in the draft minutes should be raised with the Board rather than in a request for an opinion under N.D.C.C. § 44-04-21.1. It is

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my opinion that the alleged violations of N.D.C.C. § 44-04-19.2(4) cannot be reviewed until after the minutes have been approved by the Board because any deficiencies could be eliminated before a violation actually occurs.

Looking at the minutes in their entirety, the open meeting pertained exclusively to the mediation of the Board's proceeding against Mr. Martin, and it is fairly clear that the executive session pertained to that proceeding. The Board voted to close the meeting immediately after its attorney quoted the open meetings exceptions in N.D.C.C. § 44-04-19.1 for attorney consultation and to give negotiation instructions to its negotiator. It is slightly less clear when the executive session began and ended, but there is at least some implication that the executive session started after the mediation groups split up and continued until the open meeting reconvened.

The law disregards trifles, N.D.C.C. § 31-11-05, and the procedural requirements in N.D.C.C. § 44-04-19.2 should not be applied so rigidly that a script needs to be prepared ahead of time (and reviewed by an attorney) in order to comply with those requirements. However, since the Board still needs to approve the minutes, and thus has an opportunity to make changes to the minutes, I suggest the Board amend its minutes to clarify the times the executive session began and ended.

CONCLUSIONS

1. It is my opinion that the Board did not violate N.D.C.C. § 44-04-18 by denying Mr. Skowronek's request for the recording and minutes of the Board's executive session on March 30, 1998.
2. It is my opinion that an alleged violation of N.D.C.C. § 44-04-19.2(4) does not actually occur, and therefore cannot be reviewed by this office, until after the minutes have been approved by the Board.

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