

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 99-O-07**

DATE ISSUED: June 29, 1999

ISSUED TO: Ed Malazdrewicz, Chair, North Dakota Board of Examiners on
Audiology and Speech-Language Pathology

CITIZEN'S REQUEST FOR OPINION

On March 11, 1999, April 5, 1999, and April 23, 1999, this office received requests for opinions under N.D.C.C. § 44-04-21.1 from John Skowronek, on behalf of Larry Martin, asking whether the North Dakota Board of Examiners on Audiology and Speech-Language Pathology (hereafter, Board) violated N.D.C.C. § 44-04-18 on open records and N.D.C.C. § 44-04-19 on open meetings.

FACTS PRESENTED

The Board met on January 27, 1999, and February 8, 1999, to seek and receive its attorney's advice regarding how the Board should respond to the administrative law judge's (ALJ) recommended findings of fact, conclusions of law, and order in the pending adversarial administrative proceeding involving the Board and Larry Martin. Thus, almost all of the January 27 and February 8 meetings were closed to the public for attorney consultation under N.D.C.C. § 44-04-19.1. This office previously concluded that almost all of the discussion of the closed part of the January 27, 1999, meeting and all of the closed part of the February 8, 1999, meeting was for the purpose of attorney consultation as authorized by N.D.C.C. § 44-04-19.1.¹

After the Board's original decision in the Martin case was issued, the trial court remanded the case back to the Board. The Board held a regular meeting on March 26, 1999. The Board closed a part of this meeting pursuant to N.D.C.C. § 44-04-19.1 to consult with its attorney regarding changes or additions to its findings of fact. The Board met again on April 21, 1999. The Board closed a part of this meeting to address a Board member's questions about the proposed supplemental findings of fact prior to adopting them. Mr. Skowronek contends that going into executive session (i.e., closing a part of its meetings) at the March 26, 1999, and April 21, 1999, meetings for the purposes indicated did not fall within the definition of "attorney consultation" as defined in N.D.C.C. § 44-04-19.1(4).

¹ A small part of the discussion in the closed part of the January 27, 1999, meeting consisted of a discussion of the next meeting date of the Board and what the minutes of the meeting should say. The Board was directed to provide to Mr. Skowronek a copy of this part of the tape recording of the closed meeting. See N.D.A.G. 99-O-06.

The Board adjourned the April 21, 1999, meeting without giving Mr. Skowronek the opportunity to address the Board regarding its adopted findings of fact.

ISSUES

1. Whether the Board violated the open records law when it denied Mr. Skowronek's request for a copy of the tape recording of the closed portions of the January 27, 1999, and February 8, 1999, meetings.
2. Whether the Board's meetings with its attorney to amend its findings of fact, and to address a Board member's questions about the amended findings of fact, constitute "attorney consultation" under N.D.C.C. § 44-04-19.1(4).
3. Whether the Board violated the open meetings law by not allowing Mr. Skowronek to address the Board regarding its findings of fact at its April 21, 1999, meeting.

ANALYSES

Issue One:

This office previously concluded that most of the closed part of the January 27, 1999, meeting and all of the closed part of the February 8, 1999, meeting were properly closed for attorney consultation under N.D.C.C. § 44-04-19.1(4). See N.D.A.G. 99-O-06. Mr. Skowronek contends that the open records law requires him to be given copies of the tape recordings of the closed parts of January 27 and February 8 meetings that constituted "attorney consultation."

State law provides that a recording of a closed portion of a meeting "may be disclosed upon majority vote of the governing body unless the executive session was required to be confidential." N.D.C.C. § 44-04-19.2(5). Attorney consultation is exempt from the open meetings law. N.D.C.C. § 44-04-19.1(2). Since an attorney consultation is not required to be confidential, but instead is merely exempt from the open meetings law, the tape recordings of the attorney consultation in the closed portions of the January 27 and February 8 meetings may be disclosed upon majority vote of the Board. The Board voted unanimously at its meeting on March 26, 1999, which was attended by Mr. Skowronek, not to disclose the tape recordings of its January 27 and February 8 executive sessions. Thus, it is my opinion that the Board did not violate N.D.C.C. § 44-04-18 by denying Mr. Skowronek's request for a copy of the tape recording of the

Board's executive sessions for "attorney consultations" on January 27, 1999, and February 8, 1999. See N.D.A.G. 98-O-25.

Issue Two:

The Board in its regular March 26, 1999, meeting closed a part of the meeting for "attorney consultation" under N.D.C.C. § 44-04-19.1 to consider action needed in light of the court's remand. The Board met again on April 21, 1999, to finalize and enter the Board's supplemental findings of fact, conclusions of law, and order. A Board member had questions about the proposed additional findings of fact and the meeting was closed again, for "attorney consultation" under N.D.C.C. § 44-04-19.1, so the attorney could address those questions prior to the Board's taking action on the supplemental findings. Following the executive session, the Board met in an open meeting and voted to adopt the supplemental findings of fact.

A board may close that part of a meeting where the board meets with its attorney for an "attorney consultation" as defined in N.D.C.C. § 44-04-19.1(4). Regarding the Board's January 27, 1999, and February 8, 1999, meetings, this office previously concluded:

Most of the January 27 and all of the February 8 closed meeting involved an exchange between Board members and the Board's attorney regarding the ALJ's [administrative law judge's] recommended findings of fact, conclusions of law, and order and how that document did not sufficiently reflect an understanding of the profession of audiology and speech-language pathology. The exchange also included a discussion between the Board and its attorney about how the Board's findings of fact, conclusions of law, and order should be worded to support the Board's position regarding revocation of Mr. Martin's license. This type of discussion between a professional board and its attorney, in my opinion, falls within "attorney consultation" as defined in N.D.C.C. § 44-04-19.1.

N.D.A.G. 99-O-06 (emphasis added).

It is my opinion that a Board's meetings with its attorney to amend or supplement its findings of fact and to address a Board member's questions about the supplemental findings of fact are directly related to what the findings of fact should be. Thus, it is my opinion that the Board's meetings with its attorney to amend or supplement its findings of fact, and to address a Board member's questions about the proposed changes to the findings of fact, constitute "attorney consultation" under N.D.C.C. § 44-04-19.1(4).

Issue Three:

The open meetings law is violated “when any person is denied access to a meeting” which the law does not authorize to be closed. N.D.C.C. § 44-04-19 (emphasis added). The right to attend a meeting under N.D.C.C. § 44-04-19 does not include the right to participate in the meeting. N.D.A.G. 98-F-11. Therefore, it is my opinion that the Board did not violate the open meetings law by not allowing Mr. Skowronek to address the Board at its April 21, 1999, meeting.

CONCLUSIONS

1. The Board did not violate the open records law when it denied Mr. Skowronek’s request for a copy of the tape recording of the closed portions of the January 27, 1999, and February 8, 1999, meetings, which constituted “attorney consultation” under N.D.C.C. § 44-04-19.1(4).
2. The Board’s meetings with its attorney to supplement its findings of fact, and to address a Board member’s questions about the findings of fact, constitute “attorney consultation” under N.D.C.C. § 44-04-19.1(4).
3. The Board did not violate the open meetings law by not allowing Mr. Skowronek to address the Board regarding its findings of fact at its April 21, 1999, meeting.

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