

LETTER OPINION
99-L-115

November 18, 1999

Mr. Howard Swanson
Grand Forks City Attorney
PO Box 12909
Grand Forks, ND 58208-2909

Dear Mr. Swanson:

Thank you for your letter asking whether a member of a governing body of a public entity who was absent from a properly closed meeting may listen to the recording of the executive session without the disclosure resulting in a waiver of the city's right to maintain the exempt status of the recording under the state open records law.

Your question is a hybrid of two issues which have not been previously addressed by this office or the North Dakota Supreme Court, but have been addressed by courts in other states applying similar laws. First, the recording is a closed record and may only be disclosed to the public upon court order or upon majority vote of the governing body. N.D.C.C. § 44-04-19.2(5). Accordingly, one issue presented by your letter is whether a member of a governing body is authorized or entitled to have access to closed or confidential records of the public entity. Also, since allowing the member to listen to the recording is effectively the same as permitting the member to attend the executive session, the second issue presented by your letter is the right of an individual member of a governing body to attend closed or confidential meetings of that body.

Regarding a member's access to a properly held executive session, one court has stated:

The Open Public Meetings Act . . . does not govern this dispute. . . . [The excluded member] does not seek the right to attend the Board's executive sessions as a member of the public but rather as a member of the Board. We find nothing in the Open Public Meetings Act which deals with the circumstances under which a member of a public body may be excluded from an executive session of that body.

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Scotch Plains-Fanwood Bd. of Educ. v. Syvertsen, 598 A.2d 1232, 1233 (N.J. Super. Ct. App. Div. 1991). Similarly, the North Dakota open meetings law and related statutes in N.D.C.C. ch. 44-04 regarding executive sessions are silent on the right of members of governing bodies to attend all meetings of the governing body, including executive sessions.

Courts in other states have recognized an inherent right of a member of a governmental body to attend all meetings of that body, including executive sessions. Scotch Plains-Fanwood, 598 A.2d at 1233; Myers v. Elgin Community College Bd. of Trustees, 361 N.E.2d 314 (Ill. 1977). The only exception to this right is when the subject of the executive session is litigation involving the excluded member. Scotch Plains-Fanwood, 598 A.2d at 1233-34. There is no basis in North Dakota law, as a general rule, for a governing body of a public entity to exclude one of its members from a meeting. All members are equally responsible for carrying out the governing body's public duties and functions. Accordingly, I agree with the courts in other states which have recognized an inherent right of a member of a governing body to attend all meetings of that body, including executive sessions.

A similar inherent right exists for a member's access to closed or confidential records of the public entity Gabrilson v. Flynn, 554 N.W.2d 267 (Iowa 1996). The public duty of a member of a governing body of a public entity to regulate the affairs of that entity "necessarily implies that . . . members should have access to records and documents of the [entity] . . . in order to give effect to the authority granted them by statute," assuming access by the members of the governing body is "necessary for the proper discharge of their duties." Id. at 275. Because disclosure of the recording of an executive session to a member of the governing body is inherently permitted under N.D.C.C. § 44-04-19.2, the disclosure would not constitute a waiver by the governing body of the exempt status of the recording under N.D.C.C. § 44-04-18, the state open records law.

Construing N.D.C.C. § 44-04-19.2 as entitling a member of a governing body who did not participate in an executive session to listen to the recording of that session also avoids a potentially absurd result. It is possible that a governing body would be asked several years after an executive session was held to disclose to the public the recording of that session, a disclosure which is authorized under N.D.C.C. § 44-04-19.2. When the request is made, it would be very possible that some or all of the current members of the governing body did not participate in the executive session. If the nonparticipating members were not allowed to listen to the recording,

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they could not make an informed decision on whether to disclose the recording.

I note that N.D.C.C. § 44-04-19.2 prohibits public disclosure of the recording of an executive session without a majority vote of the governing body or pursuant to a court order. This prohibition applies to individual members of the body as well as other public employees and officials who may have access to the recording. Id. Cf., Kleitman v. Superior Court, 87 Cal. Rptr.2d 813, 820 (Cal. Ct. App. 1999). Further, public officials are prohibited from using confidential information for personal gain. N.D.C.C. § 12.1-13-02.

In summary, it is my opinion that a member of a governing body who was absent from a properly closed meeting is entitled to listen to the recording of the executive session, with certain exceptions which do not apply in the situation you present. It is my further opinion that the limited disclosure of the recording to the member does not waive the governing body's right to maintain the exempt status of the recording under the state open records law.

Sincerely,

Heidi Heitkamp
Attorney General

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