

**OPEN RECORDS AND MEETINGS OPINION
2018-O-16**

DATE ISSUED: October 11, 2018

ISSUED TO: Williston Public School Board District #1

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Lanny Gabbert asking whether Williston Public School Board District #1 violated N.D.C.C. § 44-04-19 by holding an unauthorized executive session.

FACTS PRESENTED

The Board of the Williston Public School District #1 held a special meeting on May 21, 2018, and entered into an executive session “pursuant to 44-04-19.1(9) for negotiating strategy to discuss Superintendent contract and salary offer.”¹ The executive session lasted approximately two hours.² Upon reconvening the open portion of the meeting, no motions were made or final action taken.³ An offer was made for the superintendent position to the agreed upon applicant after the May 21, 2018, meeting.⁴ Another special meeting was called on May 22, 2018, where the Board approved a superintendent contract.⁵

ISSUE

Whether the executive session during the May 21, 2018, special meeting of the Williston Public School Board District #1, was authorized by law.

¹ Agenda, Williston Pub. Sch. Dist. #1 (May 21, 2018). The Board announced the legal authority and topic to the public and passed a motion before proceeding into the executive session. See *also* Letter from Rachel Bruner, att’y for Williston Pub. Sch. Dist. #1, to Att’y Gen.’s Office (June 21, 2018).

² Minutes, Williston Pub. Sch. Dist. #1 (May 21, 2018).

³ *Id.*

⁴ Letter from Rachel Bruner, att’y for Williston Pub. Sch. Dist. # 1, to Att’y Gen.’s Office (June 21, 2018). This information was also obtained from a review of the recorded executive session.

⁵ Agenda, Williston Pub. Sch. Dist. # 1 (May 22, 2018); Minutes, Williston Pub. Sch. Dist. #1 (May 22, 2018).

ANALYSIS

School board meetings must be open to the public unless otherwise specifically provided by law.⁶ The Board closed its May 21, 2018, meeting pursuant to N.D.C.C. § 44-04-19.1(9), which provides:

A governing body may hold an executive session under section 44-04-19.2 to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator regarding . . . contracts, which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future. An executive session may be held under this subsection only when an open meeting would have an adverse fiscal effect on the bargaining or litigating position of the public entity.⁷

This subsection does not authorize an executive session simply because a contract is being considered or discussed.⁸ The discussion must be in the context of negotiation strategy, or providing negotiation instructions to the governing body's attorney or negotiator, regarding contracts which are currently being negotiated or for which negotiation is reasonably likely in the future.⁹ In addition, the discussion is only protected if disclosure of the remarks to the public would have an adverse fiscal effect on the governing body's bargaining position.¹⁰

Past opinions recognize that school boards are authorized to hold executive sessions to discuss salary and benefit negotiations of teachers and employees when doing so in public would adversely affect their negotiation and bargaining position.¹¹ However, when the school board makes a unilateral decision on a contract, without options for further negotiations, the elements of N.D.C.C. § 44-04-19.1(9) are not met and an executive session is not appropriate.¹²

This office recently issued an opinion finding the West Fargo School Board's executive session for negotiation strategy and instruction was proper because the Board

⁶ N.D.C.C. § 44-04-19; N.D.A.G. 2018-O-08.

⁷ N.D.C.C. § 44-04-19.1(9).

⁸ N.D.A.G. 2018-O-08.

⁹ N.D.C.C. § 44-04-19.1(9); N.D.A.G. 2018-O-08.

¹⁰ N.D.C.C. § 44-04-19.1(9); N.D.A.G. 2018-O-08. This would result in increased costs to the public entity.

¹¹ N.D.A.G. 2018-O-08; N.D.A.G. 2004-O-13; N.D.A.G. 2000-O-05; *but see* N.D.A.G. 2000-O-09.

¹² N.D.A.G. 2018-O-08; N.D.A.G. 2010-O-11; N.D.A.G. 2005-O-21; *see also* N.D.A.G. 2017-O-03; N.D.A.G. 2016-O-01.

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considered various negotiation strategies based on what other school districts offer as salary and benefits and what it could offer to stay competitive and attract the best applicant.¹³ To have such a discussion on various salary ranges and benefits that could be negotiated based on an applicant's experience and qualifications would adversely affect the Board's bargaining and fiscal position because, if held in public, the applicant could demand the top dollar amount and certain benefits, undermining the Board's future negotiations. However, the open meetings law was violated when the Board took final action in the executive session after it "reached a consensus" to offer a baseline salary, with retirement benefits, of \$200,000.

A member of my staff reviewed the recording of Williston Public School Board's May 21, 2018, executive session.¹⁴ Unlike the West Fargo School Board's discussion on the parameters of salary and compensation packages, the Williston School Board discussed its four finalists for the superintendent position, their qualifications, personal observations, and pros and cons of each candidate.¹⁵ It was only the last few minutes of the two hour executive session that the Board discussed any salary or benefits package.

This office and the North Dakota Supreme Court repeatedly recognize that personnel matters, including discussions on employment issues, are not protected under the open records and meetings law, and a governing body may not hold an executive session on such matters, even though it may be uncomfortable to discuss at an open meeting.¹⁶ During the 2017 legislative session, a limited exception was carved out in N.D.C.C. § 44-04-18.27 which protects records of applicants for public employment, except for designated finalists. Here, the Board already designated finalists and the names and records of these finalists were therefore open records. Discussing the qualifications of the finalists and which applicant to offer the position to are the exact conversations on personnel matters that are required to be held in public.

It was only the last approximately five minutes of the executive session that the Board raised the question of how it would move forward with negotiations if the initial offer was not accepted. In that conversation, the Board discussed other compensation to offer in negotiations. This is the only discussion that was proper for the executive session because, if held in the open, it would have an adverse fiscal effect and undermine the Board's future negotiations.

¹³ N.D.A.G. 2018-O-08.

¹⁴ The executive session was recorded in compliance with N.D.C.C. § 44-04-19.2(5).

¹⁵ The Board chose four finalists for the superintendent position before the May 21, 2018, executive session.

¹⁶ See N.D.A.G. 2017-O-03, citing 23 past opinions and three North Dakota Supreme Court cases.

In addition, although no formal vote was taken, the Board reached a consensus on who would be offered the superintendent position and the baseline negotiation salary and benefits package. As recognized in past opinions, this is considered “final action” that must take place in the public portion of the meeting.¹⁷

CONCLUSION

Only the final approximately five minutes of the executive session during the May 21, 2018, special meeting of the Williston Public School Board District #1 – was authorized by law as negotiation strategy and instruction session. The rest of the two hour executive session, and final action taken therein, violated open meetings law.

STEPS NEEDED TO REMEDY VIOLATION

The Williston Public School Board District #1 must release the recording of the portion of the unauthorized executive session to Lanny Gabbert, and anyone else requesting it, free of charge. The May 21, 2018, meeting minutes must also be updated to reflect the unauthorized discussion, along with final action taken.

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. § 44-04-21.2.¹⁸ It may also result in personal liability for the person or persons responsible for the noncompliance.¹⁹

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Attorney General

sld
cc: Lanny Gabbert (via email only)

¹⁷ N.D.C.C. § 44-04-19.2(2)(e), N.D.A.G. 2018-O-08.

¹⁸ N.D.C.C. § 44-04-21.1(2).

¹⁹ *Id.*