

**OPEN RECORDS AND MEETINGS OPINION
2019-O-12**

DATE ISSUED: July 2, 2019

ISSUED TO: Linton Industrial Development Corporation

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Clarence Herz asking whether the Linton Industrial Development Corporation violated N.D.C.C. §§ 44-04-20 and 44-04-19.2 by holding meetings without proper notice and holding an improper executive session.

FACTS PRESENTED

The Linton Industrial Development Corporation (LIDC) has acted as the City of Linton's Job Development Authority since 1993, and receives tax levies from the city to fulfill its duties and functions.¹ The LIDC's board is composed of seven members and holds regular meetings on the second Wednesday of every month.² At issue in this opinion was a regular meeting held on February 13, 2019, whether notice was proper and whether the executive session was authorized.

¹ Letter from Daniel Weber, President, Linton Indus. Dev. Corp., to Att'y Gen.'s Office (Mar. 13, 2019). The LIDC is therefore considered a "public entity" subject to open records and meetings law. See N.D.C.C. § 44-04-17.1(13) (definition of "public entity"); see *also* N.D.A.G. 2005-O-06 (Napoleon Economic Development Company considered a "public entity" subject to open records and meetings law); N.D.A.G. 2001-O-11 (Fargo-Cass County Economic Development Corporation considered a "public entity" subject to open records and meetings law); and N.D.A.G. 2001-O-10 (Minot Area Development Corporation considered a "public entity" subject to open records and meetings law).

² Letter from Daniel Weber, President, Linton Indus. Dev. Corp., to Att'y Gen.'s Office (Mar. 13, 2019). Dates and times are posted on the City Website Community Calendar and on the Linton Lions Community Calendar in December.

ISSUES

1. Whether the Linton Industrial Development Corporation posted notice of its February 13, 2019, meeting in substantial compliance with N.D.C.C. § 44-04-20.
2. Whether the Linton Industrial Development Corporation's executive session during its February 13, 2019, meeting, complied with the procedures required by N.D.C.C. § 44-04-19.2.
3. Whether the executive session during Linton Industrial Development Corporation's February 13, 2019, meeting was authorized by law.
4. Whether the Linton Industrial Development Corporation held "meetings" through various means without complying with open meeting requirements.

ANALYSIS

Issue One

Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity in substantial compliance with N.D.C.C. § 44-04-20.³ Notice of regular meetings must be posted at the principal office of the governing body, if one exists, at the location of the meeting on the day of the meeting, given to anyone who asks to receive notice of upcoming meetings,⁴ and for city-level entities, either filed with the city auditor or posted on the public entity's website.⁵ The notice must contain the date, time, and location of the meeting, topics to be considered, and the general subject matter of any executive session expected to be held during the meeting.⁶ "Filing a yearly schedule of upcoming meetings does not relieve a public entity from its obligation to post an agenda for each meeting as required [by law]."⁷

The LIDC posts a schedule of its yearly meetings on the city's website under the Community Calendar and on the Linton Lions Community calendar.⁸ However, the LIDC

³ N.D.C.C. §§ 44-04-19, 44-04-20.

⁴ No one has asked to receive personal notice of upcoming LIDC meetings. Letter from Daniel Weber, President, Linton Indus. Dev. Corp., to Att'y Gen.'s Office (Mar. 13, 2019).

⁵ N.D.C.C. § 44-04-20(4), (5).

⁶ N.D.C.C. § 44-04-20(2).

⁷ N.D.C.C. § 44-04-20(3); *see also* N.D.A.G. 2013-O-05.

⁸ Letter from Daniel Weber, President, Linton Indus. Dev. Corp., to Att'y Gen.'s Office (Mar. 13, 2019).

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only has the agenda available at its principal office on the day of the meeting and does not post the agenda on its website, with the city auditor, or at the location of the meeting on the day of the meeting.⁹ The agenda must be posted when it is prepared and provided to the board members, not just available on the day of the meeting.¹⁰ Therefore, it is my opinion that the LIDC failed to post notice of the February 13, 2019, meeting in substantial compliance with N.D.C.C. § 44-04-20.

Issue Two

All “meetings”¹¹ of a “governing body”¹² of a “public entity”¹³ must be open to the public unless specifically provided by law.¹⁴ An executive session that is authorized by law can be held if the governing body follows the procedures of N.D.C.C. § 44-04-19.2:

- 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 announced 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;
- c. The executive session is recorded under subsection 5;
- d. The topics discussed or considered during the executed 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. . . .

⁹ *Id.* See also Letter from Daniel Weber, President, Linton Indus. Dev. Corp., to Att’y Gen.’s Office (Apr. 4, 2019).

¹⁰ N.D.C.C. § 44-04-20(5) (notice must be given at the same time as the governing body’s members are notified); Letter from Daniel Weber, President, Linton Indus. Dev. Corp., to Att’y Gen.’s Office (Apr. 19, 2019).

¹¹ N.D.C.C. § 44-04-17.1(9) (definition of “meeting”).

¹² N.D.C.C. § 44-04-17.1(6) (definition of “governing body”).

¹³ N.D.C.C. § 44-04-17.1(13) (definition of “public entity”).

¹⁴ N.D.C.C. § 44-04-19.

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The LIDC passed a motion before convening in executive session on February 13, 2019, and recorded the executive session.¹⁵ The LIDC president announced to the public before proceeding into the executive session that “there would be updates about Plains Mobile, Inc. and consideration of loan options to Tracie Ritz.”¹⁶ These were the only two topics discussed during the executive session.¹⁷ The LIDC came out of its executive session and took final action during the open portion of the meeting.¹⁸ However, the LIDC only referenced a discussion of “confidential information” in its motion to proceed into executive session.¹⁹ This general reference was insufficient to identify the legal authority for closing the meeting, prior to proceeding into the executive session.²⁰ In this case, the LIDC should have stated the legal authority for closing the meeting was to discuss economic development records and other financial information pursuant to N.D.C.C. § 44-04-18.4, as discussed in the next section.

The LIDC therefore violated N.D.C.C. § 44-04-19.2 by failing to announce the legal authority for the executive session to the public.

Issue Three

“Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public.”²¹ A public entity may hold an executive session to consider or discuss closed or confidential records or as otherwise provided by law. ²² The LIDC

¹⁵ Letter from Daniel Weber, President, Linton Indus. Dev. Corp., to Att’y Gen.’s Office (Mar. 13, 2019). See *also* Minutes, Bd. of Dir., Linton Indus. Dev. Corp. (Feb. 13, 2019).

¹⁶ Letter from Daniel Weber, President, Linton Indus. Dev. Corp., to Att’y Gen.’s Office (Mar. 13, 2019).

¹⁷ A member of my staff reviewed the recording of the executive session.

¹⁸ Letter from Daniel Weber, President, Linton Indus. Dev. Corp., to Att’y Gen.’s Office (Mar. 13, 2019). See *also* Minutes, Bd. of Dir., Linton Indus. Dev. Corp. (Feb. 13, 2019).

¹⁹ Letter from Daniel Weber, President, Linton Indus. Dev. Corp., to Att’y Gen.’s Office (Mar. 13, 2019). See *also* Letter from Daniel Weber, President, Linton Indus. Dev. Corp., to Att’y Gen.’s Office (Apr. 4, 2019). See *generally* N.D.A.G. 2015-O-13 (mere reference to “negotiations” was insufficient to properly identify legal authority of executive session); N.D.A.G. 2013-O-09 (mere reference to “personnel matters” or “background check” was insufficient to properly identify the legal authority for holding the executive session)

²⁰ To satisfy this requirement, a governing body is not required to reveal closed or confidential information, but must provide sufficient information about the topic and purpose of the executive session to keep the public apprised of the legally sufficient reason for holding the executive session. N.D.A.G. 2015-O-13.

²¹ N.D.C.C. § 44-04-19.

²² N.D.C.C. §§ 44-04-19, 44-04-19.2.

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went into an executive session during its February 13, 2019, meeting, to discuss economic development information pursuant to N.D.C.C. § 44-04-18.4(5).²³

Section 44-04-18.4, N.D.C.C., provides exemptions to open record and meeting laws for certain economic development records and other trade secret, proprietary, commercial, or financial information. The exceptions to economic development records under N.D.C.C. § 44-04-18.4(5)(a) are only available if no previous public disclosure was made by the business of the “interest or intent . . . to locate in, relocate within, expand within” the jurisdiction.²⁴

A public entity may also protect trade secret, commercial, or financial information received from a business under N.D.C.C. § 44-04-18.4(5)(b) if the information meets the requirements of N.D.C.C. § 44-04-18.4(1) and (2). Such information must be of a privileged nature and not previously publicly disclosed.²⁵ Information is of a privileged nature only if disclosing the records is likely to impair the public entity’s ability to obtain necessary information in the future, or if it is likely to cause substantial harm to the competitive position of the entity supplying the information.²⁶ The determination as to whether a record contains a trade secret or commercial or financial information of a privileged nature as defined under N.D.C.C. § 44-04-18.4 is generally a factual decision to be made by the public entity.

The two items discussed during the February 13, 2019, executive session related to two businesses that previously received loans and grants from the LIDC. Plains Mobile is a company that provides and creates software for commercial purposes and is being recruited by the LIDC.²⁷ During the executive session, the LIDC discussed the financial condition of Plains Mobile and its plans on expanding its business and possible relocation.²⁸ According to the LIDC, the details of this information was not previously publicly disclosed and if it were to be disclosed it could cause substantial competitive injury to Plains Mobile.²⁹ It further explains that businesses would be reluctant to partner

²³ Letters from Daniel Weber, President, Linton Indus. Dev. Corp., to Att’y Gen.’s Office (Mar. 13, 2019 and Apr. 4, 2019).

²⁴ N.D.C.C. § 44-04-18.4(5)(a); see also N.D.A.G. 98-O-03.

²⁵ N.D.C.C. § 44-04-18.4(1).

²⁶ N.D.C.C. § 44-04-18.4(2).

²⁷ Letter from Daniel Weber, President, Linton Indus. Dev. Corp., to Att’y Gen.’s Office (Apr. 4, 2019).

²⁸ A member of my staff reviewed the recording of the executive session, which was recorded in compliance with N.D.C.C. § 44-04-19.2(5).

²⁹ Letters from Daniel Weber, President, Linton Indus. Dev. Corp., to Att’y Gen.’s Office (Apr. 4 and 19, 2019).

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with or provide this detailed information to the LIDC if the information is publicly disclosed.³⁰

During the executive session the LIDC also discussed a loan made to Tracie Ritz for a business that had since closed. The LIDC discussed Ms. Ritz's personal finances in order to determine how best to collect the loan. Ms. Ritz's personal finances were not previously publicly disclosed and the LIDC explains that it would not be able to obtain the information in the future because business owners would be hesitant to share their personal financial information, impairing the LIDC's ability to work out a resolution, if they knew it would be open to the public.³¹

As recognized in several past opinions, the determination of whether information is protected by N.D.C.C. § 44-04-18.4 is generally a factual decision to be made by the public entity because it is in the best position to determine the effect of disclosure.³² This office usually defers to an agency's findings of facts unless the finding is unsupported.³³ It is my opinion that the LIDC's determination that the information discussed during the executive session is protected by N.D.C.C. § 44-04-18.4 was reasonable. This office will not contradict an entity's determination of a supported factual decision in an opinion issued under N.D.C.C. § 44-04-21.1.³⁴

Based on the foregoing, it is my opinion that the LIDC's executive session was authorized by law.

Issue Four

When a "quorum"³⁵ of a "governing body,"³⁶ or committee thereof, is present and its "public business"³⁷ is being considered or discussed, it is a "meeting"³⁸ subject to open

³⁰ Letters from Daniel Weber, President, Linton Indus. Dev. Corp., to Att'y Gen.'s Office (Apr. 4 and 19, 2019).

³¹ Letters from Daniel Weber, President, Linton Indus. Dev. Corp., to Att'y Gen.'s Office (Apr. 4 and 19, 2019).

³² N.D.A.G. 2014-O-02; N.D.A.G. 2005-O-06; N.D.A.G. 2004-O-01; N.D.A.G. 2002-O-08; N.D.A.G. 2000-L-107; N.D.A.G. 98-O-22; N.D.A.G. 98-L-17.

³³ N.D.A.G. 2014-O-02; N.D.A.G. 2005-O-06; N.D.A.G. 2004-O-01; N.D.A.G. 2002-O-08; N.D.A.G. 2000-L-107; N.D.A.G. 98-O-22; N.D.A.G. 98-L-17.

³⁴ N.D.A.G. 2014-O-02.

³⁵ N.D.C.C. § 44-04-17.1(15) (definition of "quorum").

³⁶ N.D.C.C. § 44-04-17.1(6) (definition of "governing body").

³⁷ N.D.C.C. § 44-04-17.1(12) (definition of "public business").

³⁸ N.D.C.C. § 44-04-17.1(9) (definition of "meeting").

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meetings law.³⁹ Over the years, this office has issued several opinions on the definition of “meeting” which is met when public business is being considered or discussed by a quorum of a governing body or committee through any means, including in-person, telephone, email, and text messaging.⁴⁰

The question on whether a governing body met secretly to discuss public business is one of fact.⁴¹ Section 44-04-21.1, N.D.C.C., requires this office to base open meeting opinions on the facts given by the public entity.

In response to inquiries from this office, the LIDC denies discussing its public business outside of properly noticed meetings.⁴² The LIDC is aware of one discussion that occurred outside of a meeting which involved two board members, the LIDC coordinator, and a representative from Plains Mobile.⁴³ This conversation did not involve a quorum of the LIDC, or committee thereof, and was therefore not subject to open meetings law.

Based on the signed statements of the LIDC, it is my opinion that the Commission did not hold meetings outside of its regular and special meetings.

CONCLUSIONS

1. The Linton Industrial Development Corporation violated open meetings law when it failed to post an agenda prior to its February 13, 2019, meeting in substantial compliance with N.D.C.C. § 44-04-20.

³⁹ N.D.C.C. §§ 44-04-19, 44-04-20.

⁴⁰ N.D.A.G. 2018-O-17; N.D.A.G. 2018-O-10.

⁴¹ N.D.A.G. 2016-O-19.

⁴² Statement, Daniel Weber, President, Linton Indus. Dev. Corp. (Feb. 27, 2019); Statement, Linda Schumacher-Kelsch, Vice President, Linton Indus. Dev. Corp. (Mar. 13, 2019); Statement, Jodi Kelsch, Sec’y-Treas., Linton Indus. Dev. Corp. (Mar. 13, 2019); Statement, Crystal Jahner, member, Linton Indus. Dev. Corp. (Mar. 6, 2019); Statement, Ken Schneider, member, Linton Indus. Dev. Corp. (Mar. 12, 2019); Statement, Lyle Kenner, member, Linton Indus. Dev. Corp. (Mar 13, 2019); Statement, Dennis Morris, member, Linton Indus. Dev. Corp. (Mar. 12, 2019). Each member of the LIDC provided signed statements attesting that no meetings or discussions were held regarding public business outside of its regular and special meetings.

⁴³ Statement, Daniel Weber, President, Linton Indus. Dev. Corp. (Feb. 27, 2019); Statement, Ken Schneider, member, Linton Indus. Dev. Corp. (Mar. 12, 2019).

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2. The Linton Industrial Development Corporation failed to announce its legal authority for closing the executive session during its February 13, 2019, meeting, and therefore did not comply with procedures required by N.D.C.C. § 44-04-19.2.
3. The executive session during Linton Industrial Development Corporation's February 13, 2019, meeting was authorized by law as the discussions involved protected economic development records pursuant to N.D.C.C. § 44-04-18.4(5).
4. Based on signed statements, the Linton Industrial Development Corporation did not hold "meetings" through various means without complying with open meetings law requirements.

STEPS NEEDED TO REMEDY VIOLATION

The Linton Industrial Development Corporation should review the resources available on the Attorney General's website on properly posting notice of upcoming meetings and update its practice to be in compliance with the law. Meeting minutes of the February 13, 2019, meeting must be given to Clarence Herz, and anyone else requesting them, free of charge.

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. § 44-04-21.2.⁴⁴ It may also result in personal liability for the person or persons responsible for the noncompliance.⁴⁵

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Attorney General

sld

cc: Clarence Herz

⁴⁴ N.D.C.C. § 44-04-21.1(2).

⁴⁵ *Id.*