

**OPEN RECORDS AND MEETINGS OPINION
2022-O-04**

DATE ISSUED: May 13, 2022

ISSUED TO: Stark County Board of Commissioners

CITIZEN'S REQUEST FOR OPINION

Leslie Ross asked this office whether the Stark County Board of Commissioners (Commission) violated N.D.C.C. §§ 44-04-19, 44-04-19.1, 44-04-19.2, and 44-04-20 by failing to properly notice an executive session, not following proper procedure for entering into an executive session, and denying access to the open portion of a meeting.

FACTS PRESENTED

The Commission held a regular meeting on March 2, 2021.¹ The meeting notice and agenda, stated:

“11:30 Executive Session (Statute 44-04-19.1 and 44-04-19.2) HR/Auditor Hiring Process.”²

During the meeting, Commissioner Franchuk called for “a motion to move into executive session in regards to the HR/Auditor Hiring Process.”³ After a unanimous roll call vote, the Commission went into executive session.⁴ The meeting room was then “cleared of all people and electronics, except those authorized to be present.”⁵ The teleconference phone number was disconnected, and a county commissioner who was unable to attend in person called in on a private number.⁶ The executive session was attended by the Stark County Commissioners, the Auditor, the Human Resources Coordinator, and the Stark County State’s Attorney⁷ and lasted for ten minutes.⁸ The

¹ Letter from Amanda Englestad, State’s Att’y, Stark Cnty., to Att’y Gen. Office (Mar. 16, 2021).

² Agenda, Comm’n, Stark Cnty. (Mar. 2, 2021).

³ Letter from Amanda Englestad, State’s Att’y, Stark Cnty., to Att’y Gen. Office (Mar. 16, 2021).

⁴ Minutes, Comm’n, Stark Cnty (Mar 2, 2021).

⁵ Letter from Amanda Englestad, State’s Att’y, Stark Cnty., to Att’y Gen. Office (Mar. 16, 2021).

⁶*Id.*

⁷*Id.*

⁸ Minutes, Comm’n, Stark Cnty. (Mar. 2, 2021).

executive session was recorded.⁹ After the executive session ended, the open meeting was reconvened, and the public was allowed to return to the meeting room where the teleconference line was reopened for anyone who wanted to call back in. Upon returning to the open meeting, Chairman Franchuk announced the Commission had returned from an executive session held to meet with an attorney about a possible lawsuit.¹⁰ The Commission took no further action.¹¹

Ms. Ross alleges the notice and agenda did not adequately state the basis for the executive session and providing statutory citations on the agenda did not satisfy the requirement to identify the legal authority for the executive session. Further, Ms. Ross contends she was denied access to the remainder of the meeting because she did not know when the meeting reconvened and when she called back into the meeting she was disconnected.

ISSUE

1. Whether the description of the executive session in the Commission's March 2, 2021, meeting notice substantially complied with N.D.C.C. § 44-04-20.
2. Whether the Commission followed proper procedure before convening in executive session during the March 2, 2021, regular meeting.
3. Whether the Commission denied access to the open portion of a meeting by failing to have the phone connection available after the executive session for the public.

ANALYSIS

ISSUE 1

A meeting notice must indicate whether the governing body expects to enter executive session as well as the "general subject matter" of the executive session.¹² The description of the "general subject matter" of the executive session must be "sufficient to provide information about the topic or purpose of the executive session to a member of the public."¹³

In 2003, a notice stating "Motion to go into Executive Session under NDCC 44-04-19.1" was found insufficient because it failed to provide any information about the topic or purpose of the

⁹ Letter from Amanda Englestad, State's Att'y, Stark Cnty., to Att'y Gen. Office (Mar. 16, 2021).

¹⁰ Minutes, Comm'n, Stark Cnty. (Mar. 2, 2021).

¹¹ *Id.*

¹² N.D.C.C. § 44-04-20(1), (2).

¹³ N.D.A.G. 2009-O-09 (citing N.D.A.G. 2007-O-11; N.D.A.G. 2004-O-19. *See also* N.D.A.G. 2005-O-04).

executive session to the public.¹⁴ Such a statement lacks any description about the reason behind the executive session.¹⁵

Here, the March 2nd meeting notice provides a general description of the anticipated executive session: “Executive Session (Statute 44-04-19.1 and 44-04-19.2) HR/Auditor Hiring Process.” This description puts the public on notice the Commission intended to enter executive session to discuss the process for hiring the Auditor and the HR (Human Resources) director. As this office explained in past opinions, a notice has not failed to comply with the minimum requirements in N.D.C.C. § 44-04-20(2) just because it could have included greater detail.¹⁶

Therefore, it is my opinion the Commission’s general description of the topic for the executive sessions was in substantial compliance with the notice requirements of N.D.C.C. § 44-04-20.

ISSUE 2

All meetings of a governing body of a public entity must be open to the public unless otherwise provided by law.¹⁷ A governing body is authorized to hold an executive session for an "attorney consultation" as defined by N.D.C.C. § 44-04-19.1(5).¹⁸ Before proceeding into an executive session, the governing body must comply with the procedural requirements of N.D.C.C. § 44-04-19.2, which requires, in part, an announcement “during the open portion of the meeting [of] the topics to be discussed or considered during the executive session and the body’s legal authority for holding an executive session on those topics.”¹⁹ The description of the subject matter of the executive session must be sufficient to provide information about the topic or purpose of the executive session to a member of the public.²⁰ A governing body must pass a motion by a recorded roll call vote to hold an executive session for "attorney consultation."²¹

¹⁴ N.D.A.G. 2003-O-22.

¹⁵ N.D.A.G. 2009-O-09. *See also* N.D.A.G. 2003-O-22; N.D.A.G. 2022-O-02.

¹⁶ N.D.A.G. 2009-O-09 (citing N.D.A.G. 2005-O-04).

¹⁷ N.D.C.C. § 44-04-19.

¹⁸ N.D.C.C. § 44-04-19.1(2), (5).

¹⁹ N.D.C.C. § 44-04-19.2(2)(b).

²⁰ N.D.A.G. 2020-O-02 (citing N.D.A.G. 2016-O-01; N.D.A.G. 2009-O-09).

²¹ N.D.C.C. § 44-04-19.2(2)(a). Unless a confidential meeting is required, the governing body must pass a motion by recorded roll call vote to hold an executive session. Pursuant to N.D.C.C. § 44-04-19.1(2), discussions involving “Attorney consultation” are exempt from public meetings. As these conversations are not required to be closed to the public, the governing body must pass a motion before proceeding into the executive session for such a discussion. N.D.A.G. 2016-O-13. *See also* N.D.A.G. 2020-O-03.

Prior to entering the executive session, Chairman Franchuk announced the Commission would enter an executive session to discuss the HR/Auditor position.²² According to the Commission, there were parallel investigations related to the recent hiring and appointment of Stark County's Human Resources Director and Auditor with pending complaints alleging employment law violations, referred to the North Dakota Department of Labor, and a request for a criminal investigation. The Commission noted the Stark County State's Attorney needed to provide the Commission with legal advice on these matters.²³ Chairman Franchuk's announcement sufficiently described the topics to be considered during the executive session but did not include any legal authority, such as the intended "attorney consultation," for closing the meeting.²⁴

To close a meeting for "attorney consultation" statements such as "consulting with its attorney" or "attorney consultation" or reference to N.D.C.C. § 44-04-19.1(2), (5), should be used in the announcement.²⁵ Mere citation to N.D.C.C. § 44-04-19.1 and N.D.C.C. § 44-04-19.2 in the meeting notice is not sufficient to meet the statutory requirement that "[t]he governing body *announces 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 on those topics."²⁶ Even though the topic was adequately announced, it is my opinion the Commission violated open meetings law when it failed to more precisely cite its legal authority to the public for holding the executive session.

ISSUE 3

The Commission properly disconnected the teleconference during the executive session to protect the integrity of the executive session.²⁷ According to the Commission, the line was reconnected when they reconvened in the open meeting, and the public had the opportunity to return to the call.²⁸ I am required to take the facts from the public entity;²⁹ I do not find any violation of the open meetings laws on this issue.

²² Letter from Amanda Englestad, State's Att'y, Stark Cnty., to Att'y Gen. Office (Mar. 16, 2021).

²³ *Id.*

²⁴ N.D.A.G. 2015-O-16 (citing N.D.A.G. 2011-O-05. ("There is no presumption in the law that an executive session will include attorney consultation...if the announcement is made by the governing body's attorney. It is a technical requirement with a practical purpose: the public should clearly understand why citizens cannot attend that portion of the meeting."))

²⁵ N.D.A.G. 2011-O-05.

²⁶ N.D.C.C. § 44-04-19.2 (emphasis added).

²⁷ Letter from Amanda Englestad, State's Att'y, Stark Cnty., to Att'y Gen. Office (Mar. 16, 2021).

²⁸ *Id.*

²⁹ N.D.C.C. § 44-04-21.1.

CONCLUSION

1. The notice of the Commission's March 2, 2021, meeting contained a general description of the executive session in substantial compliance with N.D.C.C. § 44-04-20.
2. The Commission violated open meetings law when it failed to announce, during the open portion of the meeting, sufficient detail regarding its legal authority for holding an executive session.
3. The Commission provided access to the open portion of a meeting by having a phone connection available after the executive session for the public.

STEPS NEEDED TO REMEDY VIOLATION

The Commission should amend its March 2, 2021, meeting minutes to state the specific legal authority for its executive session.

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. § 44-04-21.2.³⁰ It also may result in personal liability for the person or persons responsible for the noncompliance.³¹

Drew H. Wrigley
Attorney General

aml
cc: Leslie Ross (via email only)

³⁰ N.D.C.C. § 44-04-21.1(2).

³¹ Id.