

**OPEN RECORDS AND MEETINGS OPINION
2003-O-03**

DATE ISSUED: February 21, 2003

ISSUED TO: Minto City Council

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. §44-04-21.1 from Carol Nowling asking whether the Minto City Council violated the open meeting law.

FACTS PRESENTED

The Minto City Council (Council) held its regular monthly meeting on October 7, 2002. The agenda indicated that an executive session would be held regarding pending litigation. The Council made a motion to go into executive session and the Mayor asked everyone to leave. According to the city attorney, he "assured the public that no further business of the council would be discussed after the executive session and that there was no need for them to remain at the premises." The agenda also indicated that announcements would follow the executive session. The specific announcements were listed on the agenda and the minutes from the meeting indicate that the announcements were made. Ms. Nowling does not dispute that she had a copy of the agenda.

Ms. Nowling alleges that the Council violated the open meeting law by failing to tell the public that the open portion of the meeting would continue and that they could return after the executive session was completed. She alleges that this was done deliberately so that the Council could discuss an issue involving her and her neighbors without them being present. The issue allegedly discussed was a proposed easement affecting her property.¹ Specifically, she alleges that the Council discussed the pros and cons of the proposed easement and decided to schedule a special meeting about the topic for the following week. Ms. Nowling became aware that the public meeting resumed after the executive session when she read the minutes from the meeting.

¹ The city had been in negotiations regarding the easement for over a year.

In response to an inquiry by this office, the city attorney stated that no business took place after the executive session and specifically, the members did not discuss the proposed easement after the executive session on October 7, 2002. During the executive session, the city attorney informed the Council that it might be asked to act upon the proposed easement in the near future because the negotiations were nearly completed.² He also indicated to the Council that when negotiations were completed he would ask the auditor to schedule a special meeting. After the executive session, only announcements were made.

Ms. Nowling also raise two additional questions regarding permits for road construction and oaths of office of the council members. These issues are beyond the scope of N.D.C.C. § 44-04-21.1 and will not be addressed in this opinion.

ISSUE

Whether the Minto City Council violated the open meetings law at its October 7, 2002, regular meeting by failing to tell the public that the open portion of the meeting would resume after the executive session was completed.

ANALYSIS

All meetings of the governing body of a public entity are required to be open to the public unless otherwise specifically provided by law. N.D.C.C. § 44-04-19. The open meetings law is violated when any person is denied access to a meeting or if the door to the meeting room is locked. N.D.A.G. 99-O-08; N.D.C.C. § 44-04-19(1). This office has concluded that the open meetings law is violated when deliberate action is taken to conceal a meeting or to allow a member of the public to believe that a meeting was over. N.D.A.G. 99-O-08; N.D.A.G. 98-O-16.

In this instance, the Council wanted to discuss pending litigation with the city attorney in an executive session, and asked members of the public to leave the room. A governing body may close a portion of an open meeting, under certain circumstances, such as attorney consultation or contract negotiation and litigation strategy. N.D.C.C. § 44-04-19.1(4),(7). The remainder of a meeting during which an executive session is held is an open meeting unless a specific exemption is otherwise applicable. N.D.C.C. § 44-04-19.2(3).

² The city attorney stated that the status of easement negotiations was related to the litigation for which the executive session was called. N.D.C.C. § 44-04-20(2)(notice must contain general subject matter of any executive session). The propriety of the executive session is not being questioned.

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Prior to holding an executive session, the governing body is required to announce in open session the topics to be discussed and the legal authority for holding an executive session on those topics. N.D.C.C. § 44-04-19.2(2)(b). There is no legal requirement to announce when the open meeting will reconvene after the completion of an executive session. As a matter of courtesy, our office encourages governing bodies to estimate when they will reconvene so the public has some idea when they should return for the rest of the meeting.³ In response to an inquiry from this office, the city attorney explained that for the convenience of the public, he “assured them that no further business of the Council would be discussed after the executive session, thus, there was no need for them to remain at the premises waiting for the executive session to end.”

Although the city attorney announced that there was no need for the public to wait for the executive session to end, no one was prohibited from attending the remainder of the open meeting at the conclusion of the executive session. It was Ms. Nowling’s choice to leave the building instead of waiting until the executive session was completed. She could have returned after the executive session ended to listen to the rest of the meeting. She also had access to an agenda clearly stating that announcements would be made after the executive session.⁴

This office addressed a similar situation where a citizen left a meeting after the discussion of an item of interest to him, but before the meeting adjourned. N.D.A.G. 99-O-08. Later, he discovered that his name was mentioned after he left the meeting. Id. This office explained that a person who leaves a meeting before it is adjourned, does so at his or her own risk. Id. Unless the topic was deliberately left off the notice, or an interested person was specifically told an issue would not be discussed at a particular meeting, the governing body does not violate N.D.C.C. §§ 44-04-19 or 44-04-20 by discussing that topic after the person has left the meeting. Id.; KCOB/KVLN, Inc. v. Jasper County Bd. of Supervisors, 473 N.W.2d 171, 174 (Iowa 1991).

The city attorney stated that he told people not to return as a convenience to them. He also reported that the proposed easement was not discussed after the executive session. The

³ This office provides a sample executive session format on our website. It is a script that a governing body may use before it goes into executive session. It includes language informing the public when the governing body estimates the executive session will end.

⁴ The notice of the meeting is not at issue, but it should be noted that a regular meeting need not be restricted to the agenda topics included in the notice. N.D.C.C. § 44-04-20(2); N.D.A.G. 99-O-08. A governing body of a public entity is free to discuss any item of public business regarding that entity. Id. The notice of regular meetings need only include topics that are expected to be discussed. N.D.C.C. § 44-04-20(2).

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minutes from the meeting do not indicate that the issue was discussed. North Dakota law requires open meeting opinions to be based on the facts given by the public entity. N.D.C.C. § 44-04-21.1. Accordingly, it is my opinion that the Minto City Council did not violate N.D.C.C. § 44-04-19 by not specifically telling Ms. Nowling that the open meeting would resume after the executive session.

CONCLUSION

The Minto City Council did not violate the open meetings law by failing to tell the public that the regular meeting would resume after the executive session was finished.

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