

**OPEN RECORDS AND MEETINGS OPINION
2003-O-14**

DATE ISSUED: October 22, 2003

ISSUED TO: Harvey 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 Jim Mattson of the Minot Daily News asking whether Harvey City Council violated N.D.C.C. § 44-04-19 by holding an illegal executive session.

FACTS PRESENTED

On July 7, 2003, the Harvey City Council (Council) held an executive session for "attorney consultation" during its regular meeting. The executive session lasted 20 minutes and was attended by the five council members, including the mayor, and the city attorney. The executive session was tape recorded, in compliance with N.D.C.C. § 44-04-19.2(5), and has been reviewed by this office.

The minutes of the July 7, 2003, meeting indicate the executive session was held "due to attorney consultation." The minutes do not indicate whether any further explanation was given at the meeting, or whether a vote was taken to go into executive session. In its response to the request for this opinion, the City offered a more detailed description regarding the executive session. According to the city attorney, the council was discussing the agenda item "Personnel Evals. New info." when the mayor requested that the Council accept the chief of police's resignation. Council member Linda Knudtson requested an executive session to discuss the mayor's request, and the Council members agreed to conduct an executive session. The city attorney said she informed those at the meeting that an executive session was appropriate for attorney-client consultation under N.D.C.C. §§ 44-04-19.1 and 44-04-19.2 because civil litigation could be reasonably predicted in light of the chief informing people that he wanted to withdraw his resignation and be fired so he could receive unemployment compensation. After the executive session, the city reconvened in open meeting and passed a motion to accept Mayor Wilson's recommendation for resignation.

ISSUE

Whether the executive session of the Harvey City Council held on July 7, 2003, was authorized by law and limited to the topics and legal authority announced during the open portion of the meeting.

ANALYSIS

A gathering of a quorum of the members of a city council is a meeting required to be open to the public unless otherwise specifically provided by law. N.D.C.C. §§ 44-04-19, 40-06-03. N.D.A.G. 99-O-04. If a specific statutory exception applies, a public entity must identify the legal authority before closing a portion of its meeting to hold an executive session. N.D.C.C. § 44-04-19.2(2)(b), N.D.A.G. 99-O-04, N.D.A.G. 98-O-1. The portion of a meeting during which "attorney consultation" occurs may be closed to the public. N.D.C.C. § 44-04-19.1(2), N.D.A.G. 99-O-04.

"Attorney consultation" means any discussion between a governing body and its attorney in instances in which the governing body seeks or receives the attorney's advice regarding and in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings or concerning pending civil or criminal litigation or pending adversarial administrative proceedings. Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation.

N.D.C.C. § 44-04-19.1(4).

A discussion at a meeting between a governing body and its attorney is not per se "attorney consultation" under N.D.C.C. § 44-04-19.1. N.D.A.G. 99-O-04. For discussion between a governing body and its attorney to be "attorney consultation," the discussion must be directly related to the pending or reasonably predictable litigation or adversarial administrative proceedings. Id.

The phrase "reasonably predictable" in N.D.C.C. § 44-04-19.1 requires more than a simple possibility of litigation or adversarial administrative proceedings. N.D.A.G. 2001-O-15. To hold an executive session under N.D.C.C. § 44-04-19.1 for "attorney consultation" regarding reasonably predictable litigation or adversarial administrative proceedings, a governing body must show more than a fear of potentially becoming a party to litigation or an administrative proceeding. Id. The possibility of litigation or a proceeding by or against the governing body must be realistic and tangible. Id.

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This office has previously reviewed the legality of an executive session held in anticipation of a lawsuit or administrative appeal and noted that N.D.C.C. § 44-04-19.1 does not require a governing body to wait until the moment before a lawsuit or administrative appeal is filed before obtaining its attorney's advice in an executive session. Id. In that opinion, there was a real and tangible threat of litigation or an adversarial administrative proceeding. The county social service board had been accused of racial discrimination and the employee it was considering terminating threatened to "...do what I have to do" if fired, had suggested that there may be an appeal under the state veterans' preference law, and the employee's attorney was in attendance at the meeting. Id.

In this situation, the city attorney explained that the threat of anticipated litigation or adversarial administrative proceeding came from the fact that after resigning, the police chief changed his mind and asked to be terminated in order to be eligible for unemployment benefits. According to the city attorney, prior to the meeting, the mayor agreed to give the police chief a formal written statement about the forced resignation and that the city would not oppose the police chief's application for unemployment benefits. Therefore, the point of contention between the police chief and the mayor had been resolved, making the possibility for litigation or administrative action remote. The simple fact a public entity has fired someone may create a fear of litigation, but that fact alone does not create a reasonably predictable threat of litigation or adversarial administrative proceeding.

The Council recorded the executive session as required under N.D.C.C. § 44-04-19.2(5) and the recording was provided to this office for review. The recording of the executive session reveals that the executive session was, in fact, the mayor's job evaluation of the police chief rather than a consultation with the attorney about reasonably predictable civil litigation or adversarial administrative proceedings. In most instances, a governing body of a public entity may not close its evaluation of a public employee's job performance under section 44-04-19.1(4) simply because the employee was fired or asked to resign. N.D.A.G. 2000-O-09.

The entire session should have been held during a public meeting. The discussion was not directly related to any reasonably predictable litigation or adversarial administrative proceeding. N.D.A.G. 99-O-04.

CONCLUSION

It is my opinion that the July 7, 2003, executive session held by the Harvey City Council was not authorized by law.

STEPS NEEDED TO REMEDY VIOLATION

The Council must make the recording of its executive session available to the public upon request as an open record and must specifically provide a copy to Mr. Mattson, at no charge. In addition, the minutes of the executive session must be added to the minutes of the open portion of the July 7, 2003, meeting.

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. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

Wayne Stenehjem
Attorney General

Assisted by: Mary Kae Kelsch
Assistant Attorney General

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