

**OPEN RECORDS AND MEETINGS OPINION
2003-O-22**

DATE ISSUED: December 1, 2003

ISSUED TO: Walsh County Commission

CITIZEN'S REQUEST FOR OPINION

On September 19, 2003, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from The Walsh County Record publisher Jackie Thompson asking whether the Walsh County Commission (Commission) violated N.D.C.C. § 44-04-20 and N.D.C.C. § 44-04-19.2 by failing to properly notice an executive session, by holding an executive session that was not authorized by law and by failing to fully comply with required statutory procedures for holding an executive session.

FACTS PRESENTED

On September 2, 2003, the Commission held an executive session during a regular meeting. The notice and agenda for the meeting stated "Motion to go into Executive Session under NDCC 44-04-19.1." The minutes of the September 2 meeting indicate the executive session was held "[p]ursuant to NDCC 44-04-19.1 . . . for the purpose of discussing the Askew Contract." No further explanation of, or legal authority for, the executive session was included in the notice or the minutes.

The publisher of The Walsh County Record alleges that the executive session was held in order to discuss personnel matters. The Commission, through the county state's attorney, indicated that the September 2 executive session was based on the exception in N.D.C.C. § 44-04-19.1(7) for discussion of negotiation strategy regarding Assistant State's Attorney Stuart Askew's contract with the county.

The executive session lasted approximately 45 minutes. It was not tape recorded as required in N.D.C.C. § 44-04-19.2(5). Minutes from the executive session were provided to this office. The minutes indicated that a motion was made in the executive session to not renew Mr. Askew's contract. The Commission ended the executive session and reconvened the regular meeting. According to the minutes of the September 2 meeting, after five unrelated issues were addressed, the Commissioners discussed Mr. Askew's

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contract with Walsh County. A motion was made to cancel the contract and a roll call vote was taken.

ISSUES

1. Whether the notice for the September 2, 2003, regular meeting of the Walsh County Commission complied with N.D.C.C. § 44-04-20 with regard to the executive session.
2. Whether the executive session held on September 2, 2003, by the Walsh County Commission complied with the procedural requirements for holding an executive session in N.D.C.C. § 44-04-19.2(2).
3. Whether the executive session of the Walsh County Commission on September 2, 2003, was authorized by law under N.D.C.C. § 44-04-19.1(7).

ANALYSES

Issue One

All meetings subject to N.D.C.C. § 44-04-19 must be preceded by written public notice. N.D.C.C. § 44-04-20. The notice must include all topics the governing body expects to consider at the time the notice is prepared. N.D.C.C. § 44-04-20(2). A meeting notice must contain the general subject matter of any executive session expected to be held during the meeting. N.D.C.C. § 44-04-20(2), (6).

The notice of the September 2 meeting stated "Motion to go into Executive Session under NDCC 44-04-19.1." The notice failed to give a general description of the subject matter of the executive session sufficient to provide information about the topic or purpose of the executive session to a member of the public. In a prior opinion issued by this office, a notice of a meeting listed "employee relations" and "executive session" as separate agenda items, even though the subject matter of the executive session was employee relations. N.D.A.G. 2001-O-15. Because the public would not understand the relationship between these agenda items, this office concluded the notice failed to describe the subject matter of the executive session. Id. Likewise, in this situation, a citation to N.D.C.C. § 44-04-19.1 fails to describe the subject matter of the executive session. Therefore, it is my opinion the notice did not substantially comply with N.D.C.C. § 44-04-20(2).

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Issue Two

All meetings of a public entity are required to be open to the public unless a closed meeting or executive session is specifically authorized by law. N.D.C.C. §§ 44-04-19, 44-04-19.1. Even if an executive session is authorized, state law establishes certain procedures that must be followed before, during, and after the executive session. See N.D.C.C. § 44-04-19.2.

Prior to holding an executive session, the governing body must announce both the legal authority for the session and the general topics to be discussed or considered. N.D.C.C. § 44-04-19.2(2)(b), N.D.A.G. 99-O-04. The purpose of the announcement is to provide the public with a legally sufficient reason for holding the executive session. N.D.A.G. 2000-O-10.

An announcement is sufficient if it uses the phrases “negotiation strategy” or “negotiation instructions,” or similar language, and identifies the particular contract or contracts for which the governing body was discussing negotiation strategy or providing negotiation instructions under N.D.C.C. § 44-04-19.1(7). N.D.A.G. 2001-O-17. This office previously concluded that an announcement of a closed session to discuss “the conclusion of negotiations” was insufficient because, although the word “negotiation” indicated which exemption in N.D.C.C. § 44-04-19.1 was being used, it failed to identify the particular contract or contracts under consideration. N.D.A.G. 2000-O-05. See also N.D.A.G. 99-O-04 (announcement of a closed session for “attorney consultation” is not sufficient if the announcement fails to identify the pending or reasonably predictable litigation to be discussed by the governing body). In this case, the announcement in the minutes identified the contract under consideration, but did not refer to “negotiation strategy,” “negotiation instructions” or similar language. Using the word “negotiation” in some form would have sufficiently identified N.D.C.C. § 44-04-19.1(7) as the legal authority for the executive session. Therefore, it is my opinion the Commission violated N.D.C.C. § 44-04-19.2(2)(b) by failing to announce the legal authority for holding an executive session.

Another important and well-known procedural requirement is that all closed meetings of a governing body of a public entity must be recorded electronically or on audiotape or videotape. N.D.C.C. § 44-04-19.2(5). The purpose of requiring all executive sessions to be recorded is to provide a process for citizens to verify that the discussion during an executive session was limited to the announced topics. N.D.A.G. 2000-O-10. In this case, no recording or tape was made of the executive session. Thus, it is my opinion the Commission violated N.D.C.C. § 44-04-19.2(5) by failing to record or tape the executive session.

Issue Three

“A meeting may not be closed [under N.D.C.C. § 44-04-19.1(7)] simply because a contract is being discussed.” N.D.A.G. 99-O-01. Section 44-04-19.1(7), N.D.C.C., states:

A governing body may hold an executive session . . . to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator regarding litigation, adversarial administrative proceedings, or 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.

In past opinions, this office explained the limitations of this section. The last sentence of subsection 7 indicates that a negotiation strategy or instruction session may be closed only if allowing the other party to the negotiation to listen or learn of the discussion would result in increased costs to the public entity. N.D.A.G. 99-O-01. Section 44-04-19.1(7), N.D.C.C., does not authorize an executive session for a governing body to receive an update or summary from its negotiator on the status of contract negotiations. N.D.A.G. 2000-O-05. An executive session is permissible only if a governing body is discussing negotiating strategy or providing negotiating instructions. Id.

Without a recording of the executive session, I am unable to determine whether or not the Commission discussed Mr. Askew’s job performance in executive session as alleged by The Walsh County Recorder. In past opinions, this office has concluded that it is improper for a governing body to discuss an employee’s job performance in an executive session held under N.D.C.C. § 44-04-19.1(7). N.D.A.G. 2000-O-09. See also N.D.A.G. 2001-O-17.

Since the Commission failed to record the executive session, I have no choice but to rely upon the minutes of the executive session and the statements of the Walsh County state’s attorney. The state’s attorney stated that “[t]he Commission wished to discuss the means of actuating the non-renewal of the contract and any options it might have regarding the non-renewal or continuation of the contract.” The minutes of the executive session mention a discussion about a possible settlement offer. It would be reasonable to go into executive session under N.D.C.C. § 44-04-19.1(7) to receive strategy advice from, or give settlement negotiation instructions to, the state’s attorney about a possible settlement offer with Mr. Askew because if such discussions were held in an open meeting, the Commission’s bargaining position would be negatively affected.

The remaining minutes indicate a discussion about the history of the current position of assistant state’s attorney, a general description of the contract, and the state’s attorney’s

future vision for the position of assistant state's attorney. Those discussions would not have negatively impacted the Commission's position regarding its contract with Mr. Askew and should have been held in the open meeting. Therefore, other than its discussion about offering a settlement to Mr. Askew, the Commission's remaining discussion should not have occurred in executive session.

CONCLUSIONS

1. The notice of the executive session contained in the notice for the September 2, 2003, regular meeting of the Walsh County Commission did not contain a general description of the executive session and therefore did not comply with N.D.C.C. § 44-04-20.
2. The Walsh County Commission violated N.D.C.C. § 44-04-19.2 by failing to properly announce the executive session and failing to make a recording of the executive session.
3. Except for the discussion about a possible settlement offer, the executive session held by the Walsh County Commission on September 2, was not authorized by N.D.C.C. § 44-04-19.1(7) and therefore violate N.D.C.C. § 44-04-19.

STEPS NEEDED TO REMEDY VIOLATIONS

In cases such as this, where a governing body holds an executive session that is not authorized by law, the governing body must recreate the executive session in a public meeting or create minutes of the executive session for public review. Here, the Walsh County Commission already discussed the renewal or cancellation of Stuart Askew's contract in a special meeting on September 15, 2003. Therefore the Commission has already taken steps to remedy its violations of the open meetings law.

The Commission must also make the minutes of the executive session available to The Walsh County Record and to any other member of the public upon request as an open record. The sentence regarding the possible settlement offer to Mr. Askew may be crossed out. The Commission must take steps to ensure that any future executive session is electronically recorded.

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. §

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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.

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