

**OPEN RECORDS AND MEETINGS OPINION
2004-O-13**

DATE ISSUED: June 28, 2004

ISSUED TO: Richland Public School District No. 44

CITIZEN'S REQUEST FOR OPINION

This office received a timely request for an opinion under N.D.C.C. §44-04-21.1 from Mr. Michael Geiermann asking whether Richland Public School District No. 44 violated N.D.C.C. § 44-04-20 by failing to provide public notice of the executive session held on March 15, 2004; violated N.D.C.C. § 44-04-19.2(2)(b) by failing to announce during the open part of the meeting the topics to be discussed or considered at the executive session and the Board's legal authority to hold an executive session; and violated N.D.C.C. § 44-04-19.1 because it lacked legal authority to call the executive session.

FACTS PRESENTED

Because the School District's representatives had been unable to reach agreement with the teachers' bargaining representatives, the Board of Education for Richland Public School District No. 44 held an executive session during its regular March meeting to consider strategy for the stalled teacher salary negotiations and provide instructions to the District's bargaining representatives. The notice of the School District's March meeting included "Collaborative Bargaining" as an agenda item, but did not indicate that the collaborative bargaining item would be discussed in an executive session. During the open session of the School District's regular March 15, 2004, Board meeting, a motion was approved to go into executive session for the purpose of discussing collaborative bargaining strategies.

The School District submitted a tape of the executive session to the Attorney General's office and the tape has been reviewed.

ISSUES

1. Whether the School District violated N.D.C.C. § 44-04-20 by failing to provide public notice of the executive session held at its March 15, 2004, regular meeting and by failing to sufficiently specify the topics to be addressed in that session.
2. Whether the School District violated N.D.C.C. § 44-04-19.2 by failing to announce in the open portion of the meeting the topics to be discussed and the legal authority for the executive session.
3. Whether the executive session of the School District's governing body was authorized by law under N.D.C.C. § 44-04-19.1(7) and limited to the topics and legal authority announced during the open portion of the meeting.

ANALYSES

Issue One

The Richland Public School District is a public entity. N.D.C.C. § 44-04-17.1(12)(b). See also N.D.A.G. 2002-O-07 and N.D.A.G. 97-O-02. Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity, including executive sessions. N.D.C.C. § 44-04-20. The notice of a regular meeting must contain, among other things, the general subject matter of any executive session expected to be held during the meeting. N.D.C.C. § 44-04-20(2).

Information received from the School District indicates that, at the time the notice of the meeting was given, the School District expected to hold the executive session. The School District's March 15, 2004, meeting agenda item 16 stated: "Collaborative Bargaining." The agenda did not state that this item related to negotiation of teacher salaries, nor did it state that it would be discussed in an executive session. Because the public would not necessarily understand that the bargaining related to teacher salaries, 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 session to a member of the public. N.D.A.G. 2001-O-15. The notice also failed to mention that this agenda item would be considered in an executive session as required by N.D.C.C. § 44-04-20(2); N.D.A.G. 98-O-01 (the failure to mention in the notice that an executive session would take place violated N.D.C.C. § 44-04-20). Therefore, it is my opinion the notice did not substantially comply with N.D.C.C. § 44-04-20(2).

Issue Two

Prior to going into 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. 2004-O-10; N.D.A.G. 2000-O-10.

When an executive session is held to discuss negotiation strategy under N.D.C.C. § 44-04-19.1(7), the announcement need not cite the specific statute authorizing an executive session for that purpose. N.D.A.G. 2000-O-05. Rather, an announcement is sufficient if it recites the applicable statutory language, N.D.A.G. 99-O-04, such as, in this case, “negotiation strategy,” “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.” N.D.A.G. 2000-O-05.

In this instance, the minutes reflect that three words were announced regarding the executive session to identify the topic and legal authority for the executive session: “collaborative bargaining strategies.” The phrase “collaborative bargaining strategies” sufficiently identified the legal authority for the executive session. See id. My staff has been advised by the School District that the discussion among school board members preceding the motion to go into executive session clearly indicated the collaborative bargaining strategies related to negotiations over teacher salaries.¹ The discussion, which occurred after the legal authority was announced, provided the public with notice that the topic of the executive session was to develop bargaining strategies for negotiating a contract for teacher compensation for the upcoming school year. See N.D.A.G. 2001-O-17. Therefore, I conclude that this announcement, supplemented by the members’ discussion, sufficiently identified the legal authority for the session and the topic to be discussed.

Issue Three

As discussed earlier in this opinion, the School District relies on N.D.C.C. § 44-04-19.1(7) as the legal authority for its executive session on March 15, 2004. A meeting may be closed under that subsection to discuss negotiation strategy regarding contracts which are currently being negotiated or for which negotiation is reasonably likely in the future. N.D.C.C. § 44-04-19.1(7). In addition, the meeting may not be

¹ Requested opinions must be based “on the facts given by the public entity.” N.D.C.C. § 44-04-21.1(1).

OPEN RECORDS AND MEETINGS OPINION 2004-O-13

June 28, 2004

Page 4

closed unless holding the discussion in an open meeting would have an adverse fiscal effect on the public entity's bargaining position. N.D.C.C. § 44-04-19.1(7); see N.D.A.G. 2000-O-09.

Allowing the Richland Education Association's representatives to attend the executive session would have revealed the School District's strategy regarding teacher compensation for the upcoming school year. Revealing this information would have had an adverse fiscal effect on the School District's bargaining position. N.D.A.G. 2000-O-05. Therefore, an executive session to discuss negotiation strategy and provide instructions to the School District's bargaining representatives was authorized. The District was not required to disclose a copy of the tape of the executive session to Mr. Geiermann if the discussion in the executive session was limited to the topics announced in the open portion of the meeting. N.D.C.C. §§ 44-04-19.2(2)(d), 44-04-19.2(5); see also N.D.C.C. § 44-04-18.10 (2) (a public entity is not required to disclose a closed record).

The executive session held during the School District's meeting was recorded as required by N.D.C.C. § 44-04-19.2(5); N.D.A.G. 2000-O-10. A review of the recording by this office indicates that the discussion was limited to the topic announced in the open portion of the meeting. Therefore, the recording is a closed record, and the School District is not required to disclose a copy of the tape to Mr. Geiermann. N.D.C.C. § 44-04-20(5).

CONCLUSIONS

1. The Richland School District's notice for its March 15, 2004, regular meeting did not substantially comply with N.D.C.C. § 44-04-20 because the notice did not indicate there would be an executive session and did not sufficiently specify the topic to be addressed in that executive session.
2. The School District's announcement of the topics to be discussed during an executive session and the legal basis for the session complied with the requirements of N.D.C.C. § 44-04-19.2(2)(b).
3. The executive session of the School District's March 15 meeting was authorized by law and limited to the topics and legal authority announced during the open portion of the meeting. Therefore, the School District did not violate N.D.C.C. § 44-04-18 by denying the request for the recording of the executive session.

STEPS NEEDED TO REMEDY VIOLATIONS

OPEN RECORDS AND MEETINGS OPINION 2004-O-13

June 28, 2004

Page 5

A notice that the March 15, 2004, meeting included an executive session and a description of the topics discussed and the legal basis for the executive session must be prepared, filed with the county auditor, and posted at the public entity's principal office. N.D.C.C. § 44-04-20(4). The notice must contain the date, time, and location of the meeting and the topics, including the executive session, that were considered at the meeting. N.D.C.C. § 44-04-20(2). The notice must specify that the minutes of the meeting are available from the governing authority for any member of the public who requests a copy.

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.

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