

**OPEN RECORDS AND MEETINGS OPINION  
2014-O-09**

DATE ISSUED: August 8, 2014

ISSUED TO: Belfield 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 April Baumgarten and Richard Volesky asking whether the Belfield City Council violated N.D.C.C. § 44-04-19.2 by holding an executive session not authorized by law and by taking final action during an executive session.

**FACTS PRESENTED**

The Belfield City Council (Council) held a regular meeting on June 2, 2014.<sup>1</sup> During the meeting it was announced the Council would hold an executive session for an attorney consultation regarding potential liability and litigation risks for the City related to the conduct of Officer Carlson.<sup>2</sup> The executive session lasted approximately 90 minutes and ended with the Council deciding to terminate Officer Carlson's employment as a law enforcement officer due to misconduct.<sup>3</sup> Ms. April Baumgarten and Mr. Richard Volesky question whether the executive session which resulted in the termination was properly closed under open meetings law.

**ISSUES**

1. Whether the Belfield City Council's executive session held June 2, 2014, was authorized by law and limited to the topics and legal authority announced during the open portion of the meeting.

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<sup>1</sup> See Minutes, Belfield City Council (June 2, 2014).

<sup>2</sup> Id., see also Letter from Sandra Kuntz, Att'y At Law, to Sandra Voller, Ass't. Att'y Gen. (June 26, 2014); Email from Sandra Kuntz, Att'y At Law, to Sandra Voller, Ass't. Att'y Gen. (June 8, 2014; 2:28 PM).

<sup>3</sup> See Minutes, Belfield City Council (June 2, 2014); Letter from Sandra Kuntz, Att'y At Law, to Sandra Voller, Ass't. Att'y Gen. (July 26, 2014).

2. Whether the Belfield City Council violated N.D.C.C. § 44-04-19.2 by taking final action in executive session during its June 2, 2014, meeting.

## ANALYSIS

### Issue One

All meetings of the governing body of a public entity must be open to the public unless otherwise specifically provided by law.<sup>4</sup> A governing body may close a meeting to “consider or discuss closed or confidential records.”<sup>5</sup> “The topics discussed or considered during the executive session are limited to those for which an executive session is authorized by law and that have been previously announced” during the open portion of the meeting.<sup>6</sup>

“Attorney consultation” pursuant to N.D.C.C. § 44-04-19.1 is one of the legally authorized exemptions to open meetings law. “Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation.”<sup>7</sup> In order to hold an executive session for “attorney consultation,” the governing body must be receiving the attorney’s advice regarding pending or “reasonably predictable” litigation or adversarial administrative proceedings.<sup>8</sup> The use of the phrase “reasonably predictable” in N.D.C.C. § 44-04-19.1 requires more than a simple possibility or a potential of litigation or adversarial administrative proceedings.<sup>9</sup> Rather, the possibility of litigation or a proceeding must be realistic and tangible.

During the executive session, the attorney for the City of Belfield, Sandra Kuntz, advised the Council on potential liability issues that may arise for the city because of Mr. Carlson’s conduct and her recommended action based on that analysis. Specifically, Ms. Kuntz advised on the potential impact Mr. Carlson’s conduct may have on the city’s pending litigation. Such discussions by Ms. Kuntz met the definition of “attorney consultation” because she was providing the Council advice regarding pending litigation.<sup>10</sup>

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<sup>4</sup> N.D.C.C. § 44-04-19.

<sup>5</sup> N.D.C.C. § 44-04-19.2(1).

<sup>6</sup> N.C.C.C. § 44-04-19.2(2)(d).

<sup>7</sup> N.D.C.C. § 44-04-19.1(5).

<sup>8</sup> Id.

<sup>9</sup> N.D.A.G. 2009-O-14.

<sup>10</sup> See N.D.A.G. 2007-O-09 (proper to hold an executive session for attorney consultation to discuss liability issues that the Commission had to consider when determining its options for disciplining an employee).

It is also appropriate to hold an executive session to discuss or consider exempt information.<sup>11</sup> During the executive session, the Council was presented with a memorandum prepared by Ms. Kuntz which analyzed various litigation and liability issues. The memorandum contained active “criminal investigative information” and contained Ms. Kuntz’s mental impressions, conclusions, and legal theories regarding reasonably predictable criminal litigation that may be brought against Mr. Carlson. This memorandum therefore is an exempt record because it not only meets the definition of “attorney work product,”<sup>12</sup> it also contains active “criminal investigative information.”<sup>13</sup> It was appropriate for the Council to consider the memorandum in executive session.

Having concluded that an executive session for “attorney consultation” and to consider a record containing “attorney work product” and active “criminal intelligence information” was authorized in this situation, the remaining question is whether the discussions during the executive session were limited to receiving and discussing the attorney’s advice regarding the pending litigation and considering the exempt memorandum.

The executive session was recorded in compliance with N.D.C.C. § 44-04-19.2(5). Review of the recording reveals that, after proceeding into executive session, members of the Council were given a packet of information gathered by Ms. Kuntz and Belfield’s Chief of Police that contained the Police Chief’s investigation into Mr. Carlson’s conduct, including police reports and other evidence obtained by the Chief and the memorandum prepared by Ms. Kuntz. During the first 30 minutes of the executive session, the Council merely reviewed the packet and, other than two comments regarding the contents of the packet, nothing was discussed. Thereafter, for the next twenty minutes, a variety of discussions were entered into by the Council, Chief of Police, and Ms. Kuntz. In addition to reviewing its attorney’s memorandum and receiving its attorney’s advice on pending litigation and liability issues, the Council discussed a variety of issues including the termination process, how to fix community relations, the future of the police department and how it would handle covering Mr. Carlson’s absence, possible policy changes that may need to be made addressing conduct of officers and their significant others, and how to respond to press inquiries. The Council then invited Mr. Carlson and a few other members of the community into the executive session to read statements they prepared. After Mr. Carlson and the others left the meeting room, the Council had further discussions on what they believed to be the best interest of the

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<sup>11</sup> N.D.C.C. § 44-04-19.2(1).

<sup>12</sup> N.D.C.C. § 44-04-19.1(1) and (6) (“attorney work product” includes a record prepared by an attorney representing a public entity, that reflects a mental impression, conclusion, litigation strategy, or legal theory, and was prepared exclusively for reasonably predictable criminal litigation).

<sup>13</sup> N.D.C.C. § 44-04-18.7.

community and, ultimately, voted to terminate Mr. Carlson for misconduct. After voting, the Council brought Mr. Carlson back into the room to tell him their decision.

The above reveals discussions outside the scope of “attorney consultations” and outside the contents of the “attorney work product” memorandum. Instead of discussing legal theories, mental impressions, or strategies related to pending or reasonably predictable litigation, the Council focused on the termination process and community relations. It is well established that a governing body may not hold an executive session to discuss personnel matters or potentially unpopular and controversial topics.<sup>14</sup> Regardless of how uncomfortable it might be to discuss the termination of an employee on grounds for misconduct in an open meeting, the public has a right to hear the deliberations and reasoning of the Council, and there is no exception to the open meetings law for personnel matters.<sup>15</sup>

Therefore, because the discussions during the executive session were not limited to “attorney consultation” or consideration of an exempt record, it is my opinion that the Council violated the open meetings law.

### Issue Two

Generally, any final action concerning the topics discussed or considered during an executive session must be taken at a meeting open to the public.<sup>16</sup> A review of the recording reveals the Council voted on a motion to terminate Mr. Carlson’s employment during the executive session. Accordingly, it is my opinion the Council violated N.D.C.C. § 44-04-19.2(2)(e).

## CONCLUSIONS

1. Portions of the executive session held June 2, 2014, in which the Council received its attorney’s advice regarding pending and reasonably predictable litigation and considered a memorandum containing exempt information, were authorized by law, however, other discussions regarding personnel issues were improperly held during the executive session.

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<sup>14</sup> See N.D.A.G. 2011-O-10; N.D.A.G. 2010-O-13; N.D.A.G. 2008-O-02; N.D.A.G. 2007-O-09; N.D.A.G. 2005-O-02; N.D.A.G. 2004-O-19; N.D.A.G. 2003-O-14.

<sup>15</sup> See N.D.A.G. 2003-O-14 (“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.”)

<sup>16</sup> N.D.C.C. § 44-04-19.2(2)(e).

2. The Council violated N.D.C.C. § 44-04-19.2 by taking final action in executive session during its June 2, 2014, meeting.

#### STEPS NEEDED TO REMEDY VIOLATIONS

The Council must disclose the recording of the executive session, except for the portions described in this opinion as being properly closed, to Ms. Baumgarten and Mr. Volesky, and any member of the public upon request. If the Council is unable to sufficiently excise these portions of the recording, it should prepare a redacted transcript.

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.<sup>17</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>18</sup>

Wayne Stenehjem  
Attorney General

slv/vkk

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<sup>17</sup> N.D.C.C. § 44-04-21.1(2).

<sup>18</sup> Id.