

**OPEN RECORDS AND MEETINGS OPINION
2016-O-12**

DATE ISSUED: July 26, 2016

ISSUED TO: Sargent County Social Service Board

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Michael Geiermann, on behalf of Wendy Jacobson, asking whether the Sargent County Social Service Board violated N.D.C.C. § 44-04-19.2 by failing to properly convene in an executive session and holding unauthorized executive sessions.

FACTS PRESENTED

The Sargent County Social Service Board (Board) held a meeting on January 5, 2016.¹ The day before the meeting, the Sargent County Sheriff, along with two Bureau of Criminal Investigation (SCI) agents, contacted the Board chair and requested to be added to the agenda in order to address the Board about a child abuse and neglect assessment and investigation that took place in December 2015.²

When the January 5, 2016, meeting was called to order, the Board chair announced that there were concerns raised by BCI and the Sheriff's office on how a case was handled and wanted to give the parties involved an opportunity to discuss their actions, the specifics of the case, and how things could be improved upon in the future.³ The Board, along with its assistant state's attorney, the Sheriff and BCI agents, a Sargent County social worker involved in the case, and the then Sargent County Social Services

¹ The Board is composed of seven members that includes the five members of the Sargent County Commission and two appointed county citizen members and meets monthly. Sargent Cnty. Soc. Servs., http://www.sargentnd.com/dept_social_services.php (last visited on July 21, 2016).

² Letter from Jayne Pfau, Asst. Sargent Cnty State's Att'y, to Sandra L. DePountis, Asst. Att'y Gen. (Feb. 12, 2016). The agenda was amended to include the new topic and such agenda was then emailed to Wendy Jacobson. See Email from DeAnne Youle, Eligibility Worker I, Sargent Cnty. Soc. Servs., to Wendy Jacobson, with attached updated agenda (Jan. 4, 2015, 4:28 pm).

³ Letter from Jayne Pfau, Asst. Sargent Cnty. State's Att'y, to Sandra L. DePountis, Asst. Att'y Gen. (Feb. 12, 2016). Information was also taken from the recording of the Jan. 5, 2016, meeting.

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Director, Wendy Jacobson, proceeded into an executive session.⁴ Ms. Jacobson's husband, who was the only member of the public present at the meeting, was asked to leave the room.⁵ The executive session lasted approximately one hour.⁶

Thereafter, the meeting continued with agenda topics, including a portion of the meeting in which the Board met with Ms. Jacobson to discuss her Performance Improvement Plan (PIP).⁷ Mr. and Ms. Jacobson left the meeting after this discussion.⁸ The Board then proceeded to discuss Ms. Jacobson's job performance, attitude, and treatment of co-workers with Sargent County Social Service staff, which ultimately led to the Board passing a motion to recommend that the Sargent County Commission take steps to terminate Ms. Jacobson's employment.

Attorney, Michael Geiermann, on behalf of his client Wendy Jacobson, requests an opinion on whether the Board followed proper procedure before proceeding into the executive session on January 5, 2016, and whether the executive session was authorized by law.⁹ Mr. Geiermann also alleges that Ms. Jacobson was asked to leave the meeting after her PIP discussion so the Board could meet with staff without her present and this was a violation of open meetings law.¹⁰

⁴ Letter from Jayne Pfau, Asst. Sargent Cnty. State's Att'y, to Sandra L. DePountis, Asst. Att'y Gen. (Feb. 12, 2016). Information was also taken from the recording of the Jan. 5, 2016, meeting. As explained in more detail below, although the Board incorrectly stated they were just "closing" the meeting, it ultimately held an executive session to discuss confidential information.

⁵ Letter from Jayne Pfau, Asst. Sargent Cnty. State's Att'y, to Sandra L. DePountis, Asst. Att'y Gen. (Feb. 12, 2016). Information was also taken from the recording of the Jan. 5, 2016, meeting.

⁶ Mr. Jacobson was allowed to return to the meeting after the executive session. Letter from Jayne Pfau, Asst. Sargent Cnty. State's Att'y, to Sandra L. DePountis, Asst. Att'y Gen. (Feb. 12, 2016).

⁷ Letter from Jayne Pfau, Asst. Sargent Cnty. State's Att'y, to Sandra L. DePountis, Asst. Att'y Gen. (Feb. 12, 2016). Information was also taken from the recording of the Jan. 5, 2016, meeting; see *also* Minutes, Sargent Cnty. Soc. Servs. Bd. (Jan. 5, 2016).

⁸ Letter from Jayne Pfau, Asst. Sargent Cnty. State's Att'y, to Sandra L. DePountis, Asst. Att'y Gen. (Feb. 12, 2016). Information was also taken from the recording of the Jan. 5, 2016, meeting; see *also* Minutes, Sargent Cnty. Soc. Servs. Bd. (Jan. 5, 2016).

⁹ Letter from Michael Geiermann, Att'y at Law, to Att'y Gen.'s office (Jan. 21, 2016).

¹⁰ *Id.*

ISSUES

1. Whether the Sargent County Social Service Board followed proper procedure before proceeding into an executive session during the January 5, 2016, meeting.
2. Whether the executive session held during the January 5, 2016, meeting was authorized by law.
3. Whether the Sargent County Social Service Board violated open meetings law by asking Ms. Wendy Jacobson to leave the room during an open meeting on January 5, 2016.

ANALYSIS

Issue One

All "meetings"¹¹ of a "governing body"¹² of a "public entity"¹³ must be open to the public unless specifically provided by law.¹⁴ "A governing body may hold an executive session to consider or discuss closed or confidential records."¹⁵ Before convening in an executive session, the governing body must first announce to the public the topics it will be discussing during the executive session and the governing body's legal authority for holding the executive session.¹⁶

¹¹ N.D.C.C. § 44-04-17.1(9) (definition of "meeting").

¹² N.D.C.C. § 44-04-17.1(6) (definition of "governing body").

¹³ N.D.C.C. § 44-04-17.1(13) (definition of "public entity").

¹⁴ N.D.C.C. § 44-04-19. A county social service board appointed under N.D.C.C. § 50-01.2-01 is a "governing body" of the county it serves. Because the Sargent County Social Service Board is a "governing body" of Sargent County, its meetings must be open to the public "unless otherwise specifically provided by law." See *also* N.D.A.G. 2001-O-15 (Rolette County Social Service Board is a "governing body" of a "public entity" that is subject to open meeting laws).

¹⁵ N.D.C.C. § 44-04-19.2(1).

¹⁶ N.D.C.C. § 44-04-19.2(2). No motion is needed to enter into an executive session if the governing body is discussing confidential information. N.D.C.C. § 44-04-19.2(2)(a). As provided in the next section, the Board discussed confidential information during the executive session and therefore no motion was necessary before closing the meeting. The executive session must also be recorded in compliance with N.D.C.C. § 44-04-19.2(2)(c) and (5). A recording of the executive session was provided to this office.

Prior to entering into the executive session, the Board chair announced that a discussion would take place regarding a specific social service case involving a juvenile and that confidential information would be included in the discussion. The Board chair asked members of the public who were not involved in the case or authorized by law to have access to the confidential information to leave the room.¹⁷

The announcement put the public on notice of the topic to be discussed in the executive session, but failed to provide the public with the specific legal authority for closing the session. As will be discussed in more detail in the next section, the discussions involved a child abuse and neglect investigation and information, made confidential pursuant to N.D.C.C. § 50-25.1-11, and also involved discussion regarding active criminal intelligence and investigative information, protected under N.D.C.C. § 44-04-18.7, and identifying information about a victim or alleged victim of sexual offenses, protected under N.D.C.C. § 44-04-18.20. It is my opinion that the announcement made prior to the executive session failed to provide this legal authority for closing the meeting and was therefore a violation of the open meetings law.

Issue Two

"A governing body may hold an executive session to consider or discuss closed or confidential records" and information.¹⁸ A copy of the recording of the January 5, 2016, executive session was provided and reviewed by this office.

Mr. Geiermann argues that the discussions during the executive session had "absolutely nothing to do with the discussion of names of clients or confidential information" but was instead a personnel matter related to Ms. Jacobson's job performance that should have been handled in an open session.¹⁹

During the executive session, the Board engaged in discussions regarding a child abuse and neglect investigation involving a juvenile that had recently occurred. The crux of the discussion related to how the investigation was conducted and the cooperation of Sargent County Social Service's then director, Wendy Jacobson, with law enforcement personnel. In order to have the discussion, specifics of the case were brought up including interviews and interactions with the juvenile and other parties involved. Although no names were used, the Board explained that an executive session was

¹⁷ The Board mistakenly labeled this portion of the meeting as a "closed meeting" and not an "executive session." However, because members of the public were asked to leave the room so that confidential information could be discussed, it was an "executive session." See N.D.A.G. 2014-O-19 (asking members of the public to leave the room is akin to holding an "executive session").

¹⁸ N.D.C.C. § 44-04-19.2(1).

¹⁹ Letter from Michael Geiermann, Att'y at Law, to Att'y Gen.'s office (Jan. 21, 2016).

necessary because "enough information, such as time and location, would be given and a lay person may be able to determine the identity of the individuals. Sargent County is a small enough community where this was a legitimate possibility."²⁰ The discussions during the Board's January 5, 2016, executive session arguably related to Ms. Jacobson's job performance, but they were in the context of specific actions she took during an active criminal and child abuse and neglect case. This was not a general discussion on job performance.²¹

The discussion held in executive session involved the specifics of the case obtained during the investigation and such discussions were protected by N.D.C.C. § 50-25.1-11. This section protects not only the child abuse and neglect report, but "any other information obtained" during the investigation.²² Furthermore, there were discussions about an active criminal case still being investigated by the Sheriff's office and BCI which is protected pursuant to N.D.C.C. § 44-04-18.7. Finally, identifying information of victims or alleged victims of sexual offenses are protected by N.D.C.C. § 44-04-18.20. The discussion could not have taken place without revealing closed and confidential information. Therefore, it is my opinion that the Board had the legal authority to close this portion of the meeting and the executive session was therefore authorized by law.

Issue Three

Mr. Geiermann next alleges that "Ms. Jacobson was told to leave [the meeting] so that the Board could interview her staff regarding how they felt Ms. Jacobson is doing on the job."²³ This effectively created another "executive session" that was unauthorized by law.

The Board acknowledges that it met with Sargent County Social Service staff members to discuss Ms. Jacobson's job performance, attitude, and treatment of co-workers during the January 5, 2016, meeting.²⁴ The Board, however, denies Ms. Jacobson was told or asked to leave the room; rather, Ms. Jacobson left prior to the staff discussions "on her own" and "voluntarily." Opinions issued by this office must be based on the facts

²⁰ Letter from Jayne Pfau, Asst. Sargent Cnty. State's Att'y, to Sandra L. DePountis, Asst. Att'y Gen. (Feb. 12, 2016).

²¹ See N.D.A.G. 2016-O-03. Generally, discussions involving job performance and other "personnel matters" are not protected and, no matter how uncomfortable, should occur during an open meeting.

²² N.D.C.C. § 50-25.1-11.

²³ Letter from Michael Geiermann, Att'y at Law, to Att'y Gen.'s office (Jan. 21, 2016).

²⁴ Letter from Jayne Pfau, Asst. Sargent Cnty. State's Att'y, to Sandra L. DePountis, Asst. Att'y Gen. (Feb. 12, 2016), see *also* Minutes, Sargent Cnty. Soc. Servs. Bd. (Jan. 5, 2016).

provided by the public entity.²⁵ That being the case I conclude Ms. Jacobson was not asked or told to leave the meeting, and thereafter the Board did not violate the open meetings law during its discussions with staff members.

CONCLUSIONS

1. The Sargent County Social Service Board violated open meetings law when it failed to announce the legal authority before entering into an executive session during the January 5, 2016, meeting.
2. The executive session held during the January 5, 2016, meeting was authorized by law.
3. The Sargent County Social Service Board did not tell members of the public to leave the meeting during staff discussions.

STEPS NEEDED TO REMEDY VIOLATION

The Sargent County Social Service Board should amend its January 5, 2016, meeting minutes to specifically state the legal authority for closing the meeting as outlined in this opinion. A copy of the updated minutes must be provided to Mr. Geiermann, free of charge.

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. § 44-04-21.2.²⁶ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁷

Wayne Stenehjem
Attorney General

sld
cc: Michael Geiermann (via email only)

²⁵ N.D.C.C. § 44-04-21.1(1).

²⁶ N.D.C.C. § 44-04-21.1(2).

²⁷ *Id.*