

**OPEN RECORDS AND MEETINGS OPINION
2018-O-28**

DATE ISSUED: December 11, 2018

ISSUED TO: City of Belfield

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Richard Volesky asking whether the City of Belfield violated N.D.C.C. § 44-04-20 by failing to properly notice a special meeting and N.D.C.C. § 44-04-19.2 by holding an improper executive session.

FACTS PRESENTED

The Belfield City Council held a special meeting on September 10, 2018, at 5:30 p.m., before its regular meeting which was set for 7 p.m., with the agenda topic of "Discussion on Pending Law Enforcement Investigation."¹

During the September 10 special meeting, a motion was passed unanimously to enter into an executive session "to discuss a pending law enforcement and internal investigation, and attorney work product and consultation related thereto."² The executive session lasted approximately one hour and adjourned "with consensus to make an announcement in the regular meeting as to actions to be taken."³ At the regular meeting, convening at 7 p.m., during the "attorney's report," the City's Attorney informed the public "that the internal investigation they have been working on is now complete and that City Auditor Natalie Muruato will be returning from administrative leave on Monday September 17th, 2018. As a result of the investigation we (City of Belfield) will be implementing some

¹ Email from Auditor, City of Belfield, to Steve Byrne, Chief, Belfield Police Dep't; Bruce Baer, Belfield City Csl.; Dick Schuhrke, Belfield City Csl.; Ken Solberg, Mayor, City of Belfield; Melissa Chruszch; Quentin Obrigewitsch, Belfield City Csl.; Reyka Ravenwood, Belfield City Csl.; and Sandra Kuntz, Att'y, City of Belfield (Sept. 6, 2018, 11:49 AM).

² Minutes, Sp. Mtg., Belfield City Csl. (Sept. 10, 2018). Citations were made to N.D.C.C. § 44-04-18.7 – active criminal intelligence and investigating information and N.D.C.C. § 44-04-19.1, attorney work product, attorney consultation, and negotiation preparation.

³ Minutes, Sp. Mtg., Belfield City Csl. (Sept. 10, 2018).

new contract and bid policies/procedures to the city with(sic) moving forward.”⁴ A motion was made and passed by the Council to reinstate the City Auditor.⁵

ISSUES

1. Whether the Belfield City Council’s September 10, 2018, special meeting was noticed in substantial compliance with N.D.C.C. § 44-04-20.
2. Whether the executive session during Belfield City Council’s September 10, 2018, special meeting was authorized by law.

ANALYSIS

Issue One

Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity in substantial compliance with N.D.C.C. § 44-04-20.⁶ Notice of meetings must be posted at the principal office of the governing body, if one exists, at the location of the meeting on the day of the meeting, given to anyone who asks to receive notice of upcoming meetings, and for a city level entities, either filed with the city auditor or posted on the public entity’s website.⁷ For special meetings, notice must be given to the public entity’s official newspaper and to any representatives of the news media asking to be notified of the special meeting.⁸ Requests to receive personal notice of upcoming meetings are effective for one year unless a different time period is specified.⁹

Notice of the City Council’s September 10, 2018, special meeting was posted at City Hall, which is the main office of the Council and the location of the meeting, at the auditor’s office, and at the post office.¹⁰ Mr. Richard Volesky did not receive personal notice of the meeting; however, at the time of this meeting, Mr. Volesky’s request to receive personal

⁴ Minutes, Belfield City Csl. (Sept. 10, 2018).

⁵ *Id.*

⁶ N.D.C.C. §§ 44-04-19, 44-04-20.

⁷ N.D.C.C. § 44-04-20(4), (5).

⁸ N.D.C.C. § 44-04-20(6).

⁹ N.D.C.C. § 44-04-20(5).

¹⁰ Letter from Sandra Kuntz, Att’y, City of Belfield, to Att’y Gen.’s Office (Oct. 30, 2018); Email from Sandra Kuntz, Att’y, City of Belfield, to Att’y Gen.’s Office (Nov. 7, 2018, 4:18 PM).

notice had expired as it was beyond the one year timeframe.¹¹ The Council, however, failed to provide notice to its official newspaper, *The Dickinson Press*.¹²

Notice of public meetings must include the date, time, and location of the meeting, an agenda with topics to be considered, and notice of “general subject matter of any executive session expected to be held during the meeting.”¹³ “The purpose of an agenda is to provide sufficient ‘information to interested members of the public concerning the governing body’s anticipated business in order that they may attend the meeting or take whatever other action they deem appropriate.’”¹⁴ The importance of identifying what will take place at a meeting is greater for special meetings because they are unpredictable and often scheduled on short notice.¹⁵ Consequently, the law requires a level of specificity in a special meeting agenda that is not required for regular meetings because a governing body may only discuss topics during the special meeting that are listed on the notice.¹⁶ General terms or phrases that could have numerous meanings are not appropriate for a special meeting notice because they lack the specificity required to give the public meaningful notice of what will be discussed during a special meeting.¹⁷

The Council provided notice of the September 10, 2018, special meeting with the date, time, location of the meeting and the following agenda:

1. Roll Call
2. Discussion on Pending Law Enforcement Investigation
3. Adjournment.

¹¹ Email from Sandra Kuntz, Att’y, City of Belfield, to Belfield City Auditor and Richard Volesky (Oct. 15, 2018, 4:08 PM). The City recognized Mr. Volesky’s renewed request to receive personal notice and provided such notice to him thereafter. Letter from Sandra Kuntz, Att’y, City of Belfield, to Att’y Gen.’s Office (Oct. 30, 2018).

¹² Letter from Sandra Kuntz, Att’y, City of Belfield, to Att’y Gen.’s Office (Oct. 30, 2018).

¹³ N.D.C.C. § 44-04-20(2).

¹⁴ N.D.A.G. 2014-O-13; N.D.A.G. 2014-O-01.

¹⁵ N.D.A.G. 2011-O-15.

¹⁶ N.D.C.C. § 44-04-20(6); N.D.A.G. 2018-O-07; N.D.A.G. 2014-O-13; N.D.A.G. 2010-O-11; N.D.A.G. 2003-O-20.

¹⁷ N.D.A.G. 2014-O-13; N.D.A.G. 2013-O-06; N.D.A.G. 2013-O-01; N.D.A.G. 2009-O-23.

OPEN RECORDS AND MEETINGS OPINION 2018-O-28

December 11, 2018

Page 4

This agenda lacks the level of specificity required of a special meeting notice.¹⁸ The vague reference of “pending law enforcement investigation” does not adequately specify the topic and legal authority for the executive session so as to apprise the public of what would be considered during the special meeting.¹⁹ No reference was made that the topic concerned an internal investigation into the auditor’s role in the city’s bidding process. The general reference to law enforcement investigation also fails to specify the legal authority of the executive session, as recognized in the next section, to include active criminal intelligence and investigative information, an internal investigation for alleged employee misconduct, and attorney consultation.

The agenda failed to state that the discussion would be held in the executive session.²⁰ Instead, the September 10, 2018, meeting was titled as “Special Meeting (Executive Session).”²¹ Also, the subject of the email sent on September 6, 2018, concerning the

¹⁸ See *generally* N.D.A.G. 2015-O-13 (mere reference to executive session for “negotiations” or “quitclaim action” fails to cite the specific topic and legal authority for the executive session); N.D.A.G. 2014-O-13 (general and vague agenda topics that could have numerous meanings are not detailed enough to apprise the public of the topics that would be considered during the special meeting); N.D.A.G. 2013-O-09 (mere reference to “background check” or “personnel matter” was insufficient to properly identify the legal authority for holding the executive session); N.D.A.G. 2008-O-23 (agenda topic of “work session-public forum” does not provide the public with meaningful notice of the topics to be discussed); N.D.A.G. 2004-O-13 (agenda item of “collaborative bargaining” failed to give a meaningful notice of the subject matter to be considered during the meeting); N.D.A.G. 2003-O-22 (agenda for an “executive session under N.D.C.C. § 44-04-19.1” failed to give meaningful notice of the topic or purpose of the executive session); N.D.A.G. 2003-O-20 (notice did not include an agenda with topics to be discussed which prevented members of the public from obtaining proper advance notice of the special meeting).

¹⁹ N.D.A.G. 2014-O-08 (reference to “attorney consultation,” while sufficiently identifying the legal authority, did not specify topics to be considered); N.D.A.G. 2013-O-01 (agenda of “special policy meeting” is a phrase that could have several meanings and is too vague for a special meeting notice); N.D.A.G. 2010-O-11 (agenda topic of “end of year recap” is vague that could have multiple meanings and fails to provide the public with notice of what was to be discussed during the meeting).

²⁰ This office consistently recognizes that executive sessions must be specifically listed in the agenda for a special meeting and failure to do so violates open meetings law. N.D.A.G. 2004-O-13; N.D.A.G. 2002-O-11; N.D.A.G. 2001-O-15; N.D.A.G. 2000-O-03; N.D.A.G. 98-O-01.

²¹ Letter from Sandra Kuntz, Att’y, City of Belfield, to Att’y Gen.’s Office (Oct. 30, 2018).

OPEN RECORDS AND MEETINGS OPINION 2018-O-28

December 11, 2018

Page 5

special meeting was entitled “ES Meeting.”²² This misleading title of the special meeting causes concern due to the possible chilling effect on meeting attendance, because the notice could be misinterpreted by the public to imply that the entire meeting is an executive session and the public would not be permitted to attend.²³

I therefore find the Belfield City Council violated open meetings law when it failed to notice its September 10, 2018, special meeting in substantial compliance with N.D.C.C. § 44-04-18.

Issue Two

“A governing body may hold an executive session to consider or discuss closed or confidential records” or as otherwise specifically provided by law.²⁴ Some specific exceptions include records relating to a public entity’s internal investigation of an employee for misconduct pursuant to N.D.C.C. § 44-04-18.1(6),²⁵ “active criminal intelligence and investigative information” pursuant to N.D.C.C. § 44-04-18.7, and “attorney consultation” pursuant to N.D.C.C. § 44-04-19.1(5). The “attorney consultation” must be related to a governing body seeking or receiving its attorney’s advice about pending or reasonably predictable litigation or adversarial administrative proceeding or to receive the attorney’s advice and guidance on the legal risks, strengths, and weaknesses of an action of a public entity, which, if held in public would have an adverse fiscal effect on the entity.²⁶

A member of my staff reviewed the September 10, 2018, executive session. At the time of the executive session, an internal investigation was being performed on the auditor’s role in city bidding projects including the auditor’s failure to disclose personal ownership interests in companies bidding and obtaining city contracts. The auditor was placed on administrative leave at that time. The city police department performed the investigation

²² Email from Auditor, City of Belfield, to Steve Byrne, Chief, Belfield Police Dep’t; Bruce Baer, Belfield City Csl.; Dick Schuhrke, Belfield City Csl.; Ken Solberg, Mayor, City of Belfield; Melissa Chruszch; Quentin Obrigewitsch, Belfield City Csl.; Reyka Ravenwood, Belfield City Csl.; and Sandra Kuntz, Att’y, City of Belfield (Sept. 6, 2018, 11:49 AM).

²³ See Del. Op. Atty. Gen. 13-IB01, Board’s agenda format, where the executive session was separately noticed as occurring prior to the open meeting, could have a chilling effect on meeting attendance and “treads dangerously close” to violating the spirit of the applicable law by “suggesting to potential attendees that they need not or cannot exercise” their right to attend the beginning of all Board meetings.

²⁴ N.D.C.C. §§ 44-04-19; 44-04-19.2.

²⁵ Records relating to the investigation are exempt until the investigation of the complaint is complete, but no longer than seventy-five calendar days from the date of the complaint.

²⁶ N.D.C.C. § 44-04-19.1(5).

OPEN RECORDS AND MEETINGS OPINION 2018-O-28

December 11, 2018

Page 6

into the matter and the chief of police relayed the findings of the investigation during the executive session.²⁷ The city attorney provided information on the background of the investigation, clarified implicated laws, and asked for guidance from the Council on whether to pursue criminal charges by referring the matter to the state's attorney's office. The Council ultimately decided to reinstate the auditor to her full time employment position, update its policies and procedures on the bidding process, and provide training to avoid a similar situation in the future. The Council realized it could not make a motion in executive session, and decided it would take the final action during the regular meeting, scheduled for later that evening.

At the time of the executive session, the case regarding the auditor was still being investigated by law enforcement with possible pending criminal charges. The report and discussion by the police chief was therefore considered "active criminal intelligence and investigative information" exempt from disclosure pursuant to N.D.C.C. § 4-04-18.7. This was also an internal investigation of employee misconduct protected under N.D.C.C. § 44-04-18.1(6).²⁸ Finally, the attorney provided legal clarification and insights into the investigation and received input from the Council on whether to pursue criminal charges. The advice from the attorney on reasonably predictable litigation is protected as "attorney consultation" pursuant to N.D.C.C. § 44-04-19.1.

While the above discussions regarding the investigation of the auditor were properly held in executive session, throughout the executive session there were discussions that were not authorized. The Council discussed updating its policies and procedures on the bidding process, including how conflicts of interest are to be handled moving forward. The Council discussed its responsibility and the extent to which it must vet or research those working for the city and whether to require background checks on contractors. At the end of the executive session, questions were raised on how the investigation was handled, including the extent to which the Office of Attorney General was involved. Finally, the executive session ended with the police chief requesting time off. These discussions, unrelated to the investigation of the auditor, were not authorized to be held in the executive session and therefore the Council violated the open meetings law.

²⁷ This office may not advise on the validity and authority for the Belfield city police department and the Belfield city attorney to conduct the investigation of a city employee as this is outside the scope of authority for opinions issued pursuant to N.D.C.C. § 44-04-21.1.

²⁸ Less than 75 days had passed between the investigation, beginning on Aug. 17, 2018, and the executive session.

CONCLUSIONS

1. The Belfield City Council's September 10, 2018, special meeting was not noticed in substantial compliance with N.D.C.C. § 44-04-20, because notice was not provided to the official newspaper and the agenda lacked the specificity required for a special meeting.
2. The discussions relating to the investigation of the auditor during the Belfield City Council's September 10, 2018, special meeting executive session were authorized by law, however, discussions outside of this topic were not authorized and should have been discussed during the public portion of the meeting.

STEPS NEEDED TO REMEDY VIOLATION

The Belfield City Council must review its meeting minutes and provide specific reference to the topic considered in the executive session, with clear citations to the legal authority for holding the executive session.

The Belfield City Council must also review its executive session for discussions that were unrelated to the authorized topic and disclose those discussions to the public either by releasing a redacted recording or transcript. Mr. Volesky must receive the disclosure and updated meeting minutes, 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. § 44-04-21.2.²⁹ It may also result in personal liability for the person or persons responsible for the noncompliance.³⁰

Wayne Stenehjem
Attorney General

sld/amh
cc: Richard Volesky (via email only)

²⁹ N.D.C.C. § 44-04-21.1(2).

³⁰ *Id.*