

**OPEN RECORDS AND MEETINGS OPINION
2020-O-02**

DATE ISSUED: April 29, 2020

ISSUED TO: Bismarck Public School District #1 and Bismarck Public School Board

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Lawrence King asking whether Bismarck Public School District #1 violated N.D.C.C. § 44-04-18 when it discarded requested handwritten notes and whether the Bismarck Public School Board violated N.D.C.C. § 44-04-19.2 by announcing a topic of an executive session as “complaints raised to the district.”

FACTS PRESENTED

On January 13, 2020, Lawrence King made an open records request to Bismarck Public School District #1 (School) requesting, among other things, handwritten notes of the School’s human resource manager taken during meetings that occurred between the human resource manager and the School’s former assistant principal.¹ The School located notes from one meeting but determined that the notes were “not easily legible or readable.”² The School therefore transcribed the notes verbatim into a Word document, discarded the handwritten notes, and provided the Word document to Mr. King in response to the open records request.³

The Bismarck Public School Board held a regularly scheduled meeting on January 27, 2020, with the following information regarding an executive session on its agenda:

Background Information: Executive session pursuant to North Dakota Century Code Section 44-04-19.1(2) and (5) for the purpose of attorney consultation regarding potential legal liability related to complaints raised to the district that could result in a reasonably predictable lawsuit or adversarial administrative proceeding.

¹ Email from Lawrence King, Att’y, to Darin Scheer, Bus. Manager, Bismarck Pub. Sch., and Renea Walker, Dir., Cmty Relations, Bismarck Pub. Sch. (Jan. 13, 2020, 8:41 AM).

² Letter from KrisAnn Norby-Jahner, Att’y, Bismarck Pub. Sch., to Att’y Gen.’s Office (Mar. 16, 2020).

³ *Id.* See also Email from KrisAnn Norby-Jahner, Att’y, Bismarck Pub. Sch., to Lawrence King, Att’y (Jan. 29, 2020, 1:05 PM) (explaining to Mr. King that the notes were typed in a good faith effort and belief of attempting to make them easier to read).

Recommendation: It is recommended that the Board move into Executive Session pursuant to North Dakota Century Code 44-04-19.1(2) and (5) for the purpose of consultation with the district's attorney concerning potential legal liability related to complaints raised to the district that could result in a reasonably predictable lawsuit or adversarial administrative proceeding.⁴

Before proceeding into the executive session, the Board president announced to the public that the next item on the agenda was an executive session for attorney consultation pursuant to N.D.C.C. § 4-04-19.1(2) and (5) "regarding potential legal liability related to complaints raised to the district that could result in a reasonably predictable lawsuit or adversarial administrative proceeding."⁵

Before moving into executive session, Mr. King questioned the Board's attorney on whether the announcement provided proper notice to the public of the topic to be considered in executive session in compliance with N.D.C.C. § 44-04-19.2(2)(b).⁶ After the executive session, the Board's attorney announced to the public the concerns raised by Mr. King, and explained the Board's position that the announcement was adequate because the Board has a duty under law to preserve the neutrality of the process of conducting investigations and the complaints were confidential under law.⁷

ISSUES

1. Whether the Bismarck Public School District #1 violated open records law by discarding handwritten records responsive to an open records request.
2. Whether the Bismarck Public School Board announcement of the topic to be considered before proceeding into executive session complied with N.D.C.C. § 44-04-19.2.

⁴ Agenda, Bismarck Pub. Sch. Bd. (Jan. 27, 2020).

⁵ Letter from KrisAnn Norby-Jahner, Att'y, Bismarck Pub. Sch., to Att'y Gen.'s Office (Mar. 16, 2020); see also Minutes, Bismarck Pub. Sch. Bd. (Jan. 27, 2020); Public Replay, Bismarck Pub. Sch. Bd. (Jan 27, 2020), <https://24.111.15.98/CablecastPublicSite/show/6867?channel=2>.

⁶ Letter from KrisAnn Norby-Jahner, Att'y, Bismarck Pub. Sch., to Att'y Gen.'s Office (Mar. 16, 2020).

⁷ Letter from KrisAnn Norby-Jahner, Att'y, Bismarck Pub. Sch., to Att'y Gen.'s Office (Mar. 16, 2020). See also Minutes, Bismarck Pub. Sch. Bd. (Jan. 27, 2020).

ANALYSIS

Issue One

“Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours.”⁸ This office previously explained that notes cannot be thrown away or otherwise destroyed before being provided to a requestor who has made an open records request specifically for them.⁹

I appreciate the School's attempt to be helpful in creating a more easily readable Word document of the notes; however, the request specifically asked for the handwritten notes. Therefore, the School should have provided the notes, even if illegible.¹⁰ It was a violation of open records law when the School threw away requested records.

Issue Two

Before proceeding into an executive session, the governing body of a public entity must follow the procedures set forth in N.D.C.C. § 44-04-19.2(2) which requires, in part, an announcement “during the open portion of the meeting the topics to be discussed or considered during the executive session and the body's legal authority for holding an executive session on those topics.”¹¹ The description of the subject matter of the executive session must be sufficient to provide information about the topic or purpose of the executive session to a member of the public, without revealing any confidential information.¹²

Here, the topic of the executive session noticed in the agenda and announced to the public was “complaints raised to the district.” Mr. King alleges the announcement was insufficient and that the Board should have discussed the complaints before moving into the executive session.¹³

⁸ N.D.C.C. § 44-04-18.

⁹ N.D.A.G. 98-O-07.

¹⁰ Generally, under N.D.C.C. § 44-04-18(4), a public entity does not need to create or compile a record that does not exist and therefore the School did not need to create the Word document. Additionally, open records law just requires the public entity to provide the record, so whether the record was readable by the requestor is not a problem the School had to address and the School would not have been obligated to clarify the handwritten notes to the requestor.

¹¹ N.D.C.C. § 44-04-19.2(2)(b).

¹² N.D.A.G. 2016-O-01; N.D.A.G. 2009-O-09.

¹³ Letter from Lawrence King, Att'y, to Att'y Gen.'s Office (Feb. 18, 2020); Letter from KrisAnn Norby-Jahner, Att'y, Bismarck Pub. Sch., to Att'y Gen.'s Office (Mar. 16, 2020).

This office previously recognized that even if greater detail could potentially be provided, or that an individual would have preferred a different description of the topic to be discussed during an executive session, it does not mean the announcement fails to comply with the minimum requirements of N.D.C.C. § 44-04-20(2).¹⁴ The Board had received complaints from a former employee and an “anonymous complaint” signed “Citizens of Bismarck.”¹⁵ The complaints themselves, at the time of the meeting, were confidential pursuant to N.D.C.C. § 15.1-07-25(2), and therefore the Board could not reveal any information within the complaints or discuss the complaints in the open portion of the meeting. It is therefore my opinion that “complaints raised to the district” sufficiently described and adequately announced the topic of the executive session.

CONCLUSIONS

1. Bismarck Public School District #1 violated open records law when it threw away records subject to a pending records request.
2. The announcement by the Bismarck Public School Board regarding the topic to be considered before proceeding into executive session complied with N.D.C.C. § 44-04-19.2.

STEPS NEEDED TO REMEDY VIOLATION

Unfortunately, because the records were discarded, remedies for the violation are limited. The School District provides that the notes were copied verbatim. This office must take the facts of the public entity in opinions issued under N.D.C.C. § 44-04-21.1. Therefore no further action is available or necessary.

Wayne Stenehjem
Attorney General

sld

cc: Lawrence King (via email only)

¹⁴ N.D.A.G. 2009-O-09; N.D.A.G. 2005-O-04.

¹⁵ Letter from KrisAnn Norby-Jahner, Att'y, Bismarck Pub. Sch., to Att'y Gen.'s Office (Mar. 16, 2020).