

**OPEN RECORDS AND MEETINGS OPINION
2022-O-05**

DATE ISSUED: May 19, 2022

ISSUED TO: North Dakota Board of Chiropractic Examiners

CITIZEN'S REQUEST FOR OPINION

Dr. Jake Schmitz and Dr. Mason Custer requested opinions under N.D.C.C. § 44-04-21.1 asking whether the North Dakota Board of Chiropractic Examiners violated N.D.C.C. § 44-04-18 by withholding a recording of an executive session regarding records.

FACTS PRESENTED

The North Dakota Board of Chiropractic Examiners (Board) held a regular meeting on March 26, 2021.¹ During that meeting, an executive session was held to discuss closed or confidential records which contained medical or psychological information.² On March 30, 2021, Dr. Schmitz requested the recording of that executive session, or a transcript of the recording, with the closed or confidential information redacted.³

The Board held a special meeting on April 5, 2021, and voted to deny Dr. Schmitz's request.⁴ The Board responded to Dr. Schmitz the same day denying his request citing N.D.C.C. § 44-04-19.2(1), closed or confidential records, and N.D.C.C. § 43-06-15(6), medical or psychological information.⁵

¹ Agenda, N.D. Bd. of Chiropractic Exam'rs (Mar. 26, 2021); Minutes, N.D. Bd. of Chiropractic Exam'rs (Mar. 26, 2021); Letter from Dr. Dion Ficek, Pres., N.D. Bd. of Chiropractic Exam'rs, to Att'y Gen.'s Office (Apr. 14, 2021); Letter from Dr. Michael Remmick, Vice Pres., N.D. Bd. of Chiropractic Exam'rs, to Att'y Gen.'s Office (May 12, 2021).

² Letter from Dr. Dion Ficek, Pres., N.D. Bd. of Chiropractic Exam'rs, to Att'y Gen.'s Office (Apr. 14, 2021); Letter from Dr. Michael Remmick, Vice Pres., N.D. Bd. of Chiropractic Exam'rs, to Att'y Gen.'s Office (May 12, 2021).

³ Letter from Dr. Dion Ficek, Pres., N.D. Bd. of Chiropractic Exam'rs, to Att'y Gen.'s Office (Apr. 14, 2021); E-mail from Dr. Jake Schmitz to Lisa Blanchard, Exec. Dir., N.D. Bd. of Chiropractic Exam'rs (Mar. 30, 2021, 1:36 PM).

⁴ Email from Lisa Blanchard, Exec. Dir., N.D. Bd. of Chiropractic Exam'rs, to Dr. Jake Schmitz (Apr. 5, 2021, 2:55 PM).

⁵ *Id.*

On April 7, 2021, Dr. Custer requested a copy of the same executive session recording.⁶ The Board's executive director sent a response to Dr. Custer on April 8, 2021, informing him the Board scheduled a special meeting to discuss his request.⁷ On April 14, 2021, the Board met, voted to deny Dr. Custer's request based on N.D.C.C. §§ 44-04-19.2(1) and 43-06-15(6), and informed him of the denial in writing.⁸

ISSUE

Whether the Board properly withheld an executive session recording discussing closed or confidential records from Dr. Schmitz and Dr. Custer.

ANALYSIS

All records of a public entity must be open to the public unless otherwise specifically provided by law.⁹ A governing body may hold an executive session to consider or discuss closed or confidential records.¹⁰ Section 43-06-15, N.D.C.C., further protects medical or psychological information relative to the examination or treatment of a licensed chiropractor.¹¹ Unless the executive session was required to be confidential, a recording of an authorized executive session can be disclosed only pursuant to court order, to the attorney general for the purpose of administrative review under N.D.C.C. § 44-04-21.1, or upon majority vote of the governing body.¹² Dr. Schmitz and Dr. Custer both asked the Board for the recording of the March 26, 2021, executive session.

Dr. Schmitz, acknowledging medical and psychological records are protected by statute, asked for a redacted transcript of the executive session.¹³ This request presumes parts of the executive

⁶ Letter from Dr. Michael Remmick, Vice Pres., N.D. Bd. of Chiropractic Exam'rs, to Att'y Gen.'s Office (May 12, 2021).

⁷ Letter from Dr. Michael Remmick, Vice Pres., N.D. Bd. of Chiropractic Exam'rs, to Att'y Gen.'s Office (May 12, 2021); E-mail from Lisa Blanchard, Exec. Dir., N.D. Bd. of Chiropractic Exam'rs, to Dr. Mason Custer (Apr. 8, 2021, 2:22 PM).

⁸ Minutes, N.D. Bd. of Chiropractic Exam'rs (April 14, 2021); Letter from Dr. Michael Remmick, Vice Pres., N.D. Bd. of Chiropractic Exam'rs, to Att'y Gen.'s Office (May 12, 2021).

⁹ N.D.C.C. § 44-04-18.

¹⁰ N.D.C.C. §§ 44-04-19.1(2), (5); 44-04-19.2(1).

¹¹ *See also* N.D.C.C. § 43-06-14.1(7) (protecting patient testimony or records); N.D.A.G. 2019-O-19.

¹² N.D.C.C. § 44-04-19.2(5).

¹³ E-mail from Dr. Jake Schmitz to Att'y Gen.'s Office (Apr. 6, 2021, 8:09 AM).

session are open and can be redacted.¹⁴ The purpose of an executive session is not only to protect the records being discussed, but also to protect the consideration or discussion of those closed or confidential records.¹⁵ The Board's discussion about the protected records is also protected. Therefore, there is no "open" portion of the executive session to provide without redaction. If there were "open" portions of the executive session that could be released, then those parts of the session would not be authorized by law.¹⁶

Dr. Custer also requested a copy of the executive session and argues the Board "cannot deny [his] request for the recording [of the executive session], since it is [his] medical/psychological information" being discussed and the "intent of the law" is to protect his information from the public, not deny his ability to request the discussion that took place regarding his personal information.¹⁷

However, Dr. Custer's request for records was not for his own medical or psychological records which may be released with an appropriate waiver.¹⁸ Rather, his request was for the entire executive session recording.¹⁹ The protection of the discussion of the protected records by the Board during executive session is not something that can be waived by Dr. Custer.

The Board entered into this executive session to discuss closed or confidential records.²⁰ The Board also properly recorded the session. The recording is a separate and distinct record from the protected records being discussed during the executive session. An executive session not only protects closed or confidential records, but also the governing body's discussion of those protected records.²¹

¹⁴ See generally N.D.C.C. § 44-04-18.10(1) (A public entity may not deny a request for an open record on the grounds that the record also contains confidential or closed information.)

¹⁵ N.D.C.C. § 44-04-19.2.

¹⁶ See N.D.C.C. § 44-04-21.1(1) (any interested person may request an attorney general's opinion to review a . . . violation of section . . . 44-04-19.2). The validity of the executive session was not a question asked by either requester.

¹⁷ E-mail from Dr. Mason Custer to to Att'y Gen.'s Office (Apr. 18, 2021, 5:58 PM).

¹⁸ See N.D.A.G. 99-L-30 (there is an assumption confidentiality imposed by law can be waived by the party or parties who are intended to benefit from making the records confidential).

¹⁹ E-mail from Dr. Mason Custer to to Att'y Gen.'s Office (Apr. 18, 2021, 5:58 PM).

²⁰ "A governing body may hold an executive session to consider or discuss closed or confidential records." N.D.C.C. § 44-04-19.2.

²¹ N.D.C.C. § 44-04-19.2 (governing body may hold an executive session to consider or discuss closed or confidential records); N.D.A.G. 98-O-06 (discussion about a child's grades in a recorded grade book, a confidential education record under Family Educational Rights and Privacy Act, 23 U.S.C. § 1232g, was properly held in executive session).

Although there are three ways an executive session recording may be released under subsection 5 of N.D.C.C. § 44-04-19.2, none of them applies to these requests. The Board denied Dr. Schmitz's and Dr. Custer's requests for the March 26, 2021, executive session recording based on the same legally authorized reasons for holding the executive session, N.D.C.C. §44-04-19.2(1), discussion of closed or confidential records, and N.D.C.C. §43-06-15(6), medical or psychological information.²² The authorization of the executive session is not contested. Based on the information provided, the executive session was authorized by law; consequently, the executive session recording is protected by law. It is my opinion the Board properly denied both Dr. Schmitz's and Dr. Custer's requests.

CONCLUSION

The Board properly withheld from Dr. Schmitz and Dr. Custer the executive session recording of discussions of protected records.

Drew H. Wrigley
Attorney General

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cc: Dr. Jake Schmitz (via email only)
Dr. Mason Custer (via email only)

²² Email from Lisa Blanchard, Exec. Dir., N.D. Bd. of Chiropractic Exam'rs, to Dr. Jake Schmitz (Apr. 5, 2021, 2:55 PM); E-mail from Lisa Blanchard, Exec. Dir., N.D. Bd. of Chiropractic Exam'rs, to Dr. Mason Custer (Apr. 14, 2021, 2:06 PM).