



STATE OF NORTH DAKOTA  
**OFFICE OF ATTORNEY GENERAL**

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**OPEN RECORDS AND MEETINGS OPINION**  
**2024-O-05**

DATE ISSUED: July 15, 2024

ISSUED TO: City of Tioga

**CITIZEN'S REQUEST FOR OPINION**

Robert Harms requested an opinion from this office under N.D.C.C. § 44-04-21.1 asking whether the City of Tioga violated N.D.C.C. §§ 44-04-20 and 44-04-19.2 by failing to properly notice and subsequently holding an unauthorized executive session for attorney consultation.

**FACTS PRESENTED**

The Tioga City Commission (Commission) held a regular meeting on July 18, 2022, at 7:00 p.m.<sup>1</sup> During the meeting, the city attorney requested an executive session for attorney consultation be held to discuss two separate issues.<sup>2</sup> No executive session had been included on the meeting notice or agenda.<sup>3</sup> After a motion to enter executive session, the executive session was attended by the Commission members, the city attorney, the city auditor, and the city engineer.<sup>4</sup>

The executive session lasted approximately 26 minutes.<sup>5</sup> Approximately 12 minutes was discussion about a road dispute.<sup>6</sup> Following the road dispute portion, the city engineer left the executive session.<sup>7</sup> The remaining approximately 14 minutes pertained to retention of bond counsel.<sup>8</sup> The executive session was recorded, and the recording was provided to, and reviewed by, this office.

**ISSUES**

1. Whether the meeting notice complied with the requirements for executive sessions.
2. Whether the executive session for attorney consultation was authorized by law.

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<sup>1</sup> E-mail from Elizabeth L. Pendlay, Att'y at Law, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Oct. 3, 2022, 9:56 AM).

<sup>2</sup> *Id.*

<sup>3</sup> Agenda, Tioga City Comm'n (July 18, 2022).

<sup>4</sup> Exec. Session Minutes, Tioga City Comm'n (July 18, 2022); Letter from Elizabeth L. Pendlay, Att'y at Law, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Sept. 28, 2022).

<sup>5</sup> Recording: Part 2: Exec. Session held by Tioga City Comm'n (July 18, 2022).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* from approximately 11:55 to 12:04.

<sup>8</sup> *Id.* from approximately 12:04 to 26:28.

## ANALYSIS

### Issue 1

Notice must be provided to the public of all meetings, including anticipated executive sessions.<sup>9</sup> Notices must include: “the date, time, location of the meeting, and, if practicable, the topics to be considered.”<sup>10</sup> The “general subject matter of any executive session expected to be held during the meeting” must also be included in the notice.<sup>11</sup> There is no time requirement, prior to the start of a meeting, when notices need to be finalized.<sup>12</sup> Regular meeting agendas may be amended during the meeting.<sup>13</sup>

The July 18, 2022, regular meeting notice did not include notice of any executive session or general subject matter of the executive session held.<sup>14</sup> On July 13, 2022, five days prior to the meeting, the city engineer sent a draft response to a contractor regarding a contractual issue to the city attorney and city auditor for review and presentation to the Commission. This prompted the city attorney to instruct the city auditor to amend the notice to reflect an executive session for the road dispute.<sup>15</sup> However, the notice was never updated or amended. The bond counsel engagement letter was dated July 7, 2022, and even though it was only sent to the commissioners by the city auditor on the day of the meeting at 3:26 pm, that was still several hours prior to the meeting.<sup>16</sup> Therefore, both issues were known to the city attorney and city auditor prior to the meeting.<sup>17</sup>

With prior knowledge of the need for an executive session, the agenda and notice could have been updated prior to the meeting - or by motion during this regular meeting.<sup>18</sup> If a few hours are enough time for staff and the commissioners to receive the information and sufficiently prepare

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<sup>9</sup> N.D.C.C. § 44-04-20(1).

<sup>10</sup> N.D.C.C. § 44-04-20(2).

<sup>11</sup> *Id.*

<sup>12</sup> “There is no mandatory minimum notice period in N.D.C.C. § 44-04-20.” N.D.A.G. 98-O-13. *See also*, N.D.A.G. 99-O-10 and N.D.A.G. 2003-O-07.

<sup>13</sup> N.D.A.G. 2003-O-12, *citing* N.D.C.C. § 44-04-20(2), N.D.A.G. 98-O-21, N.D.A.G. 99-O-08. *See also*, N.D.A.G. 2008-O-23.

<sup>14</sup> Agenda, Tioga City Comm’n (July 18, 2022).

<sup>15</sup> E-mail from Elizabeth L. Pendlay, Att’y at Law, to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Oct. 3, 2022, 9:56 AM); E-mail from Elizabeth L. Pendlay, Att’y at Law, to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Oct. 3, 2022, 11:38 AM).

<sup>16</sup> E-mail from Abby Salinas, Tioga City Auditor, to Kevin Litten, Shawn Travis, Tim Christianson, Jessica Sandberg, and Larry Maize, Tioga City Comm’rs (July 18, 2022, 3:26 PM).

<sup>17</sup> E-mail from Elizabeth L. Pendlay, Att’y at Law, to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Oct. 3, 2022, 11:38 AM); E-mail from Joshua Reiner, Moore Engineering Inc. to Abby Salinas, Tioga City Auditor and Liz Pendlay, Att’y at Law (July 13, 2022, 3:38 PM). The Commission did amend its agenda for a different reason earlier in the meeting.

<sup>18</sup> N.D.A.G. 2003-O-12, *citing* N.D.C.C. § 44-04-20(2), N.D.A.G. 98-O-21, N.D.A.G. 99-O-08. *See also*, N.D.A.G. 2008-O-23.

to discuss and act on the matter, there is sufficient time to update the meeting agenda for an expected executive session, or schedule a special meeting with proper notice of the anticipated executive session. This failure to notice the executive session is a violation of open meetings law.

## Issue 2

A governing body may hold an executive session to consider or discuss closed or confidential information.<sup>19</sup> The legally authorized reasons to hold an executive session are:

1. Seek[] or receive[] the attorney’s advice regarding and in anticipation of reasonably predictable or pending civil or criminal litigation or adversarial administrative proceedings or . . .
2. To receive its 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.<sup>20</sup>

Attorney consultation is exempt from N.D.C.C. § 44-04-19 and means:

. . . any discussion between the members of a governing body and its attorney in instances in which the governing body seeks or receives the attorney’s advice regarding and in anticipation of reasonably predictable or pending civil or criminal litigation or adversarial administrative proceedings or to receive its 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.<sup>21</sup>

Discussion beyond the attorney’s advice and guidance must be made in the open portion of the meeting.<sup>22</sup>

This office has explained, in opinions regarding executive sessions held for negotiation strategy, that executive sessions are not proper for “update[s], history, or summar[ies].”<sup>23</sup> Information that can be presented to a board or commission without negatively impacting their negotiation or future litigation positions should be provided in open meetings.<sup>24</sup> “Introductory comments and

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<sup>19</sup> N.D.C.C. § 44-04-19.2.

<sup>20</sup> N.D.C.C. § 44-04-19.1(5).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> N.D.A.G. 2023-O-05, *citing* N.D.A.G. 2013-O-11, *citing* N.D.A.G. 2005-O-18; N.D.A.G. 2003-O-22; N.D.A.G. 2000-O-05.

<sup>24</sup> N.D.A.G. 2023-O-05, *citing* N.D.A.G. 2013-O-11, *citing* N.D.A.G. 2005-O-18.

explan[at]ions] of events that led to the options” before a governing body are not appropriate for executive sessions.<sup>25</sup>

The Commission spent approximately 12 minutes hearing from the city engineer about the road construction dispute.<sup>26</sup> The first few minutes of the executive session included procedural matters directed by the chair of the meeting, a summary of an on-going road project by the city attorney, an explanation of when the North Dakota Insurance Reserve Fund (NDIRF) should be notified by the city attorney, and what sounds like the city auditor, asking the Commission to direct the city attorney, very generally, what to do after the session.<sup>27</sup> The city engineer and city attorney explained, in very general terms, the contractor’s response to a previous letter, and the letter, drafted by the city engineer, that summarized the correspondence, explained the terms of their contract, that failure to respond to a claim was final and that the window to initiate a lawsuit had passed.<sup>28</sup> The discussion then went beyond the facts of this dispute. Flooding damage to a residential house is mentioned as an example of a water tap allegedly being left on by a contractor, presumably by a commissioner with additional information added by what sounds like the city auditor.<sup>29</sup> The final two minutes of this portion of the meeting was an explanation of what the Commission needed to do, procedurally, when they left the executive session.<sup>30</sup>

The Commission next spent approximately 14 minutes of the executive session discussing hiring bond counsel.<sup>31</sup> This discussion included funding for the community center, reviewing the engagement letter from the potential bond counsel, explaining how bond deals work, what bond counsel does, the need for the Commission to set floor and ceiling limits for bond counsel to work within, and the bond counsel’s fee for services and how those could be financed by rolling into the bond.<sup>32</sup> Multiple times several people spoke simultaneously about issues outside the topic of attorney consultation.<sup>33</sup>

The Commission argues that the executive session was appropriate to consult with its attorney because of “anticipation of reasonably predictable or pending civil or criminal litigation” and

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<sup>25</sup> N.D.A.G. 2023-O-05, *citing* N.D.A.G. 2022-O-02, *citing* N.D.A.G. 2013-O-11, *see also* N.D.A.G. 2005-O-18, N.D.A.G. 2003-O-22, N.D.A.G. 2000-O-05.

<sup>26</sup> Recording: Part 2: Exec. Session held by Tioga City Comm’n (July 18, 2022) from approximately 00:00 to 12:00. While the requester of this opinion only asked this office to review the second part of the July 18, 2022, executive session, in reviewing the materials provided, including the full executive session recording, it became clear that the entire session was inappropriately closed to the public.

<sup>27</sup> *Id.* from approximately 00:00 to 03:55.

<sup>28</sup> *Id.* from approximately 03:55 to 06:47.

<sup>29</sup> *Id.* from approximately 06:54 to 09:00.

<sup>30</sup> *Id.* from approximately 10:00 to 12:00.

<sup>31</sup> *See generally, Id.* from approximately 12:04 to 26:28.

<sup>32</sup> *Id.* from approximately 12:04 to 26:28.

<sup>33</sup> *See generally, Id.* from approximately 12:04 to 26:28.

“adverse fiscal effect if held in public.”<sup>34</sup> However, the discussion that took place in executive session was a very general update of a pending contract dispute and included a basic explanation of NDIRF. The letter drafted by the city engineer was an open record and should have been discussed in the open portion of the meeting.<sup>35</sup>

The bond issue, including financing, not only goes to the Commission for a public vote, but ultimately to the voters to approve.<sup>36</sup> Legal counsel requested review of the proposed potential retention agreement in executive session for the purpose of attorney consultation; however, attorney consultation, according to the parameters of N.D.C.C. § 44-04-19.1(5), is not what occurred in this executive session. There is no legal basis to hold a general discussion of bond counsel retention in an executive session. Further, none of the statutory elements for an executive session for attorney consultation were present during this executive session. Both discussions could – and should have – happened in an open session; therefore, this executive session was unauthorized.

#### CONCLUSIONS

1. The meeting notice did not comply with the requirements for executive session because it failed to include an anticipated executive session.
2. The executive session was not authorized by law because the discussion was not limited to attorney consultation.

#### STEPS NEEDED TO REMEDY VIOLATIONS

To remedy the notice violation:

The July 18, 2022, meeting notice must be redrafted to indicate an executive session was held, and to describe the subject matter and purpose of the executive session. The notice must be filed with the city auditor, or the designee of the city, posted on the City’s website, and posted at the Commission’s main office for one week.

To remedy the unauthorized executive session:

The Commission must amend its July 18, 2022, meeting minutes to reflect the discussions that occurred during the executive session. The Commission must provide the updated minutes and the recording of the executive session to Mr. Harms, and anyone else requesting it, all at no cost.

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<sup>34</sup> Letter from Elizabeth L. Pendlay, Att’y at Law, to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Sept. 28, 2022).

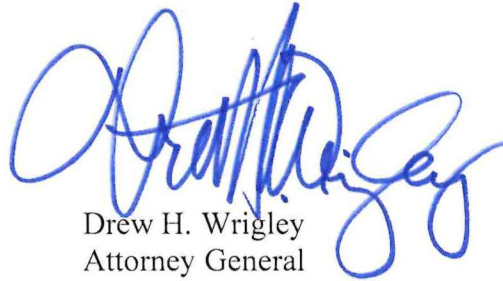
<sup>35</sup> N.D.A.G. 2020-O-03; *See also*, N.D.A.G. 2017-O-03, citing 23 past opinions and three North Dakota Supreme Court cases on matters which are not protected under the open records and meetings law.

<sup>36</sup> N.D.C.C. § 21-03-07.

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While I have every reason to expect the Commission will remedy this situation, 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>37</sup> Failure to take these corrective measures may also result in personal liability for the person or persons responsible for the noncompliance.<sup>38</sup>



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AML/mjh

cc: Robert Harms

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<sup>37</sup> N.D.C.C. § 44-04-21.1(2).

<sup>38</sup> *Id.*