



STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

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OPEN RECORDS AND MEETINGS OPINION
2025-O-01

DATE ISSUED: January 2, 2025

ISSUED TO: Lincoln City Council

CITIZEN'S REQUEST FOR OPINION

Kathy Schneibel requested an opinion from this office under N.D.C.C. § 44-04-21.1 asking whether the Lincoln City Council violated N.D.C.C. §§ 44-04-20, 44-04-19.2, and 44-04-19.1 by failing to properly notice an executive session, failing to properly announce the executive session, and holding an unauthorized executive session.

FACTS PRESENTED

On April 7, 2022, the Lincoln City Council held a regular meeting.¹ The meeting was noticed on the City of Lincoln website.² A notice was created and posted prior to the meeting, which described the topics to be discussed in the meeting and included an executive session.³ According to the minutes, near the end of the meeting a motion was made and approved by the City Council to go into executive session, citing N.D.C.C. § 44-04-19.1(2), to consult with their attorney concerning anticipated litigation.⁴ According to the City Council:

The topic of discussion during the executive session was related to the collection against the auditor's bond for a prior City auditor who failed to adequately discharge their duties and possible consideration of civil action against the former employee for actions taken during their employment with specific discussion on negligence in performance of their public office as required under the auditor's bond.⁵

"No agreements, consensus, or collective decision was reached during the executive session, and when reconvened in open session, the Mayor announced that no action had been taken during the

¹ Letter from Justin J. Hagel, Att'y, Vogel Law Firm, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (June 3, 2022).

² *Id.*

³ Minutes, Lincoln City Council (Apr. 7, 2022); Letter from Justin J. Hagel, Att'y, Vogel Law Firm, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (June 3, 2022).

⁴ Letter from Justin J. Hagel, Att'y, Vogel Law Firm, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (June 3, 2022); Minutes, Lincoln City Council (Apr. 7, 2022).

⁵ *Id.* Meeting minutes note that Mayor Wise and Councilmembers Schock, Praska, Volk, and Leingang were present at the meeting.

executive session.”⁶ This executive session lasted approximately seventeen minutes and was recorded in compliance with N.D.C.C. § 44-04-19.2(5).⁷

This office reviewed the recording of the executive session and found the recording contained conversations regarding a possible civil action. There were also discussions that centered around other topics, namely, bonding requirements of the council members, the history of the bonding of the city auditor, and a general discussion of the satisfaction with the current City Council members.⁸

After the meeting adjourned, the City Council was made aware that their agenda did not reflect the topic to be discussed or the legal authority for an executive session.⁹ The agenda was subsequently revised, on or about April 25, 2022, to accurately display the executive session, the legal basis for the executive session, and the topic of discussion for the executive session.¹⁰

ISSUES

1. Whether the City Council’s executive session on April 7, 2022, was properly noticed under N.D.C.C. § 44-04-20.
2. Whether the City Council’s executive session on April 7, 2022, was properly announced under N.D.C.C. § 44-04-19.2(2).
3. Whether the City Council’s executive session on April 7, 2022, for attorney consultation was compliant with N.D.C.C. § 44-04-19.2.

ANALYSIS

Issue One

“Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity . . . including executive sessions.”¹¹ The notice “must contain the date, time, and location of the meeting, and if practicable, the topics to be considered . . . [t]he notice also must contain the general subject matter of any executive session expected to be held during the meeting.”¹²

⁶ Letter from Justin J. Hagel, Att’y, Vogel Law Firm, to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (June 3, 2022).

⁷ N.D.C.C. § 44-04-19.2(5).

⁸ Recording: Executive Session held by Lincoln City Council (Apr. 7, 2022).

⁹ Letter from Justin J. Hagel, Att’y, Vogel Law Firm, to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (June 3, 2022).

¹⁰ *Id.*

¹¹ N.D.C.C. § 44-04-20(1).

¹² N.D.C.C. § 44-04-20(2).

The notice available on the City’s website was posted prior to the meeting and provided the date, time, location, and the general topics to be discussed, including an executive session.¹³ Although the executive session was on the agenda as “14. Executive Session” there was no legal basis, explanation, or general topic listed on the notice.¹⁴

This office has explained that “[t]he description of the ‘general 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.’”¹⁵ Here, there was no description of the subject matter of the executive session. Consequently, it is my opinion that the notice was insufficient and violated the North Dakota open meetings laws.¹⁶

Issue Two

The governing body of a public entity must make an announcement during the open portion of the meeting about what topics will “be discussed or considered during [an] executive session.”¹⁷ The announcement must include the “legal authority for holding an executive session on those topics.”¹⁸

Here, according to the minutes, there was an announcement in the open meeting that an executive session was going to be held for “attorney consultation to discuss anticipated litigation under N.D.C.C. § 44-04-19.2.”¹⁹ We have explained in past opinions that stating “attorney consultation” is insufficient if it does not identify the pending or reasonably anticipated litigation nor provide the public with sufficient information on the subject matter of the executive session.²⁰ “A public entity does not fulfill these requirements simply by quoting or citing the applicable open meetings

¹³ Letter from Justin J. Hagel, Att’y, Vogel Law Firm, to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (June 3, 2022).

¹⁴ Letter from Justin J. Hagel, Att’y, Vogel Law Firm, to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (June 3, 2022); Agenda, Lincoln City Council (Apr. 7, 2022).

¹⁵ N.D.A.G. 2009-O-09, *citing* N.D.A.G. 2007-O-11 and N.D.A.G. 2004-O-19. *See also* N.D.A.G. 2005-O-04.

¹⁶ N.D.A.G. 2022-O-02 (“[P]hrases such as ‘Collective Bargaining’ and ‘Motion to go into Executive Session . . .’ were also too vague to give the public sufficient information about the topic or purpose of the executive sessions.” *citing* N.D.A.G. 2004-O-13 (*citing* N.D.A.G. 2001-O-15); N.D.A.G. 2003-O-22. *See also* N.D.A.G. 2001-O-15 (Notice that stated, “employee relations” and “executive session” as separate agenda items failed to describe the subject matter of the executive session because the public would not understand the relationship between the items)); N.D.A.G. 2022-O-04 (“The description of the ‘general 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.’” *Citing* N.D.A.G. 2009-O-09, *citing* 2007-O-11, N.D.A.G. 2004-O-19. *See also* N.D.A.G. 2005-O-04).

¹⁷ N.D.C.C. § 44-04-19.2(2)(b).

¹⁸ *Id.*

¹⁹ Minutes, Lincoln City Council (Apr. 7, 2022).

²⁰ N.D.A.G. 2003-O-22; N.D.A.G. 2000-O-05; N.D.A.G. 99-O-04.

exception.”²¹ Further, “[t]he requirements for the announcement of an executive session are conjunctive: a governing body must announce both the legal authority and the topic to be considered during executive session.”²² While the announcement included the legal authority, it lacked the required specificity of topics to be discussed. Accordingly, it is my opinion that the announcement was noncompliant with North Dakota open meetings laws.

Issue Three

A governing body may hold an executive session to consult with its attorney.²³ For an executive session to be authorized for attorney consultation, the governing body must be discussing predictable litigation or seeking advice of possible actions or negotiations that would cause negative fiscal impact to the entity if discussed in open session.²⁴

After careful review of the recording, although portions of the discussion centered on whether the City Council would consider litigation against the former auditor, the discussion was speculative, with their attorney stating on more than one occasion that there was no evidence of embezzlement or identification of professional negligence.²⁵ Much of the discussion was unrelated to attorney consultation, as the City Council members discussed amongst themselves the bonding process, making claims against bonds, who pays for said bonds, prior overpayments to city employees, satisfaction of current City Council members, and the overall workload of the city auditor.²⁶ Approximately half way through the recording, the attorney cautioned that the discussion is outside the scope of an executive session but, nevertheless, continues with the discussion.²⁷ The “[p]ossibility of litigation or a proceeding must be realistic and tangible.”²⁸ “[A] governing body must show more than a fear of potentially becoming a party to litigation or administrative proceeding The phrase ‘reasonably predictable’ . . . requires more than a simple possibility

²¹ N.D.A.G. 99-O-04.

²² N.D.A.G. 2001-O-15, *citing* N.D.A.G. 99-O-04.

²³ N.D.C.C. § 44-04-19.1(2).

²⁴ N.D.C.C. § 44-04-19.1(5). *See* N.D.A.G. 2014-O-08 (“The use of the phrase ‘reasonably predictable’ in N.D.C.C. § 44-04-19.1 requires more than a simple possibility of litigation – the litigation by or against the governing body must be ‘realistic and tangible.’” *Citing* N.D.A.G. 2009-O-14. *See also* N.D.A.G. 2003-O-14 (prior to meeting in executive session, all conflicts were resolved therefore making the possibility of litigation remote)). *See generally* N.D.A.G. 2020-O-06; N.D.A.G. 98-O-01.

²⁵ Recording: Executive Session held by Lincoln City Council (Apr. 7, 2022).

²⁶ *Id.*

²⁷ *Id.* Information taken from Executive Session recording at approximately 8:25 minute mark.

²⁸ N.D.A.G. 2018-O-05, *citing* N.D.A.G. 2015-O-15; N.D.A.G. 2015-O-13. *See* N.D.A.G. 2019-O-19 (Board received correspondence threatening a report to the Federal Trade Commission, “[t]he Board received realistic and tangible threats of litigation and received its attorney’s advice regarding the potential outcome of litigation.”); N.D.A.G. 2005-O-04 (discussions concerning the threat of a wrongful termination suit were considered reasonably predictable); N.D.A.G. 2004-O-24 (threats by an employee to sue if terminated was seen as realistic and tangible).

of litigation or adversarial administrative proceedings.”²⁹ The decision to pursue legal remedies lies with the City Council and they admittedly do not have the requisite evidence. Therefore, in accordance with previous opinions,³⁰ the possibility of litigation was not tangible.³¹

Further, the discussion, if done in public would not have resulted in a negative fiscal impact for the City Council.³² In contrast, this office has previously noted that an executive session for attorney consultation is warranted when:

[t]o give such advice in the open may provide a ‘roadmap’ on how to initiate a lawsuit against a public entity, which would result in public funds being spent on litigation, all because the governing body did not receive full advice from legal counsel on the risks and liabilities associated with an action or decision.³³

The discussion within the executive session was not sufficient to provide a “roadmap” on how to initiate a lawsuit against the City Council, nor did it provide insight into strategy that might result in increased cost to the entity in the event of a lawsuit. Importantly, the City Council was the party in control of whether such litigation was to commence, and the recording reveals multiple acknowledgements that there is no evidence to trigger such a suit.³⁴ Because the possibility of litigation was not tangible, and the discussion posed no strategic disadvantage to the City Council, it is my opinion that the executive session held by the City Council on April 7, 2022, was in violation of North Dakota’s open meetings law.

CONCLUSION

1. The City Council violated N.D.C.C. § 44-04-20 by not properly noticing its April 7, 2022, executive session because the notice did not contain the legal authority or general subject matter to be discussed in executive session.
2. The City Council violated N.D.C.C. § 44-04-19.2(2) by failing to announce the general subject matter to be discussed in the executive session on April 7, 2022.
3. The City Council violated N.D.C.C. § 44-04-19.2 because the April 7, 2022, executive session discussion did not constitute protected attorney consultation under N.D.C.C. § 44-04-19.1(5).

²⁹ N.D.A.G. 2003-O-14, *citing* N.D.A.G. 2001-O-15. *See* N.D.A.G. 2015-O-01.

³⁰ N.D.A.G. 2019-O-19; N.D.A.G. 2005-O-04; N.D.A.G. 2004-O-24.

³¹ Recording: Executive Session held by Lincoln City Council (Apr. 7, 2022).

³² N.D.C.C. 44-04-19.1(5); N.D.A.G. 2018-O-05.

³³ N.D.A.G. 2018-O-05, *citing Hearing on H.B. 1345 Before the House Comm. on the Judiciary*, 2017 N.D. Leg. (Jan. 30) (Statement of Assistant Att’y Gen. Sandra DePountis); *Hearing on H.B. 1345 Before the Senate Comm. on the Judiciary*, 2017 N.D. Leg. (Mar. 6) (Statement of Assistant Att’y Gen. Sandra DePountis).

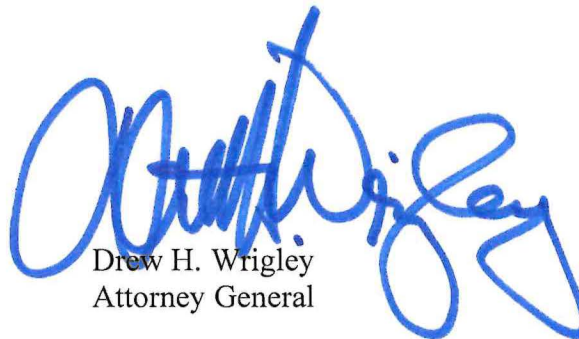
³⁴ Recording: Executive Session held by Lincoln City Council (Apr. 7, 2022).

STEPS NEEDED TO REMEDY VIOLATION

The City Council has revised its April 7, 2022, meeting notice and included a description of the executive session that provides the general subject matter and legal authority for the executive session. The updated notice has been posted on its website, therefore no further corrections to the notice are required.

The City Council must amend its April 7, 2022, meeting minutes to reflect the discussions that took place during the executive session. The City Council must provide the updated notice and minutes to Kathy Schneibel at no cost. The City Council must also provide either the recording, or if she prefers, a transcript of the executive session to Kathy Schneibel, at no cost.

While I have every reason to expect the City Council 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. § 44-04-21.2.³⁵ Failure to take these corrective measures may also result in personal liability for the person or persons responsible for the noncompliance.³⁶



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MEO/AML/mjh

cc: Kathy Schneibel (via U.S. Mail)
Monte Rogneby, Lincoln City Attorney (via e-mail)

³⁵ N.D.C.C. § 44-04-21.1(2).

³⁶ *Id.*