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OFFICE OF ATTORNEY GENERAL

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OPEN RECORDS AND MEETINGS OPINION
2025-O-05

DATE ISSUED: March 7, 2025

ISSUED TO: Stanley Rural Ambulance District

CITIZEN'S REQUEST FOR OPINION

Ken Rensch requested an opinion from this office under N.D.C.C. § 44-04-21.1 asking whether the Stanley Rural Ambulance District violated N.D.C.C. §§ 44-04-20, 44-04-19.2, and 44-04-19 by failing to properly notice an executive session, failing to properly describe the legal authority for an executive session, failing to follow proper procedure before entering an executive session, and holding an unauthorized executive session.

FACTS PRESENTED

The Stanley Rural Ambulance District (District) held a regular meeting on May 11, 2022.¹ The notice and agenda for the meeting included the following information about an executive session expected to be held during the meeting:

6. New Business

...

- Executive Session discussing legal matters
- opens [sic] records and responses to recent requests
- recent reporting to AG
- legal concerns regarding AR contract
- policy concerns in regards to body cameras, response time, and weather issues
- legal services costs²

Prior to entering the executive session, the District board president announced, "At this stage, we're going to have a quick executive session. We have like five issues to discuss, so we will step out of here and have that."³ A District board member inquired as to whether a motion was

¹ Letter from Christopher J. Nyhus, Att'y, Stanley Rural Ambulance Dist., to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Nov. 11, 2022).

² Notice of Regular Meeting & Agenda, Stanley Rural Ambulance Dist. (May 11, 2022).

³ Recording: Regular Meeting held by Stanley Rural Ambulance District before entering executive session (May 11, 2022) from approximately 1:08:23 to 1:08:32.

needed to go into executive session.⁴ It was then moved and seconded to go into executive session, and the District board conducted a voice vote, not a roll call vote, on the motion that passed unanimously with all members simultaneously saying “aye.”⁵

The District’s attorney and board members attended the executive session.⁶ The topics listed in the notice and agenda for the meeting were discussed in the executive session, and no action was taken by the District during the executive session.⁷ The executive session lasted approximately 36 minutes and was recorded in compliance with N.D.C.C. § 44-04-19.2(5).⁸ A copy of the electronic audio recording has been reviewed by this office.

ISSUES

1. Whether the District provided notice of the executive session of the May 11, 2022, regular meeting in substantial compliance with N.D.C.C. § 44-04-20.
2. Whether the District complied with N.D.C.C. § 44-04-19.2 before entering into an executive session during the May 11, 2022, regular meeting.
3. Whether the executive session held during the May 11, 2022, regular meeting was authorized by law.

ANALYSIS

Issue One

A governing body of a public entity must give advance notice of all its meetings.⁹ The notice “must contain the general subject matter of any executive session expected to be held during the meeting.”¹⁰ An executive session is the part of a meeting that is not open to the public because

⁴ Recording: Regular Meeting held by Stanley Rural Ambulance District before entering executive session (May 11, 2022) from approximately 1:08:37 to 1:08:42.

⁵ Recording: Regular Meeting held by Stanley Rural Ambulance District before entering executive session (May 11, 2022) from approximately 1:09:04 to 1:09:27; Letter from Christopher J. Nyhus, Att’y, Stanley Rural Ambulance Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Nov. 11, 2022).

⁶ Recording: Exec. Session held by Stanley Rural Ambulance Dist. (May 11, 2022).

⁷ Recording: Exec. Session held by Stanley Rural Ambulance Dist. (May 11, 2022); Letter from Christopher J. Nyhus, Att’y, Stanley Rural Ambulance Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Nov. 11, 2022).

⁸ Recording: Exec. Session held by Stanley Rural Ambulance Dist. (May 11, 2022).

⁹ N.D.C.C. § 44-04-20(1).

¹⁰ N.D.C.C. § 44-04-20(2).

closed or confidential information will be discussed.¹¹ The description of the general subject matter of the executive session must be sufficient enough to provide the public with information about the topic or purpose of the executive session.¹²

Here, the notice and agenda for the meeting included an executive session for “discussing legal matters” and specifically identified the five topics that were going to be discussed during the executive session. It is therefore my opinion that the District provided notice of the executive session in substantial compliance with N.D.C.C. § 44-04-20.

Issue Two

Before going into an executive session, a governing body must announce during the open portion of the meeting the topics that will be discussed during the executive session and the legal authority for holding an executive session on those topics.¹³ The governing body “must provide sufficient information about the topic and purpose of the executive session to keep the public apprised of the legally sufficient reason for holding the executive session.”¹⁴ Unless a confidential meeting is required, the governing body must pass a motion by a recorded roll call vote to hold an executive session.¹⁵

Here, the District board president announced that the board had “five issues to discuss” before going into executive session but did not announce the topics to be discussed or the legal authority for holding the executive session. The failure to announce the topics and legal authority for the executive session during the open portion of the meeting violated N.D.C.C. § 44-04-19.2(2)(b).

Additionally, the District admits that it did not take a roll call vote prior to entering into executive session.¹⁶ Rather, the District conducted a voice vote on the motion that passed unanimously with all members simultaneously saying “aye.”¹⁷ A past opinion of this office found a unanimous vote to go into executive session where “vote all in favor say aye” was insufficient as a roll call vote and a violation of the procedural requirements of N.D.C.C. § 44-

¹¹ N.D.A.G. 2023-O-05, *citing* N.D.C.C. § 44-04-17.1(4).

¹² N.D.A.G. 2009-O-09; *see also* N.D.A.G. 2023-O-05.

¹³ N.D.C.C. § 44-04-19.2(2)(b); N.D.A.G. 2023-O-05.

¹⁴ N.D.A.G. 2023-O-15, quoting N.D.A.G. 2022-O-02.

¹⁵ N.D.C.C. §§ 44-04-19.2(2)(a), 44-04-21(1). This office has long held that “[a] motion to hold an executive session is a nonprocedural motion . . . [that] must be decided by a recorded roll call vote.” N.D.A.G. 2016-O-13, n. 12, *citing* N.D.A.G. 2015-O-15; N.D.A.G. 2015-O-13; N.D.A.G. 2009-O-20; N.D.A.G. 2001-O-17; *see also* N.D.A.G. 2022-O-04 (stating that a motion to hold an executive session for attorney consultation must be taken by a recorded roll call vote).

¹⁶ Letter from Christopher J. Nyhus, Att’y, Stanley Rural Ambulance Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Nov. 11, 2022).

¹⁷ *Id.*

04-19.2.¹⁸ The District argues the unanimous voice vote was sufficient because the minutes reflect the board members in attendance, thereby identifying who voted to enter the executive session.¹⁹ This office has previously rejected this argument and I affirm that decision.²⁰ It is therefore my opinion that the District violated N.D.C.C. § 44-04-19.2 by failing to take a recorded roll call vote on the motion to go into executive session.

Issue Three

All meetings of a governing body of a public entity must be open to the public unless otherwise allowed by law.²¹ “A governing body of a public entity may only hold an executive session if it has specific statutory authority” to do so.²² The District board did not announce during the open portion of the meeting any legal authority for holding the executive session, and the notice and agenda for the meeting only states that the executive session was for “discussing legal matters.”²³

The District argues that the executive session was authorized under N.D.C.C. § 44-04-19.1(2) for attorney consultation.²⁴ This statute provides, “Attorney consultation is exempt from section 44-04-19. That portion of a meeting of a governing body during which an attorney consultation occurs may be closed by the governing body under section 44-04-19.2.”²⁵

The District argues that the executive session was authorized by law because “‘legal matters’ . . . is synonymous with attorney consultation.”²⁶ But this is not accurate because “attorney consultation” is a term of art that is specifically defined in the statute. The statute defines the term as follows:

“Attorney consultation” means any discussion between the members of a governing body and its attorney in instances in

¹⁸ N.D.A.G. 2016-O-13.

¹⁹ Letter from Christopher J. Nyhus, Att’y, Stanley Rural Ambulance Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Nov. 11, 2022).

²⁰ See N.D.A.G. 2005-O-02 (“The fact there was a unanimous voice vote, minutes were taken reflecting attendance, and the result of the vote was therefore ascertainable does not suffice. Failure to take a roll call vote, even though there is a record of the result, violates N.D.C.C. § 44-04-21(1).”); see also N.D.C.C. § 44-04-21(1) (“[A]ll nonprocedural votes must be recorded roll call votes, with the votes of each member being made public at the open meeting.”).

²¹ N.D.A.G. 2020-O-06, *citing* N.D.C.C. § 44-04-19.

²² N.D.A.G. 2023-O-05, *citing* N.D.A.G. 2013-0-11.

²³ Notice of Regular Meeting & Agenda, Stanley Rural Ambulance Dist. (May 11, 2022).

²⁴ Letter from Christopher J. Nyhus, Att’y, Stanley Rural Ambulance Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Nov. 11, 2022).

²⁵ N.D.C.C. § 44-04-19.1(2).

²⁶ Letter from Christopher J. Nyhus, Att’y, Stanley Rural Ambulance Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Nov. 11, 2022).

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. All other discussions beyond the attorney's advice and guidance must be made in the open, unless otherwise provided by law. All statements made by a participant or between participants during an executive session held for the purpose of attorney consultation are exempt if the statements relate to the subject for which attorney consultation was established. Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation.²⁷

The District has not explained how any of the topics discussed in the executive session fall under this statutory definition of attorney consultation.²⁸ The mere presence of the District's attorney during the executive session is insufficient to constitute attorney consultation.²⁹ The recording of the executive session demonstrates that most of the discussion did not meet the statutory definition of attorney consultation.

The first two topics of the executive session, "opens [sic] records and responses to recent requests" and "recent reporting to AG,"³⁰ were discussed together because they related to each other.³¹ The topics concerned a recent open records request by Ambulance Resources, Inc., an independent contractor that was under contract with the District, another recent open records request by an employee of Ambulance Resources, and a recent opinion request that Ambulance Resources made to the Attorney General regarding one of the open records requests.³² Requests for Attorney General opinions under N.D.C.C. § 44-04-21.1 are not "proceedings" and therefore do not fall under the definition of "attorney consultation."³³ There is also nothing in the recording of the executive session or the District's response to indicate that the District's counsel was giving advice on impending litigation or the legal risks of an action that would have an

²⁷ N.D.C.C. § 44-04-19.1(5).

²⁸ See Letter from Christopher J. Nyhus, Att'y, Stanley Rural Ambulance Dist., to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Nov. 11, 2022).

²⁹ N.D.C.C. § 44-04-19.1(5).

³⁰ Notice of Regular Meeting & Agenda, Stanley Rural Ambulance Dist. (May 11, 2022).

³¹ Letter from Christopher J. Nyhus, Att'y, Stanley Rural Ambulance Dist., to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Nov. 11, 2022).

³² *Id.*

³³ N.D.A.G. 2015-O-01 ("Attorney General opinions . . . are not proceedings.").

adverse fiscal effect on the District if it were held in public.³⁴ It is therefore my opinion that discussions on these topics were not authorized by law to be held in an executive session.

The third topic of the executive session, “legal concerns regarding AR contract,”³⁵ related to the District’s contract with Ambulance Resources and recent default on the contract by Ambulance Resources.³⁶ A portion of this discussion included advice from the District’s counsel regarding the contract dispute, the District’s legal options, and the potential legal risks and liabilities associated with the District’s options for dealing with the dispute.³⁷ Having these conversations in an open meeting would have had an adverse fiscal effect on the District because it would have provided a “roadmap” for Ambulance Resources on how to deal with the contract dispute.³⁸ It is therefore my opinion that this portion of the executive session was authorized as attorney consultation. The rest of the executive session on this topic included discussing a lawsuit that an Ambulance Resources employee had brought against a hospital that did not involve the District, and the District’s counsel told the board that the allegations in the lawsuit did not involve the District.³⁹ This discussion therefore did not involve pending or reasonably predictable litigation against the District and was not authorized to be held in executive session.

The fourth topic of the executive session, “policy concerns in regards to body cameras, response time, and weather issues,”⁴⁰ was not raised as an issue by the requestor. But during review of the executive session recording, it became apparent that this portion of the executive session was also not authorized as attorney consultation. At one point during the discussion, the District’s attorney even suggested that the topic was more appropriate for the open portion of the meeting.⁴¹ The District’s attorney was correct, and discussion on this topic was not authorized to be held during an executive session.

³⁴ Recording: Exec. Session held by Stanley Rural Ambulance Dist. (May 11, 2022).

³⁵ Notice of Regular Meeting & Agenda, Stanley Rural Ambulance Dist. (May 11, 2022).

³⁶ Letter from Christopher J. Nyhus, Att’y, Stanley Rural Ambulance Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Nov. 11, 2022).

³⁷ Recording: Exec. Session held by Stanley Rural Ambulance District (May 11, 2022) from approximately 18:30 through 19:58.

³⁸ See N.D.A.G. 2020-O-06 (“To 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.” (quoting N.D.A.G. 2018-O-05)).

³⁹ Recording: Exec. Session held by Stanley Rural Ambulance Dist. (May 11, 2022) from approximately 24:55 to 27:50.

⁴⁰ Notice of Regular Meeting and Agenda, Stanley Rural Ambulance District (May 11, 2022).

⁴¹ Recording: Executive Session held by Stanley Rural Ambulance District (May 11, 2022) from approximately 28:16 to 28:25.

The final topic of the executive session, “legal services costs,”⁴² related to the legal fees that the District had incurred.⁴³ The District’s attorney discussed with the board members what level of involvement the District wanted from its attorney and what the District board members could handle on their own.⁴⁴ The discussions related to this topic did not fall under the definition of attorney consultation and were therefore not authorized to be held in an executive session.

In sum, except for approximately ninety seconds of the executive session during which the District’s attorney discussed the contract dispute with Ambulance Resources, the District’s executive session was not authorized by law as attorney consultation.

CONCLUSIONS

1. The District substantially complied with N.D.C.C. § 44-04-20 when its notice of the May 11, 2022, regular meeting contained the general subject matter of the executive session.
2. The District violated N.D.C.C. § 44-04-19.2 by not announcing the topics and legal authority for the executive session during the open portion of the May 11, 2022, regular meeting and by not taking a roll call vote before going into the executive session.
3. The portion of the District’s executive session held during the May 11, 2022, regular meeting in which a contract dispute with Ambulance Resources was discussed from approximately 18:30 through 19:58 on the recording, was authorized by law as attorney consultation. The remainder of the District’s executive session was not authorized by law.

STEPS NEEDED TO REMEDY VIOLATION

The District must amend its May 11, 2022, meeting minutes to include the topic and legal authority for going into executive session and reflect a recorded roll call vote of each member of the board on the motion to go into executive session.

The District must disclose the recording of the May 11, 2022, executive session to Ken Rensch, at no charge, and any member of the public upon request, but the District may redact timestamps 18:30 through 19:58 from the recording.

While I have every reason to expect Stanley Rural Ambulance District 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

⁴² Notice of Regular Meeting & Agenda, Stanley Rural Ambulance Dist. (May 11, 2022).

⁴³ Letter from Christopher J. Nyhus, Att’y, Stanley Rural Ambulance Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Nov. 11, 2022).

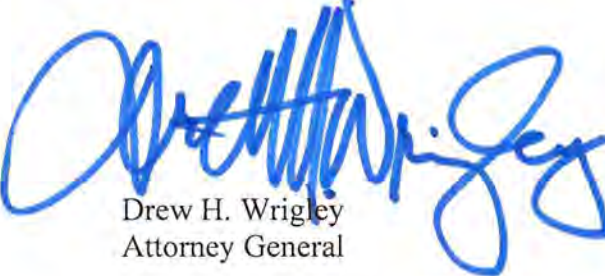
⁴⁴ *Id.*

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the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2.⁴⁵ Failure to take these corrective measures may also result in personal liability for the person or persons responsible for the noncompliance.⁴⁶



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SRH/AML/mjh

cc: Ken Rensch

⁴⁵ N.D.C.C. § 44-04-21.1(2).

⁴⁶ *Id.*