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OFFICE OF ATTORNEY GENERAL

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OPEN RECORDS AND MEETINGS OPINION
2025-O-11

DATE ISSUED: August 11, 2025

ISSUED TO: Pembina County Commission

CITIZEN'S REQUEST FOR OPINION

Robert Flemming requested an opinion from this office under N.D.C.C. § 44-04-21.1 asking whether the Pembina County Commission violated N.D.C.C. §§ 44-04-20 and 44-04-19.1 by failing to properly notice an executive session and subsequently holding an unauthorized executive session.

FACTS PRESENTED

The Pembina County Commission (Commission) held a regular meeting on February 21, 2023.¹ The meeting notice listed several discussion topics, including the “Samuels Group Proposal,” which involved a study by the Samuels Group and Walsh County to plan and potentially build a regional correctional facility.² The meeting notice did not include an executive session.³ Approximately one week before the meeting, the Commission received an email with a copy of the agreement between the Samuels Group and Walsh County.⁴ According to the Commission, Walsh County wanted to identify which other counties may have been interested in participating in the study or were interested in joining in the construction of a regional facility.⁵ During the meeting, the Commission Vice Chair “asked if [the Commission] should go into executive session to discuss the proposal since it has ‘Confidential’ printed across it,” and the State’s Attorney agreed.⁶ According to the meeting minutes, a motion was made by the Vice Chair and seconded by a Commission member to enter into executive session for “attorney consultation and

¹ Letter from Linda Schlittenhard, Auditor/Treasurer, Pembina Cnty., to Mary Kae Kelsch, Dir., Gen. Couns. Div., Off. of Att’y Gen. (Mar. 28, 2023); Notice of Regular Meeting & Agenda, Pembina Cnty. Comm’n (Feb. 21, 2023).

² Notice of Regular Meeting & Agenda, Pembina Cnty. Comm’n (Feb. 21, 2023); Letter from Linda Schlittenhard, Auditor/Treasurer, Pembina Cnty., to Mary Kae Kelsch, Dir., Gen. Couns. Div., Off. of Att’y Gen. (Mar. 28, 2023).

³ *Id.*

⁴ Letter from Linda Schlittenhard, Auditor/Treasurer, Pembina Cnty., to Mary Kae Kelsch, Dir., Gen. Couns. Div., Off. of Att’y Gen. (Mar. 28, 2023).

⁵ *Id.*

⁶ *Id.*

negotiations,” and the motion passed.⁷ The executive session was attended by the Commission members, the Pembina County State’s Attorney, the Pembina County Auditor/Treasurer, the Pembina County Sheriff, and the Pembina County Chief Deputy Sheriff.⁸

The executive session lasted approximately 33 minutes.⁹ During the executive session, the Commission discussed the proposed \$38,000 study to build a new regional correctional facility, with the potential for cost-sharing among participating counties.¹⁰ Much of the session focused on evaluating the implications of constructing a new facility.¹¹ The Commission discussed the current county jail’s condition, capacity, and maintenance needs.¹² They also considered the cost of jail beds, the age of the existing facility, and the potential impacts of a new facility on current staff.¹³ Additionally, the discussion covered prisoner transport logistics between counties, the need for clarity regarding the total project cost, the number of potential counties involved, and how the new facility would operate.¹⁴ The Samuels Group was identified as a resource for answering further questions, and it was noted that someone from Walsh County should be present at the next Commission meeting to address additional concerns.¹⁵

Once the Commission returned to open session, the Commission passed a motion to table the Samuels Group proposal for the following meeting.¹⁶

ISSUES

1. Whether the Pembina County Commission provided notice of the executive session held on February 21, 2023, in substantial compliance with N.D.C.C. § 44-04-20.

⁷ Minutes, Pembina Cnty. Comm’n (Feb. 21, 2023). It was not requested and therefore this opinion does not address whether the Commission properly announced the executive session.

⁸ *Id.*; Letter from Linda Schlittenhard, Auditor/Treasurer, Pembina Cnty., to Mary Kae Kelsch, Dir., Gen. Couns. Div., Off. of Att’y Gen. (Mar. 28, 2023).

⁹ Minutes, Pembina Cnty. Comm’n (Feb. 21, 2023); Recording: Exec. Session held by Pembina Cnty. Comm’n (Feb. 21, 2023).

¹⁰ Recording: Exec. Session held by Pembina Cnty. Comm’n (Feb. 21, 2023) from approximately 0:33 to 02:24, 3:15 to 4:38.

¹¹ *See* Recording: Exec. Session held by Pembina Cnty. Comm’n (Feb. 21, 2023).

¹² *Id.* from approximately 2:25 to 2:30, 4:40 to 5:10.

¹³ *Id.* from approximately 5:45 to 7:05, 16:13 to 16:44, 16:46 to 16:59, 17:30 to 19:07.

¹⁴ *Id.* from approximately 7:20 to 08:50, 9:25 to 9:40, 11:49 to 14:50, 22:20 to 27:11, 28:32 to 30:13, 31:26 to 32:08.

¹⁵ *Id.* from approximately 8:54 to 9:24, 21:25 to 22:18, 27:44 to 28:10.

¹⁶ Minutes, Pembina Cnty. Comm’n (Feb. 21, 2023); Letter from Linda Schlittenhard, Auditor/Treasurer, Pembina Cnty., to Mary Kae Kelsch, Dir., Gen. Couns. Div., Off. of Att’y Gen. (Mar. 28, 2023).

2. Whether the executive session held during the February 21, 2023, regular meeting was authorized by law.

ANALYSIS

Issue One

All public meetings must be pre-noticed, including anticipated executive sessions.¹⁷ Notices “must contain the date, time, and location of the meeting, and if practicable, the topics to be considered.”¹⁸ The “general subject matter of any executive session expected to be held during the meeting” must also be included in the notice.¹⁹

The notice for the Commission’s February 21, 2023, meeting did not list an intention to discuss the Samuels Group proposal in executive session.²⁰ The claimed justification for entering executive session arose during the meeting, based on the proposal being marked “Confidential.”²¹ However, the Commission received a copy of the agreement between the Samuels Group and Walsh County via email a week prior to the meeting.²² Given this advance knowledge, the meeting notice should have been updated to reflect the intent to discuss the proposal in executive session. The Commission, therefore, violated the open meetings law by failing to notice the executive session.

Issue Two

“Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public.”²³ “‘A governing body of a public entity may only hold an executive session if it has specific statutory authority’ to do so.”²⁴ According to the minutes, the Commission closed the meeting and entered executive session to discuss “attorney consultation and negotiations.”²⁵

A governing body may hold an executive session for “attorney consultation” when it is seeking or receiving its attorney’s advice regarding “reasonably predictable or pending” litigation, or when it is receiving advice on the “legal risks, strengths, and weaknesses of an action of a public entity”

¹⁷ N.D.C.C. § 44-04-20(1).

¹⁸ N.D.C.C. § 44-04-20(2).

¹⁹ *Id.*

²⁰ Notice of Regular Meeting & Agenda, Pembina Cnty. Comm’n (Feb. 21, 2023).

²¹ Letter from Linda Schlittenhard, Auditor/Treasurer, Pembina Cnty., to Mary Kae Kelsch, Dir., Gen. Couns. Div., Off. of Att’y Gen. (Mar. 28, 2023).

²² *Id.*

²³ N.D.C.C. § 44-04-19.

²⁴ N.D.A.G. 2025-O-05 (quoting N.D.A.G. 2023-O-05).

²⁵ Minutes, Pembina Cnty. Comm’n (Feb. 21, 2023).

which could result in a negative fiscal impact to the public entity if discussed in open session.²⁶ “Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation.”²⁷

A governing body may also hold an executive session “to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator” regarding current or pending contract negotiations if allowing the other party to the negotiation, or members of the public, to listen to the discussion would adversely affect the bargaining position of the entity.²⁸ “A meeting may not be closed . . . simply because a contract is being discussed.”²⁹

The Commission’s February 21, 2023, executive session was recorded in compliance with N.D.C.C. § 44-04-19.2(5) and reviewed by this office. It is clear after reviewing the recording that the discussion held during the executive session fails to meet the requirements for either attorney consultation or negotiation strategy. First, the Commission was not seeking or receiving the State’s Attorney advice regarding any reasonably predictable litigation nor seeking advice of possible actions or negotiations that would cause a negative fiscal impact to the Commission if discussed in open session. Second, the Commission did not discuss any negotiation strategies or provide negotiation instructions that, if held in public, would have an adverse fiscal effect. Instead, the Commission discussed the proposed study for a new regional correctional facility. The Commission weighed the pros and cons of building a new facility, reviewed the current jail’s condition, and considered factors like maintenance, capacity, cost of jail beds, and staff impact. The Commission then expressed its wish to have representatives from Walsh County and the Samuels Group at the next meeting to help address outstanding questions. Furthermore, the Commission acknowledges in its response to this office that the discussion “did not justify an [e]xecutive [s]ession.”³⁰ Accordingly, the Commission violated N.D.C.C. § 44-04-19 when it held an executive session that was not authorized by law.

CONCLUSIONS

1. The Pembina County Commission failed to properly notice the executive session held on February 21, 2023, in substantial compliance with N.D.C.C. § 44-04-20.
2. The executive session held during the February 21, 2023, regular meeting was not authorized by law.

²⁶ N.D.C.C. § 44-04-19.1(5).

²⁷ *Id.*

²⁸ N.D.C.C. § 44-04-19.1(9).

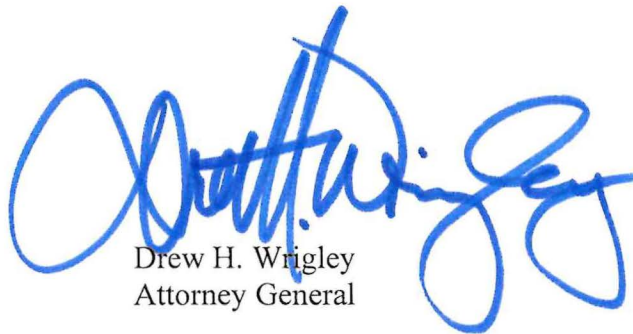
²⁹ N.D.A.G. 2022-O-02 (quoting N.D.A.G. 2000-O-05).

³⁰ Letter from Linda Schlittenhard, Auditor/Treasurer, Pembina Cnty., to Mary Kae Kelsch, Dir., Gen. Couns. Div., Off. of Att’y Gen. (Mar. 28, 2023).

STEPS NEEDED TO REMEDY VIOLATIONS

The Commission must redraft the February 21, 2023, meeting notice 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 county auditor, or the designee of the county, posted on the County's website, and posted at the Commission's main office for one week. The Commission must also amend its February 21, 2023, 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. Flemming, and anyone else requesting it, at no cost.

While I have every reason to expect the Commission will remedy this situation in accord with this opinion, failure to take those corrective measures 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. § 44-04-21.2.³¹ Failure to take these corrective measures may also result in personal liability for the person or persons responsible for the noncompliance.³²



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Attorney General

AMR/mjh

cc: Robert Flemming

³¹ N.D.C.C. § 44-04-21.1(2).

³² *Id.*