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OFFICE OF ATTORNEY GENERAL

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OPEN RECORDS AND MEETINGS OPINION
2026-O-11

DATE ISSUED: June 26, 2026

ISSUED TO: Mercer County Commission

CITIZEN'S REQUEST FOR OPINION

Marv Schwehr requested an opinion from this office under N.D.C.C. § 44-04-21.1 regarding whether the Mercer County Commission (Commission) 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, and holding an unauthorized executive session.

FACTS PRESENTED

The Commission regularly holds meetings on the first and third Wednesdays of the month.¹ At its June 21, 2023, meeting, Wes Klein, a citizen of Mercer County, addressed the Commission regarding a potential open meeting violation at a previous meeting, as well as the County Road 20 bridge closure project.² Mr. Klein did not threaten litigation on either issue, although he asked about the county's liability for the removal of Jersey barriers on the closed bridge.³

The notice and agenda for the Commission's July 6, 2023 meeting were prepared by July 1, 2023.⁴ One of the agenda items was "**Executive Session:** Legal Counsel regarding County Commission responsibilities."⁵ An amended agenda was prepared by July 3, 2023, but it did not change or provide more details regarding the executive session agenda item.⁶

During the July 6, 2023, meeting, Commission Chairman Travis Frey addressed the executive session agenda item, and said during the public session:

¹ Letter from Travis Frey, Chairman, Mercer Cnty. Comm'n, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Sept. 22, 2023).

² Minutes, Mercer Cnty. Comm'n (June 21, 2023).

³ MERCER COUNTY, ND *Mercer County Comm'n Meeting 06/21/2023*, from approximately 1:13 to 1:32 (YouTube, June 6, 2023), <https://youtube.com/watch?v=D8N115DBt8o> (last visited June 26, 2026).

⁴ Letter from Travis Frey, Chairman, Mercer Cnty. Comm'n, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Sept. 22, 2023).

⁵ Agenda, Mercer Cnty. Comm'n (July 6, 2023).

⁶ Letter from Travis Frey, Chairman, Mercer Cnty. Comm'n, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Sept. 22, 2023); Amended Agenda, Mercer Cnty. Comm'n (July 6, 2023).

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The last agenda item we have is an executive session. I know on the agenda it says County Commission responsibilities. I don't know if that was actually the topic I requested. It was basically . . . we had some allegations at the last County Commission meeting that I wanted to get legal counsel on, so that was why I called the executive session. Yeah, responsibilities wasn't the correct word. Just so everyone's aware of what the topic was. . . . The legal responsibilities was not the intent of the meeting, it was to get legal counsel from the State's Attorney.⁷

The Commission cited N.D.C.C. § 44-04-19.2 as the authority to hold the executive session to discuss the complaints Mr. Klein raised at the prior meeting, and a motion to hold the executive session passed.⁸ During the executive session, the Commission considered Mr. Klein's allegations of an open meeting violation and potential liability for Mercer County as a result of the closed bridge.⁹

ISSUES

1. Whether the Commission provided notice of agenda topics during the July 6, 2023, meeting in substantial compliance with N.D.C.C. § 44-04-20.
2. Whether the Commission complied with N.D.C.C. § 44-04-19.2 by providing adequate legal justification for the executive session before entering into it during the July 6, 2023, meeting.
3. Whether the discussion held during the executive session on July 6, 2023, was authorized by law to be conducted in an executive session.

ANALYSIS

Issue One

The Commission is a public entity as defined by law and is subject to the open meeting law.¹⁰ An executive session is the "part of a meeting that is closed or confidential."¹¹ Closed meetings are those that the public entity may choose not to open to the public,¹² while confidential meetings

⁷ MERCER COUNTY, ND, *Mercer County Comm'n Meeting 0/06/2023 Pt. 2*, from approximately 2:32 to 3:34 (YouTube, July 6, 2023), <https://www.youtube.com/watch?v=SKFqbRcN14c> (last visited June 9, 2026).

⁸ *Id.*, from approximately 3:52 to 5:26 (YouTube, July 6, 2023), <https://www.youtube.com/watch?v=SKFqbRcN14c> (last visited June 26, 2026).

⁹ Recording: Exec. Session held by Mercer Cnty. Comm'n (July 6, 2023).

¹⁰ N.D.C.C. § 44-04-17.1(13)(b).

¹¹ N.D.C.C. § 44-04-17.1(4).

¹² N.D.C.C. § 44-04-17.1(1).

are required by law to be closed to the public.¹³ Notice of all meetings of a public entity, including executive sessions, “must be given in advance.”¹⁴ “The notice also must contain the general subject matter of any executive session expected to be held during the meeting.”¹⁵ “The purpose of an agenda is to provide sufficient ‘information to interested members of the public concerning the governing body’s anticipated business in order that they may attend the meeting or take whatever other action they deem appropriate.’”¹⁶

Here, the Commission included in its agenda the following language: “**Executive Session:** Legal Counsel regarding County Commission responsibilities.”¹⁷ As Mr. Frey acknowledged during the meeting, the agenda did not adequately address the items that the Commission intended to address during the executive session.¹⁸ Even if there had not been an admission that the topic was too broad during the meeting, the agenda’s description of the items to be discussed was far too broad to provide the public adequate notice of the topics that were anticipated for the executive session. This Office has previously found phrases such as “other North Dakota higher education issues,” “other business,” “additional topics,” “any other issues that may need council attention” or “end-of-the-year recap” as phrases that are generally too broad to “provide the public with advance notice of what the entity would discuss.”¹⁹ In this case, the use of the phrase “County Commission Responsibilities” would not have put the public on notice that the Commission was addressing Mr. Klein’s statements from the previous meeting. Even members of the Commission—who were in a position to know more than the general public—were confused about the scope of the agenda item at the time of the meeting.²⁰ It is my opinion that the Commission failed to comply with N.D.C.C. § 44-04-20 when it provided improper notice of this agenda item at the July 6, 2023 meeting.

Issue Two

One of the requirements of N.D.C.C. § 44-04-19.2 is that, prior to going into executive session, the governing body must announce “the topics to be discussed or considered during the executive session and the body’s *legal authority*” for the executive session.²¹ “The governing body ‘must

¹³ N.D.C.C. § 44-04-17.1(3).

¹⁴ N.D.C.C. § 44-04-20(1).

¹⁵ N.D.C.C. § 44-04-20(2).

¹⁶ N.D.A.G. 2024-O-09 (quoting N.D.A.G. 2021-O-04 (quoting N.D.A.G. 2011-O-15)).

¹⁷ Agenda, Mercer Cnty. Comm’n (July 6, 2023); Amended Agenda, Mercer Cnty. Comm’n (July 6, 2023).

¹⁸ MERCER COUNTY, ND, *Mercer County Comm’n Meeting 07/06/2023 Pt 2*, (YouTube, July 6, 2023), <https://www.youtube.com/watch?v=SKFqbRcN14c> (last visited June 26, 2026).

¹⁹ *E.g.*, N.D.A.G. 2025-O-24; N.D.A.G. 2013-O-06; N.D.A.G. 2013-O-01; N.D.A.G. 2010-O-11; N.D.A.G. 2009-O-04; N.D.A.G. 2009-O-03; N.D.A.G. 2005-O-17; N.D.A.G. 2002-O-11.

²⁰ MERCER COUNTY, ND, *Mercer County Comm’n Meeting 07/06/2023 Pt 2*, (YouTube, July 6, 2023), <https://www.youtube.com/watch?v=SKFqbRcN14c> (last visited June 26, 2026).

²¹ N.D.C.C. § 44-04-19.2(2)(b); N.D.A.G. 2025-O-05; N.D.A.G. 2023-O-05 (emphasis added).

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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.*”²²

Here, the Commission stated that it wanted to consult with legal counsel regarding allegations made at the prior Commission meeting and cited “N.D.C.C. § 44-04-19.2” as its authority to hold the discussion with legal counsel in executive session^{23, 24} However, N.D.C.C. § 44-04-19.2 only establishes the procedure that governing bodies must follow for executive sessions; it does not provide a legal justification for entering into an executive session.²⁵ The legal reasons for which a governing body may enter into an executive session for attorney consultations are found in N.D.C.C. § 44-04-19.1 instead.

As this office has explained before:

When an executive session is held for “attorney consultation” under N.D.C.C. § 44-04-19.1, an announcement is sufficient if it indicates that the reason for the executive session is 1) attorney consultation 2) regarding reasonably predictable or pending litigation or adversarial administrative proceedings and 3) further indicates the topic of the executive session by announcing the names of the other parties to the litigation or proceeding, the purpose of the executive session, or other information about the topic of the executive session that does not reveal closed or confidential information.²⁶

In this case, although the Commission stated that the executive session was to address issues that had arisen at the prior Commission meeting, the notice was not sufficient to advise the public that the executive session was intended for consultation with legal counsel regarding alleged violations of the open meeting laws or for determining potential risk to the county regarding the closed bridge on County Road 20. It is therefore my opinion that the Commission failed to comply with N.D.C.C. § 44-04-19.1 by inadequately announcing the legal authority for the executive session.

²² N.D.A.G. 2025-O-05 (quoting N.D.A.G. 2023-O-15, quoting N.D.A.G. 2022-O-02) (emphasis added).

²³ MERCER COUNTY, ND, *Mercer County Comm’n Meeting 07/06/2023 Pt 2*, (YouTube, July 6, 2023), <https://www.youtube.com/watch?v=SKFqbRcN14c> (last visited June 26, 2026).

²⁴ *Id.*

²⁵ See N.D.C.C. § 44-04-19.2.

²⁶ N.D.A.G. 2002-O-01 (*citing* N.D.A.G. 2001-O-15). See N.D.A.G. 2023-O-05 (providing example of sufficient notice announced prior to executive session); N.D.A.G. 2022-O-02 (collecting past opinions discussing specificity required when executive session held for negotiations).

Issue Three

“Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public.”²⁷ “Attorney consultation is exempt” from the open meeting requirement.²⁸ “[A]ttorney consultation’ is a term of art that is specifically defined in the statute.”²⁹

“Attorney consultation” 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. 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.*³⁰

And the statute further defines “[a]dversarial administrative proceedings” to “include only those administrative proceedings in which the administrative agency or institution of higher education acts as a complainant, respondent, or decisionmaker in an adverse administrative proceeding.”³¹

The North Dakota Supreme Court has concluded that attorney consultation exception “provides two, separate avenues for a governing body to consult with its attorney or receive legal advice in a closed meeting.”³² A closed meeting may be held when the governing body “seeks or receives the attorney’s advice regarding and in anticipation of reasonably predictable or pending civil or criminal litigation, or an adversarial administrative proceeding.”³³ Alternatively, the governing body may hold a closed meeting “to receive its attorney’s advice on the legal risk, strengths, and weaknesses of an action of a public entity which, if held in public, would have an adverse fiscal effect on the entity.”³⁴

The executive session was recorded in compliance with N.D.C.C. § 44-04-19.2(5) and reviewed by a member of my office. The Commission claims the allegation that the Commission violated

²⁷ N.D.C.C. § 44-04-19.

²⁸ N.D.C.C. § 44-04-19.1(2).

²⁹ N.D.A.G. 2025-O-05.

³⁰ N.D.C.C. § 44-04-19.1(5) (emphasis added).

³¹ N.D.C.C. 44-04-19.1(4).

³² *Schmitz v. N.D. State Bd. of Chiropractic Exam'rs*, 2022 ND 52, ¶ 10, 971 N.W.2d 892.

³³ *Id.*

³⁴ *Id.*

the open meetings law as one justification for the executive session.³⁵ Recently this office explained that “[r]equests 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.’”³⁶ There was no evidence that the complainant intended to file a civil action under N.D.C.C. § 44-04-21.2 regarding the alleged violation.³⁷

The Commission also discussed the County 20 bridge closure and the potential risk of litigation in executive session.³⁸ However, at the time of the meeting, there was no threatened or pending civil or criminal litigation or adversarial administrative proceedings regarding the closure of the bridge.³⁹ To properly close a meeting for attorney consultation under the first avenue, the Commission would need to receive its attorney’s advice “regarding and in anticipation of reasonably predictable or pending civil or criminal litigation, or an adversarial administrative proceeding.”⁴⁰ There was no pending litigation against the Commission, nor was civil litigation reasonably predictable under these circumstances. No threats of litigation had been made by any adverse parties,⁴¹ Rather, the intent was to “correct” Mr. Klein’s “inaccurate legal statements.”⁴² The first avenue for attorney consultation was therefore unavailable to the Commission.

The second avenue for holding a closed meeting for attorney consultation is “to receive its attorney’s advice on the legal risk, strengths, and weaknesses of an action of a public entity which, if held in public, would have an adverse fiscal effect on the entity.”⁴³ Factors for determining whether there would be an adverse fiscal effect on the entity include the dollar amount at issue, the cost of litigating the dispute, the likelihood of succeeding in litigation, or the potential impact on resolutions of other disputes.⁴⁴ Based on the executive session recording, there is no indication that there would be an adverse fiscal impact to the Commission if the meeting had been open to the public.⁴⁵ Without an adverse fiscal impact to the entity, the second avenue for holding an executive session to receive attorney consultation was not met.

³⁵ Recording: Exec. Session held by Mercer Cnty. Comm’n (July 6, 2023).

³⁶ N.D.A.G. 2025-O-05, *citing* N.D.A.G. 2015-O-02 (“Attorney General opinions . . . are not proceedings.”).

³⁷ Recording: Exec. Session held by Mercer Cnty. Comm’n (July 6, 2023).

³⁸ *Id.*

³⁹ *See Id.*

⁴⁰ *Schmitz v. N.D. State Bd. of Chiropractic Exam’rs*, 2022 ND 52, ¶ 10, 971 N.W.2d 892.

⁴¹ *See* Recording: Exec. Session held by Mercer Cnty. Comm’n (July 6, 2023).

⁴² Email from Todd Schwarz, State’s Att’y, Mercer Cnty., to Travis Frey, Chairman, Mercer Cnty. Comm’n (June 22, 2023 12:55 PM).

⁴³ *Schmitz v. N.D. State Bd. of Chiropractic Exam’rs*, 2022 ND 52, ¶ 10, 971 N.W.2d 892.

⁴⁴ *See Haskell v. Grand Forks Pub. Sch. Dist.*, 2026 ND 40, ¶¶ 19–20, 31 N.W.3d 626 (quoting THE GEN. COUNSEL DIV., OFF. OF ATT’Y GEN., NORTH DAKOTA OFFICE OF ATTORNEY GENERAL OPEN MEETINGS MANUAL 21, <https://attorneygeneral.nd.gov/wp-content/uploads/2024/04/Open-Meetings-Manual.pdf> (2024)).

⁴⁵ *See* Recording: Exec. Session held by Mercer Cnty. Comm’n (July 6, 2023).

It is my opinion that the Commission violated the open meetings law when it held an executive session to discuss the alleged open meetings law violation and the County Road 20 bridge closure without legal authority.

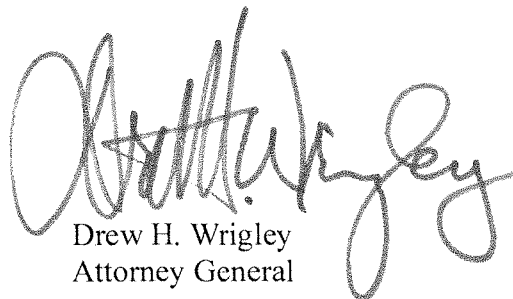
CONCLUSIONS

1. The Commission failed to provide adequate notice of the topics to be discussed in the executive session of the July 6, 2023, meeting in violation of N.D.C.C. § 44-04-20.
2. The Commission failed to provide adequate notice of the legal authority for the executive session before entering into an executive session during the July 6, 2023, meeting in violation of N.D.C.C. § 44-04-19.2.
3. The Commission lacked legal authority to hold an executive session for the topics discussed during the July 6, 2023, meeting.

STEPS NEEDED TO REMEDY VIOLATION

The Mercer County Commission must correct its minutes from the July 6, 2023, meeting to include the discussion from the executive session. The Commission must also disclose the recording of the July 6, 2023, executive session to Marv Schwehr and any member of the public upon request, and at no charge.

While I have every reason to expect the Mercer County 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. § 44-04-21.2.⁴⁶ Failure to take these corrective measures may also result in personal liability for the person or persons responsible for the noncompliance.⁴⁷



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wdw

cc: Merv Schwehr

⁴⁶ N.D.C.C. § 44-04-21.1(2).

⁴⁷ *Id.*