

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 2000-O-02**

DATE ISSUED: January 31, 2000

ISSUED TO: Dan Fremling, Chair, and Tom Tupa, Executive Secretary, North Dakota Board of Social Work Examiners

CITIZEN'S REQUEST FOR OPINION

On December 13, 1999, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Mark Hendrickson asking whether the North Dakota Board of Social Work Examiners violated N.D.C.C. §§ 44-04-19 and 44-04-19.2 by excluding him from a closed meeting of the Board and by meeting in executive session without first voting to do so and without announcing the topic of and legal authority for the executive session.

FACTS PRESENTED

On November 15, 1999, the North Dakota Board of Social Work Examiners (Board) held an executive session during a regular business meeting. The purpose of the executive session was to discuss a complaint by Mark Hendrickson against a licensed social worker. The executive session was held pursuant to N.D.C.C. §§ 44-04-19.2(1) and 43-41-10 because it was necessary, in discussing the complaint, to consider confidential client and juvenile records concerning Mr. Hendrickson's children. Mr. Hendrickson was excluded from the executive session. The Board did not vote on whether to meet in executive session on the complaint until after the session had ended. The Board also acknowledged that it discussed, but did not formally "announce," the topic of and legal authority for the executive session.

In response to an inquiry from this office, the Board voluntarily provided a copy of the recording of the executive session to Mr. Hendrickson.

ISSUES

1. Whether the Board complied with the procedures required by N.D.C.C. § 44-04-19.2 for holding an executive session when it failed to vote to go into executive session until after the session had ended and did not announce the topic of and legal authority for the executive session.
2. Whether the Board properly excluded Mr. Hendrickson from the portion of its meeting during which the Board met in executive session to consider confidential records regarding Mr. Hendrickson's children.

ANALYSES

Issue One:

Although all "meetings" of a governing body of a public entity are presumptively open to the public under N.D.C.C. § 44-04-19, a portion of a meeting may be held in executive session to consider records which are either closed or confidential. N.D.C.C. § 44-04-19.2(1). Here, in considering a pending complaint before the Board, the Board needed to review records in its possession which were confidential under N.D.C.C. §§ 43-41-10 and 27-20-51 (juvenile court records). N.D.C.C. § 43-41-10(7) provides "[t]he portions of board meetings where client or juvenile . . . records are . . . reviewed are confidential and closed to the public."

This opinion raises the distinction between exempt or closed records and confidential records. "Exempt records" are records which may be either open or closed to the public in the Board's discretion. N.D.C.C. § 44-04-17.1(5). If the Board decides not to open the records to the public, the records are "closed." N.D.C.C. § 44-04-17.1(2). "Confidential records" are records over which the Board has no discretion and which are prohibited from being open to the public. N.D.C.C. § 44-04-17.1(3).

An executive session is authorized when a governing body wants to discuss either closed or confidential records. However, since discussion of exempt records does not necessarily require a governing body to close a portion of its meeting, a vote is required before going into executive session. N.D.C.C. § 44-04-19.2(2)(a). The purpose of the vote is not to decide whether to discuss the records, which may already be included in the agenda of the meeting, but whether that discussion will occur in the open portion of the meeting or in an executive session. By contrast, because a governing body is required to go into executive session when it is considering confidential records, N.D.C.C. § 44-04-19.2(2)(a) specifically provides that a vote is unnecessary.

The records discussed by the Board during its executive session were confidential and not merely exempt. Therefore, it is my opinion that the Board was not required under N.D.C.C. § 44-04-19.2 to vote before holding its executive session.

Whether a meeting is closed to consider confidential records or to consider exempt records does not affect the requirement that the Board announce the topic of and legal authority for its executive session. In its response to this office, the Board agrees that it failed to comply with this requirement. Therefore, it is my opinion that the Board violated N.D.C.C. § 44-04-19.2.

Issue Two:

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The Board had clear statutory authority to hold a confidential meeting in this situation. See N.D.C.C. § 43-41-10(7); 44-04-19.2(1). However, the Board acknowledges that Mr. Hendrickson, as parent of the minor children, was authorized to see those confidential records. Likewise, an argument may be made that a person cannot be excluded from an executive session which is held to discuss closed or confidential records when that person has a right to have access to those records. The Board agrees that this argument is reasonable and has provided a copy of the recording of the executive session to Mr. Hendrickson. Therefore, for purposes of this opinion, I will assume that the Board violated N.D.C.C. § 44-04-19 by excluding Mr. Hendrickson from its executive session.

CONCLUSIONS

1. It is my opinion the Board did not violate N.D.C.C. § 44-04-19.2 by failing to vote before going into executive session because a vote is not required to hold an executive session to consider confidential records. However, the Board did violate N.D.C.C. § 44-04-19.2 by failing to announce the topic of and legal authority for the executive session.
2. It is my opinion that the Board violated N.D.C.C. § 44-04-19 by excluding Mr. Hendrickson from an executive session held for the sole purpose of considering confidential records when he had access to those records.

STEPS NEEDED TO REMEDY VIOLATION

The Board's failure to announce the topic of and legal authority for its executive session is sufficiently remedied by the summary of the Board's position in this opinion. Mr. Hendrickson did not have a right under N.D.C.C. § 44-04-19 to address the Board even if he had been allowed to attend the executive session. Therefore, to the extent the Board violated N.D.C.C. § 44-04-19 by excluding Mr. Hendrickson from a portion of its meeting, the Board remedied that violation as much as possible when it provided a copy of the recording to Mr. Hendrickson and no further remedial action is necessary.

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