

ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 2000-O-10

DATE ISSUED: July 19, 2000

ISSUED TO: Howard Swanson, Grand Forks City Attorney

CITIZEN'S REQUEST FOR OPINION

On June 23, 2000, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from John Hoff asking whether the Grand Forks City Council violated N.D.C.C. §§ 44-04-19, 44-04-19.2, and 44-04-20 by holding an executive session which was not authorized by law or sufficiently identified in the notice of the meeting and by failing to sufficiently announce the topics and legal authority for holding the executive session.

FACTS PRESENTED

The Grand Forks City Council (Council) held a regular meeting on June 19, 2000, during which it held an executive session to receive attorney consultation regarding a pending civil action against the City of Grand Forks (City). The agenda of the meeting included the following reference to the executive session: "10-2 Matter of attorney consultation regarding pending litigation (Council may recess into executive session per N.D.C.C. 44-04-19.2)." In its response to the opinion request, the City indicated that its announcement during the open portion of the meeting followed closely the statement in the agenda. In addition, before the Council voted whether to convene in executive session, the City Attorney advised the Council that he would be presenting a "proposed settlement offer in pending litigation" for the Council's consideration.

The executive session was attended by the members of the Council, two attorneys representing the City, a person recording the meeting, and another City staff person. The executive session was recorded, in compliance with N.D.C.C. § 44-04-19.2, and has been reviewed by this office.

ISSUES

1. Whether the Grand Forks City Council's announcement of the topics to be considered during its June 19 executive session was sufficient under N.D.C.C. § 44-04-19.2.
2. Whether the description of the executive session in the notice of the Council's meeting was in substantial compliance with N.D.C.C. § 44-04-20.
3. Whether the Council's executive session on June 19 was authorized by law and limited to the topics and legal authority announced by the Council during the open portion of the meeting.

ANALYSES

Issue One:

To properly hold an executive session for "attorney consultation" under N.D.C.C. § 44-04-19.1(2), a governing body must comply with the procedural requirements in N.D.C.C. § 44-04-19.2.

The fact that a governing body of a public entity is holding an executive session cannot be kept a secret. Rather, before going into executive session, the governing body must convene in an open meeting, preceded by public notice, and announce both the legal authority for the session and the general topics that will be discussed or considered. N.D.C.C. § 44-04-19.2(2)(b).

N.D.A.G. 99-O-04. This office has issued two prior opinions on the sufficiency of an announcement of an executive session under N.D.C.C. § 44-04-19.2.

In one situation, a governing body's announcement of its executive session regarding reasonably predictable litigation recited the appropriate statutory language (N.D.C.C. § 44-04-19.1), but failed to identify the topics to be considered during the executive session. N.D.A.G. 99-O-04. After noting that an announcement under N.D.C.C. § 44-04-19.2 must include both the legal authority for the executive session and the topics to be considered during the session, this office concluded that the announcement should have been more specific and included an identification of the factual situation in which litigation was reasonably predictable. Id. Including such additional information "would not have disclosed any closed or confidential information, but would have kept the public apprised of the reason for the executive session." Id.

In another opinion regarding the sufficiency of an announcement under N.D.C.C. § 44-04-19.2, this office concluded that a governing body was required to identify the particular contract or contracts for which the Board was discussing negotiation strategy when the context of the meeting did not indicate the specific contract or contracts that would be discussed. N.D.A.G. 2000-O-05.

Neither of these opinions answer the question presented here because the City provided more information about its June 19 executive session than either of the governing bodies in the prior opinions. The City explained that the executive session pertained to a settlement offer in a pending case.

The request for this opinion suggests that the announcement of an executive session to discuss pending litigation should always include an identification of the lawsuit which is

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being discussed. In its response to this office on the sufficiency of the announcement, the City argues:

[T]here are strategic and tactical reasons why a City Council or other governing body would not want to, nor should it be required to, identify exactly what litigation it is meeting in executive session on. This is true for both pending as well as reasonably predictable litigation.

I agree with the City's argument.

As the City points out, there are times when the other party to pending or reasonably predictable litigation involving a public entity could gain a strategic advantage from knowing that the governing body of the public entity was discussing the case, even if the discussion itself was held in an executive session. For example, a governing body may want to meet with its attorney to consider making an offer to settle a pending case. Allowing the other party to the case to know about the meeting would reveal strategic information about the public entity's commitment to proceeding with the case.

Depending on the facts in a given situation, the best way to comply with N.D.C.C. § 44-04-19.2 might be to identify the parties to the litigation but not the purpose of the "attorney consultation." In this case, the City determined that the best way to describe the topics of its executive session was to mention the purpose of the "attorney consultation" rather than identify the other party to the lawsuit. I believe N.D.C.C. § 44-04-19.2 gives public entities some flexibility on how to announce the topics of an executive session.

In interpreting the information which must be included in an announcement under N.D.C.C. § 44-04-19.2, it is important to note that the announcement required in that section is not the sole basis for determining the legality of an executive session. The Legislature has also required that all executive sessions be recorded for possible review by this office or by a court. N.D.C.C. § 44-04-19.2(5). The announcement and recording requirements serve different functions. Executive sessions are recorded so there is a process for concerned citizens to verify that the discussion during an executive session was limited to the announced topics. The announcement of an executive session is made during an open meeting and included in the minutes of the meeting, so the public is provided with a legally sufficient reason for holding an executive session. I do not believe that an announcement of an executive session for "attorney consultation" for pending litigation under N.D.C.C. § 44-04-19.1 is required to identify the particular lawsuit if other information is provided to the public about the topics considered during the executive session.

The rule of thumb for governing bodies should be to disclose as much information as possible in the announcement of an executive session without defeating the purpose of

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holding the discussion in executive session. In this case, the settlement offer was proposed by the other party to the lawsuit and not by the City. Thus, since the other party was already aware that the City would need to hold a meeting to consider the offer, the City's litigation position would not have been negatively affected by announcing that the settlement offer pertained to that particular lawsuit. However, the fact that the City could have provided more information does not mean that it failed to comply with the minimum requirements in N.D.C.C. § 44-04-19.2. It is my opinion that the City's announcement sufficiently described the legal authority and topics considered during its June 19 executive session and did not violate N.D.C.C. § 44-04-19.2.

Issue Two:

A public notice must be provided in advance of all open meetings. N.D.C.C. § 44-04-20(1). Unlike special or emergency meetings, regular meetings of a governing body "need not be restricted to the agenda topics included in the notice." N.D.A.G. 99-O-08. However, a notice of a regular meeting still must include the topics the governing body expects to discuss during the meeting. N.D.C.C. § 44-04-20(2). In addition to describing the topics expected to be discussed during the open portion of the meeting, the "notice must also contain the general subject matter of any executive session expected to be held during the meeting." Id.

As quoted in the Facts Presented portion of this opinion, the Council's notice in this situation referred to attorney consultation regarding pending litigation under N.D.C.C. § 44-04-19.1, but did not mention "settlement offer" or identify the other party to the litigation.

This office has not previously addressed the amount of information pertaining to an executive session which must be included in a meeting notice under N.D.C.C. § 44-04-20(2). The notice requirement for executive sessions was enacted in 1997. See 1997 N.D. Sess. Laws ch. 381, § 17; S.B. 2228, 1997. The only reference to this requirement in the legislative history of 1997 Senate Bill 2228 states that a meeting notice must contain a "general description of any executive session that is anticipated when the notice is prepared." Hearing on S.B. 2228 Before the House Comm. on Government and Veterans Affairs 1997 N.D. Leg. (Mar. 13) (Written section-by-section analysis by Office of Attorney General at 12-13).

Like the announcement of the executive session, more information could have been included in the notice of the June 19 meeting regarding the executive session. However, it is my opinion that the notice included a "general description" of the executive session and therefore was in substantial compliance with the requirements with N.D.C.C. § 44-04-20.

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Issue Three:

As discussed earlier in this opinion, the City's executive session on June 19 was held under N.D.C.C. § 44-04-19.1 to receive "attorney consultation" regarding a settlement offer in a pending lawsuit against the City. The recording of the executive session reveals that a councilman made a remark, roughly two-thirds of the way through the executive session, about making a public statement regarding the executive session. This passing remark, which was not related to the discussion of the pending lawsuit, does not amount to a violation of N.D.C.C. § 44-04-19. See N.D.A.G. 99-O-04 (minor, irrelevant remarks during an executive session are not always a violation of N.D.C.C. § 44-04-19). With the exception of this insignificant remark, the executive session on June 19 was limited to the receipt and consideration of the attorneys' advice regarding the pending lawsuit against the City. Because this discussion qualified as "attorney consultation" under N.D.C.C. § 44-04-19.1, it is my opinion that the executive session was authorized by law.

CONCLUSIONS

1. The Council did not violate N.D.C.C. § 44-04-19.2 because its announcement sufficiently identified the topics to be considered during its executive session on June 19, 2000.
2. The description of the executive session in the notice of the Council's meeting was in substantial compliance with N.D.C.C. § 44-04-20.
3. The executive session of the Council on June 19 was authorized by law and limited to the topics and legal authority announced during the open portion of the meeting.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: James C. Fleming
Assistant Attorney General

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