

**OPEN RECORDS AND MEETINGS OPINION  
2001-O-17**

DATE ISSUED: December 24, 2001

ISSUED TO: Ronald Reichert, Medora City Attorney

**CITIZEN'S REQUEST FOR OPINION**

On November 7, 2001, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Richard Volesky on behalf of the Dickinson Press asking whether the Medora City Council violated N.D.C.C. § 44-04-19 and 44-04-19.2 by holding an executive session on October 9, 2001, which was not authorized by law or held in compliance with required procedures.

**FACTS PRESENTED**

The Medora City Council (City) held an executive session during its meeting on October 9, 2001. The draft minutes of the October 9 meeting, as published on October 20, indicate the executive session was held to "discuss wage negotiation strategy." No further explanation of or legal authority for the executive session was included in the draft minutes, and no vote on whether to hold the executive session is recorded in the draft minutes. In its response to the request for this opinion, the City indicates that its executive session on October 9 was based on the exception in N.D.C.C. § 44-04-19.1(7) for discussion of negotiation strategy regarding salary increases it was planning to offer to the City's employees. The City further indicates a motion was made and unanimously adopted to hold the executive session.

According to the published draft minutes of the October 9 meeting, the executive session lasted for one hour and six minutes. The executive session was tape recorded in compliance with N.D.C.C. § 44-04-19.2(5), except for the last six minutes of the session. The recording has been reviewed by this office. After the executive session, the City reconvened in an open meeting and passed a motion offering specific salary increases to its employees.

**ISSUES**

1. Whether the Medora City Council violated the procedural requirements in N.D.C.C. § 44-04-19.2 for holding an executive session by failing to vote on whether to hold its executive session on October 9 and by failing to announce the legal authority and topic to be considered during the executive session.

2. Whether the executive session of the Medora City Council on October 9 was authorized by law and limited to topics for which an executive session may be held.

## ANALYSES

### Issue One:

All “meetings” of a public entity are required to be open to the public unless a closed meeting or executive session is specifically authorized by law. N.D.C.C. § 44-04-19. Even if an executive session is authorized, state law establishes certain procedures that must be followed before, during, and after the executive session. See N.D.C.C. § 44-04-19.2.

One procedure required in N.D.C.C. § 44-04-19.2 is that a governing body must vote on whether to close a portion of its meeting to the public and hold an executive session.<sup>1</sup> A motion to hold an executive session is a nonprocedural motion and therefore must be decided by a recorded roll-call vote. N.D.C.C. § 44-04-21(a). The absence of any reference in the draft minutes of the October 9 meeting to a motion or vote to hold the executive session suggests that the City neglected to comply with this requirement. The City’s response to the request for this opinion, however, indicates a motion was indeed made and passed unanimously to hold the executive session.<sup>2</sup>

A second procedure required in N.D.C.C. § 44-04-19.2 is that, prior to holding an 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 holding an executive session on those topics . . . .” N.D.C.C. § 44-04-19.2(2)(b). “The purpose of the announcement is to provide the public with a legally sufficient reason for holding the executive session.” N.D.A.G. 2000-O-10. When an executive session is held to discuss negotiation strategy under N.D.C.C. § 44-04-19.1(7), as in this case, the announcement need not cite the specific statute authorizing an executive session for that purpose. N.D.A.G. 2000-O-05. Rather, an announcement is sufficient if it uses the phrases “negotiation strategy” or “negotiation instructions,” or similar language, and

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<sup>1</sup> A vote is unnecessary if an executive session is required and not merely authorized. N.D.C.C. § 44-04-19.2(2)(a).

<sup>2</sup> The sufficiency of the minutes of the October 9 is not an issue raised in this opinion because the minutes were not yet approved when the opinion was requested. However, the minutes of the October 9 meeting need to be revised to contain a description of the motion to hold the executive session, whether the motion was seconded, and the vote of each member of the city council on the motion. N.D.C.C. § 44-04-21(2).

OPEN RECORDS AND MEETINGS OPINION 2001-O-17

December 24, 2001

Page 3

identifies “the particular contract or contracts for which the [governing body] was discussing negotiation strategy or providing negotiation instructions.” Id.

In this case, only three words were used to describe the topic and legal authority for the executive session: “wage negotiation strategy.” I conclude that this announcement was sufficient, despite its brevity. The phrase “negotiation strategy” sufficiently identified N.D.C.C. § 44-04-19.1(7) as the legal authority for the executive session. See N.D.A.G. 2000-O-05. The additional term “wage” indicated the topic of the strategy session was the salary increases the City was considering paying to its employees.

Another procedure required in N.D.C.C. § 44-04-19.2 is that all executive sessions must be recorded electronically or on audiotape or videotape. N.D.C.C. § 44-04-19.2(5). In this case, it appears the recording of the executive session stopped after the first sixty minutes of the executive session and no one noticed the audiotape needed to be turned over or replaced. As a result, the last six minutes of the executive session were not recorded. The City’s attorney attended and kept notes of the executive session, which help document the conclusion of the City’s discussion. Nevertheless, to the extent a portion of the executive session was not recorded, the City failed to comply with N.D.C.C. § 44-04-19.2(5).

It is my opinion that the announcement of the City’s executive session on October 9 was sufficient and that the City complied with the procedural requirements in N.D.C.C. § 44-04-19.2 except for its failure to record the conclusion of its executive session.

Issue Two:

As discussed earlier in this opinion, the City relies on N.D.C.C. § 44-04-19.1(7) as the legal authority for its executive session on October 9. For purposes relevant in this situation, a meeting may be closed under that subsection to discuss negotiation strategy regarding contracts which are currently being negotiated or for which negotiation is reasonably likely in the future. In addition, the meeting may not be closed unless holding the discussion in an open meeting would have an adverse fiscal effect on the public entity’s bargaining position if the meeting were open to the public. See N.D.A.G. 2000-O-09.

The City held the executive session to discuss the salary increases to offer its employees. The City’s employees are not required to continue working for the City, and are free to accept or reject the salaries offered by the City after the conclusion of the executive session. Thus, the executive session pertained to a “contract” between the City and its employees, even if the agreement is not reduced to writing. This office has previously concluded that a governing body’s consideration of the amount of a salary

OPEN RECORDS AND MEETINGS OPINION 2001-O-17

December 24, 2001

Page 4

increase to offer public employees involves contract negotiation strategy that would damage the body's negotiation position if discussed in an open public meeting. N.D.A.G. 2000-O-09. For the same reason, a contract negotiation strategy session under N.D.C.C. § 44-04-19.1(7) was legally authorized in the situation presented in this opinion. The remaining question is whether the discussion during the executive session was limited to contract negotiation strategy.

This office has previously reviewed the legality of an executive session to discuss negotiation strategy for employee salary increases and noted "[t]he job performance of the [employees] is certainly pertinent to a pay raise for those [employees], and thus is marginally relevant to a discussion of negotiation strategy on how much of a raise or cost of living increase to offer to the [employees] . . . ." N.D.A.G. 2000-O-09. However, in the situation presented in that opinion, a significant portion of the executive session was not proper under N.D.C.C. § 44-04-19.1(7) because it involved a lengthy discussion of an evaluation of an employee's job performance that went beyond the discussion needed to reach a decision on the salary increases to offer the employees.

A governing body of a public entity may not close its evaluation of a public employee's job performance under N.D.C.C. § 44-04-19.1(7) simply because the discussion occurs in the context of determining whether to approve a raise or cost of living increase for the employee or determining the size of such a raise or increase.

N.D.A.G. 2000-O-09.

Like the executive session in N.D.A.G. 2000-O-09, the City's executive session on October 9 came very close several times to crossing the line between a discussion of negotiation strategy and an evaluation of employee job performance. The executive session opened with a statement by the City's presiding officer calling to order the "executive session in regards to the employee reviews." This description by itself raises questions about the true purpose of the executive session. Following that remark, a member of the council who met previously with all city employees proposed a negotiation strategy to use with the employees. This proposal fell well within the type of discussion authorized under N.D.C.C. § 44-04-19.1(7). Unfortunately, from that point forward, a lengthy discussion (roughly thirty minutes) occurred regarding the job performance of a particular employee. However uncomfortable it might be for a governing body to discuss in public the areas in which an employee needs to improve his or her job performance, there was no connection between this discussion and the City's negotiation strategy and it was improper to hold this discussion in an executive session under N.D.C.C. § 44-04-19.1(7).

Finally, one city council member brought the discussion of the employee's job performance to a close by asking the other council members what amount of salary increase would be appropriate. This question marks the end of the discussion that should have been held in an open meeting and the beginning of the discussion of the City's negotiation strategy regarding that employee. The remaining discussion of that employee occurred in the context of the salary increase the City wanted to offer the employee and was authorized under N.D.C.C. § 44-04-19.1(7).

The discussion of the other City employees also at times came close to becoming an unauthorized job performance evaluation, but was generally limited to the salary increase that the City wanted to offer to each employee given the quality of the employee's work, the employee's workload, the need for the work performed by the employee, and the salaries for similar positions in nearby cities. In one instance, a salary increase was conditioned on a new duty being assumed by the employee. This discussion was authorized under N.D.C.C. § 44-04-19.1(7).

In its response to the request for this opinion, the City's attorney described the past negotiation process of the City in which employees and the public were allowed to comment during a city council meeting on the job performance and salaries paid to specific employees. Understandably, this created a negative atmosphere and promoted competition among city employees for salary increases. However, the solution for the City could be to limit public participation at the meeting rather than hold an unauthorized executive session to conduct job performance evaluations.<sup>3</sup> The City may wish to consider making greater use of a separate job evaluation process for its employees, which may reduce the need to discuss employee job performance when considering salary increases.

In conclusion, it is my opinion a significant portion of the City's executive session on October 9 was not authorized to be held in an executive session and therefore violated N.D.C.C. § 44-04-19.

## CONCLUSIONS

1. The Medora City Council's executive session on October 9 was held in compliance with the procedural requirements in N.D.C.C. § 44-04-19.2 except for the City's failure to record the conclusion of the executive session.

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<sup>3</sup> The right to attend an open public meeting under N.D.C.C. § 44-04-19 does not include the right to address the governing body. N.D.A.G. 99-O-07.

2. A significant portion of the Medora City Council's executive session was not authorized to be held in an executive session and therefore violated N.D.C.C. § 44-04-19.2.

#### STEPS NEEDED TO REMEDY VIOLATIONS

The notes of the City's attorney sufficiently supplement the recording of the executive session and need to be kept with the recording for the retention period described in N.D.C.C. § 44-04-19.2(5).

The City must disclose the portion of the recording identified in this opinion as being improperly closed to Mr. Volesky and to any other member of the public upon request as an open record.

Failure to issue within seven days of the date of this opinion a written public notice under N.D.C.C. § 44-04-20 of a meeting at which the City will vote to release the portion of the recording required by this opinion 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. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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