

**OPEN RECORDS AND MEETINGS OPINION
2004-O-19**

DATE ISSUED: August 10, 2004

ISSUED TO: Cavalier City Council

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Cyril J. Kalinowski asking whether the Cavalier City Council violated N.D.C.C. § 44-04-20 by not providing proper notice of a planned executive session and N.D.C.C. § 44-04-19 by holding an illegal executive session on May 10, 2004, at 8:00 a.m.

FACTS PRESENTED

On April 13, 2004, Cyril Kalinowski (Kalinowski) was terminated from the Cavalier Police Department. Pursuant to City of Cavalier's policies and procedures, Kalinowski appealed his termination to the Cavalier City Council (Council) and requested an appeal hearing in front of the full Council. The appeal hearing was scheduled for May 10, 2004, at 7:00 p.m. and was noticed as a special meeting of the Council.

The Mayor requested the city attorney to provide legal guidance to the Council prior to the appeal hearing because this appeal would be the first appeal heard by the Council. A special meeting to consult with the city attorney was scheduled for May 10, 2004, at 8:00 a.m. Notice was posted for both special meetings to be held on May 10. The notice of the 8:00 a.m. meeting stated:

CAVALIER CITY COUNCIL
SPECIAL MEETING
MONDAY, MAY 10, 2004
8:00 O'CLOCK A.M.
1. Police Employment Matters

The Council met with their attorney at 8:00 a.m. on May 10 and went into executive session based on N.D.C.C. § 44-04-19.1(2), (4) which authorizes a governing body to close the portion of a meeting in which attorney consultation occurs. The Council

OPEN RECORDS AND MEETINGS OPINION 2004-O-19

August 10, 2004

Page 2

members including the mayor, the city auditor, and the city attorney were present. The executive session was tape recorded. Later that evening, the Council held Kalinowski's appeal at the 7:00 p.m. special meeting.

ISSUES

1. Whether the notice for the May 10, 2004, 8:00 a.m. special meeting of the Cavalier City Council complied with N.D.C.C. § 44-04-20 with regard to the executive session.
2. Whether the Cavalier City Council held an illegal executive session.

ANALYSES

Issue One

All meetings subject to N.D.C.C. § 44-04-19 must be preceded by written public notice. N.D.C.C. § 44-04-20. The notice for a special meeting must include the time, place, date, and topics to be considered. N.D.C.C. § 44-04-20(6). Topics that may be considered at an emergency or special meeting are limited to those included in the notice. Id. A meeting notice must contain the general subject matter of any executive session expected to be held during the meeting. N.D.C.C. § 44-04-20(2), (6).

In this case, the notice states the time and date, but fails to list the location of the meeting. Also, at the time the notice was written, the Council knew it was going to hold an executive session. The notice, however, gives no indication that an executive session was planned. The agenda only lists "Police Employment Matters" as a topic. In past opinions, this office has found that, in order to substantially comply with N.D.C.C. § 44-04-20, a notice must contain a general description of the subject matter of the executive session sufficient to provide information about the topic or purpose of the executive session to a member of the public. N.D.A.G. 2003-O-22. In this case, the notice describes the subject matter of the special meeting, but fails to indicate that an executive session is planned. Because the Council failed to list the location of the meeting in addition to failing to indicate that there would be an executive session, it is my opinion that the notice did not substantially comply with section 44-04-20.

Issue Two

The portion of a meeting during which "attorney consultation" occurs may be closed to the public. N.D.C.C. § 44-04-19.1(2), N.D.A.G. 99-O-04.

OPEN RECORDS AND MEETINGS OPINION 2004-O-19

August 10, 2004

Page 3

"Attorney consultation" means any discussion between 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 civil or criminal litigation or adversarial administrative proceedings or concerning pending civil or criminal litigation or pending adversarial administrative proceedings. Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation.

N.D.C.C. § 44-04-19.1(4).

The phrase "reasonably predictable" in N.D.C.C. § 44-04-19.1 requires more than a simple possibility of litigation or adversarial administrative proceedings. N.D.A.G. 2001-O-15. "[T]o hold an executive session under N.D.C.C. § 44-04-19.1 for 'attorney consultation' regarding reasonably predictable litigation or adversarial administrative proceedings, a governing body must show more than a fear or potential of being a party to litigation or an administrative proceeding. The possibility of litigation or a proceeding by or against the governing body must be realistic and tangible." Id.

A governing body does not have to wait until the moment before a lawsuit or administrative appeal is filed before obtaining its attorney's advice in an executive session. N.D.A.G. 2001-O-15. In that opinion, this office determined there was a real and tangible threat of litigation or an adversarial administrative proceeding. Id. The county social service board was considering terminating an employee who claimed racial discrimination, threatened to ". . .do what I have to do" if fired, suggested that there may be an appeal under the state veterans' preference law, and had an attorney present at the meeting. Id.

In this situation, at the time of his termination, Kalinowski told the police chief that he would consult with an attorney and appeal his termination. In his appeal letter to the Council, he stated that he wanted enough notice of the hearing so that he could consult with an attorney. Kalinowski acknowledges that he indicated a few times to the police chief and the Council that he would look into legal possibilities.

The facts of this case are in contrast to the facts of a recent 2003 opinion, where I found that the Harvey City Council held an illegal executive session for attorney consultation. N.D.A.G. 2003-O-14. In that case, the Council believed litigation was reasonably predictable because the police chief who resigned changed his mind and asked to be fired in order to be eligible for unemployment benefits. Id. Prior to the meeting in that situation, all conflicts had been resolved, making the possibility for litigation remote. Id. Here, the fact that an appeal hearing was scheduled for that evening indicates that the matter was not resolved. Therefore, it was reasonable for the Council to conclude that

OPEN RECORDS AND MEETINGS OPINION 2004-O-19

August 10, 2004

Page 4

there was a realistic and tangible threat of litigation and to use N.D.C.C. § 44-04-19.1(4), "attorney consultation" as its legal reason to go into executive session.

Having concluded that an executive session for "attorney consultation" was authorized in this situation, the remaining question is whether the discussion during the executive session was limited to receiving and discussing the attorney's advice regarding the reasonably predictable litigation or adversarial administrative proceeding. The mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation. N.D.C.C. § 44-04-19.1(4). This section does not authorize an executive session any time a governing body receives its attorney's advice. See N.D.A.G. 2002-O-01. This office has previously observed that the line between a routine conversation with its attorney and "attorney consultation" under N.D.C.C. § 44-04-19.1 is "drawn at the point where the public entity's bargaining or litigation position would be adversely affected if the discussion occurred in an open meeting." N.D.A.G. 2002-O-01.

The tape recording of the executive session reveals that two times during the executive session the attorney gave advice to the Council that involved the litigation position of the Council. It was proper for the attorney to discuss strengths and weakness of the case and strategy with regard to questioning at the hearing.

However, much of the discussion should have taken place in an open meeting. The attorney explained the process and procedure for the appeal hearing scheduled for later that day and gave a short explanation of basic employment law. This could have been done in an open meeting without adversely affecting the Council's litigation position. One or more of the Council members discussed the merits of the upcoming hearing that evening. That discussion should have occurred during the Council's deliberation of the appeal hearing rather than during the executive session. Statements about Kalinowski's job performance were interspersed throughout. As I have said before, there is no exception to the open meetings law for personnel matters. N.D.A.G. 98-O-05. It is my opinion that the discussion in the executive session at the 8:00 a.m., May 10 meeting was not limited to that authorized by law to be held in an executive session.

CONCLUSIONS

1. The notice for the May 10, 2004, 8:00 a.m. special meeting of the Cavalier City Council did not indicate that the anticipated executive session would be held and failed to list the location of the meeting in violation of N.D.C.C. § 44-04-20.
2. The discussions in the executive section of the 8:00 a.m., May 10, 2004 meeting went beyond those authorized by law to be held in an executive session.

STEPS NEEDED TO REMEDY VIOLATIONS

A notice for the 8:00 a.m., May 10, 2004, meeting should be re-drafted to include the location of the meeting, and indicate that an executive session was held, and describe the subject matter of the executive session. The notice should be filed with the city auditor and posted at the city's main office for one week. N.D.C.C. § 44-04-20(4). The notice must also be provided to the city's official newspaper and any person who had previously requested to receive notice. N.D.C.C. § 44-04-20(5), (6).

The tape of the executive session should be transcribed to the best of the Council's ability. The Council's attorney can redact the portions of the transcript where he provides advice to the Council about the strategy regarding questioning at the hearing and the strengths and weaknesses of the case. The remaining transcribed meeting record must be provided to Mr. Kalinowski.

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. 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.

Wayne Stenehjem
Attorney General

Assisted by: Mary Kae Kelsch
Assistant Attorney General

vkk