

**OPEN RECORDS AND MEETINGS OPINION
2005-O-04**

DATE ISSUED: February 9, 2005

ISSUED TO: Cavalier City Council

CITIZEN'S REQUEST FOR AN OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Cyril J. Kalinowski asserting that the Cavalier City Council (Council) violated N.D.C.C. § 44-04-20 by not providing proper notice of the location and general subject matter of a planned executive session held during their regular meeting on December 6, 2004, and N.D.C.C. § 44-04-19 and N.D.C.C. § 44-04-20 by holding an improper meeting by telephone and an unauthorized executive session.

FACTS PRESENTED

On December 6, the Council held a regular meeting. The public notice of this meeting stated:

FINAL AGENDA
CAVALIER CITY COUNCIL
REGULAR MEETING
December 6, 2004
7:00 O'CLOCK P.M.

The notice also included a list of topics to be addressed at the meeting, one being "Executive Session, Kalinowski Employment Matter." After addressing all previous topics listed on the agenda, Mayor Ronald L. Storie announced that the meeting would "enter an executive session to address the C.J. Kalinowski employment matter." According to the city attorney, Thomas J. Trenbeath, the executive session was necessary to address a letter dated October 27, 2004, received from Mr. Kalinowski's lawyer. A motion was passed to close the meeting under N.D.C.C. § 44-04-19.1(2) for attorney consultation.

Prior to entering into the executive session Commissioner Robert Fleming asked Mr. Trenbeath whether they would need to amend the agenda for the executive session in order to discuss an issue pertaining to Mr. Kalinowski's employment matter which Mr. Fleming and Mr. Trenbeath discussed by telephone earlier that afternoon. Following the executive session, the Council passed a motion in open session to stand by an earlier decision made regarding a June 4, 2004, letter from Mr. Kalinowski's attorney.

ISSUES

1. Whether the city substantially complied with the notice requirement in N.D.C.C. § 44-04-20 when it failed to list the location of the meeting in its notice.
2. Whether the Cavalier City Council's listing of "Kalinowski Employment Matter" was a sufficient notice of the general subject matter to be discussed during the executive session of the December 6, 2004, regular meeting of the Council under N.D.C.C. § 44-04-20(2).
3. Whether there was a telephone conference meeting with a quorum of the Council regarding an issue that was closed and not noticed.
4. Whether the Council's discussion with the city attorney regarding a certain matter in executive session was authorized as "attorney consultation" under N.D.C.C. §§ 44-04-19.1(2), (4) and 44-04-19.2(1).

ANALYSES

Issue One

"Unless otherwise provided by law, public notice must be given in advance" of every meeting of a governing body of a public entity. N.D.C.C. § 44-04-20(1), (4). The notice must include "the date, time and location of the meeting and, where practicable, the topics to be considered." N.D.C.C. § 44-04-20(2). When a governing body holds regularly scheduled meetings, "the schedule of those meetings, including the aforementioned notice information, if available, must be filed annually in January with . . . the city auditor or designee of the city for city-level bodies," and "must be furnished to anyone who requests the information." N.D.C.C. § 44-04-20(3).

In this case, the posted notice contained the time and date of the meeting, as well as a list of topics to be considered, but did not contain the location of the meeting. The Council, in its response, states that the meeting was held on the date and at the time and location specified by city ordinance,¹ which constitutes the annual schedule for regular Council meetings. The city ordinance specifies the location of all regular

¹ Cavalier Ordinance § 30.01(A) requires the Council to "hold its regular meetings on the first Monday of each month at the city hall at 7:00 p.m. in accordance with N.D.C.C. § 40-08-10." Section 40-08-10, N.D.C.C., provides in pertinent part: "The city council shall hold its regular meetings at least once a month on a date certain established by resolution or ordinance of the council All regular and special meetings must be held at a time and place designated by the city council."

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meetings. It is on file with the city auditor and available upon request. The posted notice identified the meeting as a “regular meeting” of the city.

Section 44-04-20(3), N.D.C.C., recommends that governing bodies of public entities set a regular schedule for their meetings by statute, ordinance, or resolution when reasonable and practicable. Cavalier’s ordinance listing the time, date and location of regular meetings is consistent with this statutory recommendation and N.D.C.C. § 40-08-10. However, this does not fully meet the material requirements of N.D.C.C. § 44-04-20(2) that the notice posted “contain the date, time, and location” of meetings. While it might be argued that the notice is in substantial compliance, this office has determined that the date, time, location and general subject matter of any executive session expected to be held are minimum items required in any notice under N.D.C.C. § 44-04-20(2). N.D.A.G. 98-O-13. If a member of the public requested a copy of the notice but did not also request a copy of the ordinance or schedule, the member would not be advised of the location of the meeting. Therefore, it is my opinion that the city violated N.D.C.C. § 44-04-20 by failing to include the location of its meeting in the posted meeting notice. N.D.A.G. 2004-O-19.

Issue Two

Public notice of “the general subject matter of any executive session expected to be held during the meeting,” must be given prior to the executive session. N.D.C.C. § 44-04-20(2). The notice must contain a general description of the subject matter “sufficient to provide information about the topic or purpose of the executive session to a member of the public.” N.D.A.G. 2004-O-19 (citing 2003-O-22).

Mr. Kalinowski alleges in his opinion request that listing the general topic as “Kalinowski Employment Matter” was intentionally misleading and should have been listed as “Kalinowski Employment Reconsideration” instead. Mr. Kalinowski provided this office with a copy of the October 27, 2004, letter discussed in the executive session asking the Council to reconsider its earlier rejection of an offer of settlement.² But the fact that the Council could have provided greater detail does not mean that it failed to comply with the minimum requirements in N.D.C.C. § 44-04-20(2). See N.D.A.G. 2000-O-10 (concluding a notice stating “matter of attorney consultation regarding pending litigation” was a “general description” of any executive session expected to be held and therefore was in substantial compliance with N.D.C.C. § 44-04-20). Therefore, I am of the further opinion that the Council’s general topic for the executive session satisfied the notice requirements of N.D.C.C. § 44-04-20(2).

Issue Three

² See N.D.A.G. 2004-O-22. See also N.D.A.G. 2004-O-19 (regarding background concerning the “Kalinowski Employment Matter”).

In his opinion request, Mr. Kalinowski alleges that other Council members were contacted regarding the topic of Mr. Trenbeath's and Mr. Fleming's telephone conversation on the afternoon of December 6, 2004, violating N.D.C.C. § 44-04-20(2). Meetings of a quorum of a governing body such as the Council must be open and preceded by public notice. N.D.C.C. §§ 44-04-17.1(8)(a)(1), 44-04-19, 44-04-20(2). Meeting means a formal or informal gathering, whether in person or through other means such as telephone. N.D.C.C. § 44-04-17.1(8). It includes not only simultaneous gatherings of a quorum of the members of a governing body, but also a series of smaller gatherings, including multiple telephone conversations, collectively involving a quorum if the members hold the gatherings for the purpose of avoiding the open meetings law. N.D.C.C. § 44-04-17.1(8)(a)(2); N.D.A.G. 98-O-05. In its response, the Council denies discussing the telephone conversation with other members of the Council prior to the December 6, 2004, meeting. In any opinion issued under N.D.C.C. § 44-04-21.1, "the attorney general shall base the opinion on the facts given by the public entity." N.D.C.C. § 44-04-21.1(1). Accordingly, this office must rely on the Council's assurance that the telephone conversation between Mr. Fleming and Mr. Trenbeath was not discussed among a quorum of the Council prior to the meeting. Therefore, it is my opinion the Council did not violate N.D.C.C. § 44-04-20.

Issue Four

Meetings of the governing bodies of public entities may be closed for "executive sessions" where "attorney consultation" occurs. N.D.C.C. § 44-04-19.1(2); N.D.A.G. 2004-O-19 (citing N.D.A.G. 99-O-04).

"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).

Where the proceedings are not pending, but are considered by the entity or its counsel to be reasonably predictable, the "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." N.D.A.G. 2004-O-19, (citing N.D.A.G. 2001-O-15). In this matter communications with Mr. Kalinowski's attorney have been ongoing for several months.

Letters from Mr. Kalinowski's attorney have dealt with settlement of a possible wrongful termination claim against the city and discussed damages Mr. Kalinowski might recover in court. The "Kalinowski Employment Matter" involves reasonably predictable civil litigation.

This office's review of the tape recordings of both the regular meeting and executive session reveals that during the executive session the Council discussed the issue that Mr. Trenbeath and Mr. Fleming had discussed by telephone. This discussion occurred in conjunction with and relative to the discussion regarding the letter from Mr. Kalinowski's attorney. In my opinion the discussion regarding the additional issue specifically relates to the "Kalinowski Employment Matter" and was properly held in executive session in accordance with the requirements of N.D.C.C. §§ 44-04-19.1(2), (4) and 44-04-19.2(1).

CONCLUSIONS

1. The absence in the notice for the December 6, 2004, regular meeting of the Council of the location of the meeting violated N.D.C.C. § 44-04-20.
2. The listing of "Kalinowski Employment Matter" in the public notice of the agenda for the December 6, 2004, regular meeting of the Council was a sufficient description of the general subject matter to be discussed in an executive session during that meeting as required by N.D.C.C. §§ 44-04-20(2), 44-04-19.2.
3. There was no telephone conference meeting of a quorum of the Council prior to the regular December 6, 2004, meeting.
4. The discussion in an executive session of additional issues in relation to the "Kalinowski Employment Matter" was authorized as "attorney consultation" under N.D.C.C. § 44-04-19.1(2), (4).

STEPS NEEDED TO REMEDY VIOLATIONS

Because the notice of the December 6, 2004, regular Council meeting failed to list the location, an essential item, in violation of N.D.C.C. § 44-04-20(2), a revised final agenda notice, including the location of the meeting should be prepared and filed with the city auditor.

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.

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