

**OPEN RECORDS AND MEETINGS OPINION  
2006-O-14**

DATE ISSUED:      October 4, 2006

ISSUED TO:        Williston Family Crisis Shelter

**CITIZEN'S REQUEST FOR OPINION**

On June 26, 2006, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Charles Robinson asking whether the Williston Family Crisis Shelter violated N.D.C.C. § 44-04-19.2 because the minutes did not specify the topic of an executive session and violated N.D.C.C. § 44-04-18(7) by failing to describe the legal authority for the denial.

**FACTS PRESENTED**

On May 30, 2006, the board of directors of the Williston Family Crisis Shelter (Shelter) held an executive session to listen to grievances regarding the Shelter director, Cheryl Robinson. The board tape-recorded the meeting. Mr. Robinson asked for a copy of minutes of the meeting and a copy of the recording. The chairman of the board responded by sending Mr. Robinson a letter enclosing a copy of the minutes of the meeting.

The Shelter is a non-profit organization that provides a number of services to victims and witnesses of domestic violence. It receives funds from the county, state, and federal governments under a number of different programs. These programs include: Victims of Crime Act; Crime Victims Account; Federal Family Violence Prevention/Rape Crisis/Prevention; Stop Violence Against Women Program; Emergency Shelter Grant Program; Edward Byrne grant; North Dakota general funds; and funds from Williams, Divide, and McKenzie Counties. The Shelter is a domestic violence sexual assault organization under N.D.C.C. ch. 14-07.1 and also receives grants from the state Domestic Violence and Sexual Assault Prevention Fund under N.D.C.C. § 14-07.1-16.

## ISSUES

1. Whether the Shelter violated N.D.C.C. § 44-04-19.2 because the minutes did not specify the topic of an executive session.
2. Whether the Shelter violated N.D.C.C. § 44-04-18(7) by failing to describe the legal authority for denying a record.

## ANALYSES

North Dakota's open records laws apply to records of a "public entity," as defined in N.D.C.C. § 44-04-17.1(12).<sup>1</sup> A nonprofit entity can be a "public entity" if it is delegated authority by a public entity, it is recognized or created by state law to perform a governmental function, it is supported in whole or in part by public funds, or it is an agent or agency of a public entity performing a governmental function on behalf of a public entity or having possession of a public entity's records.<sup>2</sup>

On two previous occasions, this office determined that other similar nonprofit domestic violence organizations funded in primarily the same fashion were public entities solely because some of the funds they received constituted "public funds."<sup>3</sup> In N.D.A.G. 2003-O-10, this office concluded that Tri-County Crisis Intervention, Inc., a nonprofit organization that provides services to victims and witnesses of domestic violence, acts as an emergency shelter, provides a 24-crisis hotline, along with other services for domestic violence victims and their families was a public entity because the funds it received from the Domestic Violence and Sexual Assault Prevention Fund under N.D.C.C. § 14-07.1-16, along with state general funds and county funds, were not restricted and were used for the general support of the organization. A similar conclusion was reached in an opinion regarding the Fort Berthold Coalition Against Domestic Violence.<sup>4</sup> Likewise in this case, the funds provided to the Shelter under the Domestic Violence and Sexual Assault Prevention Fund from the Department of Health, the state general funds it receives, and the county funds provided are used for the general support of the Shelter, with the Shelter having some discretion over use of the funds. It is therefore a public entity subject to the open records and meetings laws.

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<sup>1</sup> N.D.A.G. 2003-O-10; N.D.A.G. 99-O-03.

<sup>2</sup> N.D.C.C. § 44-04-17.1(6) and (12); N.D.A.G. 99-O-03.

<sup>3</sup> N.D.A.G. 2003-O-10; N.D.A.G. 99-O-03 (similar nonprofit domestic violence organizations with similar funding were not public entities under the other tests for determining whether a nongovernmental entity is a public entity for purposes of the open records laws).

<sup>4</sup> N.D.A.G. 99-O-03.

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A governing body of a public entity may hold an executive session to consider closed or confidential information.<sup>5</sup> A closed record is “all or part of an exempt record that a public entity, in its discretion, has not opened to the public.”<sup>6</sup> For most public entities, personnel records are not exempt or confidential.<sup>7</sup> There is an exception, however, for public entities, like the Shelter, that are subject to the open records and meetings laws only because they are “supported by public funds.” For this type of “public entity,” “nonconfidential information contained in a personnel record of an employee” is exempt.<sup>8</sup>

“Personnel records” mean documents that directly pertain to employment and an employee’s ability to perform a job, including performance ratings or evaluations; records used to determine qualifications for employment, promotions, or demotions; notices of commendations or warnings; and records of termination or other disciplinary action.<sup>9</sup> The written grievances filed with the Shelter relate to the Shelter director’s job performance. They are therefore personnel records, which are exempt.<sup>10</sup> Because the grievances were exempt records, the board was authorized to hold an executive session to discuss or consider them.<sup>11</sup>

Issue one - Whether the Shelter violated N.D.C.C. § 44-04-19.2 by failing to specify in the minutes the topic of an executive session.

Section 44-04-19.2, N.D.C.C., provides:

The minutes of an open meeting during which an executive session is held must indicate the names of the members attending the executive session, the date and time the executive session was called to order and adjourned, a summary of the general topics that were discussed or considered that does not disclose any closed or confidential information, and the legal authority for holding the executive session.<sup>12</sup>

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<sup>5</sup> N.D.C.C. § 44-04-19.2(1).

<sup>6</sup> N.D.C.C. § 44-04-17.1(2); N.D.A.G. 2003-O-15.

<sup>7</sup> See, e.g., N.D.A.G. 2005-O-02.

<sup>8</sup> N.D.C.C. § 44-04-18.1(3); N.D.A.G. 2006-O-04; N.D.A.G. 2006-O-02 (the exemption in N.D.C.C. § 44-04-18.1(3) for personnel records only applies if the sole reason an organization is a public entity is because it is supported by public funds).

<sup>9</sup> N.D.A.G. 2006-O-04.

<sup>10</sup> N.D.C.C. § 44-04-17.1(5); N.D.A.G. 2006-O-04.

<sup>11</sup> N.D.C.C. § 44-04-19.2(1).

<sup>12</sup> N.D.C.C. § 44-04-19.2(4).

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The minutes provide:

At 5:35 pm Faye motioned to go into Executive session as stipulated by ND 44.04.019 - motion seconded, motion passed unopposed by all members. Role call for the following members was as follows:

Faye Moe, present; Les Slagle, present; Dennis Omvig, present; Kathy Bingeman, present; Vicky Andrews, present; Beth Veeder, absent; and Jennifer Cote, present.

The closed session was tape recorded. Closed session closed at 6:31 and Open Board Meeting resumed.

Open Session - the board discussed the closed session. Faye motioned to terminate Cheryl Robinson as director, motion seconded. A roll call vote was commenced as follows: Faye Moe, aye; Les Slagle, aye; Dennis Ombig, nay; Kathy Bingeman, aye; Vicky Andrews, aye; and Jennifer Cote, aye. Motion passed with the majority of the members. Les will write a letter of termination.

While a review of the tape recording of the meeting reveals that the topic was announced before the board went into executive session, as required by N.D.C.C. § 44-04-19.2(2), the minutes do not indicate that the topic of the executive session was to consider grievances filed against Ms. Robinson. A member of the public reading the minutes would not have known what the topic of the executive session was. Therefore, the Shelter violated N.D.C.C. § 44-04-19.2(4) by failing to specify in the minutes the topic of the executive session.

Issue two - Whether the Shelter violated N.D.C.C. § 44-04-18(7) by failing to describe the legal authority for the denial.

When a public entity denies a request for records, it must describe the legal authority for the denial.<sup>13</sup> While a denial need not cite the specific statute which provides the basis for the exemption, the legal reason for the denial must be described.<sup>14</sup>

Mr. Robinson requested a copy of the minutes and a copy of the recording of the executive session. In his reply to Mr. Robinson, the board president, in a letter dated June 20, 2006 stated “[i]n response to your request for information please find enclosed a copy of the minutes of the board of directors meeting held May 30, 2006.” The board

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<sup>13</sup> N.D.C.C. § 44-04-18(7).

<sup>14</sup> N.D.A.G. 2004-O-11; N.D.A.G. 97-O-01.

president did not mention the tape recording nor did he explain why he was not providing a copy. Therefore, it is my opinion that the Shelter should have explained to Mr. Robinson why a copy of the recording was not provided and not doing so violated N.D.C.C. § 44-04-18(7).

#### CONCLUSION

1. The Shelter violated N.D.C.C. § 44-04-19.2(4) by failing to specify in the minutes the topic of an executive session.
2. The Shelter violated N.D.C.C. § 44-04-18(7) by failing to describe the legal authority for denying a copy of the tape recording of the executive session.

#### STEPS NEEDED TO REMEDY VIOLATION

The Shelter must amend the minutes to specify that the topic of the executive session was to consider grievances filed against Ms. Robinson and provide a copy to Mr. Robinson free of charge. The explanation in this opinion describes the legal authority for not providing a copy of the tape recording to Mr. Robinson.<sup>15</sup>

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.<sup>16</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>17</sup>

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<sup>15</sup> Even if the announcement was inadequate, the recording of an otherwise authorized executive session is not an open record. N.D.A.G. 2005-O-18; N.D.A.G. 98-O-25.

<sup>16</sup> N.D.C.C. § 44-04-21.1(2).

<sup>17</sup> Id.