

**OPEN RECORDS AND MEETINGS OPINION
2007-O-09**

DATE ISSUED: June 25, 2007
ISSUED TO: Valley City Commission

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Mary Jo Hotzler of The Forum newspaper asking whether an executive session held by the Valley City Commission (Commission) was limited to the topics and legal authority announced during the open portion of a January 22, 2007, special meeting.

FACTS PRESENTED

On January 22, 2007, the five-member Commission held a special meeting, during which an executive session was held "to discuss pending litigation issued by Robert Drake at the January 16 meeting of the City Commission as defined under ND Century Code Section 44-04-19.1(2) & (4)."¹ Mr. Drake had hired an attorney and threatened to sue the city because a city employee, on his own time, had created a website that contained some controversial material regarding Mr. Drake.

The executive session was attended by Commission President Nielson, Commissioners Evenson, Ondracek, Wagar, and Dutton, attorneys Nick Simonson and R. Jon Fitzner, and Auditor Richter. The Commission was in executive session for two hours and fifteen minutes.

ISSUE

Whether the executive session of the Commission held January 22, 2007, was limited to the topics and legal authority announced during the open portion of the meeting.

ANALYSIS

A gathering of a quorum of the members of a city commission is a meeting required to be open to the public unless otherwise specifically provided by law.² "A governing body

¹ Valley City Commission Proceedings, Special Meeting minutes, January 22, 2007.

² N.D.C.C. §§ 44-04-19, 44-04-17.1(8)(a).

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may hold an executive session to consider or discuss closed or confidential records.”³ “The topics discussed or considered during the executive session are limited to those for which an executive session is authorized by law and that have been previously announced [during the open portion of the meeting].”⁴ Attorney consultation is exempt from N.D.C.C. § 44-04-19; therefore, the portion of a meeting during which attorney consultation occurs may be closed to the public if such consultation in an open meeting would have an adverse fiscal effect on the litigating position of the public entity.⁵ “Attorney consultation” is defined as follows:

[A]ny 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.⁶

In this instance, it was reasonable for the Commission's attorney to believe that a lawsuit was reasonably predictable because of statements made by Mr. Drake's attorney.

This office has reviewed the tapes of the closed portion of the January 22 meeting.⁷ The first part of the tape was properly held in an executive session because it consisted of Mr. Simonson's discussion with the Commission about the potential lawsuit by Mr. Drake, and the liability issues related to the Commission's discipline of the employee. Generally, a public entity cannot hold an executive session to discuss personnel matters, but in this instance, there were liability issues that the Commission had to consider when determining its options for disciplining the employee because of the threatened lawsuit.⁸ Discussing those liability issues in an open meeting would have had an adverse fiscal effect on the litigating position of the city; therefore, those discussions were properly held in executive session.

³ N.D.C.C. § 44-04-19.2(1).

⁴ N.D.C.C. § 44-04-19.2(2)(b), (d).

⁵ N.D.C.C. § 44-04-19.1(2), (9); see generally N.D.A.G. 2003-O-14.

⁶ N.D.C.C. § 44-04-19.1(5).

⁷ “All meetings of the governing body of a public entity that are not open to the public must be recorded electronically or on audiotape or videotape.” N.D.C.C. § 44-04-19.2(5).

⁸ Compare N.D.A.G. 2003-O-14 (city council was not authorized to hold executive session with its attorney for what was, in effect, a job evaluation of the police chief).

Once the Commission received the advice from its attorney regarding potential liability issues related to possible disciplinary action, the “attorney consultation” was complete and the open meeting should have reconvened so the public could hear the Commission’s subsequent deliberations about exactly what disciplinary action it would take. Instead, those deliberations took place in executive session. Therefore, it is my opinion that the discussion held during the closed portion of the January 22 meeting was not limited to that authorized by law to be held in executive session.

CONCLUSION

The first part of the discussion held during the executive session between the Commission and its attorney was legitimate “attorney consultation” as defined in N.D.C.C. § 44-04-19.1(5). The last part of the discussion held during the executive session, however, went beyond “attorney consultation” and should have occurred in the part of the meeting that was open to the public.

STEPS NEEDED TO REMEDY VIOLATION

The city attorney has already turned over a redacted transcript of the executive session to The Forum. Copies of the transcript or tape of the open portion of the executive session must be made available at no cost to anyone who requests a copy.

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Attorney General

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