

**OPEN RECORDS AND MEETINGS OPINION  
2013-O-09**

DATE ISSUED: June 12, 2013

ISSUED TO: Turtle Lake-Mercer School Board

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Allan Tinker asking whether Turtle Lake-Mercer School Board (Board) violated N.D.C.C. §§ 44-04-20, 44-04-19.2, and 44-04-19 by failing to provide public notice of an executive session held on September 10, 2012, by failing to follow proper procedures for conducting an executive session, and by holding an executive session that was not authorized by law.

**FACTS PRESENTED**

The Board held a regular meeting at 7 p.m. on September 10, 2012. During the meeting, the Board held an executive session to discuss a background check of two potential school district hires. The meeting agenda was posted September 6, 2012, and included, under new business, recommendations to hire a part-time librarian and a custodian, however, the agenda did not indicate the possibility of an executive session.

School Superintendent Gaillard Peltier, received an e-mail regarding background checks of two job applicants from the McLean County Sheriff's Department on September 6, 2012. Superintendent Peltier did not open the e-mail until September 10, 2012, at 4 p.m., three hours before the regular school board meeting was to begin. After opening the e-mail, he contacted the North Dakota School Board Association and was advised to hold an executive session to discuss a background check. However, at the time the agenda was drafted on September 6, 2012, Superintendent Peltier was aware that one of the job applicants had events that would be revealed in a background check because the applicant had disclosed the information during the interview.

During the open portion of the meeting, Mr. Peltier recommended and moved the Board go into executive session to discuss a personnel matter, specifically mentioning a background check. Ms. Tinker requested the legal authority for the executive session and Mr. Peltier said he would provide the legal reasoning to her at a later time.

Minutes from the executive session were provided to this office. Though the executive session was recorded as required by N.D.C.C. § 44-04-19.2(5), the recording provided was unintelligible. The executive session was adjourned and during the open portion of the meeting, the Board voted to hire the applicant. After the meeting, Ms. Tinker, via e-mail, again requested a reason for the executive session, which Mr. Peltier stated was a background check.

### ISSUES

1. Whether the executive session held September 10, 2012, was noticed in substantial compliance with N.D.C.C. § 44-04-20.
2. Whether the executive session complied with the procedural requirements of N.D.C.C. § 44-04-19.2.
3. Whether the executive session was authorized by law.

### ANALYSIS

#### Issue One

Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity, including notice of any executive sessions expected or anticipated to be held.<sup>1</sup> “Unlike special or emergency meetings, regular meetings of a governing body ‘need not be restricted to the agenda topics included in the notice.’”<sup>2</sup> However, a notice of a regular meeting, “if practicable,” should include all topics the governing body expects to consider at the time the notice is prepared.<sup>3</sup> This office has previously explained that “if practicable” means that if the governing body expects to discuss a topic when the notice is prepared, it is required to be included in the notice.<sup>4</sup>

In addition to general topics to be discussed, the notice must also contain the general subject matter of any executive session expected or anticipated to be held during the meeting.<sup>5</sup> The broad flexibility for regular meeting agendas does not relieve governing

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<sup>1</sup> N.D.C.C. § 44-04-20(1).

<sup>2</sup> N.D.A.G. 2000-O-10.

<sup>3</sup> N.D.C.C. § 44-04-20(2); N.D.A.G. 2005-O-18

<sup>4</sup> N.D.A.G. 2009-O-16

<sup>5</sup> N.D.C.C. § 44-04-20(2); N.D.A.G. 2000-O-10.

bodies of the obligation in N.D.C.C. § 44-04-20 to include in the notice the topics it knows ahead of time it will consider during the meeting.<sup>6</sup>

Superintendent Peltier did not receive the background check from the McLean County Sheriff's Department and the subsequent legal advice to review the background check in executive session until 4 p.m. on the day of the meeting. However, in telephone conversations with a member of my staff, Superintendent Peltier explained that he always planned on suggesting an executive session to the Board because one of the applicants during his employment interview had disclosed information that would be revealed in the background check. Therefore, the executive session was anticipated at the time the agenda was drafted. Any topic anticipated at the time the regular meeting notice is prepared must be included.<sup>7</sup> It is my opinion that the Board failed to provide notice of an anticipated executive session in violation of N.D.C.C. § 44-04-20.

### Issue Two

"Meetings of a school district board are generally required to be open to the public, and an executive session may be held only if 'specifically required by law.'"<sup>8</sup> Even if an executive session is authorized, state law establishes certain procedures to be followed before, during, and after the executive session.<sup>9</sup>

Prior to holding an executive session, the governing body must announce both the legal authority for the session and the general topics to be discussed or considered.<sup>10</sup> The purpose of the announcement is to provide the public with a legally sufficient reason for holding the executive session.<sup>11</sup> Topics discussed during an executive session must be limited to those announced.<sup>12</sup> In satisfying this requirement, a governing body is not required to reveal closed or confidential information, but must provide a statement that would keep the public apprised of the reason for the executive session.<sup>13</sup>

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<sup>6</sup> N.D.A.G. 2008-O-23.

<sup>7</sup> N.D.C.C. § 44-04-20(2) (notice must contain any expected executive sessions); N.D.A.G. 2011-O-06; N.D.A.G. 2009-O-16; N.D.A.G. 2004-O-13. As a corrective measure, the agenda could have been amended at 4 p.m. when the School Board Association agreed with the Superintendent's assessment that an executive session was necessary.

<sup>8</sup> N.D.A.G. 98-O-12; quoting N.D.C.C. § 44-04-19.

<sup>9</sup> N.D.C.C. § 44-04-19.2; N.D.A.G. 2003-O-22.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> N.D.C.C. § 44-04-19.2(2)(d).

<sup>13</sup> N.D.A.G. 2000-O-10; N.D.A.G. 2000-O-04.

The minutes of the September 10, 2012, meeting state: “Mr. Peltier recommended we go into executive session to discuss a personnel matter” and “Presser moved to go into executive session to discuss a personnel matter,” without further description of the reason or legal authority for the executive session.<sup>14</sup> In a telephone call with Superintendent Peltier, he explained to a member of my staff that he mentioned the personnel matter was in regards to a background check before entering into the executive session.<sup>15</sup>

“Personnel matters” are not generally confidential and, as I will explain in the next issue, not all “background checks” have statutory protection.<sup>16</sup> Thus, a mere reference to a “personnel matter” or a “background check” is insufficient to identify the legal authority required by N.D.C.C. § 44-04-19.2(2). Accordingly, it is my opinion that the Board violated N.D.C.C. § 44-04-19.2 by failing to properly disclose the legal authority for the executive session.

### Issue Three

In addition to the notice and procedural problem with the Board’s executive session on September 10, 2012, the requester alleges that the Board had no legal authority to hold an executive session on the topics actually discussed during the executive session.

All meetings of the Board, as a governing body of a North Dakota public school district, must be open to the public unless otherwise specifically provided by law.<sup>17</sup> The Board can hold an executive session to consider or discuss closed or confidential records.<sup>18</sup> “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.<sup>19</sup> All closed meetings of a governing body of a public entity must be recorded electronically or on audiotape or videotape.<sup>20</sup>

The Board cites N.D.C.C. § 44-04-19.2 as legal authority to hold the executive session to discuss the background check. This section of law sets forth the procedure that must

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<sup>14</sup> See Turtle Lake-Mercer School Board Regular Meeting Minutes, September 10, 2012

<sup>15</sup> By statute, an Attorney General’s opinion issued pursuant to N.D.C.C. ch. 44-04 must be based on the facts provided by the public entity. N.D.C.C. § 44-04-21.1(1).

<sup>16</sup> See generally, N.D.A.G. 2008-O-02; N.D.A.G. 2003-O-22; N.D.A.G. 2000-O-09.

<sup>17</sup> N.D.C.C. § 44-04-19; N.D.A.C. 2000-O-01.

<sup>18</sup> N.D.C.C. § 44-04-19.2.

<sup>19</sup> N.D.C.C. § 44-04-19.2(2).

<sup>20</sup> N.D.C.C. § 44-04-19.2(5). As explained in the “Facts” above, the recording of the executive session was unintelligible, and consequently this office relies upon the minutes of the executive session.

be followed to hold an executive session and does not provide specific legal authority that makes a record confidential. Therefore, a citation to N.D.C.C. § 44-04-19.2 is an unhelpful explanation for the public.

In general, records such as arrest records, investigative reports, incident reports, and records of court proceedings are not confidential.<sup>21</sup> A review of these types of records is commonly referred to as conducting a “background check.”<sup>22</sup> However there is a distinction between a “background check” and a “criminal history record check.”<sup>23</sup> A “criminal history record check,” is a specific kind of “background check” because it is conducted only by the Bureau of Criminal Investigation, consists of searching confidential law enforcement databases, and results in a compilation of criminal history records, commonly known as a “rap sheet.”<sup>24</sup> A “criminal history record check” is confidential and a public entity may only receive this specialized records check with statutory authorization.<sup>25</sup> A school board does have specific authorization in N.D.C.C. § 12-60-24(2)(y) to receive a “criminal history records check.”

Although Superintendent Peltier referred to the record as a “background check” the information provided to the school board by the McLean County Sheriff’s Office was a “criminal history record check” because it was derived from confidential law enforcement databases.<sup>26</sup> Therefore discussion that related to the record check was properly held in an executive session.

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<sup>21</sup> But see, N.D.C.C. § 44-04-18.7 (active criminal information is protected until the case is no longer active).

<sup>22</sup> The records are sometimes referred to as “source” documents and are open to the public once judicial proceedings are completed. N.D.A.G. 2000-L-99; see also State v. O’Connell, 151 N.W.2d 758 (ND 1967). “Source” records are “not subject to the restrictions in N.D.C.C. § 12-60-16.1 through 12-60-16.10 and are records which must be open to the public under N.D.C.C. § 44-04-18” unless otherwise prohibited or restricted by law.<sup>22</sup> See also N.D.C.C. §§ 44-04-18, 44-04-18.7(5).

<sup>23</sup> Nothing protects the results of a search of publicly available records that may be in the possession of a law enforcement agency or a court.

<sup>24</sup> See North Dakota Bureau of Criminal Investigation website; see also N.D.A.G. 2000-L-99.

<sup>25</sup> N.D.C.C. § 12-60-24(c). If a public entity does not have statutory authority under N.D.C.C. § 12-60-24 to receive a criminal history record check under that chapter, it should not assume a “background check” conducted by an entity other than the Bureau of Criminal Investigation is confidential.

<sup>26</sup> This office will not advise or comment on the validity and authority, under N.D.C.C. § 12-60-16.5 and other applicable law, of the McLean County Sheriff’s Department or the Board in requesting and compiling the information contained in the background check at issue in this case.

However, the minutes of the executive session reveal that the Board discussed topics other than the criminal history record check such as how job evaluations would be done, a zero tolerance policy, and on what basis the Board felt comfortable hiring the applicant. It is well-established that a governing body may not hold an executive session to discuss personnel issues.<sup>27</sup> Thus, the discussion on the general topics of hiring the applicants and other personnel matters were not properly held in an executive session.<sup>28</sup>

It is my opinion that only the part of the executive session that discussed the results of the criminal history record check was authorized by law.

### CONCLUSIONS

1. The Board violated N.D.C.C. § 44-04-20 by failing to properly notice the executive session held on September 10, 2012.
2. The Board violated N.D.C.C. § 44-04-19.2 by failing to announce the legal authority for its executive session on September 10, 2012.
3. The part of the executive session held by the Board in reference to the criminal history record check was authorized by law, but the part of the executive session in reference to general personnel matters was not authorized by state law.

### STEPS NEEDED TO REMEDY VIOLATIONS

The Board must redact the confidential portion of the executive session minutes and make the remaining minutes available to Ms. Tinker. The September 10, 2012, minutes must be amended to include the open portions of the executive session minutes. The Board must also take steps to ensure that any future executive session is electronically recorded in an appropriate manner that would permit review.

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

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<sup>27</sup> N.D.A.G. 2008-O-02; N.D.A.G. 2003-O-22; N.D.A.G. 2000-O-09.

<sup>28</sup> N.D.A.G. 2008-O-02; N.D.A.G. 2003-O-22; N.D.A.G. 2000-O-09 (It is well-established that a governing body may not hold an executive session to discuss personnel issues).

under N.D.C.C. § 44-04-21.2.<sup>29</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>30</sup>

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Attorney General

slv/vkk

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<sup>29</sup> N.D.C.C. §44-04-21.1(2).

<sup>30</sup> Id.