

**OPEN RECORDS AND MEETINGS OPINION  
2014-O-08**

DATE ISSUED: August 8, 2014

ISSUED TO: Crosby 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 Cecile Krimm asking whether the Crosby City Council violated N.D.C.C. § 44-04-19.2 by failing to follow the proper procedure for holding an executive session, holding an executive session not authorized by law, and by taking final action during an executive session.

**FACTS PRESENTED**

The City Council of Crosby (Council) held a regular meeting on June 2, 2014.<sup>1</sup> During the meeting, the Council voted to proceed into an executive session, along with its attorney Peter Furuseth, for “attorney consultation.”<sup>2</sup> The executive session lasted approximately 36 minutes. After convening in the open meeting, the Council voted on a motion made during the executive session, but did not disclose the contents of the motion to the public nor enter into any further discussions regarding the executive session.<sup>3</sup> Ms. Krimm questions whether the Council violated open meeting laws by not disclosing the topic to be considered during the executive session, whether the executive session was authorized by law, and whether it was a violation of law to fail to disclose the contents of a motion made during the executive session.

**ISSUES**

1. Whether the Crosby City Council followed the proper procedure for holding an executive session at its June 2, 2014, meeting.

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<sup>1</sup> See Agenda, Crosby City Council (June 2, 2014), Minutes, Crosby City Council (June 2, 2014); see also Letter from Peter Furuseth, Att'y At Law, to Sandra Voller, Ass't. Att'y Gen. (June 24, 2014).

<sup>2</sup> See Minutes, Crosby City Council ( June 2, 2014).

<sup>3</sup> Id.

2. Whether the Crosby City Council's executive session held June 2, 2014, was authorized by law.
3. Whether the Crosby City Council violated N.D.C.C. § 44-04-19.2 by taking final action in executive session during its June 2, 2014, meeting

## ANALYSIS

### Issue One

All meetings of the Council, as a governing body of a political subdivision, must be open to the public and an executive session may be held only if "specifically provided by law."<sup>4</sup> Even if an executive session is authorized, state law establishes certain procedures to be followed before, during and after the executive session.<sup>5</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>6</sup> To satisfy 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 legally sufficient reason for the executive session.<sup>7</sup>

The minutes of the June 2, 2014, meeting only reference an executive session for "attorney consultation" under N.D.C.C. § 44-04-19.1.<sup>8</sup> In response to inquiries from this office, Mr. Furuseth reiterated that it was announced the Council would enter executive session for "attorney consultation."<sup>9</sup> Although this announcement satisfies the requirement for the legal authority for holding the closed meeting, no announcement was made regarding the actual topics the Council would be considering, as required by law.<sup>10</sup> Accordingly, it is my opinion that the Council violated N.D.C.C. § 44-04-19.2 by failing to announce the topics it would consider before proceeding into executive session.

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<sup>4</sup> N.D.C.C. § 44-04-19; see also N.D.C.C. § 44-04-17.1(13)(b) (definition of "public entity").

<sup>5</sup> N.D.C.C. § 44-04-19.2.

<sup>6</sup> Id.

<sup>7</sup> N.D.A.G. 2013-O-09.

<sup>8</sup> See Minutes, Crosby City Council (June 2, 2014).

<sup>9</sup> See Letter from Peter Furuseth, Att'y At Law, to Sandra Voller, Ass't. Att'y Gen. (June 24, 2014).

<sup>10</sup> N.D.C.C. § 44-04-19.2.

Issue Two

In addition to the procedural problem with the Council's executive session on June 2, 2014, the requester alleges the Council had no legal authority to hold an executive session on the topics actually discussed during the executive session.

Although all meetings of the Council must be open to the public unless otherwise specifically provided by law,<sup>11</sup> the Council can hold an executive session to discuss or consider closed or confidential records and information.<sup>12</sup> "The topics discussed or considered during the executive session are limited to those for which an executive session is authorized by law and have been previously announced" during the open portion of the meeting.<sup>13</sup> The June 2, 2014, executive session was recorded in compliance with N.D.C.C. § 44-04-19.2(5).

The Council cites N.D.C.C. § 44-04-19.1, "attorney consultation," as its legal authority for holding the executive session on June 2, 2014.<sup>14</sup> A governing body of a public entity may hold an executive session for attorney consultation when the governing body is seeking or receiving "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."<sup>15</sup>

The recording reveals that during the executive session, the Council discussed possible overcompensation regarding two paychecks of two city employees. The Council discussed how the alleged overpayment may have happened, policy on how to avoid it happening again, and the need to get more information to verify if overpayment actually occurred. A motion was made during the executive session to table the discussion in order to obtain further information.

At no time during the executive session did the council seek or receive advice from its attorney regarding any pending or anticipated litigation. In follow up to this office's request for information, Mr. Furuseth believed an executive session was appropriate because the same issue had previously led to litigation that was subsequently

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<sup>11</sup> N.D.C.C. § 44-04-19.

<sup>12</sup> N.D.C.C. § 44-04-19.2.

<sup>13</sup> N.D.C.C. § 44-04-19.2(2)(d).

<sup>14</sup> See Minutes, Crosby City Council (June 2, 2014); Letter from Peter Furuseth, Att'y. At Law, to Sandra Voller, Ass't. Att'y Gen. (June 24, 2014).

<sup>15</sup> N.D.C.C. §§ 44-04-19.1(2) and (5).

dismissed.<sup>16</sup> He hoped an executive session would prevent a further lawsuit. Regardless of his fear of another lawsuit, Mr. Furuseth confirms that “[t]here is no current or pending litigation involving the topic discussed during the executive session on June 2, 2014.”<sup>17</sup>

As this office has previously recognized in past opinions, there is no basis in the law to close a meeting to discuss “potential” legal consequences or to close a meeting because of a “fear” of litigation.<sup>18</sup> Rather, in order to close a meeting for attorney consultation, the governing body must be receiving the attorney’s advice regarding “pending” or “reasonably predictable” litigation.<sup>19</sup> The use of the phrase “reasonably predictable” in N.D.C.C. § 44-04-19.1 requires more than a simple possibility of litigation - the litigation by or against the governing body must be “realistic and tangible.”<sup>20</sup> The Council has provided no evidence to substantiate that there was any “pending” or “reasonably predictable” litigation regarding the issues discussed during the executive session. It is therefore my opinion that the Council violated open meetings law when it held an illegal executive session.

### Issue Three

Generally, any final action concerning the topics discussed or considered during an executive session must be taken at a meeting open to the public, unless final action is otherwise required by law to be taken during the executive session.<sup>21</sup> “Final action” is defined as “a collective decision or a collective commitment or promise to make a decision on any matter, including formation of a position or policy. . . .”<sup>22</sup> During the executive session on June 2, 2014, the Council voted to table the issue to gather more information.<sup>23</sup> The Council then came out of the executive session to vote on the motion, though did not restate to the public the contents of the motion they were voting on.<sup>24</sup> The motion made by the Council should have been made in the open as the

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<sup>16</sup> See Email from Peter Furuseth, Att’y. At Law, to Sandra Voller, Ass’t. Att’y Gen. (July 7, 2014, 9:50 AM).

<sup>17</sup> See Letter from Peter Furuseth, Att’y. At Law, to Sandra Voller, Ass’t. Att’y Gen. (June 24, 2014).

<sup>18</sup> See N.D.A.G. 2009-O-14; N.D.A.G. 2003-O-14.

<sup>19</sup> N.D.C.C. § 44-04-19.1.

<sup>20</sup> N.D.A.G. 2009-O-14; see also N.D.A.G. 2003-O-14 (prior to meeting in executive session, all conflicts were resolved therefore making the possibility of litigation remote).

<sup>21</sup> N.D.C.C. § 44-04-19.2(2)(e); see also N.D.A.G. 2000-O-04

<sup>22</sup> N.D.C.C. § 44-04-19.2(2)(e).

<sup>23</sup> See Letter from Peter Furuseth, Att’y. At Law, to Sandra Voller, Ass’t. Att’y Gen. (June 24, 2014).

<sup>24</sup> Id.; see also Email from Peter Furuseth, Att’y. At Law, to Sandra Voller, Ass’t. Att’y Gen. (July 15, 2014, 12:31 PM).

public has a right to know what the Council was voting on and the motion did not reveal any closed or confidential information.<sup>25</sup> The Council violated N.D.C.C. § 44-04-19.2(2)(e) by failing to take final action during the open portion of its June 2, 2014, meeting.

### CONCLUSIONS

1. The Crosby City Council violated N.D.C.C. § 44-04-19.2 by failing to announce the topics to be discussed prior to convening in executive session on June 2, 2014.
2. The Crosby City Council violated open meetings law when it held an executive session on June 2, 2014, not authorized by law.
3. The Crosby City Council violated N.D.C.C. § 44-04-19.2 by taking final action in executive session during its June 2, 2014, meeting.

### STEPS NEEDED TO REMEDY VIOLATIONS

The Crosby City Council must amend its June 2, 2014, meeting minutes to reflect the topics considered during the executive session. The Council must provide Ms. Krimm, and any other member of the public requesting, with a copy of the recorded executive session.

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>26</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>27</sup>

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<sup>25</sup> See N.D.A.G. 2000-O-04.

<sup>26</sup> N.D.C.C. § 44-04-21.1(2).

<sup>27</sup> Id.