

**OPEN RECORDS AND MEETINGS OPINION
2014-O-19**

DATE ISSUED: November 21, 2014

ISSUED TO: State Board of Higher Education

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Rob Port asking whether the State Board of Higher Education violated N.D.C.C. § 44-04-19 by asking people to leave the room during an open meeting.

FACTS PRESENTED

The State Board of Higher Education (SBHE) held a retreat on July 30 and 31, 2014.¹ During the retreat, the SBHE met with a representative from the Association of Governing Boards, Dr. Tom Meredith, to discuss certain issues plaguing the SBHE and possible solutions.² Before the consultation, president of the SBHE, Dr. Kirsten Diederich, upon recommendation of Dr. Meredith, made the following announcement:

We are going to request, I know that this is an open meeting, but as a follow-up to yesterday's discussion with Tom Meredith, he had requested that perhaps he could have a follow-up with the board members. There will be no business, but he wanted to go through some of the issues that he discussed yesterday. So we would like to be board only. We will have our legal counsel here to be sure that we are not conducting business of any type. But it would be our request that you give us a little time to be with Tom alone. However, you have the right to stay if you like. So . . . just a request. So if those of you that are not board members could go out and maybe just enjoy yourself a little bit more. It won't take very long...but thank you.³

¹ Agenda, NDUS St. Bd. of Higher Ed., July 30 and 31, 2014.

² See Letter from Murray G. Sagsveen, NDUS Chief of Staff, to Sandra Voller, Asst. Att'y Gen.'s (Aug. 15, 2014).

³ Id.; see also Audio tape, N.D. St. Bd. of Higher Ed. Retreat (July 31, 2014) (on file with NDUS).

After the announcement, the SBHE, along with its legal counsel, consulted with Dr. Meredith for approximately 45 minutes. The discussion was recorded and reviewed by this office.

ISSUE

Whether the SBHE violated N.D.C.C. § 44-04-19 by asking that only Board members be present for a consultation.

ANALYSIS

Unless otherwise provided by law, all meetings of a public entity must be open to the public.⁴ The law is violated if a person is denied access to a meeting unless the access is due to lack of physical space.⁵ “Denial can be explicit or constructive.”⁶

The SBHE offers several arguments why it believes it was not a violation of the law to request anyone other than Board members be present for a consultation regarding problems the SBHE was having and how it could improve the performance of its duties. I will address each argument in turn.

First, the SBHE argues that the request to leave was not a mandate, rather, those attending were given the choice to stay or leave, and the announcement therefore did not violate the open meetings law.

In 2007, I found it to be a violation of the open meetings law when a district’s school board told a parent that it “preferred” their daughter not attend a meeting.⁷ Although the District asserted that the parents and daughter could have insisted on attending but voluntarily chose not to, making such a suggestion violated the open meetings law

⁴ N.D.C.C. § 44-04-19.

⁵ N.D.C.C. § 44-04-19(1).

⁶ N.D.A.G. 2007-O-05; N.D.A.G. 98-O-16.

⁷ N.D.A.G. 2007-O-05.

because the statement had a “chilling effect” on the student’s willingness to attend the meeting.⁸

Similarly here, it is unlikely the people attending the meeting felt they had a real choice to stay when the president of the SBHE requested they leave the meeting. A suggestion or request by a governing body that a person leave a meeting has a chilling effect on a person’s right to attend the meeting and is a violation of the open meetings law.⁹

Second, the SBHE argues that the training provided by Dr. Meredith was not “board business.” In fact, President Dietrich assured those who were asked to leave that “[w]e will have our legal counsel here to be sure that we are not conducting business of any type.”¹⁰

As I have repeatedly explained, the definition of “public business” is broad and encompasses “all matters that relate or may foreseeably relate in any way to the performance of the public entity’s governmental functions.”¹¹ “Public business includes all stages of the decision-making process from information gathering to final action.”¹²

⁸ Id. The 2007 opinion recognized several Attorney General opinions from various jurisdictions in which public entities asked members of the public to “voluntarily excuse themselves” from the meetings and “that a request to leave can be a powerful tool for coercing a person to waive the person’s right to attend a meeting because the person may understand that by remaining, it may antagonize board members and influence their decision.” Such actions have a “chilling effect upon the exercise of the individual’s right to be present during” the open meeting and were violations of the open meetings law.

⁹ Furthermore, as this office has explained multiple times, regardless of how uncomfortable it might be for a governing body to receive unfavorable information during an open meeting, the public has a right to hear a report as it is given to the governing body. See N.D.A.G. 2010-O-13 and N.D.A.G. 2004-O-21. Therefore, a governing body cannot ask people to leave solely because it is not comfortable with their presence

¹⁰ Letter from Murray G. Sagsveen, NDUS Chief of Staff, to Sandra Voller, Asst. Att’y Gen.’s (Aug. 15, 2014). This is a similar argument to one made by the SBHE in a recent opinion in which the SBHE was interviewed by the Higher Learning Commission. See N.D.A.G. 2014-O-13. N.D.C.C. § 44-04-17.1(12) (definition of “public business”). The SBHE has continually been warned about having conversations relating to its public business without complying with the open meetings law. See N.D.A.G. 2014-O-13; N.D.A.G. 2013-O-07; N.D.A.G. 2013-O-06.

¹¹ See N.D.C.C. § 44-04-17.1(12) (definition of public business).

¹² N.D.A.G. 2004-O-02; N.D.A.G. 98-O-08; see also N.D.A.G. 98-F-16;.

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Here, the SBHE and consultant discussed several issues that plagued the SBHE and how the SBHE could improve to adequately do its job. Such topics are undoubtedly the SBHE's "public business." Furthermore, when a quorum of a governing body is present and receives training that pertains to its public business, it is a meeting subject to the open meetings law.¹³ Therefore, it is clearly "board business" when a quorum of the SBHE receives information or training from a consultant regarding the performance of its public duties and functions.

Third, the SBHE argues that no open meeting violations took place because no person from the public was deprived of access to the meeting. Only SBHE members, its legal counsel, and NDUS employees, specifically the president and chancellor's staff, were at the meeting and no members of the public or press were present.¹⁴ Therefore, the Board argues the SBHE "has the right to ask its employees to temporarily step into another room to allow a consultant to speak bluntly about improving board governance."¹⁵

Although the open meetings law does not preclude a reasonable application of personnel policies, such as the requirement that annual leave be used to attend meetings, no such option or reasoning was given during the announcement requesting everyone to leave the room.¹⁶ President Dietrich's statement was not addressed to employees. On its face, the statement by the President was clearly addressed to anyone in attendance. It may be convenient, after the fact, to point out that only employees left the meeting. However, for the purpose of this opinion, this office must consider whether the SBHE effectively closed a meeting without statutory authority. When President Dietrich requested that any person who was not a board member leave, she closed the meeting without statutory authority.

Finally, the SBHE argues that Mr. Port has no standing to bring a complaint because he was not denied any information nor has he been harmed because he was not actually

¹³ N.D.A.G. 2004-O-02.

¹⁴ Letter from Murray G. Sagsveen, NDUS Chief of Staff, to Sandra Voller, Asst. Att'y Gen.'s (Aug. 15, 2014).

¹⁵ Id.

¹⁶ If the SBHE wished to exercise its right to regulate the participation of its staff during business hours, it could have made such a statement and required those wishing to stay to take annual leave. However, no such reasoning or option was presented and I do not believe this was the actual intent of the SBHE when it made the announcement. In its announcement, the SBHE did not draw a distinction that it was requesting the attendees to leave because they were employees versus regular members of the public. This argument appears to be merely an attempt by the SBHE to justify its actions.

present at the meeting.¹⁷ The law provides that “[a]ny interested person may request an attorney general’s opinion to review...a denial of access to a meeting.”¹⁸ The open meetings law does not require the person to be present at the meeting to make a request. Mr. Port is an “interested person” by the very fact that he is a member of the general public and has requested an opinion. As long as a request meets the time requirements found in N.D.C.C. § 44-04-21.1, a request may be made to this office.

As provided above, I find the actions taken by the SBHE to deny the public access to an open meeting to be a violation of the open meetings law. The SBHE often seems to devote an inordinate amount of time creating unsupportable legal arguments to justify violations of the open records and meetings law after the fact. Its arguments regarding legal standing and its quibbling about a perceived distinction between “a request for an opinion” and “an open meeting complaint” are examples. Devoting the same efforts to assure compliance before violations occur could go a long way to avoid these unnecessary and embarrassing incidents in the future.

CONCLUSION

The SBHE violated the open meetings law when it requested people leave the room during an open meeting.

STEPS NEEDED TO REMEDY VIOLATION

The SBHE must amend its meeting minutes to provide a detailed account of what was discussed during the consultation. The recording of the consultation must be provided to anyone requesting, free of charge.

I am concerned with the SBHE’s continual attempts to dismiss the duty to follow the statutory requirements of the open meetings law. It appears that the repeated warnings and opinions issued by this office finding the SBHE to be in violation of the law and

¹⁷ Letter from Murray G. Sagsveen, NDUS Chief of Staff, to Sandra Voller, Asst. Atty. Gen. (Aug. 15, 2014). In its response for information to this office, the SBHE attempted to provide several other arguments in defense of its actions. For example, the SBHE argues that “Mr. Port did not request an opinion. Instead he simply stated: ‘I would like to file an open meeting complaint.’” Therefore, the SBHE argues it was not appropriate for this office to issue an opinion. This office is able to deduce from Mr. Port’s email filing an open meeting complaint that he wished for this office to issue an opinion. Such attempts by the SBHE to further escape its responsibilities under the open meetings law are without merit.

¹⁸ N.D.C.C. § 44-04-21.1.

even training provided by this office to the SBHE and its legal staff, are not enough to make the SBHE follow its duties under the open meeting law.

The law requires a public entity to provide the legal authority for an executive session. If any executive session is anticipated, the legal authority must be included in the meeting notice and announced at the meeting. If the need for an unanticipated executive session arises during a regular meeting, an announcement during the meeting is necessary. For the next year, any notice of a meeting of the SBHE that includes notice of an executive session must include an explanation of why the executive session is necessary and why the statutory authority is appropriate. In instances where the executive session was not anticipated during a regular meeting, after the meeting the same explanation and legal authority must be posted on the NDUS website.

Failure to amend its minutes with a detailed account of the consultant's discussion 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. § 44-04-21.2.¹⁹ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁰

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sld/vkk

¹⁹ N.D.C.C. §44-04-21.1(2).

²⁰ Id.