

**OPEN RECORDS AND MEETINGS OPINION
2015-O-10**

DATE ISSUED: June 2, 2015

ISSUED TO: North Dakota State University Alumni Association and
Development Foundation

CITIZEN'S REQUEST FOR OPINION

This office received requests for an opinion under N.D.C.C. § 44-04-21.1 from Rob Port and Matthew Von Pinnon asking whether the North Dakota State University Alumni Association and Development Foundation violated N.D.C.C. § 44-04-19 by holding unauthorized executive sessions.

FACTS PRESENTED

The executive committees of the North Dakota State Alumni Association (Association) and Development Foundation (Foundation) held meetings on December 4, December 16, and December 29, 2014. The notices for the respective meetings included as an agenda topic "employment issues" set to be discussed in executive sessions for "Attorney consultation regarding reasonably predictable civil litigation – North Dakota Century Code §§ 44-04-19.1(2) & (5)" and for "Negotiation strategy discussion – North Dakota Century Code § 44-04-19.1(9)."¹

The meetings were necessary after President and Chief Executive Officer of the organizations, Doug Mayo, informed the Foundation chair, Ryn Pitts, of his interest in ending his employment with the organizations.² On December 4, 2014, the executive committees of both organizations held a joint meeting and proceeded into executive session. Their attorneys, Christopher McShane and Lisa Edison-Smith, were present to provide legal advice and guidance on the organizations' options regarding Mr. Mayo's employment and potential legal claims Mr. Mayo and other former employees may have

¹ Agendas, Exec. Comm., N.D. State Alumni Assoc., N.D. State Univ. Found. (Dec. 4, 2014; Dec. 16, 2014; Dec. 29, 2014).

² Letter from Christopher McShane, Att'y for N.D. Alum. & Dev. Found., to Sandra DePountis, Asst. Att'y Gen. (Jan. 9, 2015).

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against the organizations.³ The committee members reviewed a preliminary draft of a separation agreement for Mr. Mayo proposed by their attorney in the executive session.⁴ The attorneys also provided legal advice regarding potential legal ramifications of past employees who alluded to retaliatory discharge claims in their resignation letters.⁵ The executive session lasted for approximately two hours.⁶ Upon reconvening in open session, no final action was taken in the public by the executive committees other than moving to adjourn the meeting.⁷

After the December 4, 2014, meeting, Foundation Chair Ryn Pitts, along with the chair and vice-chair of the Association, Scott Handy and John Erickson, met with Mr. Mayo on December 4 and again on December 5, to discuss Mr. Mayo's terms for a separation agreement.⁸ Ms. Pitts and Mr. Erickson met with Mr. Mayo a final time on December 9, 2014, to continue negotiations and to inform Mr. Mayo of the involvement of organization's attorney, Lisa Edison-Smith.⁹ The information obtained from the meetings was then relayed to Attorney Edison-Smith, who thereafter engaged in numerous negotiations and discussions with Mr. Mayo regarding specific terms of a separation agreement.¹⁰

On December 16, 2014, the executive committees of the organizations again held an executive session to discuss the employment of Mr. Mayo.¹¹ The committees were provided updates on the discussions that took place between Mr. Mayo and members of the Foundation and Association as well as the negotiations Attorney Edison-Smith had with Mr. Mayo to date. The executive session lasted approximately an hour and a half.¹² After reconvening in open session, no final action was taken by the committees other than to adjourn the meeting.¹³

³ Id. see also Minutes, Exec. Comm. Special Meeting, N.D. Alum. & Dev. Found. (Dec. 4, 2014).

⁴ Tape recording, Exec. session, N.D. Alum. & Dev. Found. (Dec. 4, 2014).

⁵ Letter from Christopher McShane, Att'y for N.D. Alum. & Dev. Found., to Sandra DePountis, Asst. Att'y Gen. (Jan. 9, 2015).

⁶ Minutes, Exec. Comm. Special Meeting, N.D. Alum. & Dev. Found. (Dec. 4, 2014).

⁷ Id.

⁸ Email from Christopher McShane, Att'y for N.D. Alum. & Dev. Found., to Sandra DePountis, Asst. Att'y Gen. (Jan. 22, 2015, 5:49 PM).

⁹ Id.

¹⁰ Tape recording, Exec. session, N.D. Alum. & Dev. Found. (Dec. 16, 2014).

¹¹ Minutes, Exec. Comm. Special Meeting, N.D. Alum. & Dev. Found. (Dec. 16, 2014).

¹² Id.

¹³ Id.

On December 29, 2014, the executive committees met again, and although notice was posted for the possibility of an executive session, the organizations did not close any part of the meeting to the public.¹⁴ Instead, during the open meeting, the committees voted to accept the resignation of Mr. Mayo and approve the Settlement Agreement and Release signed by Mr. Mayo on December 23, 2014.¹⁵

ISSUES

1. Whether the December 4, 2014, executive session was authorized by law.
2. Whether the December 16, 2014, executive session was authorized by law.

ANALYSIS

“Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public.”¹⁶ A governing body may hold an executive session for an “attorney consultation,” if such discussions meet the requirements of N.D.C.C. § 44-04-19.1(2) and (5), or to discuss negotiation strategy or provide instructions to its negotiator, if such discussions meet the requirements of N.D.C.C. § 44-04-19.1(9).

A governing body may close an open meeting to receive advice from its attorney if the public entity’s attorney is providing a mental impression, litigation strategy, or advice regarding reasonably predictable civil litigation or adversarial administrative proceeding.¹⁷ The use of the phrase “reasonably predictable” in N.D.C.C. § 44-04-19.1 requires more than a simple possibility or a potential of litigation or adversarial administrative proceeding.¹⁸ Rather, the possibility of litigation or a proceeding must be realistic and tangible.

A governing body may also hold an executive session to discuss negotiation strategy or provide negotiation instructions to its attorney or other negotiators regarding current or

¹⁴ Minutes, Exec. Comm. Special Meeting, N.D. Alum. & Dev. Found. (Dec. 29, 2014). In his request for an opinion, Mr. Von Pinnon, asked whether the Dec. 29, 2014, executive session violated open meetings law. No executive session occurred on this date and therefore this opinion does not address this issue.

¹⁵ Minutes, Exec. Comm. Special Meeting, N.D. Alum. & Dev. Found., (Dec. 29, 2014).

¹⁶ N.D.C.C. § 44-04-19. This office previously recognized the N.D. State Univ. Found. to be a public entity subject to open records and meetings law. N.D.A.G. 2014-O-07.

¹⁷ N.D.C.C. § 44-04-19.1(2), (5); see also N.D.A.G. 2014-O-09; N.D.A.G. 2013-O-11.

¹⁸ N.D.A.G. 2014-O-09.

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pending contract negotiations if discussing the strategy or instruction in an open meeting would adversely affect the bargaining position of the entity.¹⁹ Section 44-04-19.1(9), N.D.C.C., does not authorize an executive session for all contract discussions. As this office has explained in previous opinions, an executive session held for a negotiation is authorized only if the discussions are in the context of providing negotiation instructions or discussing negotiation strategy and only if allowing the other party to the negotiation to listen to the discussion would result in increased costs to the public entity.²⁰ Section 44-04-19.1(9), N.D.C.C., does not authorize an executive session for a governing body to receive a history, update, or summary from its negotiator on the status of contract negotiations.²¹

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.²² “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, but does not include guidance given by members of the governing body to legal counsel or other negotiator in a closed attorney consultation or negotiation preparation session authorized in section 44-04-19.1.”²³

Issue One

The December 4, 2014, the joint executive session of the Foundation and Association executive committees was closed under the authority of an “attorney consultation” and “negotiation strategy session.” The organizations allege that prior to this meeting, Mr. Mayo expressed a belief that he had actionable claims against the organizations, along with past and present employees, and that he would commence suit if a reasonable severance could not be reached.²⁴ Mr. Mayo, an attorney himself, originally indicated he hired an attorney to represent him.²⁵ In addition to comments made by Mr. Mayo, two former employees of the Foundation specifically claimed “retaliatory discharge” in their resignation letters, putting the Foundation on notice of possible

¹⁹ N.D.C.C. § 44-04-19.1(9).

²⁰ N.D.A.G. 2013-O-02; N.D.A.G. 2010-O-11; N.D.A.G. 2009-O-09; N.D.A.G. 2005-O-18.

²¹ N.D.A.G. 2013-O-11; N.D.A.G. 2005-O-18; N.D.A.G. 2003-O-22; N.D.A.G. 2000-O-05.

²² N.D.C.C. § 44-04-19.2(2)(e); see also N.D.A.G. 2014-O-08.

²³ N.D.C.C. § 44-04-19.2(2)(e); see also N.D.A.G. 2014-O-08.

²⁴ Letter from Christopher McShane, Att’y for N.D. Alum. & Dev. Found., to Sandra DePountis, Asst. Att’y Gen. (Jan. 9, 2015).

²⁵ Id.

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adversarial administrative proceedings or litigation. Under the facts presented by the executive committees, it was reasonable to conclude there was a “reasonably predictable” threat of litigation or adversarial administrative proceeding.

A member of this office reviewed the recording of the executive session, required by N.D.C.C. § 44-04-19.2(5). The recording reveals that during the first part of the executive session, the executive committees received advice from the attorney on possible claims Mr. Mayo and the former employees may make against the organization and relayed her mental impressions on the strengths of those claims and risks associated with the claims. Legal counsel gave advice regarding the options available to the organizations, along with risks, benefits, and potential liability issues associated with each option. Throughout the discussion, members asked questions to clarify the legal analysis. It is my opinion the discussion fit within the exception for attorney consultation pursuant to N.D.C.C. § 44-04-19.1(2), (5).

After the executive committees received the attorney’s advice, a decision was made to pursue a separation agreement with Mr. Mayo. After the negotiation strategies and specific terms were discussed, Ryn Pitts, Scott Handy, or John Erickson, were directed by the members of the executive committees to meet with Mr. Mayo to determine his terms for the separation agreement. Any further negotiations would be handled by Attorney Smith-Edison.

This discussion held during the December 4, 2014, executive session, if held in public, would have an adverse fiscal impact on the committees because it would reveal the terms the committees were willing to consider which would hinder their negotiation position.

However, final action was taken during the executive session when the Association and Foundation executive committees appointed a subcommittee to meet with Mr. Mayo. During the executive session, the members of the committees were reminded that any subcommittee would be subject to the open meetings law. In order for the public to be aware of the existence of the subcommittee, it should have been appointed during the open portion of the meeting.²⁶ Because the appointment did not take place during the open portion of the meeting, the existence of the subcommittee was unknown to the public. The subcommittee remained unknown to the public because the subsequent

²⁶ A motion and subsequent vote to appoint a subcommittee would not have to reveal any negotiation strategy or have an adverse litigation effect. See N.D.A.G. 2000-O-04 (Final action on a topic discussed during an executive session could have been made in an open meeting in such a way that it did not reveal confidential FERPA information regarding a student.).

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meetings of the subcommittee were not noticed as open meetings in violation of N.D.C.C. § 44-04-20.

It is further my opinion that other than the appointment of a subcommittee, the December 4, 2014, executive session was properly closed pursuant to N.D.C.C. § 44-04-19.1(9).

Issue Two

The Association and Foundation executive committees again met in executive session on December 16, 2014, under the authority of “attorney consultation” and “negotiation strategy session.”²⁷

A review of the recording of the December 16, 2014, executive session, reveals that during approximately the first 25 minutes of the session, the executive committees were provided with an overview and update on negotiations between the appointed subcommittee and Mr. Mayo and negotiations between Attorney Smith-Edison and Mr. Mayo.

In past opinions, this office explained that N.D.C.C. § 44-04-19.1(9) does not authorize an executive session for a governing body to receive an update, history, or summary from its negotiator on the status of contract negotiations.²⁸ Allowing the public to hear this general update is particularly important here, where no previous meetings between the executive committees and Mr. Mayo were preceded by public notice.²⁹

After the update, Attorney Smith-Edison discussed her mental impressions on the strengths and weaknesses of claims that could be made against the organizations, gave advice based on mental impression on what would be acceptable to Mr. Mayo in the separation agreement, and received input from the committees on specific terms for the

²⁷ N.D.C.C. § 44-04-19.1(5), (9).

²⁸ N.D.A.G. 2013-O-11; N.D.A.G. 2005-O-18; N.D.A.G. 2003-O-22; N.D.A.G. 2000-O-05; N.D.A.G. 99-O-04.

²⁹ The organizations acknowledge the negotiation history was discussed, but argue such discussions were in the context of providing legal guidance and formulating negotiation strategy, and therefore allowed to be made in executive session, citing N.D.A.G. 2005-O-18 (Grand Forks City Council’s incidental discussion of negotiation history is permitted in the context of developing negotiation strategy). See Letter from Christopher McShane, Att’y for N.D. Alum. & Dev. Found., to Sandra DePountis, Asst. Att’y Gen. (Jan. 9, 2015). However, upon reviewing the tape, Attorney Smith-Edison was not providing any mental impression or negotiation information or position beyond what she relayed to Mr. Mayo in their numerous discussions.

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separation agreement that would be acceptable to both organizations, including a top dollar amount.

It is my opinion that the updates provided by Attorney Smith-Edison during the first approximately 25 minutes of the December 16, 2014, executive session violated open meetings law. The remaining discussion was legitimately in the executive session as “attorney consultation” and “negotiation strategy” and no final action was taken.

CONCLUSIONS

1. The December 4, 2014, executive session was authorized by law as attorney consultation and negotiation strategy session. However, the appointment of a subcommittee was “final action” as defined in the open meetings law and should have taken place in the open portion of the meeting. The subsequent meetings of the subcommittee were not publicly noticed as required by law.
2. The executive session held on December 16, 2014, was properly closed for attorney consultation and negotiation strategy. However, the first 25 minutes of the executive session was merely an update on negotiations to date and should have been held during the open portion of the meeting.

STEPS NEEDED TO REMEDY VIOLATIONS

The Association and Foundation executive committee minutes of the December 4, 2014, meeting should be amended to include the appointment of the subcommittee by the executive committees in executive session. Minutes of the subcommittee meetings must be created and provided to the requesters free of charge.

The first portion of the December 16, 2014, executive session in which the Association and Foundation executive committee members received an update on prior negotiations, shall be provided to Mr. Port and Mr. Von Pinnon, free of charge, and provided to any other member of the public requesting.

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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under N.D.C.C. § 44-04-21.2.³⁰ It may also result in personal liability for the person or persons responsible for the noncompliance.³¹

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Attorney General

sld/cn

cc: Rob Port (via email)
Matthew Von Pinnon (via email)

³⁰ N.D.C.C. § 44-04-21.1(2).

³¹ Id.