

**OPEN RECORDS AND MEETINGS OPINION
2015-O-13**

DATE ISSUED: August 7, 2015

ISSUED TO: Pembina County Water Resource District Board of Managers

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Randall Emanuelson asking whether the Pembina County Water Resource District Board of Managers violated N.D.C.C. §§ 44-04-19.2 and 44-04-20 by improperly noticing executive sessions, failing to describe the general subject matter and legal authority for holding the executive sessions, and holding unauthorized executive sessions.

FACTS PRESENTED

The Pembina County Water Resource District Board of Managers (Board) held an annual meeting on May 5, 2015.¹ A meeting notice was posted on May 4, 2015, amended and reposted on May 5, 2015, with reference to two executive sessions to take place at 8:30 and 9:00.² During the meeting, the Board held two executive sessions for attorney consultations.³ Randall Emanuelson questions whether the agenda provided sufficient notice of the executive sessions, whether the Board's announcements before proceeding into the executive sessions were sufficient under N.D.C.C. § 44-04-19.2, and whether the executive sessions were authorized by law.

ISSUES

1. Whether the Board's May 5, 2015, regular meeting agenda properly posted notice for the executive sessions.

¹ Letter from Gerald Juhl, Chairman, Pembina Cnty. Water Res. Dist. Bd., to Att'y Gen. office (June 2, 2015).

² Id., see also Agenda, Pembina Cnty Water Res. Dist. Bd. (May 5, 2015).

³ Letter from Gerald Juhl, Chairman, Pembina Cnty. Water Res. Dist. Bd., to Att'y Gen. office (June 2, 2015); Agenda, Pembina Cnty Water Res. Dist. Bd. (May 5, 2015).

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2. Whether the Board's announcements before proceeding into the executive sessions gave the public sufficient notice of the general subject matter and legal authority for holding the executive sessions.
3. Whether the executive sessions were authorized by law.

ANALYSIS

Issue One

"Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public."⁴ Public notice must be given in advance of all meetings of a public entity which should include the date, time, location of the meeting, topics to be considered, and the "general subject matter of any executive sessions expected to be held during the meeting."⁵

The May 5, 2015, notice lists two executive sessions: one at 8:30 and one at 9:00. There is a phone number listed next to the 8:30 executive session and a name listed next to the 9:00 with no explanation of the purpose for the phone number or the identity of the person named.⁶ There are no topics listed for the executive sessions or any legal authority for holding the executive session.⁷ Furthermore, the agenda does not reference the location of the meeting. The Board therefore violated open meeting laws when it failed to provide notice in compliance with N.D.C.C. § 44-04-20 for its May 5, 2015, meeting.

Issue Two

"A governing body may hold an executive session to consider or discuss closed or confidential records."⁸ Before proceeding into an executive session, the governing body must announce during the open portion of the meeting both the topics it will be

⁴ N.D.C.C. § 44-04-19. The Pembina County Water Resource District is a public entity subject to open meeting laws. See N.D.C.C. § 44-04-17.1(13)(b) (definition of "public entity").

⁵ N.D.C.C. § 44-04-20(2).

⁶ Agenda, Pembina Cnty Water Res. Dist. Bd. (May 5, 2015).

⁷ Under open meeting laws, the notice must include all topics the governing body expects to consider at the time the notice is prepared. N.D.C.C. § 44-04-20(2); N.D.A.G. 2005-O-18. The Board knew, at the time the agenda was prepared, the topics for the executive session and legal authority for the executive sessions and such information should therefore have been included in the agenda.

⁸ N.D.C.C. § 44-04-19.2(1).

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considering and the legal authority for holding the executive session on those topics.⁹ To satisfy this requirement, a governing body is not required to reveal closed or confidential information, but must provide sufficient information about the topic and purpose of the executive session to keep the public apprised of the legally sufficient reason for holding the executive session.¹⁰

8:30 Executive Session

Before proceeding into the first executive session, the Board announced during the open portion of the meeting that it would be going into an executive session for attorney consultation¹¹ to discuss litigation regarding Drain 55.¹² The announcement satisfies the requirements of N.D.C.C. § 44-04-19.1 because both the legal authority for holding the executive session and the specific topic to be considered were announced during the open portion of the meeting.

9:00 Executive Session

Before proceeding into the second executive session, the Board announced it would be discussing negotiations regarding a quitclaim action.¹³ This reference does not describe the specific legal authority or the topic for the executive session. As previously recognized by this office, the mere reference to “negotiations” does not give the public

⁹ N.D.C.C. § 44-04-19.1(2)(b). In addition, if the governing body will be considering closed or exempt information, it must pass a motion through a recorded roll call vote to hold the executive session. N.D.C.C. § 44-04-19.1(2)(a). The Board passed motions to go into both executive sessions. Letter from Gerald Juhl, Chairman, Pembina Cnty. Water Res. Dist. Bd., to Att’y Gen. office (June 2, 2015). However, upon review of the executive session tapes, the Board failed to do a recorded roll-call vote to proceed into the executive sessions, in violation of N.D.C.C. § 44-04-21(1)(a).

¹⁰ N.D.A.G. 2005-O-18; N.D.A.G. 2001-O-17.

¹¹ Attorney consultation and negotiation strategy or instructions are specific exceptions to the open meeting laws. N.D.C.C. § 44-04-19.1(2), (5) and (9).

¹² Letter from Gerald Juhl, Chairman, Pembina Cnty. Water Res. Dist. Bd., to Att’y Gen. office (June 2, 2015). Opinions issued by this office must be based on the facts provided by the public entity. N.D.C.C. § 44-04-21.1.

¹³ Information taken from 9:00 Executive Session recording.

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sufficient notice of the legal authorization for holding the executive session.¹⁴ A mere reference to a general “quitclaim action” also fails to cite which specific action and topic that will be discussed during the executive session.¹⁵ It is therefore my opinion that the announcement prior to the 9:00 executive session did not meet the requirements of N.D.C.C. § 44-04-19.1(2).

Issue Three

The Board may hold an executive session to discuss or consider closed or confidential records or information.¹⁶ “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.¹⁷ A governing body may hold an executive session for attorney consultation when the governing body is seeking or receiving the attorney’s advice regarding pending or reasonably predictable civil or criminal litigation or adversarial administrative proceedings.¹⁸ A governing body may close a public meeting for “attorney consultation” only if its bargaining or litigation position would be adversely affected if the discussion occurred in an open meeting or with opposing parties.¹⁹ A governing body may also hold an executive session to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator regarding pending or reasonably predictable litigation if allowing the other party to the negotiation, or members of the public, to listen to the discussion would result in increased costs to the public entity.²⁰ The executive sessions were recorded in compliance with N.D.C.C. § 44-04-19.2(5) and reviewed by this office.

¹⁴ N.D.A.G. 2005-O-18 (“[A] public entity that goes into an executive session under N.D.C.C. § 44-04-19.1(9) must, in addition to using some form of the word ‘negotiation,’ use the word ‘strategy,’ ‘instructions,’ or something similar. Using those words will clarify that the meeting is one the public entity has authority to close. Using simply the word ‘negotiations’ may be misleading. It suggests the public entity is going into executive session to negotiate with another party, which is not a legally authorized reason to close a meeting.”).

¹⁵ While the notice may have been sufficient to alert those familiar with the particular quit claim action as to the true nature of the proposed executive session, other members of the public would not have known that the subject matter of the executive session was to proceed in negotiating a settlement agreement regarding Drain 78.

¹⁶ N.D.C.C. § 44-04-19.2.

¹⁷ N.D.C.C. § 44-04-19.2(2)(d).

¹⁸ N.D.C.C. § 44-04-19.1(2), (5).

¹⁹ N.D.A.G. 2002-O-01.

²⁰ N.D.C.C. § 44-04-19.1(9); N.D.A.G. 2015-O-10.

8:30 Executive Session

According to the Board, the first executive session was necessary because there was reasonably predictable litigation involving Drain 55.²¹ Prior to the May 5, 2015, meeting, Mr. Emanuelson, unhappy with a prior reconstruction on the drain, brought an attorney to the Water Resource District office asking for a resolution on the issue and if none could be reached, threatened that suit would follow.²² Since then, the issue expanded to involve other landowners and settlement agreements were circulated among the parties to settle the threatened litigation.²³ At the time of the May 5, 2015, meeting, the Board had a counteroffer from the interested landowners.²⁴ During the ten minute executive session, the Board's attorney went through the counteroffer and pending issues, provided his thoughts on whether the issues would be resolved and if not, future claims that may arise, and what additional steps needed to be taken and additional information to obtain. It is my opinion that the executive session was authorized as an "attorney consultation" because the Board received its attorney's advice about reasonably predictable litigation.

9:00 Executive Session

The second executive session involved a currently pending lawsuit between the Board and a group of landowners.²⁵ During parts of the executive session, the Board and its attorney met with the opposing party's attorney in order to receive information on the landowners' position and demands for settlement. At other times during the session, the Board met privately with its attorney to discuss the landowners' claims, to receive its attorney's advice regarding Board liability, to discuss negotiation strategy, and to ultimately come up with settlement terms the Board was willing to accept. The Board's attorney would relay the information to the landowners' attorney, sometimes with and other times without the Board present, who would then go meet with his clients and discuss the terms. The proposals went back and forth between the parties several times before a settlement was reached.

²¹ Letter from Gerald Juhl, Chairman, Pembina Cnty. Water Res. Dist. Bd., to Att'y Gen. office (June 2, 2015).

²² Letter from Gerald Juhl, Chairman, Pembina Cnty. Water Res. Dist. Bd., to Att'y Gen. office (June 2, 2015). After the threat of suit, the North Dakota Insurance Reserve Fund appointed an attorney to the Board for defense of the claims. Id.

²³ Letter from Gerald Juhl, Chairman, Pembina Cnty. Water Res. Dist. Bd., to Att'y Gen. office (June 2, 2015).

²⁴ Id.

²⁵ Letter from Gerald Juhl, Chairman, Pembina Cnty. Water Res. Dist. Bd., to Att'y Gen. office (June 2, 2015).

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The portions of the 9:00 executive session during which the Board met privately with its attorney to discuss negotiation strategy, receive advice regarding Board liability, and discuss settlement terms were authorized under open meeting laws because such discussions met the definition of “attorney consultation” and “negotiation strategy and instruction.” If such discussions had taken place in the open, or if opposing counsel would have been privy to such conversations, the Board’s negotiation and litigation position would have been adversely affected.

In addition, it was not a meeting subject to the open meetings law when the Board’s attorney, at the direction of the Board, met with opposing counsel’s attorney to discuss the Board’s position because no governing body or committee thereof, was present.²⁶

However, when the full Board and its attorney met with the opposing counsel it was a meeting subject to the open records law.²⁷ This office has explained in past opinions that a public entity cannot close a meeting for negotiations if the negotiations are conducted with the other party present during the executive session.²⁸ The purpose of the executive session during negotiations is to protect the bargaining position of the

²⁶ Two elements must exist in order for a “meeting” to be subject to open meeting laws: a governing body or committee thereof must be present and public business must be considered. See N.D.C.C. §§ 44-04-17.1(9) (definition of “meeting”), (6) (definition of “governing body”) and (12) (definition of “public business”). Although committees are recognized to be subject to the same requirements as a full governing body under open meeting laws, including notice, a committee must be made up of two or more people. The delegation of negotiation by the Board to one person, its attorney, does not form a committee. See N.D.A.G. 2015-O-05 and N.D.A.G. 2011-O-01.

²⁷ The Board argues that the discussions should be held in executive session under “attorney consultation” because if other landowners knew the amount paid for this one easement, they may also come forward to the Board demanding similar payment. While I can appreciate this argument and the position in which the public entity finds itself, “attorney consultation” and “negotiation strategy session” require pending or “reasonably predictable” litigation or adversarial administrative proceedings. N.D.C.C. § 44-04-19.1(5), (9). The use of the phrase “reasonably predictable” requires more than a simple possibility or fear of litigation; there must be a realistic and tangible threat of litigation. N.D.A.G. 2015-O-10. At this point, the Board has shown nothing more than a fear that other landowners will request compensation for easements. With no tangible threat of litigation, the Board cannot close its meeting for “attorney consultation” and “negotiation strategy session” pursuant to N.D.C.C. § 44-04-19.1. To include such a scenario as an exception to the open meeting laws would require legislative action that would authorize public entities to close meetings for such discussions.

²⁸ N.D.A.G. 2005-O-18; N.D.A.G. 2005-O-03. N.D.A.G. 2000-O-09.

governing body so there is no adverse fiscal effect on the litigation or fiscal position of the public entity if the opposing party is present during the executive session.²⁹

Based on the foregoing, it is my opinion that the Board did not violate the open meetings law when it met with its own attorney to discuss the ongoing negotiation and receive advice, but it was a violation to keep the meeting closed during the portions where the opposing counsel was present and negotiation discussions took place with the entire Board.³⁰

CONCLUSIONS

1. The Board failed to provide notice of its May 5, 2015, regular meeting in substantial compliance with N.D.C.C. § 44-04-20.
2. The Board's announcement before proceeding into the 9:00 executive session was insufficient under open meetings law because it failed to convey a specific topic and legal authority to put the public on notice of what would be discussed and considered during the executive session.
3. The Board violated N.D.C.C. § 44-04-19 when opposing counsel was present for the Board's negotiation discussions during the 9:00 executive session.

STEPS NEEDED TO REMEDY VIOLATIONS

The Board must amend its May 5, 2015, meeting minutes to reflect the discussions that occurred with opposing counsel during the second executive session. The Board must also release the portions of the recording of the second executive session in which

²⁹ N.D.A.G. 2005-O-18 (going into an executive session to negotiate with another party is not a legally authorized reason to close a meeting); N.D.A.G. 2005-O-03 (a public entity cannot close a meeting for contract negotiations in which the negotiations are conducted with the other party; “[a]llowing the party with which the city is negotiating to attend the meeting does not protect the bargaining position of the city in its negotiations”); N.D.A.G. 2004-O-21 (allowing the adverse party to attend the negotiating session negates the right to hold an executive session); N.D.A.G. 2002-O-01 (a public entity essentially waives its right to invoke the “attorney consultation” exception to open meeting laws when its adversary attends the consultation).

³⁰ The law allows a governing body to hold an executive session to provide negotiating instructions to its attorney or other negotiator. See N.D.C.C. § 44-04-19.1(9). A delegation to one person does not trigger the open meetings law. See N.D.A.G. 2004-O-12.

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opposing counsel was part of the discussion to anyone requesting. The updated minutes and redacted recording must be provided to Mr. Emanuelson, free of charge.

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. § 44-04-21.2.³¹ It may also result in personal liability for the person or persons responsible for the noncompliance.³²

Wayne Stenehjem
Attorney General

sld

cc: Randall Emanuelson (via email only)

³¹ N.D.C.C. § 44-04-21.1(2).

³² Id.