

**OPEN RECORDS AND MEETINGS OPINION  
2015-O-15**

DATE ISSUED:      October 12, 2015

ISSUED TO:         Morton County Commission

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Steve Wallick, editor of the Bismarck Tribune, asking whether the Morton County Commission violated N.D.C.C. §§ 44-04-19 and 44-04-19.2 by failing to vote before proceeding into an executive session, by holding an unauthorized executive session, and by taking final action in executive session.

**FACTS PRESENTED**

On July 9, 2015, the Morton County Commission (Commission) held a regular meeting with the following noticed agenda topic: "6. Executive Session to discuss Legal Strategy • Cendak – Ft Rice (Lot E Pt of SW ¼ of NW ¼ of Section 11 Twp 135 Rng 79)."<sup>1</sup> The Commissioners, along with legal counsel, proceeded into an executive session, which lasted approximately ten minutes. After reconvening in open session, no motions were made, rather, the Commission moved on to the next agenda topic. Steve Wallick questions whether the Commission followed the proper procedure of passing a motion before proceeding into the executive session, whether the executive session was authorized by law, and whether final action was taken during the executive session.<sup>2</sup>

**ISSUES**

1.     Whether the Morton County Commission followed the proper procedure of voting before proceeding into an executive session during its regular meeting on July 9, 2015.
  
2.     Whether the executive session held during the July 9, 2015, regular meeting was authorized by law.

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<sup>1</sup> Agenda, Morton Cnty. Comm'n (July 9, 2015).

<sup>2</sup> Letter from Steve Wallick, Editor, The Bismarck Tribune, to Att'y Gen.'s office (Aug. 4, 2015).

3. Whether the Morton County Commission took final action during the July 9, 2015, executive session.

## ANALYSIS

### Issue One

All meetings of a governing body of a public entity must be open to the public unless otherwise required by law.<sup>3</sup> A governing body is authorized to hold an executive session for an “attorney consultation” as defined by N.D.C.C. 44-04-19.1(5) or for a “negotiation strategy session” as defined by N.D.C.C. § 44-04-19.1(9).<sup>4</sup> Unless a confidential meeting is required, the governing body must pass a motion by a recorded roll call vote to hold an executive session.<sup>5</sup> Pursuant to N.D.C.C. § 44-04-19.1(2), discussions involving attorney consultations are “exempt” from public meetings and pursuant to N.D.C.C. § 44-04-19.1(9), a governing body “may” hold an executive session for a negotiation strategy session. Because “attorney consultation” and “negotiation strategy sessions” are not required to be closed to the public, the governing body must therefore pass a motion before proceeding into an executive session for either discussion.

The Commission admits it failed to make a motion and pass a recorded roll call vote before proceeding into the executive session.<sup>6</sup> The oversight was due to confusion regarding whether the information was confidential or exempt.<sup>7</sup>

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<sup>3</sup> N.D.C.C. § 44-04-19.

<sup>4</sup> N.D.C.C. §§ 44-04-19.1(2), (5), and (9). As shown by the next section, the Morton County Commission held an executive session for attorney consultation and negotiation strategy session during the July 9, 2015, regular meeting.

<sup>5</sup> N.D.C.C. §§ 44-04-19.2(2)(a) and 44-04-21(1). N.D.A.G. 2001-O-17 (“[A] governing body must vote on whether to close a portion of its meeting to the public and hold an executive session. A motion to hold an executive session is a nonprocedural motion and therefore must be decided by recorded roll-call vote” pursuant to N.D.C.C. § 44-04-21(1)).

<sup>6</sup> Letter from Brian D. Grosinger, Asst. State’s Att’y, Morton Cnty, to Sandra DePountis, Asst. Att’y Gen. (Aug. 27, 2015).

<sup>7</sup> If records or information to be considered in executive session are confidential by law, no motion is necessary. If records or information to be considered are exempt by law, a motion by the governing body is necessary. N.D.C.C. § 44-04-19.2(2)(a).

It is therefore my opinion the Commission failed to comply with the procedural requirements of N.D.C.C. § 44-04-19.2 by failing to pass a motion before proceeding into an executive session.

### Issue Two

A governing body may hold an executive session for “attorney consultation” when the governing body is seeking or receiving its attorney’s advice regarding pending or reasonably predictable civil or criminal litigation or an adversarial administrative proceeding.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> The use of the phrase “reasonably predictable” requires more than a simple possibility or fear of litigation, rather, there must be a realistic and tangible threat of litigation.<sup>11</sup>

In response to inquiries from this office, the Commission explained the executive session was to discuss a lot and partially constructed building located in Ft. Rice, North Dakota.<sup>12</sup> The owners of the lot and building are claiming the structure was incorrectly located due to mistake on the part of a Morton County official.<sup>13</sup> The owners threatened suit unless a settlement could be reached.<sup>14</sup> In addition to attempting to settle this claim, there is also the possibility of Morton County buying the lot or litigating a nuisance claim.<sup>15</sup> The Commission met with its attorney, Assistant State’s Attorney Brian Grosinger, in executive session during the July 9, 2015, regular meeting to discuss continuing negotiations in attempting to reach a settlement with the landowners.<sup>16</sup> During the executive session, Mr. Grosinger shared his thoughts and opinions regarding

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<sup>8</sup> N.D.C.C. § 44-04-19.1(2), (5).

<sup>9</sup> N.D.A.G. 2015-O-13.

<sup>10</sup> N.D.C.C. § 44-04-19.1(9); N.D.A.G. 2015-O-10.

<sup>11</sup> N.D.A.G. 2015-O-13; N.D.A.G. 2015-O-10.

<sup>12</sup> Letter from Brian Grosinger, Asst. State’s Att’y, Morton Cnty, to Sandra DePountis, Asst. Att’y Gen. (Aug. 27, 2015).

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Id. Due to Morton County’s concern that litigation will be the ultimate result, the N.D. Ins. Reserve Fund was contacted and outside counsel retained.

<sup>16</sup> The July 9, 2015, executive session was recorded in compliance with N.D.C.C. § 44-04-19.2(5) and was reviewed by this office.

the claims, potential liability, and language to be included in the settlement agreement. The Commission also discussed costs associated with various options including cost of litigation if settlement could not be reached, cost of demolition, and the value of the property and scrap on the property. The Commission gave Mr. Grosinger guidance on how to proceed with further negotiations with the landowners.

It is my opinion that the executive session was authorized as an “attorney consultation” and “negotiation strategy and instruction.” At the time of the executive session, there was a tangible threat of litigation.<sup>17</sup> During the executive session the Commission received its attorney’s advice regarding reasonably predictable litigation, negotiation strategy was discussed, and negotiation instructions were given that, if held in a public meeting, would have an adverse effect on the Commission’s litigation, bargaining, and fiscal position.

### Issue Three

Generally, any “[f]inal action concerning the topics discussed or considered during the executive session is taken at a meeting open to the public, unless final action is otherwise required or allowed by law to be taken during a closed or confidential meeting.”<sup>18</sup> However, “final action” 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.”<sup>19</sup> During the July 9, 2015, executive session, guidance was given by the Commission to its attorney regarding the ongoing negotiations of Cendak/Ft. Rice situation. The Commission therefore did not violate open meeting laws because no “final action” was taken during the executive session.

## CONCLUSIONS

1. The Commission failed to pass a motion by recorded roll call vote before proceeding into an executive session for an “attorney consultation” and “negotiation strategy session.”
2. The executive session held during the Commission’s July 9, 2015, regular meeting was authorized by law.

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<sup>17</sup> “In any opinion issued under [N.D.C.C. § 44-04-21.1], the attorney general shall base the opinion on the facts given by the public entity.” N.D.C.C. § 44-04-21.1(1).

<sup>18</sup> N.D.C.C. § 44-04-19.2(2)(e).

<sup>19</sup> Id.

3. No final action was taken by the Commission during the executive session held during the July 9, 2015, regular meeting; rather, the Commission provided guidance to its attorney as allowed by N.D.C.C. § 44-04-19.2(2)(e).

#### STEPS NEEDED TO REMEDY VIOLATION

The Morton County Commission must amend its July 9, 2015, meeting minutes to reflect that the executive session regarding the Ft. Rice/Cendak issue was authorized as an attorney consultation and negotiation strategy and instruction session pursuant to N.D.C.C. § 44-04-19.1. The updated meeting minutes must be provided to Steve Wallick, 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.<sup>20</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>21</sup>

Wayne Stenehjem  
Attorney General

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cc: Steve Wallick (via email only)

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<sup>20</sup> N.D.C.C. § 44-04-21.1(2).

<sup>21</sup> Id.