

**OPEN RECORDS AND MEETINGS OPINION
2016-O-01**

DATE ISSUED: January 12, 2016

ISSUED TO: South Central Dakota Regional Council

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Chris Olson asking whether the Executive Board of the South Central Dakota Regional Council violated N.D.C.C. §§ 44-04-19 and 44-04-19.2 by failing to follow proper procedure before entering into executive sessions and by holding unauthorized executive sessions.

FACTS PRESENTED

The South Central Dakota Regional Council (SCDRC) is a Regional Planning Council recognized under N.D.C.C. ch. 54-40.1, and organized under a joint powers agreement¹ comprised of nine counties.² The SCDRC “provides planning and development services, technical assistance, information coordination, and program administration to facilitate the needs of local units of government in the areas of community development, economic development, and public infrastructure.”³ The SCDRC has a Board of Directors, which meets quarterly each year.⁴ The Board of Directors delegates duties to an Executive Board, composed of five members, that meets monthly.⁵

The Executive Board held a regularly scheduled meeting on May 20, 2015, and discussed, among other things, staff issues, and an invoice received from Lutheran Social Services (LSS) for services rendered.⁶ One discussion item was project manager Daniel Schwartz, who, prior to the meeting, was terminated for insubordination.⁷ Jerry Bergquist, Stutsman County Emergency Manager, requested the Executive Board reinstate Mr. Schwartz in order for Mr. Schwartz to complete the

¹ N.D.C.C. ch. 54-40.3.

² Counties in the SCDRC are Barnes, Dickey, Foster, Griggs, LaMoure, Logan, McIntosh, Stutsman, and Wells, <http://www.scdrc.org>.

³ SCDRC, <http://www.scdrc.org>.

⁴ See “2015 Public Schedule” on the “Services” link at <http://scdrc.org>.

⁵ Letter from SCDRC to Att’y Gen.’s office (June 12, 2015).

⁶ *Id.*, see also Minutes, Exec. Bd., SCDRC (May 20, 2015).

⁷ *Id.*

OPEN RECORDS AND MEETINGS OPINION 2016-O-01

January 12, 2016

Page 2

Stutsman County Multi-Hazard Mitigation Project. Mr. Schwartz also made a statement regarding his termination. Alison Kassian, another employee with the SCDRC who was on probation because of job performance issues, also made a statement to the Executive Board. Included in Ms. Kassian's statement were allegations of a hostile work environment and inappropriate conduct against other staff members.

During the May 20, 2015, meeting, the Executive Board held an executive session "to discuss staff terminations, employment contract with Schwartz, and the attorney's advice regarding the invoice from Lutheran Social Services."⁸ The executive session lasted approximately 35 minutes. After the executive session was adjourned and the public was invited to return to the meeting room, the Executive Board members voted to have the executive director contact SDCRC's attorney to develop an employment contract with Mr. Schwartz for completion of the Stutsman County project and any other planning projects currently open.⁹ The Executive Board also requested the director prepare a termination letter for Ms. Kassian. Finally, the Executive Board recognized its attorney would continue to work on addressing the LSS's invoice.

A special meeting of the Executive Board was held on June 5, 2015.¹⁰ During the meeting, the Board held an executive session with its legal counsel, Tim Ottmar, for "attorney work product, negotiations, and consultations" pursuant to N.D.C.C. § 44-04-19.1 to discuss drafting an employment contract agreement to re-employ Mr. Schwartz, the possible hiring of an independent investigator to investigate allegations made by Ms. Kassian, and to discuss the May 20, 2015, executive session minutes.¹¹ The executive session lasted approximately 42 minutes. Upon reconvening in an open meeting, a motion was passed to enter into negotiations to employ Mr. Schwartz to complete contracted projects. A motion was made and passed to hire an independent investigator to investigate the allegations made by Ms. Kassian. Finally, the Executive Board voted to approve the minutes of the May 20, 2015, executive session.

Chris Olson, Jamestown Sun, alleges the Executive Board failed to follow the proper procedure for entering into the May 20 and June 5, 2015, executive sessions and that the executive sessions were not authorized by law.

⁸ Letter from SCDRC to Att'y Gen.'s office (June 12, 2015). The Executive Board received an invoice from Lutheran Social Services which was doing some work for the SDCRC. During the open portion of the meeting SDCRC decided to table the agenda item to discuss during the executive session, pursuant to N.D.C.C. § 44-04-19.1.

⁹ Letter from SCDRC to Attorney General's office (June 12, 2015), see also Minutes, SCDRC Exec. Bd. (May 20, 2015).

¹⁰ Letter from SCDRC to Att'y Gen.'s office (June 25, 2015).

¹¹ Id.

ISSUES

1. Whether the SCDRC Executive Board followed proper procedure before entering into an executive session during its May 20, 2015, regular meeting.
2. Whether the SCDRC Executive Board's executive session held during the May 20, 2015, regular meeting was authorized by law.
3. Whether the SCDRC Executive Board followed proper procedure before entering into an executive session during its June 5, 2015, special meeting.
4. Whether the SCDRC Executive Board's executive session held during the June 5, 2015, special meeting was authorized by law.

ANALYSIS

Issue One

All meetings of the SCDRC Executive Board, as a committee delegated authority from the governing body of a public entity, must be open to the public and an executive session may be held only if "specifically provided by law."¹² Even if an executive session is authorized, open meetings law establishes certain procedures to be followed before, during, and after the executive session.¹³ 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.¹⁴ 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.¹⁵ Also, all executive sessions must be recorded electronically, by

¹² N.D.C.C. § 44-04-19. The SCDRC, created under the authority of N.D.C.C. ch. 54-40.1, is a "public entity" as defined by N.D.C.C. § 44-04-17.1(13). The Executive Board is a committee of the SCDRC so it is a "governing body." See N.D.C.C. § 44-04-17.1(6) (definition of "governing body" includes not only the multimember body responsible for making a collective decision on behalf of the public entity, but also any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body). A committee that is delegated authority to perform any function on behalf of a governing body, is subject to the state's open meeting and record laws. See N.D.A.G. 2015-O-07; N.D.A.G. 2014-O-05.

¹³ N.D.C.C. § 44-04-19.2.

¹⁴ N.D.C.C. § 44-04-19.2(2).

¹⁵ N.D.A.G. 2014-O-08; N.D.A.G. 2013-O-09.

OPEN RECORDS AND MEETINGS OPINION 2016-O-01

January 12, 2016

Page 4

audiotape or videotape.¹⁶ Finally, any final action must occur after reconvening in open session except that guidance can be given to legal counsel or other negotiator during closed attorney consultation or negotiation preparation session authorized by N.D.C.C. § 44-04-19.2(2)(e).¹⁷

During the May 20, 2015, meeting the Executive Board unanimously voted to hold an executive session to discuss “staff terminations, employment contract with Schwartz, and attorney’s advice regarding the invoice from Lutheran Social Services.”¹⁸ Prior to the announcement, the Executive Board discussed the employee terminations and heard statements from Mr. Schwartz, Ms. Kassian, and another person on Mr. Schwartz’s behalf.¹⁹ Earlier in the meeting, the Executive Board referenced an invoice from LSS, but tabled the issue until it could be discussed during the executive session.²⁰

The public was provided sufficient notice of the general topics for the executive session because the announcement was made immediately after the public discussions about the employment issues.²¹ The Executive Board, however, failed to announce the legal authority for holding the executive session and failed to record the executive session. It is my opinion that the Executive Board violated open meetings law when it did not follow proper procedure before entering into an executive session during the May 20, 2015, regular meeting, and when it failed to record the executive session.²²

¹⁶ N.D.C.C. § 44-04-19.2(5). The purpose of requiring all executive sessions to be recorded is to provide a process for citizens to verify that the discussion during an executive session was limited to the announced topics. N.D.A.G. 2009-O-20.

¹⁷ N.D.C.C. § 44-04-19.2(2)(e).

¹⁸ Minutes, SCDRD Exec. Bd. (May 20, 2015).

¹⁹ Id., see also Letter from SCDRC to Att’y Gen.’s office (June 12, 2015).

²⁰ Minutes, SCDRC Exec. Bd. (May 20, 2015).

²¹ See N.D.A.G. 2005-O-18 (recognizing the announcement before proceeding into the executive session is not an isolated statement and it is reasonable to consider discussions before and after the announcement to determine whether a member of the public could understand what the governing body was planning to discuss in executive session).

²² Mr. Olson also alleges that final action was taken during the executive session. The SCDRC Executive Board states, although it discussed its decisions during the executive session, all final action was taken after reconvening in the open session. See Letter from SCDRC to Att’y Gen.’s office (June 12, 2015) and Minutes, SCDRC Exec. Bd. (May 20, 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.

Issue Two

“Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public.”²³ A governing body may hold an executive session to consider confidential or exempt information,²⁴ for an attorney consultation if such discussions meet the requirements of N.D.C.C. § 44-04-19.1(2) and (5), or for negotiation strategy or to provide negotiation instructions to its negotiator, if such discussions meet the requirements of N.D.C.C. § 44-04-19.1(9). Because no attorney was present for the May 20, 2015, executive session, this analysis will focus on whether the Executive Board considered confidential or exempt information during the executive session, and whether negotiation strategy was discussed and instruction occurred.

A governing body may hold an executive session to discuss negotiation strategy or provide negotiation instructions to its attorney or other negotiator regarding current or pending contract negotiations if discussing the strategy or instruction in an open meeting would adversely affect the bargaining position of the entity.²⁵ Section 44-04-19.1(9), N.D.C.C., does not authorize an executive session for all contract discussions. Rather, executive sessions can only be held for negotiation if allowing the other party to the negotiation to listen to the discussions would result in increased costs to the public entity.²⁶ 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.²⁷

Because the executive session was not recorded, I must rely on written minutes of the May 20, 2015, executive session, provided by the Executive Board. The minutes reveal the Executive Board first discussed the continued employment of Ms. Kassian along with Ms. Kassian’s allegations of a hostile work environment.²⁸ The Executive Board argues the discussions to consider Ms. Kassian’s personnel file were properly held in executive session in part because N.D.C.C. § 44-04-19.2(1) allows an executive session to discuss or consider confidential or closed records.²⁹

As this office has repeatedly recognized, personnel records are generally open to the public and a governing body may not hold an executive session to discuss personnel

²³ N.D.C.C. § 44-04-19.

²⁴ N.D.C.C. § 44-04-19.2.

²⁵ N.D.C.C. § 44-04-19.1(9).

²⁶ N.D.C.C. § 44-04-19.1(9); N.D.A.G. 2015-O-10.

²⁷ N.D.A.G. 2015-O-10; N.D.A.G. 2005-O-18.

²⁸ See SCDRC Exec. Bd. Exec. Sess. (May 20, 2015).

²⁹ See Letter from SCDRC to Att’y Gen.’s office (June 12, 2015). N.D.C.C. § 44-04-19.2(1) merely recognizes closed or confidential records may be considered in executive session but does not specifically make any records closed or confidential.

OPEN RECORDS AND MEETINGS OPINION 2016-O-01

January 12, 2016

Page 6

matters or potentially unpopular and controversial topics.³⁰ “Regardless of how uncomfortable it might be to discuss the termination of an employee on grounds for misconduct in an open meeting, the public has a right to hear the deliberations and reasoning of the [governing body], and there is no exception to the open meetings law for personnel matters.”³¹

In the executive session, the Executive Board discussed Ms. Kassian’s job performance and whether to extend her probation period or to terminate the employment.³² The Executive Board ultimately decided to terminate her employment.³³ The Executive Board did not negotiate with Ms. Kassian, rather, it made a unilateral decision to terminate.³⁴ There was no legal authority for holding an executive session for discussions related to Ms. Kassian’s termination and the Executive Board therefore violated open meetings law when it closed its meeting on this topic.

Next, the Executive Board discussed the termination of Mr. Schwartz and whether to rehire him to complete projects at the urging of Stutsman County.³⁵ His personnel file was discussed, past job performance, and what projects needed to be finished.³⁶ The Executive Board ultimately decided to contact its attorney to draft a contract to rehire Mr. Schwartz to finish projects.³⁷ Based on a review of the meeting minutes, no specific contract terms were discussed. Rather, it appears a general discussion on past performance took place and the need to contact its attorney to work out the details of a future employment contract. No negotiation strategies were discussed or instructions given that would have an adverse fiscal effect on the bargaining position of the Executive Board if held in public. Therefore, it is my opinion that the discussions related to the Executive Board’s decision to direct its attorney to draft a contract to rehire Mr. Schwartz were not properly held in an executive session.

³⁰ N.D.A.G. 2014-O-09; N.D.A.G. 2011-O-10; N.D.A.G. 2010-O-03; N.D.A.G. 2008-O-02; N.D.A.G. 2007-O-09; N.D.A.G. 2005-O-02; N.D.A.G. 2004-O-19; N.D.A.G. 2003-O-14.

³¹ N.D.A.G. 2014-O-09 citing N.D.A.G. 2003-O-14 (“In most instances, a governing body of a public entity may not close its evaluation of a public employee’s job performance under section 44-04-19.1(4) simply because the employee was fired or asked to resign.”).

³² See Minutes, SCDRC Exec. Bd. Exec. Sess. (May 20, 2015).

³³ Id., see also Minutes, SCDRC Exec. Bd. (May 20, 2015).

³⁴ Therefore, the decision by the Board to terminate the employment does not fit into the definition of “negotiation strategy” or providing negotiation instruction required under N.D.C.C. § 44-04-19.1(9).

³⁵ Minutes, SCDRC Exec. Bd. Exec. Sess. (May 20, 2015).

³⁶ Id.

³⁷ Id., see also Minutes, SCDRC Exec. Bd. (May 20, 2015).

Finally, during the executive session, the Executive Board considered an invoice from LSS for services provided.³⁸ The SCDRC executive director explained to the Board that she spoke with its attorney prior to the meeting and the attorney asked that the SCDRC compile additional information related to the project and that once he received the information the attorney would write a letter on behalf of SCDRC to negotiate a final payment amount. Again, no negotiation strategy or instruction was discussed, rather the executive director merely kept the Executive Board apprised of the steps being taken by the SCDRC staff and attorney. It was therefore a violation of open meetings law when the Executive Board closed its meeting on this topic.

Issue Three

The Executive Board held a special meeting on June 5, 2015, during which an executive session was held for “contract/employment agreement with planner, independent investigator, and the May 20, 2015, executive session” pursuant to “N.D.C.C. § 44-04-19” for “attorney work product, negotiations, and consultations.” Although the correct statute for attorney consultation and negotiation strategy sessions is N.D.C.C. § 44-04-19.1, the Executive Board specifically mentioned “attorney work product, negotiations, and consultation” as its legal authority. The announcement satisfies the procedural requirement for announcing the legal authority mandated by N.D.C.C. § 44-04-19.2.³⁹

However, a member of the public, unfamiliar with the issues previously discussed by the Executive Board during the May 20, 2015 meeting, would not know what contract or employment agreement was being discussed, why the Executive Board was considering hiring an independent investigator, or why the May 20, 2015, executive session needed to be discussed.⁴⁰ Accordingly, the Executive Board violated open meetings law because its announcement prior to the June 5, 2015 executive session did not sufficiently describe the topics to be considered.⁴¹

Issue Four

As stated, the legal authority cited by the Executive Board for entering into the June 5, 2015, executive session was for “attorney work product, negotiations, and consultations.” Pursuant to N.D.C.C. § 44-04-19.1(2) and (5), a governing body

³⁸ Minutes, SCDRC Exec. Bd. Exec. Sess. (May 20, 2015).

³⁹ See N.D.A.G. 2005-O-18.

⁴⁰ See N.D.A.G. 2007-O-11; N.D.A.G. 2005-O-18.

⁴¹ Unlike the last meeting, in which the Executive Board listened and considered statements and held discussions regarding the invoice and staff issues which helped to identify the specific topics to be considered during the executive session, during this special meeting, the Executive Board immediately went into an executive session with only the vague announcement outlined above. See N.D.A.G. 2005-O-18.

OPEN RECORDS AND MEETINGS OPINION 2016-O-01

January 12, 2016

Page 8

may close a meeting to receive advice from its attorney if the public entity's attorney is providing a mental impression, litigation strategy, or advice regarding pending or reasonably predictable litigation or adversarial administrative proceedings.⁴² The use of the phrase "reasonably predictable" in N.D.C.C. § 44-04-19.1 requires more than a simple possibility or potential of litigation or adversarial administrative proceeding.⁴³ The possibility of litigation or a proceeding must be realistic and tangible.

The June 5, 2015, executive session was recorded in compliance with N.D.C.C. § 44-04-19.2(5) and was reviewed by this office. During the executive session, the Executive Board discussed a draft employment contract for rehiring Mr. Schwartz with its attorney, Timothy Ottmar. The Executive Board reviewed the terms of the draft contract and discussed how the proposed contract addressed the concerns it had in rehiring Mr. Schwartz. Mr. Ottmar advised the Executive Board about the negotiation process that may follow regarding the specific terms of the contract.

No actual negotiation instructions were given, nor strategy discussed during the executive session. Rather, the Executive Board reviewed a proposed contract and discussed whether to direct an attorney to engage in future negotiations with Mr. Schwartz. Allowing Mr. Schwartz to listen to the discussions as the Executive Board went over the terms of the contract would not result in increased costs to the SCDRC. In addition, there was no reasonably predictable or pending litigation involving Mr. Schwartz's employment with the SCDRC that would justify an attorney consultation. It was therefore, in my opinion, a violation of open meetings law to hold an executive session on this topic.

The next topic discussed by the Executive Board during the June 5, 2015, executive session was whether to hire an independent investigator to investigate the allegations made by Ms. Kassian during the May 20, 2015, meeting. In this instance, there was an indication of reasonably predictable litigation arising out of Ms. Kassian's claims. Ms. Kassian had raised allegations of a hostile work environment and inappropriate conduct against other staff members after being terminated from employment.⁴⁴ The attorney provided advice regarding how to handle the allegations in order to protect the possible litigation position of the board. Due to the nature of the allegations, it was reasonable for the Executive Board to receive this advice from its attorney in executive session. However, much of the conversation was not attorney advice regarding the litigation position of the board, but rather a discussion by board members about an investigation of the general workplace environment. In my opinion, only the discussion between the attorney and the Executive Board regarding reasonably predictable litigation regarding Ms. Kassian was attorney consultation.

⁴² N.D.C.C. § 44-04-19.1(2) and (5).

⁴³ N.D.A.G. 2015-O-10; N.D.A.G. 2014-O-09.

⁴⁴ See Letter from SCDRC to Att'y Gen.'s office (June 12, 2015); see also Minutes, SCDRC Exec. Bd. (May 20, 2015).

Finally, the Executive Board reviewed the May 20, 2015, executive session minutes. As previously stated, the May 20, 2015, executive session was unauthorized by law. There is no legal authority to discuss minutes reflecting the discussions that took place since the minutes do not contain any confidential or closed information. It was therefore a violation of open meetings law to hold an executive session on this topic.

CONCLUSIONS

1. The SCDRC Executive Board failed to follow proper procedure before entering into an executive session during the May 20, 2015, regular meeting, because it failed to announce its legal authority for holding the executive session to the public during the open portion of the meeting. It was also a violation of open meetings law when the Executive Board failed to record the executive session.
2. The SCDRC Executive Board held an unauthorized executive session during the May 20, 2015, regular meeting.
3. The SCDRC Executive Board failed to follow proper procedure before entering into an executive session during the June 5, 2015, special meeting, because it failed to sufficiently describe the topics to be considered during the executive session.
4. The portion of the June 5, 2015, executive session in which the SCDRC Executive Board received its attorney's advice regarding reasonably predictable litigation with Ms. Kassian was properly closed as attorney consultation. The rest of the executive session in which the Board reviewed a drafted employment contract, discussed hiring an investigator, and meeting minutes of the May 20, 2015, executive session, were not authorized by law.

STEPS NEEDED TO REMEDY VIOLATIONS

Each member of the Executive Board must individually provide a signed, written statement of their recollection of the conversations occurring during the May 20, 2015, executive session. The statements must be compiled and added to the May 20, 2015, executive session meeting minutes. The meeting minutes and statements will be considered open records, copies of which must be provided to Mr. Olson and any others requesting copies, free of charge.

The June 5, 2015, meeting minutes must be updated to provide further details on the topics to be considered in executive session. A copy of the recording of the portions of the June 5, 2015, executive session that were improperly closed to the public should be provided to Chris Olson and others, free of charge. If the Executive Board, after sufficiently attempting to do so, is unable to redact its recording, a transcript must be

OPEN RECORDS AND MEETINGS OPINION 2016-O-01

January 12, 2016

Page 10

made of the portions of the executive session unauthorized by law as outlined in this opinion, and such portions of the transcript must be open to the public, and made available 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. § 44-04-21.2.⁴⁵ It may also result in personal liability for the person or persons responsible for the noncompliance.⁴⁶

Wayne Stenehjem
Attorney General

sld

cc: Chris Olson (via email only)

⁴⁵ N.D.C.C. § 44-04-21.1(2).

⁴⁶ Id.