

**OPEN RECORDS AND MEETINGS OPINION
2016-O-13**

DATE ISSUED: July 26, 2016

ISSUED TO: Griggs 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 Rob Port asking whether the Griggs County Commission violated N.D.C.C. § 44-04-19.2 by failing to follow proper procedure before proceeding into an executive session and holding an unauthorized executive session.

FACTS PRESENTED

The Griggs County Commission held a regular meeting on February 19, 2016.¹ During the meeting, the Commission held an executive session that lasted approximately one hour and twenty minutes.² Upon reconvening in an open meeting, the Commission voted for its state's attorney to move forward in the course of a lawsuit, determine if any settlement agreements could be reached, and to report back to the Commission with his findings.³

ISSUES

1. Whether the Commission complied with N.D.C.C. § 44-04-19.2. before entering into an executive session during its February 19, 2016, regular meeting.
2. Whether the executive session held during the February 19, 2016, meeting was authorized by law.

ANALYSIS

Issue One

¹ Letter from Samantha M. Quast, Griggs Cnty. Auditor, to Sandra L. DePountis, Asst. Att'y Gen. (Mar. 11, 2016).

² Minutes, Griggs Cnty. Comm'n (Feb. 19, 2016).

³ *Id.*

OPEN RECORDS AND MEETINGS OPINION 2016-O-13

July 26, 2016

Page 2

All meetings of a governing body of a public entity must be open to the public unless otherwise provided by law.⁴ 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).⁵ Before proceeding into an executive session, the governing body must announce to the public "the topics to be discussed or considered during the executive session and the body's legal authority for holding an executive session on those topics."⁶ A governing body must pass a motion by a recorded roll call vote to hold an executive session for "attorney consultation."⁷

Prior to the executive session during the February 19, 2016, meeting, Commissioner Wakefield made a motion to "recess the regular session and move into executive session."⁸ This motion received a second from Commissioner Steffen.⁹ Chairman Olson then called for a "vote all in favor say aye" - with all Commissioners voting aye.¹⁰ The Commission then convened in executive session.¹¹

⁴ N.D.C.C. § 44-04-19.

⁵ N.D.C.C. § 44-04-19.1(2) and (5). As shown by the next section, the Commission held an executive session for attorney consultation during the Feb. 19, 2016, meeting.

⁶ N.D.C.C. § 44-04-19.2(2)(b).

⁷ N.D.C.C. § 44-04-19.2(2)(a). Unless a confidential meeting is required, the governing body must pass a motion by recorded roll call vote to hold an executive session. Pursuant to N.D.C.C. § 44-04-19.1(2), discussions involving "attorney consultation" are exempt from public meetings and therefore, since these conversations are not required to be closed the public, the governing body must pass a motion before proceeding into the executive session for such a discussion. N.D.A.G. 2015-0 -15.

⁸ Email from Samantha M. Quast, Griggs Cnty. Auditor, to Sandra DePountis, Asst. Att'y Gen. (Mar. 22, 2016, 9:21am); Minutes, Griggs Cnty. Comm'n (Feb. 19, 2016); and recording, Exec. Session, Griggs Cnty. Comm'n (Feb. 19, 2016) (found online through Griggs County's Website).

⁹ Email from Samantha M. Quast, Griggs Cnty. Auditor, to Sandra DePountis, Asst. Att'y Gen. (Mar. 22, 2016, 9:21am); Minutes, Griggs Cnty. Comm'n (Feb. 19, 2016); and recording, Exec. Session, Griggs Cnty. Comm'n (Feb. 19, 2016) (found online through Griggs County's Website).

¹⁰ Email from Samantha M. Quast, Griggs Cnty. Auditor, to Sandra DePountis, Asst. Att'y Gen. (Mar. 22, 2016, 9:21am); Minutes, Griggs Cnty. Comm'n (Feb. 19, 2016); and recording, Exec. Session, Griggs Cnty. Comm'n (Feb. 19, 2016) (found online through Griggs County's Website).

¹¹ Email from Samantha M. Quast, Griggs Cnty. Auditor, to Sandra DePountis, Asst. Att'y Gen. (Mar. 22, 2016, 9:21am); Minutes, Griggs Cnty. Comm'n (Feb. 19, 2016); and recording, Exec. Session, Griggs Cnty. Comm'n (Feb. 19, 2016) (found online through Griggs County's Website).

OPEN RECORDS AND MEETINGS OPINION 2016-O-13

July 26, 2016

Page 3

The Commission failed to announce the topic it would be considering in the executive session or the legal authority for closing the meeting. The Commission also failed to take a recorded roll call vote to hold the executive session.¹² It is therefore my opinion that the Commission violated the procedural requirements of N.D.C.C. § 44-04-19.2 prior to entering into executive session.

Issue Two

A governing body may hold an executive session for "attorney consultation" when it is seeking or receiving its attorney's advice regarding pending or reasonably predictable civil or criminal litigation or an adversarial administrative proceeding.¹³ "Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation."¹⁴ 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.¹⁵ The Commission's February 19, 2016, executive session was recorded in compliance with N.D.C.C. § 44-04-19.2(5) and reviewed by this office.

At the time of the February 19, 2016, meeting, Griggs County was in litigation.¹⁶ During the executive session, the Commission met with its attorneys regarding this case and discussed terms proposed from the opposing party and how to respond to such terms. The Commission received its attorneys' advice, questioned its attorneys on litigation strategy, and ultimately conveyed its desires on how to move forward based on the advice and recommendations of counsel.

It is my opinion the discussions fit within the exception for "attorney consultation" pursuant to N.D.C.C. § 44-04-19.1(2) and (5) and the executive session was therefore authorized by law.

¹² N.D.C.C. § 44-04-21(1) requires a recorded roll call vote for all "nonprocedural" items. A motion to hold an executive session is a nonprocedural motion as it involves the merits of business before the Commission and therefore must be decided by a recorded roll call vote. N.D.A.G. 2015-O-15; N.D.A.G. 2015-O-13; N.D.A.G. 2009-O-20; N.D.A.G. 2001-O-17.

¹³ N.D.C.C. § 44-04-19.1(2) and (5).

¹⁴ N.D.C.C. § 44-04-19.1(5).

¹⁵ N.D.A.G. 2015-O-15

¹⁶ *Griggs Cnty. v. Griggs Cnty. Bldg. Auth.*, Griggs Cnty. Dist. Court, Civil No. 20-2015-CV-00033.

CONCLUSIONS

1. The Commission violated N.D.C.C. § 44-04-19.2 when it failed to announce the topics and legal authority to the public, and failed to pass a motion by recorded roll call vote, before proceeding into an executive session during its February 19, 2016, meeting.
2. The February 19, 2016, executive session was authorized by law as "attorney consultation."

STEPS NEEDED TO REMEDY VIOLATION

The Commission must amend its February 19, 2016, meeting minutes to include the specific topic and authority for convening in an executive session. These minutes must be provided to Mr. Port, and anyone requesting, 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. § 44-04-21.2.¹⁷ It may also result in personal liability for the person or persons responsible for the noncompliance.¹⁸

Wayne Stenehjem
Attorney General

sld

cc: Rob Port (via email only)

¹⁷ N.D.C.C. § 44-04-21.1(2).

¹⁸ *Id.*