

**OPEN RECORDS AND MEETINGS OPINION
2017-O-03**

DATE ISSUED: May 12, 2017

ISSUED TO: Devils Lake City Commission

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Eric Arndt (KZZY Radio), Chuck Wickenhofer (Devils Lake Journal), and April Baumgarten (Grand Forks Herald) asking whether the Devils Lake City Commission violated N.D.C.C. § 44-04-19 by holding an unauthorized executive session.

FACTS PRESENTED

The Devils Lake City Commission (Commission) held a regular meeting on April 3, 2017.¹ During the meeting, the Commission entered into an executive session for negotiation strategy and instruction and to review the City Police Department's Operations Assessment report.² The report was a result of concerns brought forward regarding Chief Schroeder and Captain Barnett of the Devils Lake Police Department. The Human Resource Consultant interviewed and reviewed questionnaires from staff and officers within the Police Department to create the report.³ The executive session lasted approximately an hour and a half. After reconvening the public meeting, the Commission passed a motion to place Chief Schroeder and Captain Barnett on administrative leave, with pay, "pending further investigation and Commission action on the operations assessment."⁴

ISSUE

Whether the executive session held during the April 3, 2017, regular meeting was authorized by law.

¹ Minutes, Devils Lake City Comm'n (Apr. 3, 2017).

² *Id.*, see also Letter from J. Thomas Traynor, Devils Lake City Att'y, to Sandra L. DePountis, Asst. Att'y Gen. (Apr. 18, 2017).

³ Operations Assessment, City of Devils Lake Police Dept.

⁴ Minutes, Devils Lake City Comm'n (Apr. 3, 2017).

ANALYSIS

All meetings of the Commission must be open to the public unless otherwise specifically provided by law.⁵ The Commission closed its April 3, 2017, meeting for negotiation strategy and instruction pursuant to N.D.C.C. § 44-04-19.1(9) which states:

A governing body may hold an executive session under section 44-04-19.2 to discuss negotiating strategy or provide negotiation instruction to its attorney or other negotiator regarding litigation, adversarial administrative proceedings, or contracts, which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future. An executive session may be held under this subsection only when an open meeting would have an adverse fiscal effect on the bargaining or litigating position of the public entity.⁶

This section does not authorize an executive session for all discussions involving contract and litigation negotiations. Rather, the discussions must be in the context of negotiation strategy or providing instructions to its negotiator and, even then, the discussions are only protected if disclosure of the remarks would have an adverse fiscal effect on the bargaining position of the governing body.⁷

A member of my staff reviewed the recording of the April 3, 2017, executive session.⁸ For most of the executive session, the Commission reviewed and discussed the Operations Assessment Report with the Human Resource Consultant. Prior to the meeting, the Consultant reviewed the report with the Police Chief Schroeder and Police Captain Barnett and relayed their impressions and remarks to the Commission during the executive session. The Commission shared stories of personal experience and other things they had heard in the community regarding Chief Schroeder and Captain Barnett. A brief discussion referenced the Chief and Captain's medical information. The Commission discussed personnel policies and how to proceed within the confines of city ordinances and policies, including conversations about how a similar situation was handled by the City of West Fargo. Finally, the Commission discussed who would take on the Chief and Captain duties during the interim. The Commission ultimately decided to suspend Chief Schroeder and Captain Barnett, with pay, while it continued to investigate the matter and determine what ultimate course of action it would take.

⁵ N.D.C.C. § 44-04-19.

⁶ N.D.C.C. § 44-04-19.1(9).

⁷ N.D.A.G. 2010-O-11.

⁸ The executive session was recorded in compliance with N.D.C.C. § 44-04-19.2(5).

Except for the brief reference to medical information, which is protected under N.D.C.C. § 44-04-18.1, the discussions during the executive session were all related to personnel issues and job performance and duties. This office and the North Dakota Supreme Court have repeatedly recognized that personnel issues and records, including discussions on termination of a public employee and job performance and evaluation, are not protected under the open records and meetings law⁹ and a governing body may not hold an executive session to discuss such them even though they may be unpopular or controversial topics.¹⁰ “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.”¹¹

Furthermore, the Commission did not engage in any discussions regarding negotiation strategy and did not provide negotiation instructions that, if held in public, would have an adverse fiscal effect, as required by N.D.C.C. § 44-04-19.1(9). Instead, the Commission discussed a personnel report that was already reviewed by Captain Schroeder and Chief Barnett and made a unilateral decision to place them on administrative leave. This office previously recognized that such unilateral decisions do not fit into the definition of “negotiation strategy” or providing negotiation instruction as required by N.D.C.C. § 44-04-19.1(9).¹²

CONCLUSION

Other than the brief reference to medical information, protected under N.D.C.C. § 44-04-18.1, the executive session that discussed personnel matters, and a unilateral decision to place two public employees on administrative leave, was not an authorized

⁹ There is a limited exception for organizations that are only considered public entities because they receive government funds, in which case N.D.C.C. § 44-04-18.1(3) makes personnel records of such organizations exempt. N.D.A.G. 2015-O-01; N.D.A.G. 2006-O-14; N.D.A.G. 2006-O-04.

¹⁰ N.D.A.G. 2016-O-16, N.D.A.G. 2016-O-01; N.D.A.G. 2015-O-06; N.D.A.G. 2015-O-01; N.D.A.G. 2014-O-09; N.D.A.G. 2013-O-16, N.D.A.G. 2013-O-09; N.D.A.G. 2011-O-10; N.D.A.G. 2010-O-13; N.D.A.G. 2010-O-11; N.D.A.G. 2008-O-04; N.D.A.G. 2008-O-02; N.D.A.G. 2006-O-03; N.D.A.G. 2005-O-02; N.D.A.G. 2004-O-21; N.D.A.G. 2004-O-19; N.D.A.G. 2003-O-22; N.D.A.G. 2003-O-14; N.D.A.G. 2001-O-17; N.D.A.G. 2001-O-11; N.D.A.G. 2001-O-09; N.D.A.G. 2000-O-09; N.D.A.G. 98-O-05. See also *Hovet v. Hebron Pub. School Dist.*, 419 N.W.2d 189 (N.D. 1988); *Forum Pub’g Co., v. City of Fargo*, 391 N.W.2d 169 (N.D. 1986); *City of Grand Forks v. Grand Forks Herald, Inc.*, 307 N.W.2d 572 (N.D. 1981).

¹¹ N.D.A.G. 2016-O-01; N.D.A.G. 2014-O-09; see also N.D.A.G. 2003-O-14.

¹² N.D.A.G. 2016-O-01; N.D.A.G. 2010-O-11.

negotiation strategy and instruction session under N.D.C.C. § 44-04-19.1(9) and therefore violated open meetings law.

STEPS NEEDED TO REMEDY VIOLATION

Other than the brief reference to Chief Schroeder and Captain Barnett's medical history and information, the rest of the executive session must be disclosed to Mr. Arndt, Mr. Wickenhofer, Ms. Baumgarten, and anyone else 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. § 44-04-21.2.¹³ It may also result in personal liability for the person or persons responsible for the noncompliance.¹⁴

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cc: Eric Arndt (via email only)
Chuck Wickenhofer (via email only)
April Baumgarten (via email only)

¹³ N.D.C.C. § 44-04-21.1(2).

¹⁴ *Id.*