

**OPEN RECORDS AND MEETINGS OPINION
2018-O-05**

DATE ISSUED: March 7, 2018

ISSUED TO: Lincoln City Council

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from KXMB TV, The Bismarck Tribune, and Michael Geiermann asking whether the Lincoln City Council violated N.D.C.C. §§ 44-04-19, 44-04-19.2, and 44-04-20 by failing to properly notice and proceed into an executive session and holding an unauthorized executive session.

FACTS PRESENTED

The Lincoln City Council held a special meeting on January 9, 2018. The agenda for the meeting included: “[e]xecutive session to receive attorney consultation related to legal actions associated with labor and employment of Sgt. Richard Hoffer.”¹

After calling the meeting to order, Mayor Gerald Wise read the above agenda item to the public.² A motion to hold an executive session was made and seconded. After the motion, one council member questioned why the topic was being brought at this time and the merits of the executive session. Lincoln City Attorney Justin Hagel stated “the purpose of the meeting was for attorney consultation to discuss concerns and issues raised at the prior City Council Meeting and possible legal action the City may become involved in.”³ A roll call vote was taken and the motion to hold an executive session passed. Before asking the public to leave the room, Mayor Wise again stated that the executive session was for an attorney consultation pursuant to N.D.C.C. § 44-04-19.1. The executive session lasted for approximately one hour. Upon reconvening the open

¹ Agenda, Lincoln City Council (Jan. 9, 2018).

² Letter from Justin Hagel, Att’y, City of Lincoln, to Sandra L. DePountis, Asst. Att’y Gen. (Feb. 5, 2018). The exchange was also on the tape recording provided to the Attorney General’s office that included the executive session.

³ Letter from Justin Hagel, Att’y, City of Lincoln, to Sandra L. DePountis, Asst. Att’y Gen. (Feb. 5, 2018).

meeting, a statement was made that no final action took place during the executive session.

ISSUES

1. Whether the topics stated in the notice of the executive session of the January 9, 2018, special meeting met the requirements of N.D.C.C. § 44-04-20.
2. Whether the Lincoln City Council complied with N.D.C.C. § 44-04-19.2 before proceeding into an executive session during its January 9, 2018, special meeting.
3. Whether the executive session held during the January 9, 2018, special meeting was authorized by law.

ANALYSIS

Issue One

“Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity” which must include the “date, time, and location of the meeting,” the topics to be considered, and “the general subject matter of any executive session expected to be held during the meeting.”⁴ The agenda for the January 9, 2018, special meeting included the date, time, and location of the meeting.⁵ It further referenced the general subject matter of the executive session for attorney consultation associated with labor and employment of Sergeant Richard Hoffer. It is my opinion that the topic stated in the notice of the Council’s January 9, 2018, special meeting complied with N.D.C.C. § 44-04-20.

Issue Two

All meetings of a governing body of a public entity must be open to the public unless otherwise provided by law.⁶ 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).⁷ 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.”⁸ A governing body

⁴ N.D.C.C. § 44-04-20(1), (2).

⁵ Agenda, Lincoln City Council (Jan. 9, 2018).

⁶ N.D.C.C. § 44-04-19.

⁷ N.D.C.C. § 44-04-19.1(2), (5).

⁸ N.D.C.C. § 44-04-19.2(2)(b).

must pass a motion by a recorded roll call vote to hold an executive session for “attorney consultation.”⁹

As outlined in the “Facts Presented,” before proceeding into the executive session, Mayor Wise announced the legal authority and topic of the executive session to be “attorney consultation,” specifically referencing N.D.C.C. § 44-04-19.1, related to legal actions associated with labor and employment of Sergeant Richard Hoffer. The City Attorney also explained the purpose for the executive session and why it was necessary to discuss the legal issues involving the city. A motion was passed by recorded roll call vote. It is my opinion that the City Council followed the procedure required by N.D.C.C. § 44-04-19.2 prior to holding the executive session.¹⁰

Issue Three

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.¹¹ “Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation.”¹² Rather, a governing body may close a 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.¹³ 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.¹⁴ The possibility of litigation or a proceeding must be realistic and tangible.¹⁵ The Council’s

⁹ N.D.C.C. § 44-04-19.2(2)(a). See N.D.A.G. 2016-O-13 (“Unless a confidential meeting is required, the governing body must pass a motion by 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 [t]o the public, the governing body must pass a motion before proceeding into the executive session for such a discussion.”)

¹⁰ 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).

¹¹ N.D.C.C. § 44-04-19.1(2), (5).

¹² N.D.C.C. § 44-04-19.1(5).

¹³ N.D.A.G. 2016-O-13.

¹⁴ N.D.A.G. 2016-O-01.

¹⁵ N.D.A.G. 2015-O-15; N.D.A.G. 2015-O-13.

OPEN RECORDS AND MEETINGS OPINION 2018-O-05

March 7, 2018

Page 4

January 9, 2018, executive session was recorded in compliance with N.D.C.C. § 44-04-19.2(5) and reviewed by this office.

The requestors allege that there was no pending or reasonably predictable litigation involving Sergeant Hoffer at the time of the executive session and it was therefore improper. I disagree, taking into account the circumstances surrounding the executive session and the expanded definition of “attorney consultation” added during the 2017 Legislative Session.

During the 2017 Legislative Session, the definition of “attorney consultation” was expanded to include instances in which a governing body seeks to “receive its attorney’s advice and guidance on the legal risks, strengths, and weaknesses of an action of a public entity which, if held in public, would have an adverse fiscal effect on the entity.”¹⁶ The amendment recognized that decisions and actions of a governing body may not reach a litigation threshold, but an attorney should be able to provide guidance and advice on how to avoid litigation, or the risks and liabilities associated with a certain, proposed course of action, so governing bodies could make informed decisions.¹⁷ To give such advice in the open may provide a “roadmap” on how to initiate a lawsuit against a public entity, which would result in public funds being spent on litigation, all because the governing body did not receive full advice from legal counsel on the risks and liabilities associated with an action or decision.¹⁸

Based on the facts provided by the Council, prior to the January 9, 2018, special meeting, Sergeant Hoffer made specific claims to the City Attorney regarding alleged workplace harassment and discrimination accusations against the City and had hired a lawyer.¹⁹ The City Attorney brought these accusations to the Council during the executive session to discuss potential litigation involving the City. Due to the nature of these allegations and subsequent actions by Sergeant Hoffer, it was reasonable for the

¹⁶ N.D.A.G. 44-04-19.1(5); H.B. 1345, 2017 N.D. Leg.

¹⁷ Hearing on H.B. 1345 Before the House Comm. on the Judiciary, 2017 N.D. Leg. (Jan. 30, 2017) (Statement of Asst. Att’y Gen. Sandra DePountis); Hearing on H.B. 1345 Before the Senate Comm. on the Judiciary, 2017, N.D. Leg. (Mar. 6, 2017) (Statement of Asst. Att’y Gen. Sandra DePountis).

¹⁸ Hearing on H.B. 1345 Before the House Comm. on the Judiciary, 2017 N.D. Leg. (Jan. 30, 2017) (Statement of Asst. Att’y Gen. Sandra DePountis); Hearing on H.B. 1345 Before the Senate Comm. on the Judiciary, 2017, N.D. Leg. (Mar. 6, 2017) (Statement of Asst. Att’y Gen. Sandra DePountis).

¹⁹ Letter from Justin Hagel, Att’y, City of Lincoln, to Sandra L. DePountis, Asst. Att’y Gen. (Feb. 5, 2018). The exchange was also on the tape recording provided to the Attorney General’s office that included the executive session.

Council and its attorney to conclude that “reasonably predictable litigation” could ensue.²⁰

Furthermore, the discussions during the executive session fit into the expanded definition of “attorney consultation” as the City Attorney not only provided advice regarding the potential lawsuit, but advised on the legal risks, strengths, and weaknesses of possible actions of the Council moving forward. During the executive session, the City Attorney specifically warned the Council that it would be inappropriate to discuss job performance or take disciplinary action during the closed meeting, as such personnel issues should be put forward during a public meeting. Rather, the City Attorney gave advice on how to address the accusations and the procedure to follow for initiating disciplinary action, if so desired, that would minimize the Council’s exposure to further claims and litigation. To give such guidance during an open meeting would reveal the strengths and weaknesses of Council’s potential actions and claims which could result in further public funds being spent defending the Council’s decisions.²¹ The executive session ended with the Council discussing its legal strategy and next steps regarding the potential lawsuit and possible disciplinary action.

It is my opinion that the discussions that took place during the January 9, 2018, executive session fit into the definition of “attorney consultation” contemplated by N.D.C.C. § 44-04-19.1 and therefore the executive session was authorized by law.

CONCLUSIONS

1. The topic stated in the notice of the executive session of the January 9, 2018, special meeting met the requirements of N.D.C.C. § 44-04-20.

²⁰ See N.D.A.G. 2016-O-01 (finding a former employee’s allegations of hostile work environment and inappropriate conduct against other staff members rose to the level of “reasonably predictable litigation” that was appropriate for discussion as attorney consultation).

²¹ Although there were moments when members of the Council would try to discuss issues other than the liability and claims against the City, such as questioning when an employee may contact the City Attorney and how attorney fees are charged, the City Attorney continually brought the discussion back on topic, reminding the Council what it could and could not discuss in executive session. See *generally* N.D.A.G. 2014-O-01 (brief reference to item not included in the agenda on a special meeting was not a violation when, in recognizing the potential violation, the governing body abandoned such consideration and moved on to discuss items directly related to the agenda topics).

OPEN RECORDS AND MEETINGS OPINION 2018-O-05

March 7, 2018

Page 6

2. The Lincoln City Council complied with N.D.C.C. § 44-04-19.2 before proceeding into an executive session during its January 9, 2018, special meeting.
3. The executive session held during the January 9, 2018, special meeting was an “attorney consultation” authorized by law.

Wayne Stenehjem
Attorney General

sld

cc: Alison Kelly – Assistant News Director KXMB TV (via email only)
Steve Wallick – Editor of The Bismarck Tribune (via email only)
Michael Geiermann (via email only)