

**OPEN RECORDS AND MEETINGS OPINION
2019-O-19**

DATE ISSUED: October 17, 2019

ISSUED TO: North Dakota Board of Chiropractic Examiners

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Dr. Jake Schmitz asking whether the North Dakota Board of Chiropractic Examiners violated N.D.C.C. §§ 44-04-19.2 and 44-04-18 by holding improper executive sessions and withholding requested records.

FACTS PRESENTED

The North Dakota Board of Chiropractic Examiners held a regular meeting on July 10, 2019.¹ During the meeting, the Board held several executive sessions, two of which were questioned by the requestor for this opinion, Dr. Schmitz, as to whether they were authorized by law and whether final action was taken.

During the meeting, the Board discussed amendments to its administrative rules, Title 17.² The Board held an executive session to discuss one specific administrative rule, N.D.A.C. § 17-03-01-01(18), citing attorney consultation pursuant to N.D.C.C. § 44-04-19.1(2) as the legal authority for closing the meeting.³ Upon reconvening in open session, the Board announced that it was directing its legal counsel to continue drafting amendments to the administrative rules and to specifically remove subsections (g) and (h) from N.D.A.C. § 17-03-01-01(18). The Board then continued its discussion about further amendments to other administrative rules.⁴

¹ Agenda, N.D. Bd. of Chiropractic Exam'rs (July 10, 2019); Minutes, N.D. Bd. of Chiropractic Exam'rs (July 10, 2019).

² Minutes, N.D. Bd. of Chiropractic Exam'rs (July 10, 2019); Email from Allyson Hicks, Asst. Att'y Gen., N.D. Bd. of Chiropractic Exam'rs, to Att'y Gen.'s Office (July 31, 2019, 11:04 AM).

³ Agenda, N.D. Bd. of Chiropractic Exam'rs (July 10, 2019); Minutes, N.D. Bd. of Chiropractic Exam'rs (July 10, 2019).

⁴ Minutes, N.D. Bd. of Chiropractic Exam'rs (July 10, 2019).

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The other executive session at issue in this opinion was held to discuss new complaints submitted against three licensed chiropractors under the legal authority for attorney consultation and to discuss exempt complaint records pursuant to N.D.C.C. § 43-06-15(2).⁵ After adjourning the executive session and reconvening to an open meeting, the Board did not further discuss or take any action on the new cases.⁶

On July 11, 2019, Dr. Schmitz made an open records request to the Board for emails and recordings of the executive sessions discussed above.⁷ The Board responded to the request the next day, providing copies of the emails with attachments but denied the request for the recordings of the executive session, citing N.D.C.C. § 44-04-19.1(2), attorney consultation, and N.D.C.C. § 43-06-15(2), complaint records.⁸

ISSUES

1. Whether two of the executive sessions held during the North Dakota Board of Chiropractic Examiners' July 10, 2019, meeting were authorized by law.
2. Whether the North Dakota Board of Chiropractic Examiners properly withheld executive session recordings from an open records request.

ANALYSIS

Issue One

All meetings of a governing body of a public entity must be open to the public unless otherwise provided by law.⁹ 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) and to consider or discuss closed or confidential records.¹⁰

⁵ Agenda, N.D. Bd. of Chiropractic Exam'rs (July 10, 2019); Minutes, N.D. Bd. of Chiropractic Exam'rs (July 10, 2019).

⁶ Agenda, N.D. Bd. of Chiropractic Exam'rs (July 10, 2019); Minutes, N.D. Bd. of Chiropractic Exam'rs (July 10, 2019); Letter from Dr. Dion Ficek, Pres., N.D. Bd. of Chiropractic Exam'rs, to Att'y Gen.'s Office (July 24, 2019).

⁷ Email from Dr. Jake Schmitz to Lisa Blanchard, Exec. Dir., N.D. Bd. of Chiropractic Exam'rs (July 11, 2019, 5:31 PM).

⁸ Email Lisa Blanchard, Exec. Dir., N.D. Bd. of Chiropractic Exam'rs, to Dr. Jake Schmitz (July 12, 2019, 9:47 AM).

⁹ N.D.C.C. § 44-04-19.

¹⁰ N.D.C.C. §§ 44-04-19.1(2), (5) and 44-04-19.2(1).

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 The use of the phrase “reasonably predictable” in N.D.C.C. § 44-04-19.1 requires more than a mere possibility or potential of litigation or adversarial administrative proceeding.¹² The possibility of litigation or a proceeding must be realistic and tangible.¹³ The definition of “attorney consultation” was expanded during the 2017 legislative session.¹⁴ A recent opinion from this office analyzed the expanded definition:

[T]he 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.” 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. 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.¹⁵

In addition, an executive session may be held to discuss closed or confidential records.¹⁶ Section 43-06-15, N.D.C.C., protects complaints filed with the Board against a licensee and protects medical or psychological information relative to the examination or treatment of the licensed chiropractor.¹⁷

Final action on a topic discussed during an executive session must occur during the open portion of the meeting unless otherwise required by law to be taken during the executive session.¹⁸ “Final action” is defined as “a collective decision or a collective commitment or promise to make a decision on any matter, including formation of a

¹¹ N.D.C.C. § 44-04-19.1(2), (5).

¹² N.D.A.G. 2018-O-05.

¹³ N.D.A.G. 2018-O-05; N.D.A.G. 2015-O-15; N.D.A.G. 2015-O-13.

¹⁴ N.D.A.G. 44-04-19.1(5); H.B. 1345, 2017 N.D. Leg.

¹⁵ N.D.A.G. 2018-O-05 (citations omitted).

¹⁶ N.D.C.C. § 44-04-19.2(1).

¹⁷ See *also* N.D.C.C. § 43-06-14.1(7) (protecting patient testimony or records).

¹⁸ N.D.C.C. § 44-04-19.2(2)(e).

position or policy.”¹⁹ 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.”²⁰

If a governing body provides guidance to a negotiator which, if revealed in public, would undermine future negotiations and result in adverse fiscal effects, then it is considered “guidance” under N.D.C.C. § 44-04-19.2.²¹ Likewise, it is only considered “guidance” under N.D.C.C. § 44-04-19.1, “attorney consultation,” if the discussion would reveal attorney work product, litigation strategy, or legal risks, strengths, and weaknesses that would have an adverse fiscal effect on the public entity if conducted in public.²² However, when a governing body makes a unilateral decision without options for further negotiations, or authorizes a negotiator to finish negotiations and enter into a final agreement without further approval from the governing body, it goes beyond “guidance” and is considered “final action.”²³

The two executive sessions at issue were recorded in compliance with N.D.C.C. § 44-04-19.2(5) and reviewed by this office.

Administrative Rules Executive Session

The Board entered into the first executive session for attorney consultation to discuss a specific change to an administrative rule, N.D.A.C. § 17-03-01-01(18), subsections (g) and (h). Prior to the meeting, the Board had received correspondence from a company that markets to chiropractors, complaining about these subsections and threatening to report the Board to the Federal Trade Commission if the Board did not change the rule.²⁴ The Board received its attorney’s advice and guidance regarding the threatened legal action, and the legal risks, strengths, and weaknesses regarding this rule. Holding the discussions in public would have an adverse fiscal effect as the resulting litigation could be costly depending on the position of the Board. The Board provided guidance

¹⁹ *Id.*

²⁰ *Id.* See also N.D.A.G. 2018-O-14; N.D.A.G. 2015-O-16; N.D.A.G. 2015-O-15; N.D.A.G. 2013-O-02; N.D.A.G. 2009-O-09; N.D.A.G. 2007-O-11.

²¹ N.D.A.G. 2018-O-14; N.D.A.G. 2018-O-08.

²² N.D.C.C. § 44-04-19.1(5) (definition of “attorney consultation”), (6) (definition of “attorney work product”).

²³ N.D.A.G. 2018-O-14; N.D.A.G. 2018-O-08.

²⁴ Letter from Dr. Dion Ficek, Pres., N.D. Bd. of Chiropractic Exam’rs, to Att’y Gen.’s Office (July 24, 2019).

to the attorney to continue drafting the rules by removing the discussed subsections, which was relayed to the public upon reconvening in open session.²⁵

It is my opinion that the discussions regarding the specific rule were properly held in executive session as attorney consultation. The Board received realistic and tangible threats of litigation and received its attorney's advice regarding the potential outcome of the litigation. Furthermore, the attorney provided an overview of the strengths and weaknesses of the Board's position if they did not change the rule that, if held in public, would divulge the legal strategy of the Board, compromising the Board's position against a potential lawsuit, which could result in an adverse fiscal effect.

It is further my opinion that the Board providing guidance to its attorney during the executive session was not considered final action. The Board has yet to take final action on the rules as the Board, at the time of this opinion, is continuing to review and discuss additional amendments to its administrative rules.

New Complaints against Licensees

During the next executive session, the Board discussed new complaints against three licensees, possible legal grounds to pursue action, and what additional information they would request from the licensees to make a determination. The Board's attorney provided guidance on the strengths of pursuing action based on the information provided. The Board asked its executive director to send letters to two of the licensees requesting further information and asked its attorney to begin negotiating a settlement agreement against the other licensee.

Complaints made to the Board against licensees are not public records pursuant to N.D.C.C. § 43-06-15(2). The Board also received its attorney's advice on the legal strengths of the case and what additional information would be needed to pursue claims. To hold that discussion in public would reveal the legal strategy of the Board for potential disciplinary action. It is therefore my opinion that the Board had the legal authority to hold the executive session to discuss the complaints.

Finally, it is my opinion that no final action was taken during the executive session. The Board requested additional information before making a decision on whether to pursue disciplinary action against two licensees. Further, the Board provided guidance to its attorney to negotiate a settlement agreement with certain terms discussed during the

²⁵ Email from Allyson Hicks, Asst. Att'y Gen., N.D. Bd. of Chiropractic Exam'rs, to Att'y Gen.'s Office (July 31, 2019, 11:04 AM).

executive session. Once an agreement is reached, the agreement would come back before the Board to approve, which would be the final action.²⁶

Issue Two

Dr. Schmitz made an open records request to the Board for recordings of the executive sessions at issue in this opinion.²⁷ The Board denied the request for the recordings of the executive session, citing N.D.C.C. § 44-04-19.1(2) attorney consultation and N.D.C.C. § 43-06-15(2) exempt complaint records.²⁸

All records of a public entity must be open to the public unless otherwise specifically provided by law.²⁹ Disclosure of the recording of an authorized executive session is limited:

The recording must be disclosed pursuant to court order under subsection 2 of section 44-04-18.11 or to the attorney general for the purpose of administrative review under section 44-04-21.1. The attorney general may not disclose to the public any recording received under this subsection and must return the recording to the governing body upon completion of the administrative review. The recording may be disclosed upon majority vote of the governing body unless the executive session was required to be confidential. Disclosure of the recording by a public servant except as provided in this subsection is a violation of section 12.1-13-01.³⁰

A recording of an executive session, held to hear exempt information, may be disclosed only upon approval of the Board.³¹ The Board did not approve disclosure of the executive session recordings and it is therefore my opinion that the Board properly denied Dr. Schmitz's request for these records.

²⁶ Email from Allyson Hicks, Asst. Att'y Gen., N.D. Bd. of Chiropractic Exam'rs, to Att'y Gen.'s Office (July 31, 2019, 11:04 AM). I would caution that if the agreement was not coming back before a governing body in an open meeting, and instead, the governing body authorized the execution of the agreement without further approval, that would be considered "final action" and would need to be taken in the open meeting following the executive session. See N.D.A.G. 2016-O-22.

²⁷ Email from Dr. Jake Schmitz to Lisa Blanchard, Exec. Dir., N.D. Bd. of Chiropractic Exam'rs (July 11, 2019, 5:31 PM).

²⁸ Email Lisa Blanchard, Exec. Dir., N.D. Bd. of Chiropractic Exam's, to Dr. Jake Schmitz (July 12, 2019, 9:47 AM).

²⁹ N.D.C.C. § 44-04-18.

³⁰ N.D.C.C. § 44-04-19.2(5).

³¹ *Id.*, see also N.D.C.C. § 12.1-13-01.

CONCLUSIONS

1. The executive sessions held during the North Dakota Board of Chiropractic Examiners' July 10, 2019, meeting were authorized by law.
2. The North Dakota Board of Chiropractic Examiners properly withheld executive session recordings from an open records request.

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cc: Dr. Jake Schmitz (via email only)