

**OPEN RECORDS AND MEETINGS OPINION  
2020-O-03**

DATE ISSUED: May 18, 2020

ISSUED TO: City of Napoleon

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Amanda Hayen asking whether the City of Napoleon violated N.D.C.C. §§ 44-04-19 and 44-04-20 by failing to properly notice a meeting, failing to follow proper executive session procedure, and holding an unauthorized executive session.

**FACTS PRESENTED**

The Napoleon City Council holds its regular meetings on the first Monday of every month.<sup>1</sup> A recurring agenda item considered at all monthly meetings is "Police & Court Report" delivered by the municipal judge.<sup>2</sup> At its March 2, 2020, meeting, the municipal judge provided a report to the City Council that raised several concerns regarding the Napoleon Police Chief.<sup>3</sup> In response to the report, the City Council entered into an executive session with its attorney "to discuss what was said here [...] the police issue."<sup>4</sup>

The executive session lasted over an hour and upon reconvening the meeting in open session "[a] brief verbal summary of the executive session was provided as part of the open meeting after adjourning the executive session, which summarized that the Napoleon City Council had reviewed the complaints received at the meeting, that the matter would be turned over to the Police Committee, and that further advice would be sought from the city attorney as to appropriate legal action."<sup>5</sup>

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<sup>1</sup> Napoleon, ND, *City Leadership*, <http://napoleonnd.com/about-us/>.

<sup>2</sup> Letter from Cody Cooper, Asst. City Att'y, Napoleon, to Att'y Gen. Office (Apr. 2, 2020), *see also* Agenda, City Council (Mar. 2, 2020).

<sup>3</sup> Letter from Cody Cooper, Asst. City Att'y, Napoleon, to Att'y Gen. Office (Apr. 2, 2020), *see also* Minutes, Napoleon City Council (Mar. 2, 2020).

<sup>4</sup> Letter from Cody Cooper, Asst. City Att'y, Napoleon, to Att'y Gen. Office (Apr. 2, 2020), *see also* Minutes, Napoleon City Council (Mar. 2, 2020).

<sup>5</sup> Letter from Cody Cooper, Asst. City Att'y, Napoleon, to Att'y Gen. Office (Apr. 2, 2020), *see also* Minutes, Napoleon City Council (Mar. 2, 2020).

The City Council then discussed abolishing the municipal court.<sup>6</sup> This issue had been previously raised at meetings and was briefly discussed during the executive session, but was not specifically included as topic on the March 2, 2020, meeting agenda.<sup>7</sup> A motion was made and passed to approve the first reading of a proposed ordinance to dissolve the municipal court.<sup>8</sup>

### ISSUES

1. Whether Napoleon City Council's notice of its March 2, 2020, meeting substantially complied with N.D.C.C. § 44-04-20.
2. Whether Napoleon City Council's executive session during its March 2, 2020, meeting, complied with the procedures required by N.D.C.C. § 44-04-19.2.
3. Whether the executive session held during Napoleon City Council's March 2, 2020, 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 in substantial compliance with N.D.C.C. § 44-04-20, including an agenda of topics that will be considered and any executive session expected or anticipated to be held.<sup>9</sup> "Unlike special or emergency meetings, regular meetings of a governing body 'need not be restricted to the agenda topics included in the notice.'"<sup>10</sup> Instead, notice of a regular meeting must include all topics the governing body expects to consider *at the time* the agenda is prepared.<sup>11</sup> New agenda items, not anticipated at the time the agenda was prepared, may therefore, be added and discussed during a regular meeting.<sup>12</sup>

At the time the March 2, 2020, regular meeting agenda was prepared, the City Council did not know it would hold an executive session or discuss abolishing the municipal

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<sup>6</sup> Letter from Cody Cooper, Asst. City Att'y, Napoleon, to Att'y Gen. Office (Apr. 2, 2020), *see also* Minutes, Napoleon City Council (Mar. 2, 2020).

<sup>7</sup> Letter from Cody Cooper, Asst. City Att'y, Napoleon, to Att'y Gen. Office (Apr. 2, 2020); *see also* Agenda, City Council (Mar. 2, 2020).

<sup>8</sup> Letter from Cody Cooper, Asst. City Att'y, Napoleon, to Att'y Gen. Office (Apr. 2, 2020), *see also* Minutes, Napoleon City Council (Mar. 2, 2020).

<sup>9</sup> N.D.C.C. § 44-04-20(1), (9).

<sup>10</sup> N.D.A.G. 2013-O-09; N.D.A.G. 2000-O-10.

<sup>11</sup> N.D.C.C. § 44-04-20(2); N.D.A.G. 2015-O-13; N.D.A.G. 2005-O-18.

<sup>12</sup> N.D.A.G. 2013-O-09; N.D.A.G. 2011-O-06; N.D.A.G. 2010-O-12.

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court.<sup>13</sup> Instead, the executive session was in direct response to concerns raised by the municipal judge in his report. It was during this executive session that the City Council raised a previously discussed topic of whether to abolish the municipal court. The City Council came out of the executive session and took action regarding abolishing the court.

The City Council can add unanticipated items to its agenda during a regular meeting. It is therefore my opinion that because the agenda contained all topics the City Council anticipated at the time it was prepared, the notice of the City Council's March 2, 2020, regular meeting substantially 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.<sup>14</sup> 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).<sup>15</sup> Before proceeding into an executive session, the governing body must comply with the procedural requirements of N.D.C.C. § 44-04-19.2, including announcing 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."<sup>16</sup> A governing body must pass a motion by a recorded roll call vote to hold an executive session for "attorney consultation."<sup>17</sup>

Before proceeding into the executive session, the City Council announced to the public that the purpose for the executive session was to discuss "what was said here [...] the police issue."<sup>18</sup> Past opinions recognize that the announcement regarding the topic to be considered during 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

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<sup>13</sup> Letter from Cody Cooper, Asst. City Att'y, Napoleon, to Att'y Gen. Office (Apr. 2, 2020).

<sup>14</sup> N.D.C.C. § 44-04-19.

<sup>15</sup> N.D.C.C. § 44-04-19.1(2), (5). As shown in the next section, the City Council held an executive session for Attorney consultation during the March 2, 2020, meeting.

<sup>16</sup> N.D.C.C. § 44-04-19.2(2)(b).

<sup>17</sup> 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 to the public, the governing body must pass a motion before proceeding into the executive session for such a discussion. N.D.A.G. 2016-O-13.

<sup>18</sup> Letter from Cody Cooper, Asst. City Att'y, Napoleon, to Att'y Gen. Office (Apr. 2, 2020).

planning to discuss in executive session.<sup>19</sup> Taking into account the report and concerns raised by the municipal judge right before proceeding into the executive session, and the Chairman's statement that the executive session would be in regards to the police issue raised by the judge, it is my opinion that the City Council adequately announced the topic it would be discussing during the executive session.

However, as discussed in the next section, the legal authority used to close the meeting was "attorney consultation" pursuant to N.D.C.C. § 44-04-19.1. This was not announced to the public before proceeding into the executive session. No motion was made before proceeding into the executive session, which is required for attorney consultation.

### Issue Three

A governing body may hold an executive session for "attorney consultation" when it is seeking or receiving its "attorney's advice regarding and in anticipation of reasonably predictable ... litigation<sup>20</sup> ... or 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.<sup>21</sup> All other discussions beyond the attorney's advice and guidance must be made in the open, unless otherwise provided by law. Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation."<sup>22</sup>

The City Council's March 2, 2020, executive session was recorded in compliance with N.D.C.C. § 44-04-19.2(5) and reviewed by this office.

The executive session began with the city attorney providing a first-hand account of the events described by the municipal judge. The attorney went through the events and gave his impression on the actions of the police chief and the response by the municipal judge. Using this information as a basis, the city attorney then gave his impression on

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<sup>19</sup> N.D.A.G. 2016-O-01; N.D.A.G. 2005-O-18.

<sup>20</sup> At the time of the executive session, there was no evidence or argument of pending or reasonably predictable litigation against the City regarding the matters at issue. This opinion will therefore focus on the second part of "Attorney consultation" for receiving legal guidance on the risks, strengths, and weaknesses of an action of a public entity.

<sup>21</sup> N.D.C.C. § 44-04-19.1(5).

<sup>22</sup> The City of Napoleon also cited N.D.C.C. § 44-04-19.1(1) and (6), "attorney work product" as a basis for the executive session. However, upon review of the recording of the executive session, although there were references made to various documents and reports, including a confidential Child Abuse and Neglect Report received from the Department of Social Services, the contents of this report and other documents were not discussed. Therefore, the analysis will focus on the "attorney consultation" exception under open meetings law.

the potential legal implications regarding the events and of the police chief's involvement with any future actions or cases before the municipal or district court.

The City Council then engaged in a lengthy discussion on the events and issues raised by the judge and how to handle the animosity between the police chief and judge. Briefly, the City Council considered moving forward with a previously discussed ordinance abolishing the municipal court, and how that could potentially address part of the issue, but then brought the conversation back to how it would handle its employee, the police chief. The City Council discussed the actions of the police chief, individual concerns, first-hand impressions, and the performance of the police chief's official duties. The City Council discussed how to move forward with this and other future personnel matters for all city employees.

The attorney gave guidance at the beginning of the executive session. The only other time the attorney gave advice about the potential risks, exposure, and liabilities of the City during the executive session was halfway through the executive session for approximately ten minutes. The remaining time was a discussion by council members about personnel matters.

The executive session ended with the City Council agreeing that the matter should be referred to the Police Committee and discussed at a later date.

This office and the North Dakota Supreme Court repeatedly recognize that personnel matters, including discussion on employment issues, termination of public employees, and job performance and evaluations, are not protected under the open records and meetings law, and a governing body may not hold an executive session on such matters, even though it may be uncomfortable to discuss at an open meeting.<sup>23</sup> Except for the first approximately ten minutes at the beginning and ten minutes during the middle of the executive session when the City Council was receiving its attorney's advice on the potential risks and liabilities for the City, the rest of the executive session consisted of the City Council discussing personnel issues, the job performance of a city employee, and personnel policies and procedures moving forward. It is my opinion that the discussions went beyond the limits of an "attorney consultation" and were improperly held in the executive session.

## CONCLUSIONS

1. The notice of Napoleon City Council's March 2, 2020, meeting substantially complied with N.D.C.C. § 44-04-20.

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<sup>23</sup> See N.D.A.G. 2017-O-03, citing 23 past opinions and three North Dakota Supreme Court cases.

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2. Napoleon City Council's executive session during its March 2, 2020, meeting, failed to comply with the procedures required by N.D.C.C. § 44-04-19.2 because the City Council did not announce its legal authority for holding the executive session or pass a motion to enter the executive session for attorney consultation.
3. The majority of the executive session held during Napoleon City Council's March 2, 2020, meeting was unauthorized by law because the discussions related to personnel issues.

STEPS NEEDED TO REMEDY VIOLATION

The March 2, 2020, meeting minutes must be updated to reflect that the City Council entered into the executive session for "attorney consultation."

Except for the two instances in which the City Council was receiving its attorney's advice on the potential risks and liabilities as outlined in Issue Three, the rest of the March 2, 2020, executive session recording must be disclosed to Ms. Hayen, and anyone else requesting it, 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.<sup>24</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>25</sup>

Wayne Stenehjem  
Attorney General

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cc: Amanda Hayen (via email only)

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<sup>24</sup> N.D.C.C. § 44-04-21.1(2).

<sup>25</sup> *Id.*