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**OPEN RECORDS AND MEETINGS OPINION**  
**2023-O-05**

DATE ISSUED: October 12, 2023

ISSUED TO: Williston Basin School District #7

**CITIZEN'S REQUEST FOR OPINION**

Michael J. Geiermann requested an opinion from this office under North Dakota Century Code § 44-04-21.1, asking whether Williston Basin School District #7 violated N.D.C.C. §§ 44-04-20, 44-04-19.2, 44-04-19 by improperly noticing an executive session, failing to properly describe the general subject matter and legal authority before entering an executive session, and holding an unauthorized executive session.

**FACTS PRESENTED**

On October 22, 2021, the Williston Basin School District #7 (District) school board (Board) held a special meeting.<sup>1</sup> The meeting notice was posted at each school in the District, including the main District office, and on the District website.<sup>2</sup> The official newspaper and county auditor were notified.<sup>3</sup> Notice of the special meeting included an executive session for “attorney consultation for the school board to receive attorney advice and guidance on the legal risks, strengths, and weaknesses of potential negotiations with the superintendent, under NDCC 44-04-19.1(2), (5), (9); NDCC 44-04-19.2).”<sup>4</sup>

Prior to entering the executive session, the Board announced “the purpose and topic of the executive session, which was to seek or 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 of the entity.’”<sup>5</sup> The Board President clearly articulated the Board’s intent that “[t]he topic or purpose of this executive session is for the board to receive attorney consultation and for the board to provide direction on potential negotiations with the superintendent.”

During the executive session, attended by the District’s legal counsel and all of the Board members, John Kasmer, Kyle Renner, Tom Kalil, Heather Wheeler, Sarah Williams, Cory Swint,

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<sup>1</sup> Letter from KrisAnn Norby-Jahner, Att’y at Law, to Annique M. Lockard, Assistant Att’y Gen. (Dec. 17, 2021).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Agenda, Sch. Bd., Williston Basin Sch. Dist. #7 (Oct. 22, 2021).

<sup>5</sup> Letter from KrisAnn Norby-Jahner, Att’y at Law, to Annique M. Lockard, Assistant Att’y Gen. (Dec. 17, 2021).

and, Board President, Chris Jundt, the Board “provided instructions to its Board President and legal counsel on negotiations with Dr. Thake [the District Superintendent] regarding his contract.”<sup>6</sup> There were “no actionable items to discuss or consider following the executive session” and “no action was taken” upon returning to the open portion of the meeting.<sup>7</sup> The executive session lasted approximately one hour and was recorded in compliance with N.D.C.C. § 44-04-19.2(5).<sup>8</sup> A copy has been reviewed by this office.

### ISSUES

1. Whether the meeting notice described the general subject matter of the executive session in compliance with N.D.C.C. § 44-04-20.
2. Whether the announcement before entering executive session gave the public sufficient notice of the general subject matter of, and the legal authority for holding the executive session.
3. Whether the executive session was authorized by law and limited to the topics and legal authority announced during the open part of the meeting.

### ANALYSIS

#### Issue 1

When a governing body of a public entity holds a meeting, it must provide a notice of the meeting in advance that includes the date, time, location of the meeting, topics to be considered, and the “general subject matter of any executive sessions expected to be held during the meeting.”<sup>9</sup> An executive session is the part of a meeting that is not open to the public because closed or confidential information is being discussed.<sup>10</sup> It is important for the notice to describe the general subject matter of the executive session in such a way that the public understands the topic or purpose of the executive session.<sup>11</sup>

Here, the special meeting notice stated an executive session would be held for attorney consultation so the Board could “receive attorney advice and guidance on the legal risks, strengths, and

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> N.D.C.C. § 44-04-20(2), *see also* N.D.A.G. 2022-O-02.

<sup>10</sup> N.D.C.C. § 44-04-17.1(4).

<sup>11</sup> N.D.A.G. 2022-O-02, *citing* N.D.A.G. 2009-O-15; *see also* N.D.A.G. 2005-O-18; N.D.A.G. 2004-O-19; N.D.A.G. 2003-O-22.

weaknesses of potential negotiations with the superintendent.”<sup>12</sup> The agenda cited N.D.C.C. § 44-04-19.1(2), (5), (9); N.D.C.C. § 44-04-19.2 as the legal authority for the executive session.<sup>13</sup>

The notice provided sufficient information to the public that the topic or purpose of the executive session would be consultation with their attorney regarding potential negotiations with the District Superintendent; therefore, it is my opinion that the Board’s notice complied with the notice requirements of N.D.C.C. § 44-04-20(2).

## Issue 2

In addition to information about the executive session included in the meeting notice, the governing body must also make an announcement in the open meeting about the topics it will be considering and the legal authority for holding the executive session.<sup>14</sup> A governing body “must provide sufficient information about the topic and purpose of the executive session to keep the public apprised of the legally sufficient reason for holding the executive session.”<sup>15</sup> “A governing body must pass a motion by a recorded roll call vote to hold an executive session for ‘attorney consultation.’”<sup>16</sup>

Before entering the executive session, the Board President announced to the public “[t]he first item on this special meeting agenda is an executive session for attorney consultation for the school board to receive attorney advice and guidance on the legal risks, strengths, and weaknesses of potential negotiations with the superintendent which, if held in public, would have an adverse fiscal effect on the school district.”<sup>17</sup> He further stated, “[t]he legal authority for closing this portion of the meeting is North Dakota Century Code section 44-04-19.1, subdivisions (2), (5), and (9); and section 44-04-19.2 The topic or purpose of this executive session is for the board to receive attorney consultation and for the board to provide direction on potential negotiations with the superintendent.”<sup>18</sup> The Board then motioned to enter the executive session.<sup>19</sup>

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<sup>12</sup> Agenda, Sch. Bd., Williston Basin Sch. Dist. #7 (Oct. 22, 2021).

<sup>13</sup> *Id.*

<sup>14</sup> N.D.C.C. § 44-04-19.2(2)(b), *see also* N.D.A.G. 2022-O-02.

<sup>15</sup> N.D.A.G. 2022-O-02, *citing* N.D.A.G. 2015-O-13 (*citing* N.D.A.G. 2005-O-18); N.D.A.G. 2001-O-17.

<sup>16</sup> N.D.A.G. 2022-O-04; *citing* 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. As 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.” *See also* N.D.A.G. 2020-O-03.

<sup>17</sup> Letter from KrisAnn Norby-Jahner, Att’y at Law, to Annique M. Lockard, Assistant Att’y Gen. (Dec. 17, 2021).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

This announcement has more specificity than many past opinions which found references to “[n]egotiations of [c]ontracts,” “personnel matters,” or “the conclusion of negotiations” to be insufficient to apprise the public of the reason for the executive session.<sup>20</sup> This verbal announcement identified the Board’s intention to receive advice and guidance from its attorney regarding negotiations with the District Superintendent; and the legal authority to hold the executive session; therefore, it is my opinion that the Board’s general description of the topic or purpose for the executive session was in substantial compliance with the notice requirements of N.D.C.C. § 44-04-19.2.

### Issue 3

A governing body of a public entity may only hold an executive session if it has specific statutory authority.<sup>21</sup> The authority used by the Board to hold the executive session is commonly referred to as “attorney consultation” and “negotiation strategy.”<sup>22</sup> Both exemptions have certain requirements that must be met in order to close a meeting and, while in the meeting, the discussion is limited to the topics previously announced during the open part of the meeting.<sup>23</sup>

#### Attorney Consultation

The first reason listed on the notice to close the special meeting was pursuant to N.D.C.C. §§ 44-04-19.1(2) and (5). N.D.C.C. § 44-04-19.1(5) states:

‘Attorney consultation’ means any discussion between the members of a governing body and its attorney in instances in which the governing body seeks or receives the attorney's advice regarding and in anticipation of reasonably predictable or pending civil or criminal litigation or adversarial administrative proceedings 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. 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>24</sup>

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<sup>20</sup> See N.D.A.G. 2022-O-02; N.D.A.G. 2015-O-13; N.D.A.G. 2013-O-09; N.D.A.G. 2003-O-22, citing N.D.A.G. 2000-O-05).

<sup>21</sup> N.D.A.G. 2013-O-11.

<sup>22</sup> *Id.*

<sup>23</sup> See also N.D.A.G. 2004-O-24. N.D.A.G. 2022-O-02, see N.D.C.C. § 44-04-19.2(2)(d).

<sup>24</sup> N.D.C.C. § 44-04-19.1(2) makes attorney consultation exempt.

Here, the executive session recording begins with nineteen minutes of discussion about the motion to close the meeting.<sup>25</sup> This part of the recording happened in the open meeting.<sup>26</sup> Upon entering the executive session, the Board heard introductory comments from the Board President, took roll call of the Board members and their legal counsel, and explained background information about the matter.<sup>27</sup> For almost 20 more minutes the Board discussed topics that were not part of the announced topics prior to the executive session.<sup>28</sup> Not until approximately forty minutes into the executive session did the attorney explain the Board's legal options.<sup>29</sup> The Board and its attorney then discussed specifics about Dr. Thake's situation and how they could proceed.<sup>30</sup> Much of this discussion was proper for executive session. However, after that discussion,<sup>31</sup> the Board discussed how to treat Dr. Thake during the negotiation process and then heard a recitation of a prepared media statement. The recording continued another approximately six minutes after the Board adjourned the executive session and included Mr. Jundt's statement to the media, read to the public during the re-opened part of the public meeting, and questions for Mr. Jundt about who the Board members were.<sup>32</sup>

It is my opinion that the Board properly held an executive session for attorney consultation. However, there are many instances during the executive session where the Board members discussed amongst themselves issues leading up to, and following, their attorney's advice and negotiation discussion. The portion of the discussion limited to the scope of the executive session – the properly announced topics – should have been redacted from the recording upon request, and the remainder of the recording should have been promptly provided to the requester. Additionally, the approximately nineteen minutes of discussion on the motion to enter executive session, held by the Board in the open part of the meeting, and the discussion after the executive session ended, should have been provided to Mr. Geiermann immediately.<sup>33</sup>

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<sup>25</sup> Recording: Executive Session held by Sch. Bd., Williston Basin Sch. Dist. #7 (Oct. 22, 2021).

<sup>26</sup> Letter from KrisAnn Norby-Jahner, Att'y at Law, to Annique M. Lockard, Assistant Att'y Gen. (Dec. 17, 2021).

<sup>27</sup> Recording: Executive Session held by Sch. Bd., Williston Basin Sch. Dist. #7 (Oct. 22, 2021).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* Information taken from Executive Session recording at the 40:13-minute mark.

<sup>30</sup> *Id.* Information taken from Executive Session recording from approximately 40:45 to 01:05.

<sup>31</sup> *Id.* Information taken from Executive Session recording at approximately 01:05.

<sup>32</sup> *Id.*

<sup>33</sup> After this executive session occurred, the North Dakota Supreme Court issued an opinion in *Schmitz v. State Bd. of Chiropractic Exam'rs*, 2022 ND 52, 971 N.W.2d 892, that narrowly interpreted attorney consultation and ordered portions of an executive session that occurred in the open meeting to be released.

Negotiating Strategy

The second reason stated on the Board's notice to close its meeting was for negotiating strategy pursuant to N.D.C.C. § 44-04-19.1(9) and N.D.C.C. § 44-04-19.2. To close a meeting for negotiation strategy, public entities must meet three elements:

First, the public entity must discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator. Second, there must be litigation, adversarial administrative proceedings, or contracts which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future. Third, a meeting may be closed under this subsection only if keeping the meeting open would have an adverse fiscal effect on the public entity's bargaining or litigating position.<sup>34</sup>

This office has consistently explained that N.D.C.C. § 44-04-19.1(9) "does not authorize an executive session for a governing body to receive an update, history, or summary from its negotiator on the status of contract negotiations."<sup>35</sup> A 2013 opinion stated, "[p]resenting [the] information [of the events that led to the Board meeting] during the open portion of the meeting would not have negatively impacted the Board's position regarding its negotiations . . . and was therefore improperly closed to the public."<sup>36</sup> This office has elucidated that "'introductory comments and explain[ing] the course of events that led to the options before the Board' were not negotiating strategy or instructions and were not properly made in an executive session."<sup>37</sup>

The only parts of the executive session that were properly held for discussion of negotiations, is the approximately fourteen minutes<sup>38</sup> when the Board's discussed negotiating a separation agreement for Dr. Thake. During this period, the Board discussed strategy and terms for the negotiation and gave negotiating instructions to its negotiator, Mr. Jundt, and its attorney. Additionally, the Board explained that because "Dr. Thake had requested that the school board consider entering into the negotiation process with him, and discussion of his contract and a potential contract buy-out would have had an adverse fiscal effect on the Board's bargaining position with Dr. Thake if discussed in open meeting" the Board wanted to seek legal counsel

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<sup>34</sup> N.D.A.G. 2022-O-02, *citing* N.D.C.C. § 44-04-19.1(9); N.D.A.G. 2013-O-11 ("[I]f allowing the other party to the negotiation to listen to the discussion would result in increased costs to the public entity, a meeting may be closed").

<sup>35</sup> N.D.A.G. 2013-O-11, *citing* N.D.A.G. 2005-O-18; N.D.A.G. 2003-O-22; N.D.A.G. 2000-O-05.

<sup>36</sup> N.D.A.G. 2013-O-11, *citing* N.D.A.G. 2005-O-18.

<sup>37</sup> N.D.A.G. 2022-O-02, *citing* N.D.A.G. 2013-O-11, *see also* N.D.A.G. 2005-O-18, N.D.A.G. 2003-O-22, N.D.A.G. 2000-O-05.

<sup>38</sup> Recording: Executive Session held by Sch. Bd., Williston Basin Sch. Dist. #7 (Oct. 22, 2021). Information taken from Executive Session recording from 40:45 to 01:05.

before moving forward with negotiations.<sup>39</sup> Therefore, it is my opinion that during this portion of the executive session, the necessary elements to merit the protections of an executive session were present.

Even though the Board met the three requirements to close the meeting for negotiation much of the discussion during executive session was not limited to the announced topic. All discussion extraneous to the negotiation was improper within the closed executive session.

The portions of the executive session in which the Board received advice from its attorney and provided negotiating instructions to Mr. Jundt were properly closed under N.D.C.C. § 44-04-19.1(5). The remainder of the discussion in executive session was improper because it did not involve negotiation strategy or instruction to its attorney or other negotiator that would result in an adverse fiscal effect on the Board's bargaining or litigating position, nor did it involve attorney consultation regarding reasonably predictable or pending litigation, in violation of N.D.C.C. §§ 44-04-19.1(5) and N.D.C.C. 44-04-19.1(9).

#### CONCLUSIONS

1. The Board's meeting notice described the general subject matter to be discussed during the executive session and complied with the notice requirements of N.D.C.C. § 44-04-20.
2. The Board's announcement before entering the executive session was sufficient because it conveyed the topic to be considered and informed the public of the legal authority for the discussion in compliance with N.D.C.C. § 44-04-19.2.
3. The Board ran afoul of N.D.C.C. § 44-04-19 when it failed to keep its discussion limited to the announced topics and legal authority of attorney consultation and negotiation strategy for the executive session.

#### STEPS NEEDED TO REMEDY VIOLATION

The Board must amend its October 22, 2021, meeting minutes to reflect the discussions that occurred during the executive session. The Board must provide the updated minutes and either the recording of, or at Mr. Geiermann's option, a transcript, of the executive session to Mr. Geiermann, and anyone else requesting it, all at no cost. The parts of the executive session in which the Board's discussion was properly limited to the announced topics may be redacted.

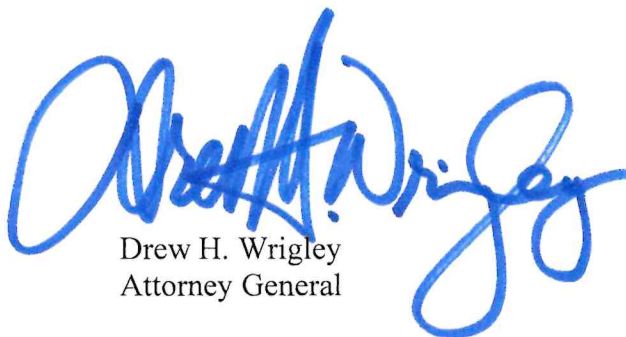
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<sup>39</sup> Letter from KrisAnn Norby-Jahner, Att'y at Law, to Annique M. Lockard, Assistant Att'y Gen. (Dec. 17, 2021).

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While I have every reason to expect the Board will remedy this situation, 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>40</sup> Failure to take these corrective measures may also result in personal liability for the person or persons responsible for the noncompliance.<sup>41</sup>



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cc: Michael J. Geiermann

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<sup>40</sup> N.D.C.C. § 44-04-21.1(2).

<sup>41</sup> *Id.*