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**OPEN RECORDS AND MEETINGS OPINION**  
**2024-O-04**

DATE ISSUED: January 9, 2024

ISSUED TO: North Dakota Board of Chiropractic Examiners

**CITIZEN'S REQUEST FOR OPINION**

Dr. Jake Schmitz requested an opinion from this office under N.D.C.C. § 44-04-21.1 asking whether the North Dakota Board of Chiropractic Examiners violated N.D.C.C. §§ 44-04-18 and 44-04-20 by improperly denying a request for an executive session recording and improperly noticing an executive session.

**FACTS PRESENTED**

During a regular meeting, on January 21, 2022, the North Dakota Board of Chiropractic Examiners (Board) moved into executive session to discuss a pending case regarding Dr. Jeffrey Pokorny.<sup>1</sup> The Board identified N.D.C.C. § 43-06-14.1(7) as the legal authority for the executive session on the original meeting agenda and in an announcement prior to entering the executive session.<sup>2</sup>

The executive session lasted approximately 27 minutes and included discussions “regarding any possible violations of law” and information the Board “had requested and received from Dr. Pokorny.”<sup>3</sup> As the Board identified possible violations, they discussed potential disciplinary sanctions and negotiation strategy.<sup>4</sup> The Board’s legal counsel “provided legal advice on the strengths and weakness of each consideration.”<sup>5</sup> Upon returning to the open meeting, the Board agreed to final terms of a settlement agreement and approved offering a settlement agreement to Dr. Pokorny.<sup>6</sup>

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<sup>1</sup> Letter from Dr. Eric Froehling, President, N.D. Bd. Of Chiropractic Exam’rs, to Annique Lockard, Ass’t Attorney Gen., Off. of Att’y Gen. (Feb. 14, 2022).

<sup>2</sup> Agenda, N.D. Bd. Of Chiropractic Exam’rs (Jan. 21, 2022). This reference is to the Board’s statute on peer review committees and record confidentiality.

<sup>3</sup> Letter from Dr. Eric Froehling, President, N.D. Bd. Of Chiropractic Exam’rs, to Annique Lockard, Ass’t Attorney Gen., Off. of Att’y Gen. (Feb. 14, 2022).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Minutes, N.D. Bd. Of Chiropractic Exam’rs (Jan. 21, 2022).

That same day, Dr. Schmitz requested the portion of the executive session recording “concerning Jeff Pokorny,”<sup>7</sup> specifically discussion about “subsequent punishment/penalty.”<sup>8</sup> After receiving the request, the Board realized that citations were absent from the agenda and the announcement during the meeting regarding the legal authority for the executive session.<sup>9</sup> The Board responded to Dr. Schmitz, on January 25, 2022, denying his request under N.D.C.C. § 44-04-19.1(2) (attorney consultation) and N.D.C.C. § 44-04-19.1(9) (negotiation strategy).<sup>10</sup>

To remediate the notice, the Board promptly drafted an amended agenda, with the additional legal authority for Dr. Pokorny’s case, which included the attorney consultation and negotiation strategy discussed, and posted the updated agenda on the Board’s website on January 24, 2022.<sup>11</sup> The Board provided a copy of the amended agenda with the proper legal authority for the executive session to Dr. Schmitz.<sup>12</sup>

### ISSUE

1. Whether the Board properly denied a request for an executive session recording.
2. Whether the Board’s notice violated the open meetings law.

### ANALYSIS

#### Issue 1

All records are open unless stated otherwise in law.<sup>13</sup> Executive sessions, such as meetings held to “consider or discuss closed or confidential records,”<sup>14</sup> must be recorded; recordings of executive sessions can only be disclosed pursuant to court order, to the attorney general for the purpose of administrative review under N.D.C.C. § 44-04-21.1, or upon majority vote of the governing body “unless the executive session was required to be confidential.”<sup>15</sup>

This office has previously stated, “[t]he purpose of an executive session is not only to protect the records being discussed, but also to protect the consideration or discussion of those closed or

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<sup>7</sup> Email from Dr. Jake Schmitz to Off. of Att’y Gen. (Jan. 25, 2022, 10:09 AM).

<sup>8</sup> Email from Dr. Jake Schmitz to Lisa Blanchard, Exec. Dir., N.D. Bd. of Chiropractic Exam’rs (Jan. 21, 2022, 4:44 PM).

<sup>9</sup> Letter from Dr. Eric Froehling, President, N.D. Bd. Of Chiropractic Exam’rs, to Annique Lockard, Ass’t Attorney Gen., Off. of Att’y Gen. (Feb. 14, 2022).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> N.D.C.C. § 44-04-18.

<sup>14</sup> N.D.C.C. § 44-04-19.2(1).

<sup>15</sup> N.D.C.C. § 44-04-19.2(5).

confidential records.”<sup>16</sup> “[E]xecutive session not only protects closed or confidential records, but also the governing body’s discussion of those protected records.”<sup>17</sup>

Dr. Schmitz immediately requested the portion of the recording of the executive session held to discuss Dr. Pokorny’s case.<sup>18</sup> The Board denied the request stating the recordings were protected attorney consultation and negotiation even though the original notice and announcement during the open portion of the meeting said the reason for the executive session was confidential records under N.D.C.C. § 43-06-14.1(7).<sup>19</sup>

The fact that the Board did not include attorney consultation and negotiation in the notice does not prevent the Board from denying a record on that basis. The law explicitly allows for executive sessions for the purposes of attorney consultation and negotiation in addition to the reasons stated on the notice.<sup>20</sup> According to the Board, parts of the discussion constituted consultation with its attorney and negotiation strategy, in addition to discussions of the N.D.C.C. § 43-06-14.1(7) records.<sup>21</sup> I must take the facts given by the public entity.<sup>22</sup> Therefore, the Board properly denied Dr. Schmitz’s request for the executive session held to discuss Dr. Pokorny’s disciplinary case. The executive session was authorized by law; consequently, the executive session recording is protected by law.

## Issue 2

Notice must be given to the public before “all meetings of a public entity . . . including executive sessions.”<sup>23</sup> Meeting notices “must contain the general subject matter of any executive session expected to be held during the meeting.”<sup>24</sup> The description of the “general subject matter of the

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<sup>16</sup> N.D.A.G. 2022-O-05 *citing* N.D.C.C. § 44-04-19.2.

<sup>17</sup> N.D.A.G. 2022-O-05 *citing* N.D.C.C. § 44-04-19.2; N.D.A.G. 98-O-06.

<sup>18</sup> Email from Dr. Jake Schmitz to Lisa Blanchard, Exec. Dir., N.D. Bd. of Chiropractic Exam’rs (Jan. 21, 2022, 4:44 PM).

<sup>19</sup> Letter from Dr. Eric Froehling, President, N.D. Bd. Of Chiropractic Exam’rs, to Annique Lockard, Ass’t Attorney Gen., Off. of Att’y Gen. (Feb. 14, 2022).

<sup>20</sup> N.D.C.C. § 44-04-19.1(2) and (9).

<sup>21</sup> Dr. Schmitz did not ask for an opinion of this office as to whether the executive session was authorized by law, but rather, whether the Board’s denial was proper, so this office did not review the executive session recording. To the extent that any discussion during the executive session exceeded the general subject of the executive session – attorney consultation, peer review committee records, and/or negotiation strategy – the Board should have reviewed the requested portion of the recording and provided any extraneous discussion in a redacted form to Dr. Schmitz.

<sup>22</sup> N.D.C.C. § 44-04-21.1(1).

<sup>23</sup> N.D.C.C. § 44-04-20(1).

<sup>24</sup> N.D.C.C. § 44-04-20(2).

executive session . . . must be sufficient to provide information about the topic or purpose of the executive session to a member of the public.”<sup>25</sup>

Here, the Board’s meeting agenda, which functions as its notice, stated, in relevant part:

Cases:

...

Dr. Jeffery Pokorny (#2021-03)

...

This item must be discussed in Executive Session. The legal authority for Executive Session is N.D.C.C. 43-06 14.1(7) All data and information, including patient records acquired by the board or the peer review committee, in the exercise of its duties and functions, are confidential and closed to the public. All board and peer review committee meetings wherein patient testimony or records are taken or reviewed are confidential and closed to the public.<sup>26</sup>

The meeting notice contained the general subject matter of the executive session as required in N.D.C.C. § 44-04-20(1). When the notice was created, the Board anticipated it would be discussing confidential records regarding Dr. Pokorny and stated such in the notice. As described in the “Facts Presented” above, when the Board realized that it did not include N.D.C.C. § 44-04-19.1(2) (attorney consultation) and N.D.C.C. § 44-04-19.1(9) (negotiation strategy) in the notice, it immediately amended the notice to include these citations. While this amendment was commendable, it was not necessary because, regardless of what citations were included in the notice,<sup>27</sup> the general subject matter noted in the notice did not change.

#### CONCLUSIONS

1. The Board properly denied Dr. Schmitz’s request for a portion of the executive session recording.
2. The Board’s notice substantially complied with the notice requirements.

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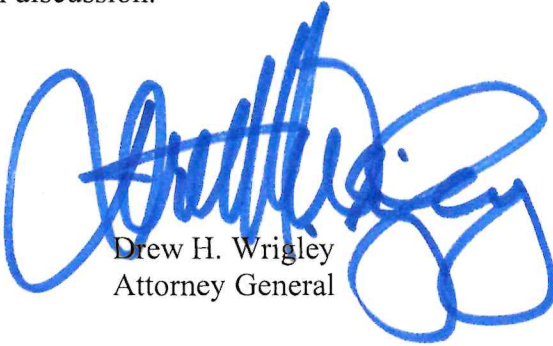
<sup>25</sup> N.D.A.G. 2022-O-04, *citing* N.D.A.G. 2009-O-09, *citing* N.D.A.G. 2007-O-11; N.D.A.G. 2004-O-19. *See also* N.D.A.G. 2005-O-04, *citing* N.D.A.G. 2004-O-19, *citing* N.D.A.G. 2003-O-22.

<sup>26</sup> Agenda, N.D. Bd. Of Chiropractic Exam’rs (Jan. 21, 2022) (internal citations omitted).

<sup>27</sup> Legal authority is a requirement of the announcement in the open portion of the meeting prior to holding the executive session but is not a requirement in the meeting notice. N.D.C.C. § 44-04-19.2(2)(b). Dr. Schmitz did not ask for an opinion on the legal announcement; however, in its response, the Board admits that it did not limit its discussion to N.D.C.C. § 43-06-14.1(7) as stated on the notice and announced in the open meeting.

STEPS NEEDED TO REMEDY VIOLATION

The Board promptly updated its agenda, included in the meeting notice, to reflect the legal authority for the Pokorny executive session; therefore, no further action is necessary regarding the notice. The Board should update its January 21, 2022, meeting minutes to include the legal authority applicable to the executive session discussion.



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cc: Dr. Jake Schmitz