

**OPEN RECORDS AND MEETINGS OPINION
2009-O-20**

DATE ISSUED: November 13, 2009

ISSUED TO: Tioga Airport Authority

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Steve Andrist asking whether the Tioga Airport Authority violated N.D.C.C. § 44-04-19 by holding an executive session that was not authorized by law.

FACTS PRESENTED

On August 13, 2009, the Tioga Airport Authority ("Authority") held a meeting.¹ At the meeting, one of the Authority's members made a motion to go into executive session to discuss a letter from an attorney concerning a former employee of the Authority. The Authority entered executive session to read the letter. The attorney representing the Authority was not present at the meeting and did not participate in the executive session. The executive session was not recorded.

ISSUES

1. Whether the Tioga Airport Authority violated the procedural requirements for holding an executive session found in N.D.C.C. § 44-04-19.2.
2. Whether the Authority's executive session was authorized by law.

ANALYSIS

Issue one

An airport authority is a political subdivision as defined in N.D.C.C. § 44-04-17.1(10) and is therefore a "public entity" subject to the open meetings law.² Unless otherwise

¹ The Authority failed to respond to a letter from this office asking numerous questions about the meeting. Thus, I do not know whether the meeting was a regular meeting or a special meeting of the Authority. The only information this office received was a letter offering a general description of the meeting from Chairman Harold Sundhagen and a copy of the letter reviewed in executive session from member Wayne Knutson.

² See N.D.C.C. § 44-04-17.1(12)(b).

OPEN RECORDS AND MEETINGS OPINION 2009-O-20

November 13, 2009

Page 2

provided by law, all meetings of a public entity must be open to the public.³ A governing body may only hold an executive session to consider or discuss closed or confidential records.⁴ If an executive session is authorized, state law establishes certain procedures that must be followed before, during, and after the executive session.⁵

One procedure required by N.D.C.C. § 44-04-19.2 is that a governing body must vote on whether to close a portion of its meeting to the public and hold an executive session. However, a vote is unnecessary if an executive session is required to protect records that are confidential by law.⁶ A motion to hold an executive session is a nonprocedural motion and therefore must be decided by a recorded roll-call vote.⁷ According to the chairman of the Authority, a motion was made, but the vote was taken by having the members nod their heads.⁸

In 2004, this office addressed whether it was appropriate for members of a board to raise their hands when voting.⁹ I explained that the votes of each member must be made public at the open meeting and so in that situation, the practice of raising hands to vote was not sufficient because the public attending the meeting may not see the hands being raised.¹⁰ The same concern exists with the use of “nod” votes. The chance of the attending public noticing a nod of a head at a meeting is even less than seeing a hand vote. In addition, without the minutes, I cannot verify that the votes were recorded.

A second procedure required by N.D.C.C. § 44-04-19.2 is that prior to holding an executive session, the governing body must “announce the topics to be discussed or considered during the executive session and the body’s legal authority before holding an executive session on those topics. . . .”¹¹ “The purpose of the announcement is to provide the public with a legally sufficient reason for holding the executive session.”¹²

Here, the letter from the Authority’s chairman does not indicate that any announcement of topics or legal authority was made prior to the executive session and no minutes from the meeting were provided. Thus, the Authority failed to comply with N.D.C.C. § 44-04-19.2(2)(b).

³ N.D.C.C. § 44-04-19.

⁴ N.D.C.C. § 44-04-19.2(1).

⁵ N.D.A.G. 2003-O-22. See also N.D.C.C. § 44-04-19.2.

⁶ N.D.C.C. § 44-04-19.2(2)(a).

⁷ N.D.C.C. § 44-04-21(a). See also N.D.A.G. 2004-O-17.

⁸ No minutes from the meeting were provided to this office for review.

⁹ See N.D.A.G. 2004-O-17.

¹⁰ N.D.C.C. § 44-04-21; N.D.A.G. 2004-O-17.

¹¹ N.D.C.C. § 44-04-19.2(2)(b); N.D.A.G. 2001-O-17.

¹² N.D.A.G. 2000-O-10; N.D.A.G. 2001-O-17.

Another procedure required by N.D.C.C. § 44-04-19.2 is that all executive sessions must be recorded electronically or on audiotape or videotape.¹³ The purpose of requiring all executive sessions to be recorded is to provide a process for citizens to verify that the discussion during an executive session was limited to the announced topics.¹⁴ In this case, no recording or tape was provided to this office so I must assume one does not exist.

Based on the foregoing, it is my opinion the Authority failed to comply with the procedural requirements of N.D.C.C. § 44-04-19.2 by failing to take a recorded roll call vote on the motion to go into executive session, by failing to announce the legal authority and topic of the executive session, and by failing to record or tape the executive session.

Issue two

The governing body of a public entity may hold an executive session for an attorney consultation with its attorney regarding and in anticipation of reasonably predictable or pending civil or criminal litigation or adversarial administrative proceedings.¹⁵ In addition, an executive session is authorized to review “attorney work product” which is defined as “any document or record that was prepared by an attorney representing a public entity . . . [and that] [r]eflects a mental impression, conclusion, litigation strategy, or legal theory of that attorney or the entity; and [w]as prepared exclusively for civil or criminal litigation, for adversarial administrative proceedings, or in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings.”¹⁶

Here, the Authority did not meet with its attorney during the executive session so an attorney consultation did not occur. Also, the letter reviewed in executive session by the Authority was not written by its attorney so it is not attorney work product.

A copy of the letter that was reviewed by the Authority during its executive session was provided to my office and reviewed by a member of my staff.¹⁷ The letter contains no exempt or confidential information. Consequently, because the letter is an open record, the Authority had no legal basis for the executive session.

In conclusion, it is my opinion that the executive session held by the Authority on August 13 was not authorized by law and was violation of N.D.C.C. § 44-04-19.

¹³ N.D.C.C. § 44-04-19.2(5).

¹⁴ N.D.A.G. 2003-O-22; N.D.A.G. 2000-O-10.

¹⁵ N.D.C.C. § 44-04-19.1(5).

¹⁶ N.D.C.C. § 44-04-19.1(6).

¹⁷ Letter from David Hermanson to Tioga Airport Authority (Aug. 3, 2009).

CONCLUSIONS

1. The Tioga Airport Authority violated the procedural requirements for holding an executive session found in N.D.C.C. § 44-04-19.2 by failing to vote on whether to hold its executive session, failing to announce the legal authority and topics to be considered during the executive session, and failing to record the executive session.
2. The Tioga Airport Authority had no legal authority to close the meeting on August 13, 2009, to review a letter in executive session.

STEPS NEEDED TO REMEDY VIOLATIONS

The Authority must draft minutes describing the discussion that took place during the executive session. The Authority should then amend the minutes of the August 13, 2009, meeting to include the minutes from the executive session. A copy of the minutes from the executive session and of the letter reviewed in the executive session must be provided to the requester free of charge.

Failure to take the corrective measures described in this opinion within 7 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. § 44-04-21.2.¹⁸ It may also result in personal liability for the person or persons responsible for the noncompliance.¹⁹

Wayne Stenehjem
Attorney General

mkk/vkk

¹⁸ N.D.C.C. § 44-04-21.1(2).

¹⁹ Id.