N.D.A.G. Letter to Ulmer (March 17, 1989)

March 17, 1989

Rep. Dan Ulmer
North Dakota House of Representatives
State Capitol
Bismarck, ND 58505

Dear Representative Ulmer:

Thank you for your recent letter regarding the application of North Dakota's open meetings law to a school board meeting. My staff has learned that your inquiry more specifically concerns a committee or "task force" appointed by the Mandan School Board.

The North Dakota Supreme Court has not discussed the applicability of the open meetings law to committees of public bodies. However, there are several prior Attorney General opinions addressing this issue. Essentially, these opinions have concluded that the applicability of the open meetings law on committees of public bodies depends upon the authority provided to those committees. Where the committee has received a delegation of authority from the parent public body, this office has concluded that the committee should be treated as an entity subject to the open meetings law. Where the committee has no authority to act on its own, this office has stated that the open meetings law is inapplicable. A 1967 Attorney General's opinion provides:

> It is therefore our opinion that the Faculty Senate at the University of North Dakota, when exercising jurisdiction which has been delegated to it by the State Board of Higher Education, assumes the color of a public body as contemplated by section 44-04-19 and the meetings of such group must be open to the public when such jurisdiction is being exercised. Meetings at which the exercise of such jurisdiction does not take place need not be open to the public since the group, in such instance, has no color of a public body.

1966-1968 N.D. Op. Att'y. Gen. 244, 246. A more recent Attorney General's Opinion provides:

> If that committee has the authority to bind the entire board without further action by the board, it would appear the Courts might well conclude meetings are subject to the open meeting law.

Letter from first assistant attorney general Gerald W. VandeWalle to David Little (July 21, 1975).

Courts in other jurisdictions where the applicable open meetings law does not refer specifically to committees have also addressed this issue. Those courts have also found that the application of the open meetings law to a committee depends upon the committee's decision-making authority. The following excerpt from the Oklahoma Supreme Court decision in Sanders v. Benton, 579 P.2d 815 (Okla. 1978), provides a good summary of the case law on this issue:

> Although different courts must construe different statutory provisions, it appears that the majority of other jurisdictions have generally held that ad hoc committees or citizens advisory committees, empaneled for the purpose of furnishing information and recommendations to governing or decision-making entities, are not subject to the open meeting laws unless they have actual, or de facto decision-making authority.

Id. at 819. See also Washington School Dist. No. 6 v. Superior Court, 112 Ariz. 335, 541 P.2d 1137 (1975); Wilson v. Freedom of Information Com'n, 181 Conn. 324, 435 A.2d 353 (1980); Greene v. Athletic Council of Iowa State University, Iowa, 251 N.W.2d 559 (Iowa 1977); Tribune Pub. Co. v. Curators of Univ. of Mo., 661 S.W.2d 575 (Mo. App. 1983).

An opinion other courts often refer to in restating the general rule concerning the inapplicability of the open meetings law to public bodies' fact-finding committees is McLarty v. Board of Regents of the University System of Georgia, 231 Ga. 22, 200 S.E.2d 117 (1973). McLarty, concerned a committee which was composed of faculty members and students of the University of Georgia and which was organized by the dean of student affairs to review the student senate's recommended allocation of student activity funds. The court concluded that the committee did not come within the purview of the Georgia open meetings law:

> The "Sunshine Law" does not encompass the innumerable groups which are organized and meet for the purpose of collecting information, making recommendations, and rendering advice but which have no authority to make governmental decisions and act for the State. What the law seeks to eliminate are closed meetings which engender in the people a distrust of its officials who are clothed with the power to act in their name. . . . There is no such compelling reason to require public meetings of advisory groups. They can take no official action. Generally their reports are submitted in writing and are available to the public well in advance of any official action and are considered by the official body in public meeting.

200 S.E.2d at 119.

The Florida courts have created a slight variation on this majority rule. The variation concerns a committee's ability to make recommendations. For example, Wood v. Marston, 442 So. 2d 934 (Fla. 1983), involved a "search-and-screen" committee, the purpose of which was to solicit and screen applications for a position and to submit for faculty approval a list of the best qualified applicants. The Florida Supreme Court held that

the committee occupied a decision-making role rather than an exclusive fact-gathering role.

> [The committee] had an equally undisputed decision-making function in screening the applicants. In deciding which of the applicants to reject from further consideration, the committee performed a policy-based, decision-making function delegated to it by the president of the university through the faculty as a whole.

Id. at 938. The court held that as such, the "search-and-screen" committee was subject to the open meetings law. However, in Florida where a committee exercises only fact-finding responsibilities with no decision-making authority, the post-Wood rule appears to be that the open meetings law is inapplicable. Cape Publications, Inc. v. City of Palm Bay, 473 So. 2d 222 (Fla. Dist. Ct. App. 1985).

In summary, under the general rule from other jurisdictions a committee which possesses no decision-making authority and acts only to furnish information and recommendations to the governing or decision-making entity is not subject to the open meetings law. There is some authority, from the state of Florida, for the proposition that a committee that makes recommendations is engaging in a decision-making authority sufficient to impose upon it the requirements of the state's open meetings law.

In the case described by your letter and further developed through additional facts, a school board has appointed a "task force" for the purpose of studying the feasibility of a middle school organizational structure for the next school year. These are the only facts I have concerning this task force. Clearly, I am unable to apply the rule of law previously described to these limited facts. I do not know of the decision-making authority of this task force or its ability to make recommendations to the school board. Therefore, without sufficient facts, I am unable to determine the applicability of the open meetings law to this task force.

Although I cannot make a final determination on this question, I hope this general discussion of the open meetings law and its applicability to committees will be helpful to you and your constituent.

Sincerely,

Nicholas J. Spaeth

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