May 3, 1978

Mr. Thomas J. Clifford, President
University of North Dakota
Grand Forks, ND 58202

RE: Open Governmental Meeting Law -- Family Educational Rights and Privacy Act

Dear President Clifford:

This is in reply to your letter of April 26, 1978, relative to the above captioned matter. You state the following facts and questions:

> "In light of the recent Florida District Court of Appeal decision entitled Marston v. Gainesville Sun Publishing Co., Inc., 341 So.2d 783 (1977), a copy of which is enclosed for your convenience, I am writing to request your opinion as to whether or not the Family Educational Rights and Privacy Act of 1974 (The Buckley Amendments) provides an exception to the provisions of Article 92 of the North Dakota Constitution and section 44-04-19 of the North Dakota Century Code, commonly referred to as North Dakota's Open Governmental Meeting Law. It is my understanding that the Family Educational Rights and Privacy Act Office in Washington, D.C. has taken the position that disciplinary hearings must be closed if the proceedings are to be a part of the student's educational record or if evidence from a student's educational record are to be used in the hearing. It is their further position that a student would be entitled to waive his or her right to a closed hearing providing that waiver was in writing, as is otherwise required under the Buckley Amendment.
>
> "More specifically, does Subsection 2 of section 15-10-17 of the Code, which provides an expressed exception to the open public records law, also impliedly provide an exception to the open meeting law, where confidential records are inherently involved.
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> "If the opinion of your office is consistent with the Family Educational Rights and Privacy Act Office, then I would also request your opinion concerning the nature of the deliberations by the committee or hearing body assigned the responsibility for determining the outcome of student academic or disciplinary hearings. More specifically:
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> 1. If the student elects to have a "closed" meeting, would the deliberations also be closed? If so, would the student and his or her advisor or attorney be entitled to be present during these deliberations or could the governing body make that decision

outside the presence of the student and his or her advisor or attorney, without a procedural due process violation.

2. If the student waives his or her right to a closed meeting, would the student, his or her advisor or attorney, and the public be entitled to be present during the deliberations by the governing body.

"If I can be of further assistance in defining the problem, please so inform me. I await your response."

Section 44-04-19 of the North Dakota Century Code as well as Article 92 of the Amendments to the North Dakota Constitution require that except as otherwise provided by law all meetings of public bodies, boards, commissions, etc., be open to the public.

Section 15-10-17(2) of the North Dakota Century Code, as amended, provides in part:

"The state board of higher education shall have all the powers and perform all the duties necessary to the control and management of the institutions described in this chapter, including the following:

* * *

2. To have supervision and control of the grounds, buildings, and all other property of such institutions, and to authorize such institutions to maintain confidential records containing personal information regarding their prospective, current, or former students or regarding patients at the medical center rehabilitation hospital at the University of North Dakota, with the information in such records subject to release by the institutions only upon a court order or the express or implied consent of the student or patient involved. A prospective, current, or former student shall be deemed to have consented to the release of all records to a prospective employer upon application for employment to that employer, provided the position is of such a nature as to require security clearances.

* * *

While this provision obviously provides an exception to the open records statute (Section 44-04-18 of the North Dakota Century Code), the question is whether it becomes an exception to the open meetings provisions of the North Dakota statutes and the North Dakota Constitution.

The decision of the Florida Court of Appeals cited in your letter, i.e., Marston v. Gainesville Sun Pub. Co., Inc., holds that a state statute making records of students confidential except under certain conditions also requires hearings at which those records are discussed to be closed even though another statute required meetings of a state agency to be open to the public at all times. The Court's rationale is that the

statute providing for confidentiality of records would be subverted if the public, denied access to the records, should nevertheless have entry as of right to the meeting whose only purpose is to formulate the record. The Court stated, page 785 of the report case:

> "The question is therefore whether the Honor Court, without consent of the affected student, must open to press and general public scrutiny Honor Court 'meetings', the written record and result of which are shielded from public eyes. To ask the question, we think, is to answer it. As in the case of proceedings for adoption, the beneficial policy promoted by the legislature in sec. 239.77 would be entirely subverted if the curious public, denied access to the record of the Honor Court's consideration and recommendation disposition of a disciplinary matter, should nevertheless have entry as of right to the meeting whose only purpose is formulation of that record. To put it another way, there is no benefit to the student of confidentiality in the documentary evidence and report of his infraction if the public may demand admittance to the meeting where the evidence is exhibited and the substances of that report discussed; and there is little purpose in preserving from public view a memorandum or transcript of a witness's testimony before the Honor Court if the public is there to hear the spoken word."

The Florida Court noted the Florida statute providing for confidentiality of student records was consistent with the policy of the Federal Family Educational and Privacy Act of 1974, 20 USC sec. 1232g, which withhold federal funding from any educational institution which a policy or practice of indiscriminately releasing education records pertaining to students.

While the Florida decision is not binding in North Dakota, the similarity of the statutes to those of this State and the application of the Federal act both indicate the same rationale would be applicable insofar as North Dakota is concerned. We do not believe the Legislature, in enacting statutes providing for the confidentiality of student records, intended that those records could be made public indirectly through the open meeting statute but not directly by virtue of the open records statute. Such a result would, as the Florida court noted, subvert the policy of the Legislature.

In direct response to your first question we conclude that Section 15-10-17 of the North Dakota Century Code does provide an exception to the open meeting law where confidential records are inherently involved or are being formulated.

With regard to your questions concerning the deliberations of the committee or hearing body assigned the responsibility for determining the outcome of student academic or disciplinary hearings, the Florida Court specifically expressed no view as to whether disciplinary sessions of the "Honor Court," which would be similar to such committee or hearing body, would constitute meeting of a board or commission of a state agency or authority which would be required to be open in that state. We do note in that State the function of the Honor Court was to conduct hearings on student discipline and to

recommend appropriate penalties to the president. The Court also noted that in the majority of cases the penalty recommendations made by the Honor Court have been accepted and enforced by the President. No such information is provided us with regard to the situation in North Dakota. I.e., does the committee or hearing body have the final authority in these matters? Is its decision advisory only? If it is advisory only, does the body or officer having final authority usually accept the findings of the hearing body? These matters are all significant in attempting to answer your remaining questions. Absent such information, we make certain assumptions which, on the basis of facts presented in the future, might not be correct.

We note that in an opinion of this office issued to Mr. Kenneth Raschke, Commissioner of Higher Education on January 8, 1967, we concluded that when a committee of the University is exercising jurisdiction delegated to it by the Board of Higher Education, it assumes the color of a public body as contemplated by Section 44-04-19 and must be open to the public when such jurisdiction is being exercised. We note that the cases from other jurisdictions concerning whether a committee of a University is a governmental body subject to the open meeting statute of that jurisdiction are not in accord. See, e.g., Cathcart v. Andersen, 530 P.2d 313 (Wash. 1975); Greene v. Athletic Council of Iowa State U., 251 N.W.2d 559 (Iowa 1977) holding that meetings are open. See, e.g., Student Bar Association of Univ. of N. Car. V. Byrd, et al., 239 S.E.2d 415 (N. Car. 1977) holding that law faculty meetings are not open. As you are perhaps aware, there are no cases decided by the North Dakota Supreme Court on this issue involving the public institutions of higher education in North Dakota.

We note, however, that subsection 7 of section 15-10-17 provides that the Board of Higher Education has the authority:

> "to confer upon the faculty, through bylaws, the power to suspend or expel students for misconduct or for other causes prescribed by such bylaws."

It thus appears to us that the committee or hearing body may very well be exercising a governmental function which, under the 1967 opinion referred to above, would be subject to the open meeting statute except as qualified by Subsection 2 of the same section regarding the confidentiality of student records. We also conclude that the provision, both State and Federal, regarding the confidentiality of student records were enacted for the benefit of the student and not for the benefit of the institution or the discipline committee. Because of these conclusions we would further conclude that if the student elects to have a "closed" meeting, the deliberations of the committee would also be closed although we believe the student and his counsel may be present, if the student so requests, since the provisions are, as we noted, for the benefit of the student and there would be no violation of the student's right to privacy in such an instance. We would further note, however, that the presence of the student during the deliberations following the hearing does not confer any right upon the student or his counsel to present further evidence or make further statements to the committee.

We also conclude that if the student waives his or her right to a closed meeting, that the student, his or her advisory or attorney, and the public are entitled to be present during the deliberations by the governing body.

I trust this will adequately set forth our position on the matters presented.

Sincerely,

Gerald W. VandeWalle
Chief Deputy Attorney General