July 19, 1977

Mr. Dewel E. Viker, Jr.
State's Attorney For Traill County
Box 696
Hillsboro, ND 58045

Dear Mr. Viker:

This is in reply to your letter of July 13, 1977, relative to the open meeting statute. You state the following facts and questions:

> "I have reviewed N.D.C.C. Section 44-04-19 as amended, which is commonly known as the "open meeting law".
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> "Among the duties of the States Attorney, I am required to act as counsel for the County in civil law suits in which the County is the Plaintiff, for example condemnation suits for acquiring right-of-way, and also in suits against the County of a civil nature. It appears that under the circumstances described above, an attorney-client relationship would exist, and that the States Attorney could discuss with the Board of County Commissioners, in the absence of the press and the general public, matter of tactics, offer and compromise, as well as other matters directly related to the issues of the law suit.
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> "Above described is the typical fact situation where pleadings have either been served upon the County or prepared by the County. A different situation would be present when the Board and the States Attorney are discussing existing fact situations which could serve as the basis for a suit either by or against the County. Would an attorney-client relationship exist in that instance exempting the situation from 44-04-19.
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> "The first word of the statute in question read as follows: "except as otherwise specifically provided by law . . ." I am not aware of the specific statutes exempting specific types of subjects from the purview of 44-04-19. I would be most appreciative if they could be enumerated.
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> "In summary, I would be most appreciative of your office if it would render an opinion generally discussing the questions raised above. As a supplemental issue it would also appear that the penalties imposed by the statute in question would be implemented in a manner somewhat similar to a criminal complaint, and upon the request of a complaining party. If in fact the States Attorney and the Board were the parties complained of, where should the complaining party present his complaint.

We would note, first of all, that an attempt on our part to list each statutory provision in which an exception to the open meeting law exists would be dangerous should we fail to list one or more of the statutes, i.e., some persons might consider the opinion as conclusive of all existing statutory provisions. Those person concerned with particular meetings of particular boards or agencies should secure the advice of their attorney to determine if that particular meeting by that particular board or agency is subject to any provisions which would exempt it from the open meeting law.

With regard to the attorney-client relationship to the open meeting law, there are, to our knowledge, no cases in North Dakota directly in point. North Dakota does recognize an attorney-client privilege. However, that privilege with respect to public agencies may be somewhat limited. Rule 502 of the North Dakota Rules of Evidence, adopted by the Supreme Court effective February 15, 1977, provides at subsection (d)(6) thereof:

> "(d) EXCEPTIONS. There is no privilege under this rule:
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> ***
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> (6) PUBLIC OFFICER OR AGENCY. As to a communication between public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest."

See also Canon 4 of the Code of Professional Responsibility of the American Bar Association as amended February, 1975, adopted by the North Dakota Supreme Court effective January 1, 1977.

We have previously cited Channel 10, Inc. v. Independent Sch. Dist. No. 709, 215 NW2d 814 (Minn. 1974) which discusses exception to the open meeting statute. One of the exceptions to the open meeting statute which had been carved out by the decision of the lower court involved the attorney-client privilege. At page 825 of the reported case the court stated:

> "The only factual information that the trial court had concerning this exception was that the present lawsuit was discussed at a closed meeting of seven or eight members. Under the circumstances we hesitate to make a precedent-setting decision adopting either the rule, adopted by a majority of the courts, favoring recognition of this exception or the minority rule refusing to recognize it, or possibly some modification of either."

The case contains a discussion of the exception and the cases from other jurisdictions which have either approved such an exception or disallowed such an exception. The Court then concluded, page 826:

> "Open meeting laws and their exceptions are a developing field of law and at this stage we are inclined to employ judicial restraint. We think this exception is too broad and that if any exceptions are to be made because of attorney-client relationship, it should be done on a case-by-case basis or at least in a case with a more detailed factual setting than is presented by this record."

You will note that the Minnesota statute was, if not entirely identical to section 44-04-19 of the NDCC, nearly so for the purpose of the question you raise. Thus the Minnesota statute reads that "Except as otherwise expressly provided by law, all meetings. . . shall be open to the public." There is obviously great similarity between the statutes of the two States.

In a subsequent decision, Minneapolis Star and Tribune Co. v. H. & R.A., etc., 246 NW2d 448 (Minn. 1976) the Minnesota Supreme Court did not hold that the open meeting law did not require that a meeting between the agency and its counsel be open to the public where the meeting was for the purpose of discussing strategy in active and immediate litigation involving the agency. The Court indicated that the exception would almost never extend to the mere request for general legal advice or opinion by a public body in its capacity as a public agency, the Court further stated, page 454 of the reported case:

> "We cannot emphasize too strongly that should this exception be applied as a barrier against public access to public affairs, it will not be tolerated, for this court has consistently emphasized that respect for and adherence to the First Amendment is absolutely essential to the continuation of our democratic form of government. It will be upheld, however, if the balancing of these conflicting public policies dictates the need for absolute confidentiality. The exception is therefore available to satisfy the concerns expressed herein but is to be employed or invoked cautiously and seldom in situations other than in relation to threatened or pending litigation.

While the cited cases are not necessarily the prevailing law in North Dakota Court in any action concerning the open meeting law and the attorney-client privilege, we are in agreement with the conclusions of the Minnesota Court that a broad exemption is not warranted and any exception based on this relationship should be formulated on a case by case basis with detailed facts available. That is what took place in the subsequent Minnesota decision. Your letter contains no specific case and no specific factual situation. Until otherwise indicated by the Legislature or the Courts of North Dakota, however, we believe the position taken by the Minnesota Courts in the above cited cases should be followed in North Dakota.

Finally, should the state's attorney be one of the parties complained of for violating the open meeting law, we assume the same provisions would apply as in any instance in which a criminal complaint is filed against a state's attorney. See, sections 11-16-06, et seq.; and section 29-21-36 and section 54-12-04 of the NDCC, i.e., the District Judge

would either appoint an attorney to prosecute for the county or require the Attorney General to do so.

I trust this discussion will prove of interest to you.

Sincerely,

Gerald W. VandeWalle
Chief Deputy Attorney General