

November 15, 1977

The Honorable Wayne Stenehjem  
State Representative, District 42

The Honorable Raymon Holmberg  
State Senator, District 17

2122 12th Avenue North  
Grand Forks, North Dakota 58201

Dear Representative Stenehjem and Senator Holmberg:

This is in reply to your letter of November 4, 1977, wherein you set forth the following facts and questions:

“We would respectfully request an opinion from your office regarding provisions in the Constitution and statutes of North Dakota relating to open meetings of governmental bodies.

“Specifically, does North Dakota's law require that all official actions of a governing body be taken viva voce, or by roll call vote, or can a secret ballot satisfy the provisions of the Constitution and statute; as where a county commission acts to fill a vacancy in an elective county office.

“Further, if such secret ballot is contrary to law, is the action void or merely voidable? And what is the effect of any official action taken by a county officer so selected.

“Finally, what penalties, if any, might accrue to any officer who participates in such a procedure in violation of our open meeting requirements.

With respect to your first question, the North Dakota open meeting provision (Section 44-04-19 of the North Dakota Century Code, Article 92 of the Amendments to the North Dakota Constitution) requires, except as otherwise provided by law, that all meetings of public or governmental bodies of the State or any political subdivision of the State shall be open to the public. Section 11-11-06 of the North Dakota Century Code also requires that meetings of the board of county commissioners shall be open to the public and further provides that all matters pertaining to the affairs of the county shall be considered by the board in session only. Chapter 11-11 of the North Dakota Century Code, which governs the procedures of the board of county commissioners, does not refer directly to the question of whether secret ballots may be used in conducting official business of the board nor do the open meeting provisions refer directly to that matter.

There may be some instances in which the applicable statutes permit the use of a secret ballot in conducting certain business. We have made no attempt to determine

whether such statutes exist with regard to other matters. However, we have found no statutes which specify that a secret ballot may be used in filling a vacancy in an office pursuant to Section 44-02-04 of the North Dakota Century Code, as amended.

While not specifically permitted or prohibited by the open meeting provision, we believe the use of a secret ballot, except where specifically authorized, is a diminishment of the open meeting provisions and should not be used. One of the obvious reasons for an open meeting of a governmental body is that the citizens may be aware of the business the governing body is conducting. Another obvious reason is that the citizens may be aware of the manner in which their public officials are performing, their position on certain questions, etc. The use of a secret ballot denies the public the right to ascertain the position of a given public official on the question. Whether there are reasons for use of a secret ballot in the filling of a vacancy in county office may be a matter for discussion. However, as we have noted above, there are no indications in the statutes that the procedure for filling a vacancy in a county office is any different than the procedure for conducting any other county business. Were we to conclude that the vote to fill the vacancy in a county office could be by secret ballot, we would necessarily have to conclude that the vote on other matters before the board could also be by secret ballot. Such procedure would, in our estimation, destroy one of the primary reasons for open meetings, i.e., permitting the citizens to determine how their public officials have voted on a particular matter.

Assuming, therefore, that a public body cannot use a secret ballot in voting on a substantive question, except where specifically authorized by statute, we note the decision of the North Dakota Supreme Court in Peters v. Bowman Public School District No. 1, 231 NW2d 817 (ND 1975), in which it held that an executive session conducted by a school board for the purpose of evaluating a teachers performance violated the open meetings law and that action taken at a subsequent board meeting in voting not to renew the contract was void, notwithstanding that such meeting met the requirements of the open meeting law. The difference between the situation described in your letter and that involved in the case cited was that the case involved an executive session while your question involves an open meeting at which a secret ballot was used. Despite that difference, however, we believe there is a substantial possibility the courts would hold that business conducted by secret ballot is contrary to the open meeting law and therefore void. However, it would also appear the person appointed by secret ballot to fill the vacancy would be considered a de facto officer until and unless a direct challenge to that person's right to hold the office were instituted. We have serious doubts that a collateral challenge to the right of the person so appointed could be sustained such as a question as to the authority of that person raised in an action other than a direct action to challenge the right of the person to hold the office.

Insofar as penalties are concerned, as you are aware, the 1977 Legislative Session made a violation of the open meeting statute an infraction for a first offense. However, while your letter does not so state, we have been informed that in the situation to which you refer, the county commissioners were informed by the state's attorney, their legal advisor, that a secret ballot was permissible in that instance. Recognizing that the laws

with regard to the use of secret ballots by public bodies are not specific in prohibiting the same, and recognizing that reasonable persons might differ as to the legality of the use of such a ballot, and assuming that the county commissioners acted pursuant to the advice of their legal advisor, we do not believe a criminal action, even for an infraction, could be sustained in this instance. In State v. Baker, 21 NW2d 355 (ND 1945) the North Dakota Supreme Court held that where a State officer in the performance of an official act consults with the attorney general and is guided by the opinion of the attorney general, that officer, even though the opinion thus given be later held erroneous, will be protected by it. See also Section 12.1-05-09 of the North Dakota Century Code. We believe the same rationale is applicable as to county officials acting pursuant to the advice of their legal advisor, the state's attorney.

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

Sincerely,

Gerald W. VandeWalle  
Chief Deputy Attorney General