

1999 SENATE JUDICIARY

SB 2372

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2372

Senate Judiciary Committee

Conference Committee

Hearing Date February 8, 1999

Tape Number	Side A	Side B	Meter #
1	x		0 - 2052
Committee Clerk Signature <i>Jackie Fallon</i>			

Minutes:

SB2372 relates to the administrative review procedure for a written denial of a request for public records or a denial of access to a public meeting.

SENATOR STENEHJEM opened the hearing on SB2372 at 9:00 a.m.

All were present.

SOPHIA PRESZLER testified in support of SB2372. Testimony attached.

SENATOR NAADEN, District 28, testified in support of SB2372. This bill is to require that a person requesting an opinion receive that opinion.

SENATOR LYSON asked if only state's attorney and legislators can receive opinions.

SENATOR NAADEN stated that public officials can receive opinions.

SENATOR STENEHJEM stated that any interested person can ask for an opinion.

JERRY HJELMSTATD, North Dakota League of Cities, testified with proposed amendments for SB2372. Amendments attached. We want the public entities to continue to receive these opinions.

KEN YANTES, North Dakota Township Association, testified in agreement with the proposed amendments.

BETH BAUMSTARK, Attorney General's Office, testified to explain SB2372. The Attorney General's Office doesn't want to be in the position of fact finder. The public entity has to comply with our opinion and may be financially responsible.

SENATOR STENEHJEM asked if a person under the current law brought a suit in District Court and there followed an opinion by the Attorney General and you relied on the facts given by the public entity and the matter went to Court and the Court said the Attorney General is right from the facts that were given by the public entity, however, that is not what really happened. What really happened is what the citizen said, would the citizen then be entitled to recover attorney's fees.

BETH BAUMSTARK stated that would be up to the Court.

SENATOR STENEHJEM CLOSED the hearing on SB2372.

SENATOR NELSON made a motion on the Amendments, SENATOR LYSON seconded.

Motion carried. 6 - 0 - 0

SENATOR TRAYNOR made a motion on Further Amendments, SENATOR BERCIER

seconded. Motion carried. 6 - 0 - 0

SENATOR LYSON made a motion for DO PASS AS AMENDED, SENATOR BERCIER

seconded. Motion carried. 6 - 0 - 0

Page 3

Senate Judiciary Committee

Bill/Resolution Number SB2372

Hearing Date February 8, 1999

SENATOR STENEHJEM will carry the bill.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2372

Page 1, line 15, remove the overstrike over “~~public entity involved~~” and insert immediately thereafter “and to the”

Page 1, line 19, remove the overstrike over “~~public entity~~”

Page 1, line 20, remove the overstrike over “~~providing the public funds~~” and insert immediately thereafter “and to the”

Renumber accordingly

Submitted by: North Dakota League of Cities

Date: 2-8-99
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2372

Senate Judiciary Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Amendments

Motion Made By Nelson Seconded By Lyson

Senators	Yes	No	Senators	Yes	No
Senator Wayne Stenehjem	X				
Senator Darlene Watne	X				
Senator Stanley Lyson	X				
Senator John Traynor	X				
Senator Dennis Bercier	X				
SenatorCarolyn Nelson	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment _____

Date: 2-8-99
Roll Call Vote #: 2

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB2372

Senate Judiciary Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Further Amendments

Motion Made By Traynor Seconded By Bercier

Senators	Yes	No	Senators	Yes	No
Senator Wayne Stenehjem	X				
Senator Darlene Watne	X				
Senator Stanley Lyson	X				
Senator John Traynor	X				
Senator Dennis Bercier	X				
SenatorCarolyn Nelson	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment _____

Date: 2-8-99
 Roll Call Vote #: 3

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB2372

Senate Judiciary _____ Committee

- Subcommittee on _____
 or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass As Amended

Motion Made By Lyson Seconded By Bercier

Senators	Yes	No	Senators	Yes	No
Senator Wayne Stenehjem	X				
Senator Darlene Watne	X				
Senator Stanley Lyson	X				
Senator John Traynor	X				
Senator Dennis Bercier	X				
Senator Carolyn Nelson	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Stenehjem

REPORT OF STANDING COMMITTEE

SB 2372: Judiciary Committee (Sen. W. Stenehjem, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2372 was placed on the Sixth order on the calendar.

Page 1, line 15, remove the overstrike over "~~public entity involved~~" and after "an" insert "and to the"

Page 1, line 19, remove the overstrike over "~~public entity~~"

Page 1, line 20, remove the overstrike over "~~providing the public funds~~" and insert immediately thereafter "and to the"

Page 1, line 22, remove "person requesting the opinion and by the"

Renumber accordingly

1999 HOUSE GOVERNMENT AND VETERANS AFFAIRS

SB 2372

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2372

House Government and Veterans Affairs Committee

Conference Committee

Hearing Date 3-5-1999

Tape Number	Side A	Side B	Meter #
1	X		36.7 - 60.4
1		X	0 - 14.0
1		X	27.8 - 43.7
Committee Clerk Signature <i>James M. Williams</i>			

Minutes: Some of the individuals testifying submit written testimony. When noted please refer to it for more detailed information.

Representative Klein, Chairman of the GVA Committee opened the hearing on March 5, 1999.

Summary of the Bill: Relating to the administrative review procedure for a written denial of a request for public records or a denial of access to a public meeting.

Testimony in Favor:

William Schuh, Appeared before the committee and submitted written testimony and amendments. I am here to speak on behalf of Sophie Pressler. We have submitted two amendments and would prefer option 1 amendment, but would accept option 2 also.

Representative Klein, Did the Senate when they were contesting this look at your amendments?

Schuh, No, I was not involved with this bill at that time and the amendments were not available.

Greg Boyer, ND Family Alliance appeared before the committee with option 1 amendments.

Representative Klein, Your organizations concern on this bill, could you give me an example where this would aid your concerns.

Boyer, If a complaint was raised against our organization, we would like the input of information into that complaint and not by facts from an opposing view point.

Representative Devlin, I am waiting for the Attorney Generals office to enlighten us on how the open meeting law is working for them.

Beth Baumstark, Office of Attorney General stated that her office has no objection to the engrossed version of the bill. When we get a complaint we send a copy to the public entity and provide their side of the story. In most cases there is not a difference of facts but a question of law, whether or not the public entity it a public entity and subject to the law. It is the public entity that faces a financial detriment. If they violated the law and they don't correct it in seven days, then the person who's complaint it is can take it to court. If the court agrees with the attorney general's office that there was a violation, the public entity has to pay the attorney's fees for the person who brought the complaint. Since the bill that passed in the 97 session, we have had 47 requests for attorney general's opinion, 8 of those have been withdrawn. We have issued 28 opinions. Of the 47 requested, we issued 20 opinions, 8 withdrawn. 31 of the complaints were related to open meeting laws and 19 to open records. The problem we have with the amendments is that it turns the attorney general's office into a fact finder. We could do that without a formal hearing process.

Representative Klein, The problem you have with the amendment is that would cause the additional time and effort to do what the amendments would require you to do?

Baumstark, That's correct.

Representative Devlin, I missed something in your compiling of your reports, could you go through them again. My numbers don't come out right.

Baumstark, Of the 47 complaints, 8 were withdrawn, 3 pending, and 28 opinions have been issued. I realize that is not going to add up to the 47 and the reason is that some of the opinions were issued based on 4 to 5 opinions.

Representative Gorder, Of the 20 violations, what generally happens.

Baumstark, That depends on the violations.

Representative Klemin, These amendments, one proposes to delete the last sentence of the section. If that sentence wasn't in there, there wouldn't be any requirements. What would be the problem with deleting it?

Baumstark, It would leave it to open to the way we get information.

Representative Klemin, There is a manual of open meetings-records

Baumstark, Our office gave it out to all state agencies as to how to deal with open meetings and it is also available on our home page and purchase. It is for a public entity to follow the laws so they don't get questions and know the requirements.

Representative Haas, With the opinions issued, what was the response of the public entity? Were they cooperative?

Baumstark, I am not aware of any entity that didn't correct it.

Representative Hawken, An example of a misunderstanding by a public entity.

Baumstark, The Fargo Park District comes to mind. One of the records they refused to give out they said was a trade secret.

Representative Winrich, You indicated that there was one situation where the facts were in dispute and you were constrained to render an opinion based on the facts from the public entities. Did that case go to court?

Baumstark, It was not taken to court and I believe they found another way.

Representative Haas, Of the 47 situations, did you find a deliberate attempt of the public entity to circumvent the open meeting law?

Baumstark, Yes.

Senator Naaden, The problem with the way the bill is drafted now is that a private citizen has to pay for the costs of a law suit. Can't regain the costs.

Representative Winrich, If it goes to court and the decision is against the public agency, they have to pay. Is this bill prompted by a particular case.

Schuh, Sophie Pressler is the one who requested this bill, so I would say it probably is related.

Representative Klein, Closed the hearing on SB 2372.

Committee Action:

Representative Klemin, This bill does nothing that they're not already doing.

Representative Cleary, I have a problem with the last sentence.

Representative Metcalf, Made a motion for a Do Pass on option 2 of the amendments.

Representative Thoreson, They have the information from the people who make the complaint.

Representative Klemin, They also get the recording of the meeting.

Representative Winrich, Also Ms. Baumstark said they do consider both sides when in this situation. I don't think we want to turn the attorney general's office into a court. We would be complicating things more by doing this.

Representative Metcalf, I would like to withdraw my motion.

Representative Brekke, Made a motion for a Do Pass.

Representative Thoreson, Seconded the motion.

Representative Devlin, I don't think we need this bill. The attorney general is already doing this.

Representative Klemin, It does nothing and I echo what Representative Devlin has just said.

Representative Winrich, I am going to take the same position as Devlin and Klemin. I do so in the interest of consistency, because I felt the same way about SB 2208.

Representative Cleary, I am going to vote against it because I don't think it is doing anything without the amendments.

Motion Fails: Do Not Pass **6-7-2**.

Representative Devlin, Made a motion for a Do Not Pass.

Representative Cleary, Seconded the motion.

Motion Passes: Do Not Pass **9-4-2**.

Representative Devlin, Is the carrier for the bill.

Date: 3-5-99

Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2312

House GOVERNMENT AND VETERANS AFFAIRS Committee

Subcommittee on _____

or

Conference Committee

Legislative Council Amendment Number _____

Action Taken DO PASS

Motion Made By BREKKE Seconded By THORESON

Representatives	Yes	No	Representatives	Yes	No
CHAIRMAN KLEIN	✓		REP. WINRICH		✓
VICE-CHAIR KLINISKE	✓				
REP. BREKKE	✓				
REP. CLEARY		✓			
REP. DEVLIN		✓			
REP. FAIRFIELD					
REP. GORDER		✓			
REP. GRANDE					
REP. HAAS	✓				
REP. HAWKEN	✓				
REP. KLEMIN		✓			
REP. KROEBER		✓			
REP. METCALF		✓			
REP. THORESON	✓				

Total (Yes) 6 No 7

Absent 2

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Roll Call Vote #: 2 Date: 3-5-99

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2372

House GOVERNMENT AND VETERANS AFFAIRS Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken DO NOT PASS

Motion Made By DEVLIN Seconded By CLEARY

Representatives	Yes	No	Representatives	Yes	No
CHAIRMAN KLEIN	✓		REP. WINRICH	✓	
VICE-CHAIR KLINISKE		✓			
REP. BREKKE		✓			
REP. CLEARY	✓				
REP. DEVLIN	✓				
REP. FAIRFIELD					
REP. GORDER	✓				
REP. GRANDE					
REP. HAAS	✓				
REP. HAWKEN		✓			
REP. KLEMIN	✓				
REP. KROEBER	✓				
REP. METCALF	✓				
REP. THORESON		✓			

Total (Yes) 9 No 4

Absent 2

Floor Assignment DEVLIN

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
March 5, 1999 12:41 p.m.

Module No: HR-40-4123
Carrier: Devlin
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2372, as engrossed: Government and Veterans Affairs Committee (Rep. Klein, Chairman) recommends **DO NOT PASS** (9 YEAS, 4 NAYS, 2 ABSENT AND NOT VOTING). Engrossed SB 2372 was placed on the Fourteenth order on the calendar.

1999 TESTIMONY

SB 2372

Chairman Stenehjem and Judiciary Members,

My name is Sophia Preszler. I'm a concerned citizen from Bismarck. SB 2372 would correct the problems in NDCC 44-04-21.1. Under the present law when the citizen asks for an Attorney General's opinion, the opinion goes to the public entity rather than the person requesting the opinion. SB 2372 would cause the opinion to go to the citizen or entity requesting the opinion.


The statement "the public entity providing the public funds" is confusing and not true. The public entity does not provide the the funds. The citizen is the tax providing entity. SB 2372 would correct that problem.

Under the present law the Attorney General bases the opinion on the "facts of the public entity", the entity that receives public funds. There is no reference to the citizen who is the tax providing entity. SB 2372 would base the opinion the facts of both the Public Entity and the Citizen Entity.

The one-sidedness of the present law causes the citizen not to be heard and to be abused as was my case on October 23, 1997, when on the promptings of the Attorney General I attempted to sit in on an Executive Board meeting of the Bismarck School District and was ushered by the nape of the neck out of the Administration Building. Copies of the complaint and documents are enclosed.

Also, please, compare the two opinions that are enclosed, one is the Attorney General's opinion under the "facts of the public entity", the other I had drafted by an attorney which presents all sides of of this issue.

I urge a DO PASS on SB 2372 because it would do justice to both the Public Entity and the Citizen who is the Tax Providing Entity.

Sincerely,

Sophia Preszler
1725 N 5th St.
Bismarck, ND 58501
1-701-255-0269

One Nation
Under God

SOPHIA E. PRESZLER
725 North 5th Street
Bismarck, ND 58501
(701) 255-0269

Sophia Preszler,

Plaintiff,

CRIMINAL COMPLAINT

vs.

Harvey Schilling,

Defendant.

On the morning of October 23, 1997, I called Lowell Jensen, Superintendent of the Bismarck School District's Executive Cabinet meeting, which is an arm of the Bismarck School Board, concerning the matter of "open" and "closed" meetings. Mr. Jensen asserts that all Executive meetings are closed to the public-at-large. I asked Mr. Jensen why I was not welcomed at these meetings; his response was "Because I said so." His reply didn't satisfy me. He then told me that he had talked to each of these leaders, and all of them said they were uncomfortable when someone else sits in the meeting. They will not tell you why they are uncomfortable when a citizen is around or why the meeting is closed.

I did attend the October 23, 1997, 9:30 a.m. meeting:

I said, "I have a right to be here, even though I may not be able to take part in all of the meeting. Some of the meeting may not be open to me".

I was forced to leave, but not before I told the gathering that I was leaving under protest. I emphasized that they record the matter in the Minutes; especially, that I was leaving under protest. Mr. Jensen agreed to do so.

When the door closed behind me, there was laughter. And since an Attorney General's opinion has not yet been written on "open" and "closed" meetings, and it has not yet been determined as to what is an open or closed meeting, I opened the door without entering to see and hear what the laughter was about. Mr. Schilling, the Assistant Superintendent, came out. He seized me by the nape of my neck, and so held me for over *about 50* ~~100~~ feet. He said, "This has gone too far", as he led me down the hall.
SP

I've known Mr. Schilling for many years and I respect his office. I could not believe what was happening to me. "Harvey", I replied, "I can't believe you are doing this to me. I can't believe this is happening to me." I was deeply shocked. I repeated myself. Mr. Schilling kept one hand on my neck and with the other hand he stopped his ear. "I can't hear you! I'm not listening! I can't hear a word you are saying," he replied.

"Harvey, that's the problem, you haven't been hearing us (parents and concerned citizens) for a long time", I answered him. I kept repeating, "Harvey, I can't believe you are doing this to me", thinking that here is a trusted leader and I am a concerned citizen who needs to be intelligent and informed about educational matters, am not only denied from getting the educational information I need, but the trusted leader has laid his hands on me as though I were a second-class citizen, a criminal, or a dog.

"You are usurping the law", I said. I couldn't think of anything else to say, thinking that it was unlawful for Mr. Schilling to take hold of me by the nape of the neck and lead me from the Bismarck School Administration building.

The statement, seemingly, bothered Mr. Schilling. "You are mocking me", he said, "It makes me angry when you mock me." I don't understand what Mr. Schilling meant by those words. But I assured him, "I am not mocking you."

By then, we were close to the exit. Mr. Schilling released the neck hold on me. "You are nothing but a schnook", he informed me. "What was that name you called me?", I wanted to know. I was shocked and didn't think I was hearing correctly. He would not respond, so I stated the question again, but there was no response. It seemed to bother Mr. Schilling that I repeated the question. A "schnook", according to Webster, is a stupid and unimportant person.

Mr. Schilling held both of his hands by the side of his face and he waved them, as I was leaving. He laughed in a most boisterous, mocking way, he repeated my words, "You are usurping the law. You are usurping the law." The air outside, as I removed myself from the situation and the building, was refreshing.

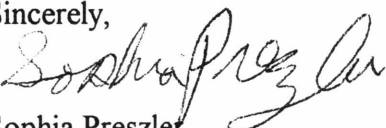
Criminal Complaint
October 28, 1997
Page 3

A copy of the October 23 Executive Cabinet meeting agenda is enclosed. There were two police officers at this meeting concerning the Bomb Threat Procedure. Their names are Duane Haughton and Steve Lundin.

I have filed a complaint with the Attorney General's office in the hope that an opinion concerning "open" and "closed" meetings would soon be forthcoming.

Also find enclosed is a copy of my complaint to the Executive Cabinet Members.

Sincerely,



Sophia Preszler

Enclosures

Bismarck Public Schools
400 Avenue E East
Bismarck, North Dakota 58501

10-23-97

Dr. Jensen and Executive Cabinet Members,

I believe that as a citizen I have every right to sit in on the 10-23-97 Executive Cabinet meeting with a few exceptions, thereby becoming informed on what is happening in our local schools.

It greatly concerns me that this right is being taken from me. If you can force me from this meeting, you can require the same from the citizenry-at-large.

The Executive Cabinet, according to the Descriptor Code: C L -R, was given it's authority to function by the Bismarck School Board, and as such "it possesses no inherent authority" aside from the Board and as such, apparently, must be in alignment with the open meeting law. 44-04-19, NDCC.

I would assume that you, Mr. Jensen, as Superintendent of Bismarck Schools, and your staff, which are employees, are gathering today to discuss matters relating to policies and the performance of responsibilities and how to more efficiently perform these public responsibilities.

Why can't I have an inside view on how you will perform this public service?

If you will not allow me to remain, I want you to know that I'm leaving under protest. I'm leaving against my wishes. I feel that my constitutional right has been violated.

I want you to make sure that you record in your minutes that I'm leaving under protest.

Sincerely,



Sophia Preszler
1725 North, 5th Street
Bismarck, North Dakota 58501
255-0269

TO: Superintendent Cabinet Members
FROM: Lowell L. Jensen, Superintendent of Schools
DATE: October 21, 1997
SUBJECT: Superintendent Cabinet Meeting Agenda
Thursday, October 23, 1997, 9:30 A.M.

1. Emergency Procedures Manual
2. Bomb Threat Procedure/Policy (Police Dept. Coming)
3. Satellite Town Meeting
4. Futures Program
5. Assistant Superintendent Job Descriptions
6. Leadership
7. Reports
 - A. Harvey Schilling
 - B. John Salwei
 - C. Ed Gerhardt
 - D. Jerry Gusaas
 - E. Lisa Kudelka

Sen. Ed Kringsstad
Rep. Connie Johnson
Rep. Bob Martinson



STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

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BISMARCK, ND 58505-0040
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Heidi Heitkamp
ATTORNEY GENERAL

ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
NO. 97-O-02

DATE ISSUED: December 22, 1997

ISSUED TO: Bismarck Public School Board President Melvin Fischer
and District Superintendent Lowell Jensen

CITIZEN'S REQUEST FOR OPINION

On October 24, 1997, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Sophia Preszler regarding whether she was improperly denied access to a meeting of the Bismarck School District's Superintendent's Cabinet on October 23, 1997.

FACTS PRESENTED

A Bismarck School Board policy provides: "The Superintendent shall provide leadership in implementing an educational program within available funding and School Board policies." Bismarck School Board Policy: Superintendent's Job Description, CE, issued 11-10-97. This same School Board policy lists the performance responsibilities of the superintendent. These responsibilities include the following:

The Superintendent shall participate in all School Board meetings by assisting the board president in the development of the meeting agenda, by preparing background materials and analyses of issues brought to the board, and by preparing recommendations on all issues brought to the board for decisions.

The Superintendent shall assist the School Board with the development of school Board policy and shall establish rules, forms, guidelines, and procedures to implement board policy.

(Emphasis added.) A different Bismarck School Board policy provides:

The school board encourages the superintendent and administrative staff to create and maintain appropriate mechanisms such as councils, cabinets and committees to

1. foster good communications within the staff;
2. allow each member of the staff to have a voice in the development of policies and in the making of decisions affecting them.

Bismarck School Board Policy: Councils, Cabinets and Committees, CL, issued 2-11-80.

The Superintendent has established rules to implement School Board policy. One of these administrative rules provides:

Councils, Cabinets and Committees

The superintendent of schools may establish an administrative cabinet as an advisory and deliberative body consisting of those members of the school staff who hold major administrative positions. Its precise membership is to be determined by the superintendent who serves as chairman of the cabinet.

As a group, the cabinet will discuss and attempt to develop effective modes of operation for implementing policies. Functioning in an advisory capacity, individual members or groups as a whole may make suggestions and recommendations with respect to policy which in turn will be transmitted through the superintendent to the school board for consideration. As a cabinet it possesses no inherent authority, nor does it exercise any executive function.

The administrative cabinet is concerned with matters relating to:

1. Curriculum
2. Instruction
3. Pupils
4. Teaching and custodial personnel
5. Building administration
6. Budget development
7. Internal business operation
8. Maintenance and custodial standards
9. Community relations

The cabinet functions as a channel of communication. Its individual members bear the responsibility of disseminating information to staff members under their charge, in promoting understanding of the total school program and assuring its harmonious operation. It is the responsibility

of the superintendent to keep the cabinet informed of decisions and activities of the school board pertaining to its concerns. Conversely, the cabinet has the responsibility of informing the superintendent and through him, the school board, of suggestions and problems originating with the school staff.

Bismarck Public School District Administrative Rule: Councils, Cabinets and Committees, CL-R, issued 2-13-78.

It is the position of the Bismarck School District that the meetings of the Superintendent's Cabinet are not subject to N.D.C.C. § 44-04-19, the open meetings law, because no authority is delegated to it by the Bismarck School Board and the Superintendent's Cabinet is not a "governing body" as defined in N.D.C.C. § 44-04-17.1(6).

ISSUE

Whether the Superintendent's Cabinet is a "governing body" of a public entity.

ANALYSIS

"Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public." N.D.C.C. § 44-04-19 (emphasis added). "Meeting" means a gathering of "[a] quorum of the members of the governing body of a public entity regarding public business." N.D.C.C. § 44-04-17.1(8)(a)(1) (emphasis added).

If the Superintendent's Cabinet is a "governing body" of a public entity, it is subject to the open meetings law.

"Governing body" means the multimember body responsible for making a collective decision on behalf of a public entity. "Governing body" also includes any groups of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.

N.D.C.C. § 44-04-17.1(6).

Thus, the Superintendent's Cabinet is a "governing body" if it is a "multimember body responsible for making a collective decision on behalf of a public entity." The phrase "public entity" includes entities created or recognized by "state statute, . . . resolution, ordinance, rule, bylaw, or executive order of the chief executive

authority¹ of a political subdivision of the state to exercise public authority or perform a governmental function." N.D.C.C. § 44-04-17.1(12)(b). Even though designated as an Administrative Rule, the "rule" under which the Superintendent's Cabinet was created was established by the Superintendent, and not promulgated by the School Board. The other terms in the statute (resolution, ordinance, and bylaw) all reflect formal enactments by the authority responsible for making binding legislative or policy decisions on behalf of a political subdivision. The entity must be created or recognized to exercise public authority or perform a governmental function, which also indicates that a substantive policy decision is required. For these reasons, it is my opinion that "rule" as used in N.D.C.C. § 44-04-17.1(12) refers to enactments by the governing body of the political subdivision--in this case, the School Board. The Superintendent's authority is to implement, rather than establish, policies on behalf of the school district. Therefore, although created by a Superintendent's "rule," the Superintendent's Cabinet is not itself a public entity.

Thus, the "public entity" involved in this matter is the school district, and the multimember body responsible for making a collective decision on behalf of the school district is the school board, not the Superintendent's Cabinet.

The Superintendent's Cabinet may also be subject to the open meetings law if it is "acting collectively pursuant to authority delegated to that group by the governing body" of a public entity. N.D.C.C. § 44-04-17.1(6). The Bismarck School Board is the governing body of the Bismarck School District, which is a "public entity" under N.D.C.C. § 44-04-17.1(12)(b). The issue is whether the Bismarck School Board has delegated any authority to the Superintendent's Cabinet. As indicated under the FACTS PRESENTED portion of this opinion, the School Board policy simply states:

The school board encourages the superintendent and administrative staff to create and maintain appropriate mechanisms such as councils, cabinets and committees to

1. foster good communications within the staff;
2. allow each member of the staff to have a voice in the development of policies and in the making of decisions affecting them.

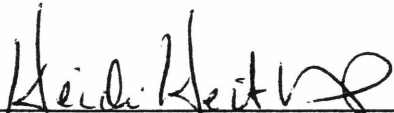
¹ The chief executive authority of a school district is the school district board. See Seher v. Woodlawn School Dist., 59 N.W.2d 805 (N.D. 1953) (school board's dismissal of teacher was exercise of an executive function).

Bismarck School Board Policy: Councils, Cabinets and Committees, CL, issued 2-11-80. This school board policy does not delegate any authority of the Bismarck School Board to any entity. It is under the Superintendent's rule that the Superintendent's Cabinet was created and duties specified. Thus, it is my opinion that the Bismarck School Board has not delegated any authority to the Superintendent's Cabinet.

CONCLUSION

Based on the above analysis, it is my opinion that the Superintendent's Cabinet is not subject to the open meetings law because it is not a "governing body."

It is my further opinion that there was no violation of the open meetings law as a result of the denial of access to the October 23, 1997, meeting of the Superintendent's Cabinet.



Heidi Heitkamp
ATTORNEY GENERAL

Assisted By: James C. Fleming
Assistant Attorney General

bah

THE BISMARCK SCHOOL DISTRICT'S -- AUTHORIZATION OF ESTABLISHMENT OF A SUPERINTENDENT'S CABINET AND THE AUTHORITY GRANTED THAT ENTITY, TOGETHER WITH THE ACTIVITIES OF THE CABINET SUBJECT IT TO THE STATE OPEN MEETINGS LAW.

Who is subject to the open meetings law?

This question is answered in NDCC Sec. 44-04-17.1. It would appear the "SUPERINTENDENTS COUNCIL" of the Bismarck School District falls squarely under this Section of the NDCC because:

A. It has been created and is recognized¹ by the "chief executive authority of" the school district which is a political sub-division (NDCC Sec. 44-04-17.1(10)).

B. It is an organization supported in whole by public funds .

Contrary to the assertions, (advanced in a letter dated November 6, 1997 and addressed to Attorney General Heidi Heitkamp by Gary Thune, attorney representing the Bismarck School District) which included four (4) misleading "arguments" as to why the Superintendent's Cabinet is not subject to the Open Meetings Law this Cabinet is subject to the law.

It is subject to that law because the NDCC makes it subject to that law. A look at Mr. Thune's points, each in turn demonstrate not even he challenges the NDCC, instead he simply ignores the Century Code.

First: He proposes a definition he heard when he attended a Special Assistant Attorneys General Training session. Such definitions, regardless of who presents them do not overrule the Century Code.

Second: Mr. Thune's second argument is based upon his understanding of the definition he refers to in his first point. If the first point is invalid then the second is no more valid. Further, this second point actually says nothing. It is a partial quotation from the Century Code and is used completely out of context. The Open Meetings Law applies to PUBLIC ENTITIES and is not limited to "governing bodies". It is clear that any group "acting pursuant to authority delegated by a governing body" also comes under the Open Meeting Law².

Third: Mr. Thune may be correct when he asserts there are "no members of the Bismarck Public Schools (i.e. School Board) on the Superintendent's Cabinet. However, this has nothing to do with determining whether or not this entity is subject to the Open Meetings Law. The critical question is: "Does this entity exist and act pursuant to authority delegated by the governing body"? The answer is YES. (See footnote #1).

¹ The Superintendent has been granted the authority to, "establish an administrative cabinet as an advisory and deliberative body" pursuant to ADMINISTRATIVE RULE: COUNCILS, CABINETS AND COMMITTEES, CLR on 2-13-78.

² See M-A6, Open Records and Meetings Manual, May 1996, Revised September 1997 - Office of the Attorney General.

Fourth: Mr. Thune claims, "Since the Superintendent's Cabinet has no authority delegated to it by the Bismarck School Board and contains no publicly-elected school board members, it... is not subject the open meeting law." First, it does not have to have any "authority" to be subject to the open meetings law, it has simply to have been created and be acting pursuant to authority delegated by a governing body. The "authority" Mr. Thune is attempting to claim is necessary is authority to make "executive decisions". However, the **authority** under the code is that the entity in question was created pursuant to the authority of the governing body.

What is a Governing Body?

For purposes of this determination the legislator has made it clear "governing body" is not limited to "the chief decision-making body of a public entity." If this were the case it would be easy for the governing body to simply delegate authority to a committee or some other group.³

According to the State Attorney General, "Any doubt whether a committee or other group is subject to the open meeting law should be resolved in favor of opening meetings of the group the public."⁴

This was summarized by the Attorney General in the following words, "Meetings of groups connected with public agencies or institutions or groups assuming quasi public functions should, as a matter of policy, be open to the public except in the most unusual of circumstances."⁵

Who Has the Right to Attend Open Meetings?

Anyone and everyone.

How Is the Open Meetings Law Enforced?

Following the last Legislative session the penalties and means of enforcing the OML have changed. The time to file has been established at 60 days from the date of the denial or 30 days from the date of an Attorney General's opinion.

The situation you experienced is likely not actionable because of the timing. However, there is now a civil fine for violation of the OML.

However, with the opinion of the present Attorney General the next time you or anyone else is ejected from this type of meeting, the ability to exact the penalty may be difficult. But the ability to reverse the Attorney General's opinion is still ripe.

Exemptions From the Open Meetings Law.

³ See M-A6 and M-A7, Open Records and Meetings Manual, May 1996, Revised September 1997 - Office of the Attorney General.

⁴ Ibid.

⁵ 1967 N.D. Op. Attorney General, 244, 246.

While there are exemptions to the OML, based on the authority creating the Superintendent's Cabinet and the Agenda of the October 23, 1997 meeting would lead one to conclude there is no basis to claim "exemption".

SUMMARY.

The Bismarck School Board's authorizing establishment of a Superintendent's Cabinet makes that entity subject to the OML. This Cabinet has the duty to discuss, review, rewrite manuals, determine actions and activities within the school district, direct the activities of teachers and staff, set standards for leadership quality, and through the input of the members of this committee the Superintendent makes decision which involve expenditure of public funds.

The purpose of the Cabinet is to "foster communications" , "give a voice to the development of policies" among other things.

OML's are intended to permit the public to view the entire process involved in the decision making by a public entity.

It is clear from the Attorney General's 12/22/97 opinion that the purpose of the Cabinet did involve decision making by the Cabinet. However, the Attorney General argued that since "substantive policy decision(s)"⁶ are required to make this Cabinet subject to the OML.

The purpose of the OML is to insure the public is aware of what goes into the decisions of a public entity. The Superintendent's Cabinet is established among other things to, "Allow each member of the staff to have a voice in the development of policies and in the making of decisions affecting them." This alone is sufficient to make this Cabinet subject North Dakota's Open Meeting Law.

Ref.: Sophia[Justice for All]

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1725 North 5th Street
Bismarck, ND 58501
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⁶ Page 4, Attorney General's Open Records and meetings Opinion, NO. 97-0-02, issued 12/22/97. It is interesting that this opinion was, ISSUED TO: Bismarck Public School Board President Melvin Fischer and District Superintendent Lowell Jensen. It is interesting because it was not issued to the individual who had requested the opinion.

February 8, 1999

Received	Public Entity	Requester	Status	Type of Violation
08/27/97	NDSU	Saye, Patrick	Withdrawn	Records
10/17/97	Burleigh County	Fought, Tim	Opinion 97-01	Records
10/27/97	Bismarck School	Preszler, Sophia	Opinion 97-02	Meetings
11/12/97	Bismarck School	Preszler, Sophia	Opinion 98-02	Notice
12/10/97	Griggs County	Hill, Tim	Opinion 98-01	Meetings, Notice
12/12/97	Walsh County Water	Fisher, Pat	Withdrawn	Records, Fee
12/15/97	Southwest Correction	Schatz, Margueri	Opinion 98-04	Meetings, Notice
12/29/97	Southwest Correction	Schorsch, Kerry	Opinion 98-04	Mtg, Rec, Fee, Not
12/29/97	Hettinger Cnty JDA	Schorsch, Kerry	Opinion 98-03	Records, Fee
01/05/98	Southwest Correction	Schwartz, Randy	Opinion 98-04	Records, Fee
01/05/98	Hazel-Mof-Brad School	McDonald, Jack	Withdrawn	Notice
01/09/98	ND Wheat Commission	Fought, Tim	Withdrawn	Notice
01/09/98	City of Dickinson	Fought, Tim	Withdrawn	Fee
01/26/98	Southwest Correction	Schorsch, Kerry	Opinion 98-04	Records, Fee
02/05/98	City of Velva	Jackson, Jack	Withdrawn	Records
02/10/98	City of Selfridge	Bormann, Clark	Withdrawn	Records
02/20/98	Board of Higher Educa	Fought, Tim	Opinion 98-05	Meetings, Notice
02/20/98	Board of Higher Educa	Aamodt, Al	Opinion 98-05	Meetings, Notice
02/23/98	Board of Higher Educa	McDonald, Jack	Opinion 98-05	Meetings, Notice
02/24/98	Board of Higher Educa	Devine, Terry	Opinion 98-05	Meetings, Notice
03/17/98	City of Velva	Jackson, Jack	Opinion 98-10	Notice
03/20/98	Dunseith School	Geiermann, Mike	Opinion 98-06	Meeting
03/30/98	Township of Pembina	Defoe, Don	Opinion 98-09	Minutes, Notice
04/01/98	City of Mandan	Schmidt, Kelly	Opinion 98-08	Notice
04/01/98	City of Beach	Hanson, John	Opinion 98-14	Minutes
04/03/98	Southwest Correction	Schorsch, Kerry	Opinion 98-07	Records, Fee
04/22/98	Bismarck School	Fought, Tim	Opinion 98-12	Meetings
04/29/98	Burleigh County	Kouba, Gene	Opinion 98-15	Records, Minutes
04/29/98	Foster County Water	Seitz, Jim	Opinion 98-11	Mtgs, Noti, Min
04/29/98	City of Regan	Young, David	Opinion 98-18	Notice, Minutes
05/01/98	City of Lincoln	Filibeck, MaryAn	Opinion 98-16	Meetings, Notice
05/12/98	Griggs County	Hendrickson, Pau	Opinion 98-13	Notice
05/19/98	Foster County Water	Seitz, Jim	Opinion 98-11	Mtgs, Noti, Min
06/12/98	Foster County Water	Seitz, Jim	Opinion 98-19	Records
06/22/98	City of Minnewaukan	Wallace, Mark	Opinion 98-20	Records
06/26/98	Child Support Comm.	Beehler, Susan	Opinion 98-17	Meetings
07/07/98	Assoc Soil Cons Dists	Johnson, Roxanne	Opinion 98-21	Meetings; Notice
07/22/98	Fargo Park District	Clute, Steve	Opinion 98-22	Records
08/04/98	Grand Forks Homes Inc	Youngberg, Jerry	Opinion 98-23	Meetings
08/07/98	Grand Forks Homes Inc	Waletzko, Jerry	Opinion 98-23	Meetings
09/17/98	Fargo Youth Comm'n	Condon, Patrick	Opinion 98-24	Records
10/22/98	ND Hearing Inst Disp	Skowronek, John	Opinion 98-25	Records; minutes
12/01/98	ND Insurance Reserve	Dohman, Raymond	Pending	Records
12/20/98	Grand Forks Homes Inc	Youngberg, Jerry	Pending	Meetings

Total: 44 requests

Pending: 2 requests

Issued: 27 opinions to 35 requesters

Withdrawn: 7 requests

Dear Chairman Steneberg and Judiciary members,

Although the changes you have made are very good, it greatly concerns me that the very pervasive "untruth" on line 20 which says "public entity providing the public funds." The Public Entity does not provide the public funds, the Citizen Entity does.

the control of education and government will go where the money is. the document saying that the Public Entity provides the funds is "untrue". this takes the control from the Citizen providing the funds and gives the control to the Public Entity. this enslaves the citizen.

this is the very reason the Citizen is not heard, and many citizens have ceased

to be involved in Civic and political matters.

The attorney General's opinion and the one written by a private attorney gives a clear picture about what I'm speaking about, which is included in your packet.

Senator Stenejem and Judiciary members, would it be possible to have the bill read on line 20 and 21 the public entity and the person requesting the opinion and leave of providing the public funds.

It's troubling to know that the ND League of Cities would ask to have the "untruth" re-instated, but moreso that you would accept it. Please! Reconsider!

Sincerely,
Sophia Prozler
1725 N 5th
Bismarck, ND 58501

255-0269

Written Testimony Presented to the House Government and Veteran Affairs Committee
(of the 56th Legislative Assembly / on March 5, 1999)
Concerning Senate Bill 2372

by
William M. Schuh
Private Citizen, on behalf of Sophia Preszler

Chairman Klein, and Honorable members of the House Government and Veteran Affairs Committee. Please vote do pass on SB 2372 with the following amendments.

SB 2372 was written to correct a weakness in subsection 1 of section 44-04-21.1 of the 1997 Supplement to the North Dakota Century Code, which allows the "public entity" against which the complaint is filed (for non disclosure of public information) sole control over the definition of the "facts" relating to the complaint, thereby unfairly biasing the proceedings.

The problematic statement is:

"In any opinion issued under this section, the attorney general shall base the opinion on the facts given by the public entity." (II 20-22 of the First Engrossment).

In the original proposed SB 2372 version , this statement was amended as follows:

"In any opinion issued under this section, the attorney general shall base the opinion on the facts given by the person requesting the opinion and by the public entity."

The change was amended in the engrossed version which passed the Senate, returning the law to its original form and effectively negating the entire purpose of the bill.

We propose one the following two options to amend lines 20-22 of the first engrossment, and restore the function of the bill.

Option 1. Rewrite II 20-22 (final sentence of the bill) to read as follows:

"In any opinion issued under this section the attorney general shall base the opinion on the ~~facts given~~ information provided by the public entity, the person filing the complaint, and any other persons or sources of information related to the complaint.

This version explicitly directs the Attorney General to consider and weigh all available information.

Option 2. Delete II 20-22 (final sentence of the bill):

~~*"In any opinion issued under this section, the attorney general shall base the opinion on the facts given by the public entity."*~~

This version removes the explicit direction that the Attorney General derive the facts from only one source, and allows the Attorney General to proceed with the investigation using procedures that would routinely be considered a part of good investigative practice: ei, considering and weighing all information sources available.