

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1297

2005 HOUSE POLITICAL SUBDIVISIONS

HB 1297

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1297

House Political Subdivisions Committee

☐ Conference Committee

Hearing Date January 21, 2005

Tape Number	Side A	Side B	Meter #
1	x		6.6 to 41.1
2	x		5.7 to 6.8

Committee Clerk Signature



Minutes: **Rep. Devlin, Chairman** opened the hearing on HB 1297, A Bill for an Act to amend and reenact subdivision b of subsection 8 of section 44-04-17.1 of the North Dakota Century Code, relating to the definition of a meeting for purposes of the open meetings law.

**Rep. Kretschmar** ( 7.1 ) representing District 28 spoke as prime sponsor for HB 1297. The background of this bill is rooted in the Constitutional Convention of 1973. Rep. Kretschmar began his political career then and has been active since. His career has paralleled the opens meeting legislation through the years. Rep. Herbal, Vice Chairman has supported the open meetings concept all his political life. Over the years Attorney General opinions and changes in the open meetings have swung to the facilities too far in my opinion. Last summer at a county commissioners meeting from counties meeting in our area expressed this concern among other things -- the subject of this bill. A quorum of a three commissioner board is two. Any time you have two commissioners who get together to inspect a bridge or meet with another elected

official for a cup of coffee or to inspect fire damage or a culvert wash out -- it is legally an open meeting requiring a notice to the local paper. I don't want to do away with the open meetings law but I do want to swing the pendulum back a bit so that three member boards can function without being in violation of the law when they are not doing any county business. Another example is that from our county two commissioners can not travel in the same to a meeting across the state without violating the open meetings law.

**Rep. Maragos ( 12.5 )** Is there a penalty for violating the open meetings law ?

**Rep. Maragos** To my knowledge there is no basic penalty but the board which has quote unquote which has violated an open meetings law are supposed to have another meeting and rehash all aspects in open public forum.

**Rep. Ekstrom ( 12.9 )** Legislative intent, if clearly defined it seems to me should govern. If we can clearly define it -- how does that square with your bill?

**Rep. Kretschmar ( 13.3 )** When the Attorney General rules on law one of the first things He does is look at is the legislative intent.

**Rep. Herbel, Vice Chairman : ( 13.5 )** One of the issues I get involved with back home is negotiators for the teachers meet with the teachers to decide what they are going to bring to the meeting -- would that be in line with what you intend here.

**Rep. Kretschmar :** That may not especially if there is not a quorum present. In my District the township boards consist of three members. Two of them can't get together without constituting a quorum and subject to the open meetings law.

**Rep. Devlin, Chairman ( 14.0 )** This is a rewrite of the whole question of the open meetings law in judiciary.

**Rep. Kretschmar** : It may well be there should be an interim legislative study.

**Terry Traynor** : Assistant Director of the North Dakota Association of Counties. We don't know if this the appropriate language but we do recognize there are some issues that have been raised in the three commission counties. The language mention a governing body representatives meet with other government officials is a little problematic. They always meet with the Auditor. Then there is those training and education sessions for staff and elected officials being trained for risk management. There are many other instances for training and education which could be construed as a public meeting. We suggest you look at some of these aspects.

**Rep. Devlin, Chairman ( 16.6 )** I know that you were working with the Task force that was working on the open meetings law. Was any of this brought up at those meetings?

**Terry Traynor** : some were but not all and the McIntosh and the Renville County decisions were more recent.

**Rep. Herbel, Vice Chairman ( 17.0 )** Rep. Kretschmar sort of suggested that this could be the subject of an interim study. How do you respond to that?

**Terry Traynor** : There was a study and it was quite whole which was the basis for current bill before the legislature --- I believe it is contained in HB 1286. Whether another study is needed at this time , I don't know.

**Opposition testimony:**

**Rep. Zaiser** : While he himself was not appearing in opposition, he appeared to read into the record the testimony of constituent, Charlie Johnson, GM and News Director for KVLV & KXJB TV in Fargo. A copy of Mr. Johnson's message is attached.

**Sen. Andrist** : Before he became a legislator 12 years earlier Rep. Herbal, Vice Chairman was in the newspaper business for 25 - 30 years. **Sen. Andrist** spoke in opposition to HB 1297 stating his firm belief and support for open meetings as absolutely needed for our freedoms.

**Jack McDonald** : Representing the North Dakota Newspaper Association and the North Dakota Broadcasters Associations appeared in opposition to HB 1297. A copy of his written testimony is attached.

**Rep. Koppelman ( 29.6 )** Could the objectives of this bill be accomplished under current law and how would that work?

**Jack McDonald** : Yes it could be done -- if let's say that you wanted to go out and look at dam or a piece of road, you simply call an emergency meeting. There is a provision in law now that says -- say -- there a lot of times for instance when the roof blows off the school -- there's a washout-- a flood happens -- all you need to do then is if you are going to call a meeting -- all you do is make one more call to the local official county newspaper and tell them you are going to have meeting down somewhere -- where are going out to look at the dam -- or whatever.

**Rep. Koppelman ( 31.4 )** So you could go look but not talk about it?

**Jack McDonald** : If you go out to look at it you are conducting business all you have to do is make one more call.

**Rep. Devlin, Chairman ( 32.4 )** Looking at HB 1286 which is the Attorney general's Task Force Bill. That is scheduled to be heard Monday the 24th in judiciary. Would you just briefly explain What is to be accomplished in that bill.

**Jack McDonald** : Mr. McDonald went on to explain the work of the task force and some of the revisions which may be approved and hopefully with good consensus.

**Beth HELFRICH :** As Executive Director of the North Dakota Broadcasters Association

she appeared in opposition to the bill. A copy of comments in writing are attached.

**Roger Bailey :** Mr. Bailey representing the North Dakota Newspaper Association spoke briefly in opposition to the bill.

**Nancy Sand** speaking for the North Dakota NEA and NDEA stated there was enough distrust And suspicion among the public as to what boards and commissions might be doing and that meetings must be kept open. She was for a 'do Not Pass" for the bill.

**Rep.Devlin, Chairman** closed the hearing as there was no one wishing to appear on this bill

**Record closed ( 41.1 )**

**In work session, Rep.Devlin, Chairmanb** ( 5.7 Tape 2 side A ) opened the discussion for action on HB 1297. **Rep. Ekstrom** moved a 'Do Not Pass' motion for HB 1297. **Rep. Dietrich** seconded the motion. On a roll call vote the motion carried

**Rep. Zaiser** was designated to carry HB 1287 on the floor.

**End of record. ( 6.8 )**

Date: *January 21, 2008*  
Roll Call Vote:

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. *HB 1297*

House POLITICAL SUBDIVISIONS

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken

*Do not Pass*

Motion Made By

*Rep Ek*

Seconded By

*Dietrich*

Representatives  
Rep. Devlin, Chairman  
Rep. Herbel, Vice Chairman  
Rep. Dietrich  
Rep. Johnson  
Rep. Koppelman  
Rep. Kretschmar  
Rep. Maragos  
Rep. Pietsch  
Rep. Wrangham

Yes No  
✓  
✓  
✓  
✓  
✓  
✓  
✓  
✓  
✓  
✓

Representatives  
Rep. Ekstrom  
Rep. Kaldor  
Rep. Zaiser

Yes No  
✓  
✓  
✓

Total (Yes)

*12*

No

*0*

Absent

*0*

Floor Assignment

*Rep - Zaiser*

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



**REPORT OF STANDING COMMITTEE (410)**  
January 26, 2005 9:22 a.m.

**Module No: HR-17-1058**  
**Carrier: Zaiser**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**HB 1297: Political Subdivisions Committee (Rep. Devlin, Chairman) recommends DO NOT PASS (12 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1297 was placed on the Eleventh order on the calendar.**

2005 TESTIMONY

HB 1297

January 21, 2003

HOUSE POLITICAL SUBDIVISIONS COMMITTEE  
HB 1297

CHAIRMAN DEVLIN AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing here today on behalf of the North Dakota Newspaper Association and the North Dakota Broadcasters Association. We oppose HB 1297 and respectfully request a DO NOT PASS.

North Dakota's open meeting law was enacted in 1957. For the past 47 years, meetings of public bodies, regardless of whether they are meeting with public officials or whether they take action at the meeting, have been open to the public. That's nearly a half century. In 1974, the people of North Dakota, by a 78% yes vote, put the open meetings law into the Constitution. In 1997, the Legislature, by votes of 89-8 and 44-1, revised the open meetings law, and reinforced the then 40 year concept that North Dakota citizens expected that all of their governmental meetings would be open.

Attached as Exhibit 1 is a copy of §44-04-17.1 that defines meetings and which this bill seeks to amend. This is an annotated version which includes the numerous Attorney General's Opinions interpreting this section of the law. Exhibit 2 is a portion of the Attorney General's Open Meetings Manual which discusses open meetings of governmental bodies.

Exhibits 3 & 4 are copies of the two Attorney General's Opinions that led to HB 1297 being introduced.

Quite simply, HB 1297 would destroy the state's open meetings law. It says the only meetings that need to be open are those at which votes are taken. The caveat that this is only if a public official is present is meaningless since nearly all public bodies meet, or would meet if this law was passed, with a public official, such as a state's attorney, a city attorney, a county or city auditor, or an elected official. The caveat about meeting with another public body is even worse, since this would allow the meeting to be closed even without the token public official.

As you well know, there are many, many meetings of public bodies where no votes are taken, but there is only discussion of issues and testimony. This discussion and testimony on issues is at the heart of public participation and understanding. Your committee meeting this morning is a prime example. If this law were enacted, this meeting could be closed after testimony was concluded. How can the public understand the issues and know what its government is doing if they are not allowed to hear the discussions of the issues? If the only open meetings are going to involve votes, then the public has been effectively shut out of the process.

(OVER)

We don't think this is what you want and we don't think this is what North Dakota citizens want. They want open government. Approximately 75% of the open meeting and open records opinion requests to the Attorney General each year come from North Dakota citizens, not from the media or other interest groups.

North Dakota's governmental bodies have learned to live and operate well under the open meetings law. There is no need to make such a drastic change now. The McIntosh county Commission is one of the few 3-member county commissions in the state. Such small groups sometimes present problems regarding open meetings, but they are not problems that can't be solved. On the state level, the Public Service Commission, a 3-member governmental entity, works well with the open meetings law and has no problems separating official meetings from chance or informal gatherings of the three commissioners. It often meets with other public officials and it makes numerous trips to examine specific facilities or locations. It has no problems doing this within the parameters of the open meetings law.

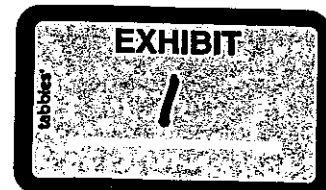
Therefore, we respectfully request a DO NOT PASS on this bill. If you have any questions, I will be happy to try to answer them. THANK YOU FOR YOUR TIME AND CONSIDERATION.

## **Annotated Open Records and Meetings Laws North Dakota Century Code §§ 44-04-17.1 through 44-04-21.3**

(covering opinions issued since January 1, 1997)

### **44-04-17.1. Definitions. As used in this section through section 44-04-21.2:**

1. "Closed meeting" means all or part of an exempt meeting that a public entity in its discretion has not opened to the public, although any person necessary to carry out or further the purposes of a closed meeting may be admitted.
2. "Closed record" means all or part of an exempt record that a public entity in its discretion has not opened to the public.
3. "Confidential meeting" or "confidential record" means all or part of a record or meeting that is either expressly declared confidential or is prohibited from being open to the public.
4. "Executive session" means all or part of a meeting that is closed or confidential.
5. "Exempt meeting" or "exempt record" means all or part of a record or meeting that is neither required by law to be open to the public, nor is confidential, but may be open in the discretion of the public entity.
6. "Governing body" means the multimember body responsible for making a collective decision on behalf of a public entity. "Governing body" also includes any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.
7. "Law" includes federal statutes, applicable federal regulations, and state statutes.
8. a. "Meeting" means a formal or informal gathering, whether in person or through other means such as telephone or video conference, of:
  - (1) A quorum of the members of the governing body of a public entity regarding public business; or
  - (2) Less than a quorum of the members of the governing body of a public entity regarding public business, if the members attending one or more of such smaller gatherings collectively constitute a quorum and if the members hold the gathering for the purpose of avoiding the requirements of section 44-04-19.
- b. "Meeting" includes work sessions, but does not include chance or social gatherings where public business is not considered and does not include the attendance of members of a governing body at meetings of any national, regional, or state association to which the public entity, the governing body, or individual members belong.
- c. Notwithstanding subdivisions a and b, as applied to the legislative assembly, "meeting" means any gathering subject to section 14 of article IV of the Constitution of North Dakota.
9. "Organization or agency supported in whole or in part by public funds" means an organization or agency in any form which has received public funds exceeding the fair market value of any goods or services given in exchange for the public funds, whether through grants, membership dues, fees, or any other payment. An exchange must be conclusively presumed to be for fair market value, and does not constitute support by public funds, when an organization or agency receives a benefit under any authorized economic development program.
10. "Political subdivision" includes any county or city, regardless of the adoption of any home rule charter, and any airport authority, township, school district, park district, rural fire protection district, water resource district, solid waste management



authority, rural ambulance service district, irrigation district, hospital district, soil conservation district, recreation service district, railroad authority, or district health unit.

11. "Public business" means all matters that relate or may foreseeably relate in any way to:
  - a. The performance of the public entity's governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power; or
  - b. The public entity's use of public funds.
12. "Public entity" means all:
  - a. Public or governmental bodies, boards, bureaus, commissions, or agencies of the state, including any entity created or recognized by the Constitution of North Dakota, state statute, or executive order of the governor or any task force or working group created by the individual in charge of a state agency or institution, to exercise public authority or perform a governmental function;
  - b. Public or governmental bodies, boards, bureaus, commissions, or agencies of any political subdivision of the state and any entity created or recognized by the Constitution of North Dakota, state statute, executive order of the governor, resolution, ordinance, rule, bylaw, or executive order of the chief executive authority of a political subdivision of the state to exercise public authority or perform a governmental function; and
  - c. Organizations or agencies supported in whole or in part by public funds, or expending public funds.
13. "Public funds" means cash and other assets with more than minimal value received from the state or any political subdivision of the state.
14. "Quorum" means one-half or more of the members of the governing body, or any smaller number if sufficient for a governing body to transact business on behalf of the public entity.
15. "Record" means recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business. "Record" does not include unrecorded thought processes or mental impressions, but does include preliminary drafts and working papers. "Record" also does not include records in the possession of a court of this state.
16. "Task force or working group" means a group of individuals who have been formally appointed and delegated to meet as a group to assist, advise, or act on behalf of the individual in charge of a state agency or institution when a majority of the members of the group are not employees of the agency or institution.

**Source:** 2001 N.D. Sess. Laws ch. 391, §§ 3, 4; 1997 N.D. Sess. Laws ch. 381, § 2.

#### **Non-governmental organizations**

A non-governmental organization is subject to the open records and meetings laws under the following four circumstances: if the organization is 1) a governing body by delegation (N.D.C.C. § 44-04-17.1(6)), 2) recognized by state law or by an action of a political subdivision to exercise public authority or perform a governmental function (N.D.C.C.

§ 44-04-17.1(12)(a)), 3) supported by public funds or expending public funds (N.D.C.C. § 44-04-17.1(9)), or 4) an agent or agency of a public entity performing a governmental function or possessing records on behalf of a public entity (N.D.C.C. § 44-04-17.1(12), (15)). 1999 N.D. Op. Att'y Gen. O-03; 1999 N.D. Op. Att'y Gen. O-02; 1998 N.D. Op. Att'y Gen. O-23; 1998 N.D. Op. Att'y Gen. O-21.

The four circumstances described above are disjunctive. 1999 N.D. Op. Att'y Gen. O-02.

**(1) Closed meeting**

A governing body may admit anyone to a closed meeting whom the body feels is necessary to carry out or further the purposes of the closed meeting. 1999 N.D. Op. Att'y Gen. O-1.

A "closed meeting" is a meeting or part of a meeting which may either be open or closed to the public in the public entity's discretion. 1999 N.D. Op. Att'y Gen. O-1.

**(2) Closed record**

If a public entity decides not to make public a record which is exempt from the open records law, the record is "closed" as defined in this subsection. 2000 N.D. Op. Att'y Gen. O-02.

**(3) Confidential record**

A "confidential record" under this section is a record over which a public entity has no discretion and which is prohibited from being open to the public. 2000 N.D. Op. Att'y Gen. O-02.

**(4) Executive session**

The phrase "executive session" includes both a "confidential meeting" and a "closed meeting" as those terms are defined in this section. 1999 N.D. Op. Att'y Gen. O-01.

**(5) Exempt records**

Disclosure of exempt records is left to the discretion of the public entity possessing the records. 1998 N.D. Op. Att'y Gen. F-09.

**(6) Governing body**

**— Multimember body**

The phrase "governing" body refers to multi-member groups rather than one individual such as the chairman of a county board of commissioners. 1999 N.D. Op. Att'y Gen. O-05.

A director of a state administrative agency, as a single individual, is not a "governing body." 1998 N.D. Op. Att'y Gen. F-12.

The multi-member body responsible for making a decision on behalf of the child support guidelines drafting advisory committee is the committee itself. 1998 N.D. Op. Att'y Gen. O-17.

The board of a water resource district is the governing body of the district. 1998 N.D. Op. Att'y Gen. F-16; 1998 N.D. Op. Att'y Gen. O-11.

The township board of supervisors is the governing body for a township. 1998 N.D. Op. Att'y Gen. O-09. The group of township electors

who attend the annual township meeting also is a governing body. Id.

The group responsible for filling vacancies on a county commission under N.D.C.C. § 40-02-05 is a governing body. 1998 N.D. Op. Att'y Gen. F-11.

The school district board is the multi-member body responsible for making decisions on behalf of the school district. 1998 N.D. Op. Att'y Gen. O-06; 1997 N.D. Op. Att'y Gen. O-02.

The county social services board is a governing body. 2001 N.D. Op. Att'y Gen. O-15.

**— Delegation to smaller group**

A franchise committee formed by a city council is a governing body. 2001 N.D. Op. Att'y Gen. O-04.

A group of less than a quorum of the members of a governing body which was appointed by the chairman of the body to meet with the North Dakota Insurance Reserve Fund was a governing body by delegation. 1998 N.D. Op. Att'y Gen. O-13.

A group is not a governing body by delegation if the delegation is made by an individual rather than a group. 1997 N.D. Op. Att'y Gen. O-02. See also 1998 N.D. Op. Att'y Gen. O-02.

**(7) Law**

The term "law" does not include a contractual commitment of a public entity to keep a record confidential. 2000 N.D. Op. Att'y Gen. F-09.

The term "law" includes federal regulations pertaining to records of federal prisoners who are placed in the custody of a multi-county correction center. 2000 N.D. Op. Att'y Gen. F-09.

An exception to the open records law can be found in federal law as well as state statutes. 1998 N.D. Op. Att'y Gen. F-13.

The Family Educational Rights and Privacy Act (FERPA), 12 U.S.C. § 1232g, is a "law" prohibiting the disclosure of certain education records. 1998 N.D. Op. Att'y Gen. L-51; 1998 N.D. Op. Att'y Gen. O-06.

The term "law" includes federal regulations which prohibit further disclosure of criminal history record information received from the Federal Bureau of Investigation. 1998 N.D. Op. Att'y Gen. L-32.

**(8) Meeting**

The term "meeting" has four elements: public entity, governing body, public business, and a gathering of a quorum of the members of the governing body. 1998 N.D. Op. Att'y Gen. O-05.

A gathering needs to pertain to public business for it to be a meeting. 1999 N.D. Op. Att'y Gen. O-09. Social or chance gatherings are not meetings unless public business is considered during the gathering. 1998 N.D. Op. Att'y Gen. O-11; 1998 N.D. Op. Att'y Gen. O-05.

Action need not be taken at a gathering for it to be a meeting, nor is it necessary that the gathering be formally convened as a "meeting." All that is required is that the gathering involve a quorum of the members of a governing body of a public entity and pertain to the public business of the governing body, which includes all stages of the decision-making process. 1998 N.D. Op. Att'y Gen. O-16; 1998 N.D. Op. Att'y Gen. F-16; 1998 N.D. Op. Att'y Gen. O-11; 1998 N.D. Op. Att'y Gen. O-08.

The term "meeting" includes the attendance of a quorum of the members of a governing body at a meeting of another group when the group's discussion pertains to the public business of the governing body. 1998 N.D. Op. Att'y Gen. O-18; 1998 N.D. Op. Att'y Gen. O-10.

A school board retreat involving school business is a meeting. 2001 N.D. Op. Att'y Gen. O-05.

An on-site investigation by a water resource district board of an area which is the subject of a complaint to the board is a meeting. 1998 N.D. Op. Att'y Gen. F-16.

The term "meeting" includes a gathering at which a governing body requests information from its staff for the body's next meeting. 1998 N.D. Op. Att'y Gen. O-11.

By adopting the quorum rule, the Legislature exempted from the open meetings law most conversations between two or three members of an eight member group, even about public business. However, once those conversations cumulatively involve a quorum of the group's members, it is a meeting. 1998 N.D. Op. Att'y Gen. O-05. See also 2001 N.D. Op. Att'y Gen. O-18 (a gathering must involve a quorum to be a meeting).

The term "meeting" does not include conversations between the presiding officer of a governing body and the other members of the governing body to identify agenda topics for the next meeting, as long as the substance of those

topics is not discussed. 1998 N.D. Op. Att'y Gen. O-05.

It is not a meeting for a member of a governing body who was absent from a meeting to contact the other members if the conversations are limited to finding out what happened at the meeting. 1998 N.D. Op. Att'y Gen. O-05.

A series of e-mail messages or letters involving a quorum of the members of a governing body is not a "gathering" of those members and is therefore not a meeting of the governing body, although the messages or letters will be open to the public unless otherwise provided by law. 1998 N.D. Op. Att'y Gen. O-05.

It is not a meeting if the members of a governing body communicate and transact business in writing. 2001 N.D. Op. Att'y Gen. O-14.

A gathering must involve a quorum of the members of a governing body for it to be a meeting. 2001 N.D. Op. Att'y Gen. O-18.

**-- Smaller gatherings cumulatively involving a quorum**

A series of on-site investigations by individual water resource district board members which collectively involve a quorum is not a meeting if the members are investigating the area on their own, but is a meeting if the separate investigations are an organized effort by the board for its members to obtain information. 1998 N.D. Op. Att'y Gen. F-16.

A series of smaller gatherings collectively involving a quorum is a meeting, even if the members did not intend to violate the open meetings law, if the body intentionally met in groups smaller than a quorum and intentionally discussed or received information regarding public business which would have had to occur in an open meeting if any of the smaller gatherings had involved a quorum. 1998 N.D. Op. Att'y Gen. O-05.

**(9) Organization supported by public funds**

The total funds provided to an organization, combined with the indistinct terms of the organization's contract with a public entity, lead to the conclusion the organization is supported by public funds. 2001 N.D. Op. Att'y Gen. O-11.

An organization is supported by public funds if public funds are used to fund the organization's operations rather than to



purchase services from the organization at fair market value. 2001 N.D. Op. Att'y Gen. O-10.

An organization is supported by public funds if it receives unrestricted funds for its general support. 1999 N.D. Op. Att'y Gen. O-03; 1998 N.D. Op. Att'y Gen. O-24.

An organization is not supported by public funds if the funds received by the organization were paid in exchange for goods or services having an equivalent fair market value. 1998 N.D. Op. Att'y Gen. O-24; 1998 N.D. Op. Att'y Gen. O-23.

For the fair market value test to be met, there first must be a contract between the public entity and the contractor that reasonably identifies the goods and services provided in exchange for the public funds. 2001 N.D. Op. Att'y Gen. O-10.

An organization receiving public funds under a contract with a state agency is not supported by public funds under this section, even if the contract is entitled "Grant Agreement," as long as the goods or services provided in exchange for those funds are reasonably identified in the agreement and have a fair market value that is equivalent to the amount of public funds it receives. 1999 N.D. Op. Att'y Gen. O-03; 1998 N.D. Op. Att'y Gen. F-19.

"Fair market value" under this definition can include a commercially reasonable amount of profit for the contractor. 1998 N.D. Op. Att'y Gen. F-19.

#### — Economic development funds

The fair market value presumption for funds provided under an economic development program is limited to new employers or businesses accepting funds for their general operations. 2001 N.D. Op. Att'y Gen. O-11; 2001 N.D. Op. Att'y Gen. O-10.

An organization which receives Community Development Block Grant funds and a loan from a city job development authority is not supported by public funds for purposes of this section because the funds are provided under authorized economic development programs. 1998 N.D. Op. Att'y Gen. O-23.

#### (10) Political subdivision

A city park district is a political subdivision. 1998 N.D. Op. Att'y Gen. O-22.

A soil conservation district is a political subdivision. 1998 N.D. Op. Att'y Gen. O-21.

A public school district is a political subdivision. 1998 N.D. Op. Att'y Gen. L-128.

A water resource district is a political subdivision. 1998 N.D. Op. Att'y Gen. O-11.

#### (11) Public business

When an organization has received public funds for its general support, all of its financial records pertain to public business and are open because the organization's use of public funds can be fully determined only if those transactions are placed in context with the organization's overall finances. 2001 N.D. Op. Att'y Gen. O-11; 2001 N.D. Op. Att'y Gen. O-10; 1999 N.D. Op. Att'y Gen. O-03; 1998 N.D. Op. Att'y Gen. O-24.

Supervising the employees or other staff of a public entity falls within the public business of the entity, even if delegated to other staff. 1998 N.D. Op. Att'y Gen. O-21; 1998 N.D. Op. Att'y Gen. O-05.

The relationship and communications between members of a governing body of a public entity in their official capacities falls within the public business of the entity. 1998 N.D. Op. Att'y Gen. O-21.

The performance of a member of a governing body in his or her official capacity and the effect of the member's actions on the performance of the public entity's governmental functions are items of public business. 1998 N.D. Op. Att'y Gen. O-16.

Public business includes all matters which relate to a public entity's performance of governmental functions or use of public funds. 1998 N.D. Op. Att'y Gen. O-11.

#### (12) Public entity

The terms "resolution, ordinance, rule, or bylaw" in subdivision 12(b) refer to enactments by the authority responsible for making binding legislative or policy decisions on behalf of the public entity. 1997 N.D. Op. Att'y Gen. O-02.

A teachers' representative organization is not a public entity because it represents the interests of its individual members and does not exercise public authority or perform a governmental function. 2002 N.D. Op. Att'y Gen. L-15.

The committee created by state law to selected nominees for appointment to the North Dakota Wheat Commission is a public entity. 2001 N.D. Op. Att'y Gen. O-16.

A nonprofit corporation recognized in a resolution of a city housing authority as performing the governmental function of developing a new housing development in

collaboration with the housing authority is a public entity. 1998 N.D. Op. Att'y Gen. O-23.

The North Dakota Association of Soil Conservation Districts is a public entity because it is recognized by state law to perform the governmental function of managing trust lands which are dedicated to the soil conservation programs of the soil conservation districts. 1998 N.D. Op. Att'y Gen. O-21.

The child support guidelines drafting advisory committee is a public entity because it is recognized by state statute to perform the governmental function of reviewing the child support guidelines and serving as an advisory group for the Department of Human Services. 1998 N.D. Op. Att'y Gen. O-17.

A township is a public entity. 1998 N.D. Op. Att'y Gen. O-09.

A public school district is a public entity. 1998 N.D. Op. Att'y Gen. L-128.

The Board of Higher Education is a public entity. 1998 N.D. Op. Att'y Gen. O-05.

A county job development authority is a public entity. 1998 N.D. Op. Att'y Gen. O-03.

The North Dakota Board of Hearing Instrument Dispensers is a public entity. 1998 N.D. Op. Att'y Gen. O-25.

The Public Employees Retirement System (PERS) is a public entity. 1997 N.D. Op. Att'y Gen. F-06.

#### **— Agency**

Nine factors may be used to aid in determining whether a contractor is performing a government function: 1) the level of public funding; 2) commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether services contracted for are an integral part of the public entity's decision making process; 5) whether the contractor is performing a function the public entity otherwise would perform; 6) the extent of the public entity's control over the contractor; 7) whether the contractor was created by the public entity; 8) whether the public entity has a substantial financial interest in the contractor; and 9) for whose benefit the private entity is functioning. 2001 N.D. Op. Att'y Gen. O-11.

A contractor acting in place of or on behalf of a public entity, rather than simply providing services to the entity, is an agency of the public entity. 2001 N.D. Op. Att'y Gen. O-11; 2001 N.D. Op. Att'y Gen. O-10; 2001 N.D. Op. Att'y Gen. O-04.

The fact a contractor is not supported by public funds does not negate the possibility that

the contractor may be acting as an agent of a government entity. 2001 N.D. Op. Att'y Gen. O-10.

A contractor managing a pool of government funds is acting as an "agency of government." 2001 N.D. Op. Att'y Gen. O-11.

A contractor who promotes a city program and makes recommendations to the city on how to conduct the program is performing a governmental function on behalf of the city and is an "agency" of the city. 2001 N.D. Op. Att'y Gen. O-10.

A private advertising firm conducting a media campaign to promote a position of the city council is acting as an "agent" of the City. 2001 N.D. Op. Att'y Gen. O-04.

The North Dakota Insurance Reserve Fund is a public entity because it is a joint enterprise of several political subdivisions who have united to self-insure against their legal liability. 1999 N.D. Op. Att'y Gen. O-02.

Public entities which are subject to the open records and meetings laws cannot avoid the requirements of those laws by incorporating a joint enterprise and transferring funds to that enterprise. 1999 N.D. Op. Att'y Gen. O-02.

A separately incorporated joint enterprise of soil conservation districts to coordinate their activities is an agency of those districts. 1998 N.D. Op. Att'y Gen. O-21.

A joint enterprise of several political subdivisions to carry out public business on behalf of the political subdivisions is an agency of those subdivisions. 2002 N.D. Op. Att'y Gen. O-02; 1998 N.D. Op. Att'y Gen. O-04.

#### **— Organizations expending public funds**

The North Dakota Insurance Reserve Fund is expending public funds because the contributions from its member-public entities are a form of risk retention rather than the purchase of insurance coverage, and the contributions therefore never lose their identity as public funds. 1999 N.D. Op. Att'y Gen. O-02.

#### **(13) Public funds**

Public funds which are transferred to a government self-insurance pool do not lose their identity as public funds. 1999 N.D. Op. Att'y Gen. O-02.

The definition of public funds in this subsection includes cash and other assets or property which have a significant economic value, including the co-signature of a public entity on a loan by a non-governmental organization or the free use of public property.

1998 N.D. Op. Att'y Gen. O-24; 1998 N.D. Op. Att'y Gen. O-23.

The definition of public funds in this subsection does not include de minimis contributions of property or assets, such as the occasional use of a public meeting room. 1998 N.D. Op. Att'y Gen. O-24; 1998 N.D. Op. Att'y Gen. O-23.

The definition of public funds in this subsection does not include funds provided from the federal government directly to a non-governmental organization. 1999 N.D. Op. Att'y Gen. O-03; 1998 N.D. Op. Att'y Gen. O-23.

**(14) Quorum**

A quorum of an eight-member governing body is four members. 1998 N.D. Op. Att'y Gen. O-05.

**(15) Record**

The form in which information is recorded is irrelevant to whether the information is a "record." 1998 N.D. Op. Att'y Gen. O-22.

Mere possession of records regarding public business, rather than ownership, is all that is necessary for an item of recorded information to be a "record" under subsection (15). 1998 N.D. Op. Att'y Gen. L-73.

An item of recorded information is not a record if it has not been received or prepared for use in connection with public business. Mere possession of recorded information by a public entity is not sufficient. Rather, the term "connection" requires a link or association between the recorded information and the public entity's public business. 1998 N.D. Op. Att'y Gen. L-128.

A personal letter received by an employee at work would not, for that reason alone, be a record. However, information in a school district phone bill regarding personal telephone calls

has a link or association with payment of school district expenses and is a record, notwithstanding the fact that the charges are later reimbursed by school district personnel. 1998 N.D. Op. Att'y Gen. L-128.

Any settlement agreement by the North Dakota Insurance Reserve Fund or its attorneys, as agents of the public entities who participate in the fund, is an open record. The balance of the file of any case which is no longer pending is also an open record, with a limited exception for records in the file referring to or concerning the amount of reserves set aside during the case. 1999 N.D. Op. Att'y Gen. O-02.

The budget of an organization supported by public funds is an open record because it relates to the use and impact of the public funds received by the organization, notwithstanding the fact that the information may be speculative and outdated. 1998 N.D. Op. Att'y Gen. O-24.

Field inspection applications and reports by the State Seed Department are records. 1998 N.D. Op. Att'y Gen. L-77.

The term "record" includes a resume and other personal information of a person applying for employment with a public entity. 1998 N.D. Op. Att'y Gen. F-11.

The term "record" does not include the unwritten thoughts of a public official. 1997 N.D. Op. Att'y Gen. O-1.

The term "record" includes each entry on forms submitted to a public entity regarding public business. 1997 N.D. Op. Att'y Gen. F-06.

**-- Court records**

Court records are not subject to the open records law. Rather, disclosure of municipal court records is governed by the court or by administrative rules of the North Dakota Supreme Court. 2002 N.D. Op. Att'y Gen. L-19.

**44-04-18. Access to public records - Electronically stored information.**

1. Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours. As used in this subsection, "reasonable office hours" includes all regular office hours of a public entity. If a public entity does not have regular office hours, the name and telephone number of a contact person authorized to provide access to the public entity's records must be posted on the door of the office of the public entity, if any. Otherwise, the information regarding the contact person must be filed with the secretary of state for state-level entities, for public entities defined in subdivision c of subsection 12 of section 44-04-17.1, the city auditor or designee of the city for city-level entities, or the county auditor or designee of the county for other entities.

# OPEN MEETINGS

## A. General Open Meetings Law Requirements

### 1. What Does the Open Meetings Law Require?

Similar open meetings provisions are found in both the North Dakota Constitution and the North Dakota Century Code:

Unless otherwise provided by law, all meetings of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be open to the public.

N.D. Const. art. XI, § 5.<sup>1</sup>

Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public. . . .

1. This section is violated when any person is denied access to a meeting under this section, unless such refusal, implicitly or explicitly communicated, is due to a lack of physical space in the meeting room for the person or persons seeking access.
2. For purposes of this section, the meeting room must be accessible to, and the size of the room must accommodate, the number of persons reasonably expected to attend the meeting.
3. The right of a person to attend a meeting under this section includes the right to photograph, to record on audio or video tape and to broadcast live on radio or television the portion of the meeting that is not held in executive session, provided that there is no active interference with the conduct of the meeting. The exercise of this right may not be dependent upon the prior approval of the governing body. However, the governing body may impose reasonable limitations on recording activity to minimize the possibility of disruption of the meeting.
4. For meetings subject to this section where one or more of the members of the governing body is participating by telephone or video, a speakerphone or monitor must be provided at the location specified in the notice issued under section 44-04-20.

<sup>1</sup> This section was approved by the citizens of North Dakota in 1974 and became effective July 1, 1975. See 1975 N.D. Sess. Laws ch. 604.



These provisions contain similar language to the open records provisions and serve the same important public purpose. Therefore, the open meetings law should also be construed liberally in favor of the public's access to information.

## **2. Who Is Subject to the Open Meetings Law?**

North Dakota's open meetings law applies to meetings of a "public entity," which is defined to include three categories of entities:

- a. Public or governmental bodies, boards, bureaus, commissions or agencies of the state, including any entity created or recognized by the Constitution of North Dakota, state statute, or executive order of the governor or any task force or working group created by the individual in charge of a state agency or institution,<sup>3</sup> to exercise public authority or perform a governmental function;
- b. Public or governmental bodies, boards, bureaus, commissions or agencies of any political subdivision<sup>4</sup> of the state and any entity created or recognized by the Constitution of North Dakota, state statute, executive order of the governor, resolution, ordinance, rule, bylaw, or executive order of the chief executive authority of a political subdivision of the state to exercise public authority or perform a governmental function; and
- c. Organizations or agencies supported in whole or in part by public funds, or expending public funds.<sup>5</sup>

<sup>2</sup> This section was first adopted in 1957 and amended in 1977 and 1997. See 1957 N.D. Sess. Laws ch. 306; 1977 N.D. Sess. Laws ch. 417; 1997 N.D. Sess. Laws ch. 381, § 13. The 1997 amendments explain terminology and add provisions regarding recording of meetings and holding meetings by telephone or video conference.

<sup>3</sup> "Task force or working group" means a group of individuals who have been formally appointed and delegated to meet as a group to assist, advise, or act on behalf of the individual in charge of a state agency or institution when a majority of the members of the group are not employees of the agency or institution." N.D.C.C. § 44-04-17.1(16).

<sup>4</sup> "Political subdivision" includes any county or city, regardless of the adoption of any home rule charter, and any airport authority, township, school district, park district, rural fire protection district, water resource district, solid waste management authority, rural ambulance service district, irrigation district, hospital district, soil conservation district, recreation service district, railroad authority, or district health unit." N.D.C.C. § 44-04-17.1(10).

<sup>5</sup> "Public funds" means "cash and other assets with more than minimal value received from the state or any political subdivision of the state." N.D.C.C. § 44-04-17.1(13). See also N.D.A.G. 98-O-24 (Nov. 23 to Garryle Stewart and Vern Bennett); N.D.A.G. 98-O-23 (Nov. 9 to Howard Swanson).

N.D.C.C. § 44-04-17.1(12). An entity is subject to the open meetings law if it falls into any one of these three categories.

### **Nongovernmental Organizations**

The fact that an organization is a corporation or other business entity rather than a governmental entity does not necessarily mean that the organization is excluded from the definition of "public entity" for purposes of the open meetings law. Based on the definitions of certain terms used in the open meetings law, there are four circumstances in which the meetings of a nongovernmental organization may be open to the public.<sup>6</sup>

First, the organization may be created or recognized by state law or by an action of a political subdivision to exercise public authority or perform a governmental function.<sup>7</sup> As used in N.D.C.C. § 44-04-17.1(12)(b), the terms "resolution, ordinance, rule, [or] bylaw" refer to enactments by the official or group responsible for making binding legislative or policy decisions on behalf of the political subdivision.<sup>8</sup> An executive order of the Governor or chief executive authority of a political subdivision also may create or recognize an organization as a "public entity."

Second, an organization may be a "public entity" if the organization is supported by public funds or is expending public funds.<sup>9</sup> A nongovernmental organization is expending public funds if it receives and uses a direct appropriation from a governmental entity<sup>10</sup> or if it manages a pool of public funds on behalf of one or more public entities.<sup>11</sup> An organization is "supported in whole or in part by public funds" if the organization receives public funds that exceed the fair market value of any goods or services given in exchange for the funds.<sup>12</sup> The manner of payment is not important, and can include grants, membership dues, or fees. However, an organization receiving public funds under a contract with a public entity is not supported by those funds as long as the funds were paid in exchange for goods or services that are reasonably identified in the agreement and have an equivalent fair market value, which may include a commercially reasonable amount of profit for the contractor.<sup>13</sup> A payment under a vague and indistinct contract for unspecified goods or services is considered "support."<sup>14</sup> The key question is whether

<sup>6</sup> N.D.A.G. 99-O-03 (Apr. 7 to Murray Sagsveen); N.D.A.G. 99-O-02 (Apr. 5 to Steve Spilde); N.D.A.G. 98-O-23 (Nov. 9 to Howard Swanson); N.D.A.G. 98-O-21 (Sept. 22 to Wes Tossett and Gary Puppe).

<sup>7</sup> N.D.C.C. § 44-04-17.1(12)(a), (b).

<sup>8</sup> N.D.A.G. 97-O-2 (Dec. 22 to Melvin Fischer and Lowell Jensen). One example would be a resolution of a governing body of a political subdivision authorizing a joint enterprise between the political subdivision and the corporation. N.D.A.G. 98-O-23 (Nov. 9 to Howard Swanson).

<sup>9</sup> N.D.C.C. § 44-04-17.1(9).

<sup>10</sup> N.D.A.G. 96-F-18 (Sept. 13 to Gerald Sveen).

<sup>11</sup> N.D.A.G. 99-O-02 (Apr. 5 to Steve Spilde).

<sup>12</sup> N.D.C.C. § 44-04-17.1(9).

<sup>13</sup> N.D.A.G. 99-O-03 (Apr. 7 to Murray Sagsveen); N.D.A.G. 98-F-19 (June 10 to Carol Olson).

<sup>14</sup> N.D.A.G. 2001-O-11 (Sept. 13 to Greg Selbo); N.D.A.G. 2001-O-10 (Sept. 7 to Robert Lamont and Nevin Van de Streek).

public funds are being used to support an organization, or merely to purchase goods or services.<sup>15</sup>

If an organization receives public funds under an authorized economic development program, the exchange is conclusively presumed to be for fair market value rather than "support" and the organization is therefore not a public entity as a result of receiving the funds.<sup>16</sup> However, this presumption is limited to grants to new employers or businesses for their general operations.<sup>17</sup>

Third, even if an organization is paid fair market value for the services it provides, the organization may be considered an agent or agency of a public entity if the organization performs a governmental function or possesses records regarding public business on behalf of a public entity.<sup>18</sup> Examples of "agencies of government" include personnel firms, an advertising company hired to perform an educational campaign on behalf of a city,<sup>19</sup> and a local economic development corporation.<sup>20</sup>

Public entities cannot avoid the requirements of the open meetings law by forming joint enterprises and transferring funds to that enterprise.<sup>21</sup> Thus, a joint enterprise of several public entities to carry out the public business of those entities is an "agency" of those entities and is therefore a "public entity," even if the enterprise is formed as a separate corporation.<sup>22</sup>

Nine non-exclusive factors may be used to help determine whether a contractor is simply providing services to a public entity or is acting in place of or on behalf of the entity: 1) the level of public funding; 2) commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether services contracted for are an integral part of the public agency's chosen decision-making process; 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; 6) the extent of the public agency's involvement with, regulation of, or control over the private entity; 7) whether the private entity was created

<sup>15</sup> N.D.A.G. 2003-O-02 (Feb. 21 to James River Senior Citizen's Center) (a nongovernmental organization that receives mill levy money for its general support without a specific contract with the county for specific services to be provided in exchange for the mill levy money and had discretion in using mill levy money was a public entity).

<sup>16</sup> N.D.C.C. § 44-04-17.1(9); N.D.A.G. 98-O-23 (Nov. 9 to Howard Swanson) (CDBG funds).

<sup>17</sup> N.D.A.G. 2001-O-10 (Sept. 7 to Robert Lamont and Nevin Van de Streek).

<sup>18</sup> N.D.C.C. § 44-04-17.1(12), (15). See also Forum Publishing Co. v. City of Fargo, 391 N.W.2d 169 (N.D. 1986).

<sup>19</sup> N.D.A.G. 2001-O-04 (May 16 to Laurel Forsberg).

<sup>20</sup> N.D.A.G. 2001-O-11 (Sept. 13 to Greg Selbo); N.D.A.G. 2001-O-10 (Sept. 7 to Robert Lamont and Nevin Van de Streek).

<sup>21</sup> N.D.A.G. 99-O-02 (Apr. 5 to Steve Spilde).

<sup>22</sup> Id. (North Dakota Insurance Reserve Fund); N.D.A.G. 98-O-21 (Sept. 22 to Wes Tossett and Gary Puppe) (Association of Soil Conservation Districts); N.D.A.G. 98-O-04 (Mar. 3 to Norbert Sickler and Franklin Appledorn) (Southwest Multi-County Correction Center).

by the public agency; 8) whether the public agency has a substantial financial interest in the private entity; and 9) for whose benefit the private entity is functioning.<sup>23</sup>

Finally, a group composed of the directors or officers of an organization may be a "governing body," and be required to keep its meetings regarding public business open to the public, if the group has been delegated authority from another governing body, such as a county commission or city council. This possibility is addressed later in this manual in the section regarding governing bodies.

### **3. Court Hearings**

Prior to the 1997 amendments to the open meetings law, the North Dakota Supreme Court held that the courts were not "public or governmental" entities as those terms are used in the open records and meetings laws.<sup>24</sup> However, just as meetings of governing bodies of public entities are generally open to the public, court proceedings are generally open to the public.<sup>25</sup> The court expressed a "policy of openness in judicial proceedings."<sup>26</sup> However, this policy is frequently limited by statutes providing that certain court proceedings are not open to the public. Preliminary hearings may be closed upon the request of the defendant "upon a showing that evidence inadmissible at trial will be offered at the preliminary examination and as a result there is a substantial likelihood of interference with the defendant's right to a fair trial."<sup>27</sup> Juvenile court hearings are generally closed, but must be open if the purpose of the hearing is to consider a petition alleging certain conduct for which the juvenile may be transferred to district court for criminal prosecution.<sup>28</sup> Also closed are hearings in actions to determine parentage or terminate parental rights.<sup>29</sup> Grand jury sessions are not open to the public.<sup>30</sup> Hearings regarding the incapacity of a person and the need for a guardian may be closed,<sup>31</sup> and unnecessary persons must be excluded from involuntary treatment hearings.<sup>32</sup>

### **4. What Gatherings Are Covered by the Open Meetings Law?**

As used in the open meetings law,

- a. "Meeting" means a formal or informal gathering, whether in person or through other means such as telephone or video conference, of:

<sup>23</sup> N.D.A.G. 2001-O-11 (Sept. 13 to Greg Selbo)

<sup>24</sup> Grand Forks Herald v. Lyons, 101 N.W.2d 543, 546 (N.D. 1960).

<sup>25</sup> N.D. Const. art. I, § 9.

<sup>26</sup> Dickinson Newspapers, Inc. v. Jorgensen, 338 N.W.2d 72, 79 (N.D. 1983).

<sup>27</sup> Minot Daily News v. Holum, 380 N.W.2d 347, 349 (N.D. 1986) (exercise of discretion under N.D.C.C. § 29-07-14).

<sup>28</sup> N.D.C.C. § 27-20-24(5).

<sup>29</sup> N.D.C.C. § 14-17-19.

<sup>30</sup> N.D.C.C. § 29-10.1-28.

<sup>31</sup> N.D.C.C. § 30.1-28-03.

<sup>32</sup> N.D.C.C. § 25-03.1-19. See also N.D.C.C. § 47-25.1-05 (preserving secrecy of trade secret).



- (1) A quorum of the members of the governing body of a public entity regarding public business; or
  - (2) Less than a quorum of the members of the governing body of a public entity regarding public business, if the members attending one or more of such smaller gatherings collectively constitute a quorum and if the members hold the gathering for the purpose of avoiding the requirements of section 44-04-19.
- b. "Meeting" includes work sessions,<sup>33</sup> but does not include chance or social gatherings where public business is not considered and does not include the attendance of members of a governing body at meetings of any national, regional, or state association to which the public entity, the governing body, or individual members belong.
  - c. Notwithstanding subdivisions a and b, as applied to the legislative assembly, "meeting" means any gathering subject to section 14 of article IV of the Constitution of North Dakota.<sup>34</sup>

N.D.C.C. § 44-04-17.1(8). As this definition indicates, whether a gathering of a group of persons is a "meeting" depends in part on the number of persons attending (quorum) and the topics of discussion (public business), although the form of the gathering is generally irrelevant. Also important is whether the persons attending the gathering are members of a "governing body," which will be discussed later in this manual. Whether a gathering is a "meeting" is a question of fact, but the letter and spirit of the law prohibit officials from contriving subterfuges to evade the requirements of the open meetings law,<sup>35</sup> and any doubt whether a gathering is a meeting should be resolved by complying with the open meetings law.

#### **a. Gatherings**

A governing body does not have to transact business for a gathering to be a meeting.<sup>36</sup> Rather, the public's right to observe and monitor the performance of governmental functions through attendance at public meetings applies to all stages of the decision-making process, from gathering information to deliberating to making a final decision.<sup>37</sup> Thus, a gathering of the members of a governing body of a public entity to discuss or receive information regarding the business of the public entity is a "meeting," even if the members merely listen and do not interact or participate in the discussion. The

<sup>33</sup> A school board retreat is a meeting. N.D.A.G. 2001-O-05 (June 7 to D. Guy McDonald).

<sup>34</sup> Article IV, Section 14 of the North Dakota Constitution provides: "All sessions of the legislative assembly, including the committee of the whole and meetings of legislative committees, must be open and public."

<sup>35</sup> N.D.C.C. § 44-04-17.1(8); Letter from Attorney General Allen Olson to Myron Atkinson (Mar. 5, 1976). See *Peters v. Bowman Public School District*, 231 N.W.2d 817 (N.D. 1975).

<sup>36</sup> N.D.A.G. 2001-O-07 (Aug. 6 to Steven McCullough); N.D.A.G. 98-O-16 (July 2 to Jeff Schneider); N.D.A.G. 98-F-16 (June 8 to Dan Gaustad).

<sup>37</sup> See N.D.C.C. §§ 44-04-17.1(8)(a) ("regarding" public business), 44-04-17.1(11) ("all matters that relate to" public business).

presence of public employees or the members of a governing body in the audience of a gathering of another entity generally does not make the entity holding the gathering subject to the open meetings law,<sup>38</sup> but the members' presence may constitute a separate meeting of the governing body.<sup>39</sup> It makes no difference under the definition of "meeting" whether the members of a governing body meet in person or by telephone; both are meetings.

Not every gathering of the members of a governing body is a "meeting."

[I]t is appropriate for a member who was absent from a meeting to contact the other members, if the conversations are limited to finding out what happened at the meeting. . . . Similarly, it would be appropriate for the presiding officer of a governing body to contact the other members to determine which items to include on the agenda of the next meeting, as long as the conversations do not include information-gathering or discussion regarding the substance of the issues on the agenda. It is only when those meetings become steps in the decision-making process (information gathering, discussion, formulating or narrowing of options, or action) regarding public business that the open meetings law is triggered.<sup>40</sup>

The term "gathering" also does not include a series of written communications between the members of a governing body.<sup>41</sup> The open meetings law describes how a public entity must conduct its meetings, but does not establish meetings as the exclusive method for a public entity to conduct business.<sup>42</sup>

#### **b. Quorum**

For a gathering to be a part of the decision-making process, and the public to be entitled to access, the gathering must involve a sufficient number of members of a governing body to take some official action or perform some step in the process, even if no action is taken at a particular gathering. Thus, to be a "meeting," the gathering must be attended by a quorum of a governing body,<sup>43</sup> or a quorum must be involved in a series of smaller gatherings intended to avoid the requirements of the open meetings law.<sup>44</sup> "Quorum" means "one-half or more of the members of the governing body, or any smaller number

<sup>38</sup> Letter from Attorney General Nicholas Spaeth to Wayne Jones (Jan. 28, 1985).

<sup>39</sup> N.D.A.G. 98-O-18 (Aug. 11 to Marvin Gillig *et al*); N.D.A.G. 98-O-10 (May 7 to R. James Maxson *et al*).

<sup>40</sup> N.D.A.G. 98-O-05 (Mar. 3 to Paul Ebeltoft).

<sup>41</sup> *Id.* at O-05 n.8.

<sup>42</sup> N.D.A.G. 2001-O-14 (Oct. 4 to Steven McCullough).

<sup>43</sup> See generally N.D.A.G. 2001-O-18 (Dec. 27 to Mary O'Donnell) (pre-meeting discussion involving less than a quorum is not a meeting); N.D.A.G. 2001-O-03 (May 3 to Paul Koehmstedt) (same).

<sup>44</sup> N.D.C.C. § 44-04-17.1(8). For example, a planned series of investigations of the site of a complaint by the members of a governing body is a meeting. N.D.A.G. 98-F-16 (June 8 to Dan Gaustad).

if sufficient for a governing body to transact business on behalf of the public entity."<sup>45</sup> By adopting the quorum rule, the Legislature impliedly exempted from the open meetings law most conversations between less than a quorum of the members of a governing body.<sup>46</sup> As a result, a meeting involving a single member of a governing body is generally not a meeting of that governing body.

### **c. Public Business**

Because a gathering must pertain to "public business" to fall within the definition of "meeting," the purpose of a gathering must be considered, and not every gathering will constitute a "meeting." For example, a social or chance gathering where public business is not considered is not a "meeting."<sup>47</sup> Public business means "all matters that relate or may foreseeably relate in any way to . . . [t]he performance of the public entity's governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power; or . . . [t]he public entity's use of public funds."<sup>48</sup> Thus, meetings of a nongovernmental organization that is a "public entity" because it is supported by or expending public funds, but is not otherwise performing a governmental function, are open only to the extent the meetings pertain to how public funds are being or have been spent.

## **5. What Is a Governing Body?**

### **a. Chief Decision-Making Body**

The open meetings law has never applied to all meetings of two or more public employees. The public's right to know how government decisions are made and public funds are spent does not require access to a meeting of a "group" that is not authorized to perform some stage in a public entity's decision-making process. Instead, the term "meeting" is limited to gatherings of a "governing body" of a public entity.<sup>49</sup>

"Governing body" includes "the multimember body responsible for making a collective decision on behalf of a public entity."<sup>50</sup> This definition preserves the public's right to view the process leading up to government decision-making, but does not extend the open meetings, notice, voting and minutes laws to conversations between public officials or employees that are not part of the decision-making process.

<sup>45</sup> N.D.C.C. § 44-04-17.1(14). See N.D.A.G. 2003-O-05 (Apr. 11 to Glen Ullin City Council) (the mayor of a city council is to be counted as a member of the governing body in determining whether a quorum is present so as to conduct business); N.D.A.G. 98-O-05 (Mar. 3 to Paul Ebeltoft) (a quorum of an eight-member board is four members).

<sup>46</sup> N.D.A.G. 98-O-05 (Mar. 3 to Paul Ebeltoft).

<sup>47</sup> N.D.C.C. § 44-04-17.1(8)(b).

<sup>48</sup> N.D.C.C. § 44-04-17.1(11).

<sup>49</sup> N.D.C.C. § 44-04-17.1(8).

<sup>50</sup> N.D.C.C. § 44-04-17.1(6).

**OPEN RECORDS AND MEETINGS OPINION  
2004-O-08**

DATE ISSUED: April 6, 2004

ISSUED TO: McIntosh County Commission

**CITIZEN'S REQUEST FOR OPINION**

On March 8, 2004, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Tony Bender, Editor and Publisher of The Ashley Tribune asking whether the McIntosh County Commission violated N.D.C.C. §§ 44-04-19 and 44-04-20 by holding an illegal meeting without notice prior to the McIntosh County Commission meeting on Tuesday, February 10, 2004.

**FACTS PRESENTED**

On February 10, 2004, all three members of the McIntosh County Commission unexpectedly stopped by the office of the County State's Attorney a few minutes prior to the regular County Commission meeting to speak with State's Attorney Terry Elhard. The door of the office was never closed and the Commissioners remained in the entry of the office on one side of the counter while State's Attorney Elhard stood on the other side. According to State's Attorney Elhard, he and the Commissioners discussed various complaints regarding the local sheriff and the procedure involved in recalling an elected official but no official action was taken. No minutes or recording was made of the meeting. The Commission did not provide notice to the public or the media that it was meeting with the State's Attorney.

**ISSUE**

Whether the McIntosh County Commission violated the open meetings law and notice requirements when it met with the County State's Attorney prior to the February 10, 2004, regular meeting without providing notice of the meeting to the public or media.



### 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. The definition of "meeting" has four main elements: public entity, governing body, public business, and a gathering of a quorum of the members of the governing body. N.D.A.G. 98-O-05; See N.D.C.C. § 44-04-17.1(8)(a). This definition does not include chance or social gatherings as long as public business is not considered or discussed. N.D.C.C. § 44-04-17.1(8)(b). "Public business" includes all matters that relate to a public entity's performance of its governmental functions or use of public funds. N.D.C.C. § 44-04-17.1(11). Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity. N.D.C.C. § 44-04-20(1).

During the informal gathering, the Commissioners and State's Attorney Elhard discussed complaints received from the public regarding the McIntosh County Sheriff, whether the Commission was in a position to do anything about the complaints, and how a recall of an elected official works. The Commission did not believe the informal gathering was a meeting because no official action was discussed or taken.

As this office has stated in previous opinions, the fact that no motions were made and no actions were taken is not relevant in determining whether the gathering was a meeting subject to the open meetings law. N.D.A.G. 98-O-11; N.D.A.G. 98-O-16. Rather, any discussion or receipt of information regarding public business at a gathering of a quorum of the Commission is a meeting under N.D.C.C. § 44-04-17.1(8) that must be properly noticed. N.D.A.G. 98-O-11; N.D.A.G. 98-O-16.

### CONCLUSION

It is my opinion that the informal gathering of the Commission on February 10, 2004, related to public business and constituted a "meeting" as defined in N.D.C.C. § 44-04-17.1 and therefore the Commission violated open meetings law and notice requirements when it failed to notice the meeting in accordance with N.D.C.C. § 44-04-20.

### STEPS NEEDED TO REMEDY VIOLATIONS

At its next regular meeting, the Commission must recreate the discussion that occurred at the meeting held in the State's Attorney's office prior to the Commission's regular February 10, 2004, meeting. The Commission members must describe, to the best of their ability, the discussion and opinion of each member expressed during the meeting with the State's Attorney. The notice and agenda for the next regular meeting should clearly state that a

OPEN RECORDS AND MEETINGS OPINION 2004-O-08

April 6, 2004

Page 3

description of the meeting held in the State's Attorney's office prior to the February 10 regular meeting will be discussed.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. § 44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

Wayne Stenehjem  
Attorney General

Assisted by: Mary Kae Kelsch  
Assistant Attorney General

vkk

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-16

Date Issued: June 8, 1998

Requested by: Dan Gaustad, Attorney, Walsh County Water Resource  
District Board

- QUESTIONS PRESENTED -

I.

Whether an on-site investigation by a water resource district board of the area that is the subject of a complaint to the board under N.D.C.C. §§ 61-16.1-53 or 61-32-07 is a "meeting" required to be open to the public under N.D.C.C. § 44-04-19 and preceded by public notice under N.D.C.C. § 44-04-20.

II.

If an on-site investigation is a "meeting," does that conclusion extend to inspections by individual board members that collectively involve a quorum?

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that an on-site investigation by a water resource district board of an area that is the subject of a complaint to the board is a "meeting" under N.D.C.C. §§ 44-04-19 and 44-04-20.

II.

It is my further opinion that on-site inspections by individual board members, but collectively involving a quorum, are not a "meeting" as long as those inspections are not organized and deliberately conducted in groups of less than a quorum to avoid the requirements in N.D.C.C. § 44-04-19.

- ANALYSES -

I.



ATTORNEY GENERAL'S OPINION 98-16

June 8, 1998

Page 2

"Meetings" of a water resource district board, as governing body of a public entity, are required to be open to the public unless otherwise provided by law. N.D.C.C. §§ 44-04-17.1(6), (10), (12); 44-04-19. A "meeting" is defined as any gathering of a quorum of the members of a governing body regarding the public business of the entity. N.D.C.C. § 44-04-17.1(8)(a)(1). Action need not be taken at a gathering for it to be a "meeting." See Peters v. Bowman Public School Dist., 231 N.W.2d 817 (N.D. 1975); Letter from Attorney General Allen Olson to Myron Atkinson (March 5, 1976). Rather, the definition of "meeting" covers all stages of the decision-making process, including the gathering of information by the governing body. 1998 N.D. Op. Att'y Gen. O-45 [May 4 opinion to Bob Dykshoorn]; 1996 N.D. Op. Att'y Gen. 38, 43. The definition of "meeting" also is not limited to gatherings held in a governing body's usual meeting room.

An investigation of a complaint to a water resource district board under N.D.C.C. §§ 61-16.1-53 or 61-32-07 pertains to the board's public business. N.D.C.C. § 44-04-17.1(11). Thus, it is my opinion that an on-site investigation by a quorum of the members of a water resource district board of an area that is the subject of a complaint to the board is a "meeting" under N.D.C.C. § 44-04-19 and is required to be preceded by sufficient public notice under N.D.C.C. § 44-04-20.

II.

Whether the conclusion in Issue One applies to on-site investigations by individual board members is a more difficult question. The definition of a meeting is not limited to gatherings of a quorum of a governing body's members at the same time, but also includes a series of gatherings of less than a quorum "if the members attending one or more of such smaller gatherings collectively constitute a quorum and if the members hold the gathering for the purpose of avoiding the requirements of section 44-04-19." N.D.C.C. § 44-04-17.1(8)(a)(2) (emphasis added).

This office recently issued an opinion on the conduct a single member of a governing body may engage in without running afoul of N.D.C.C. § 44-04-19.

By adopting the "quorum rule," the Legislature impliedly exempted from the open meetings law most conversations between [less than a quorum of a] Board's members. Individual Board members are generally not prohibited from gathering information on their own or from talking to another Board member, even regarding public business. However, there is a threshold at which multiple



ATTORNEY GENERAL'S OPINION 98-16

June 8, 1998

Page 3

conversations (in person or over the telephone) on a particular subject, each involving two or three Board members, collectively involve enough Board members (a quorum) that the conversations have the potential effect of forming consensus or furthering the Board's decision-making process on that subject. At the point the conversations on a particular subject collectively involve a quorum of the Board, the "quorum rule" is satisfied and the topic of discussion must be considered.

1998 N.D. Op. Att'y Gen. O-27, O-31 to O-32 (footnotes omitted) (emphasis added).

As discussed in Issue One, an on-site investigation of the area that is the subject of a complaint to the board pertains to the board's public business. If each board member investigates the site of the complaint on his or her own, that by itself is not a meeting. It is simply the way the board members educate themselves on the facts of a situation before making a decision on the complaint. However, if these individual investigations are an organized, deliberate effort by the board for a quorum of its members to obtain information regarding the complaint, the smaller gatherings replace in effect the kind of group information-gathering that is required to occur in an open meeting. Whether individual inspections have this effect is a question of fact that must be decided on a case-by-case basis.

In conclusion, it is further opinion that on-site inspections by individual board members, but collectively involving a quorum, are not a "meeting" as long as those inspections are not organized and deliberately conducted in groups of less than a quorum to avoid the requirements in N.D.C.C. § 44-04-19.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

Heidi Heitkamp  
ATTORNEY GENERAL

ATTORNEY GENERAL'S OPINION 98-16

June 8, 1998

Page 4

Assisted by: James C. Fleming  
Assistant Attorney General

vkk

As I understand it, HB1297 would create an exception to the open meeting law in that it would allow elected officials to get together and chat, privately and without announcement to the public, as long as no official decisions were made, and no votes taken.

It is patently ridiculous for anyone to suggest that this proposed measure is anything other than a brazen and cynical attempt put all of the serious discussion about difficult issues behind closed doors.

Here's what will happen, frequently, if this measure passes: the people who participate in these "unofficial" discussions will show up at the next "open" meeting of their body, call the question and cast their votes. The public and the journalists who report on these things for them will be left to scrounge around the hallways and cloak rooms to try and figure out what just happened, and why. Only guess what? No one who really knows will feel obligated to tell them.

Unless I'm totally missing the point, it appears to me that passage of this bill would amount to the de facto repeal of open meeting laws as we know them.

The fact that this idea is even getting a hearing in the Legislature confirms a suspicion I've developed over thirty-plus years as a reporter:

In spite of the lip service they pay to "sunshine" laws, and the "public's right to know", an unfortunately high percentage of public officials would jump at the opportunity to conduct much of the public's business in private and come out just often enough to tell us how things were going to be.

It will be a sad day for North Dakota if this measure gets past one committee hearing-- I think it's already sad enough that someone even had the nerve to propose such a thing.

Thanks for listening.

Charley Johnson  
GM & News Director  
KVLV & KXJB TV  
Fargo  
800-450-5844

Good Morning Committee Members. My name is Beth Helfrich and I am the Executive Director of the North Dakota Broadcasters Association. The NDBA exists to serve & assist 83 commercial radio stations, 18 commercial television stations and 35 Associate Members throughout North Dakota to better serve the public interest.

I solicit your support this morning to oppose House Bill 1297.

Open Meeting Laws were established to guarantee public participation in government and prevent secret decisions by government officials. The North Dakota Open Meetings Law states "All meetings of public entities are "open" – right of public to photograph, record or broadcast. (M-E56)

Put simply, this bill does not support Freedom of Information, which is the right to know what government is doing, how it creates and implements policy and how it makes decisions that affect the public. It is the opposite of secrecy. It means the doors and files of government are open and available to the public; instead of being closed to all but a select few. (55 – Journal book)

On behalf of the NDBA members, I urge you to Vote "NO" on House bill 1297. Thank you.