

N.D.A.G. Letter to Atkinson (March 5, 1976)

March 5, 1976 (OPINION)

Honorable Myron Atkinson
State Representative
32nd District
Box 1176
Bismarck, ND 58501

Dear Representative Atkinson:

This is in reply to your letter of February 27, 1976, relative to the North Dakota open meeting statute. You state the following facts and questions:

"It appears that on January 22, 1976, a meeting was held of the North Dakota Water Commission in Hazen, North Dakota, for the purpose of transacting business which was pending before it. It appears that all of the members of the commission were present with the exception of Governor Link who was traveling outside of the State of North Dakota. The commission was also scheduled to continue its meeting the following day, January 23, 1976, at the State Capitol Building.

"On the evening of January twenty second, all of the members of the State Water Commission joined with Governor Link at his residence in Bismarck. No other persons were invited with the exception of the Water Commission counsel, and neither the public nor the news media were aware that such an event was taking place.

"The meeting was variously described in subsequent interviews by persons who were attending as 'an informal get together' or an informal meeting'; or 'We had a meeting informally. . .' It appears that the Water Commission counsel distributed to each of the persons a draft of a proposed resolution which was to be considered by the commission at its scheduled meeting on the following day. A discussion then took place regarding both the proposed resolution and other matters pending before the State Water Commission.

"While it seems quite clear that no formal vote was taken, one of the commissioners who was in a minority position during the evening's conversations stated that she did not repeat her arguments at the formal meeting of the commission on the following day because she understood that her views would not prevail. As Commissioner Wilhelm stated 'I'd lost my case, and there was no use to discuss it in public like we had the night before.'"

"On the following day, January twenty-third, the State Water Commission convened at its formal hearing and took specific action on matters before the commission including items which had been the subject of the discussion the preceding evening."

"As indicative of the matters which transpired at the private meeting on the evening of January twenty-second at the Governor's Mansion, there are enclosed transcripts and summaries of interviews and conversations held by members of the Meyer Broadcasting Company News Department with members of the State Water Commission. There is also enclosed a copy of an opinion issued October 29, 1974, by the Office of the Attorney General of the State of Minnesota relating its views as to the application of the open meeting law to private meetings by public officials."

"Would you please furnish me with the opinion of your office as to the application of section 44-04-19, N.D.C.C., to private and informal meetings of public or governmental bodies wherein matters pending before such bodies are discussed. While issues of fact may not make it possible for your office to express a definitive opinion as to the meeting on the evening of January twenty-second by the State Water Commission, it would be most helpful in guiding public groups in the future if your opinion could set forth general guidelines relating to this issue."

As you have noted in your request, this office cannot express a definitive opinion on the meeting in question, since such action would involve an adjudication of facts not within our scope of authority as an agency of the executive branch of government. The ultimate facts concerning whether a meeting was called, what did or did not take place, and what was or was not discussed, are not established and therefore cannot be considered by this office. We express no opinion thereon nor do we understand your letter to request such an opinion. We will limit our response to the question you have asked, i.e., the application of section 44-04-19 of the N.D.C.C. to private and informal meetings of public or governmental bodies wherein matters before bodies are discussed.

Section 44-04-19 of the N.D.C.C. provides:

"OPEN GOVERNMENTAL MEETINGS. Except as otherwise specifically provided by law, all meetings of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivisions 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."

This statute was enacted in 1957. See chapter 306, 1957 Session Laws.

There is no doubt that the State Water Commission organized pursuant to chapter 61-02 of the N.D.C.C. is governed by the statute.

In September, 1974, the electorate of the state of North Dakota approved Article 92 of the amendments to the North Dakota Constitution. This article became effective July 1, 1975, and provides as follows:

"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."

The only difference between the statutory provision and the constitutional provision is the use of the word "specifically." In view of the fact that the statutory provision has not been repealed, we do not consider the slight language variation to be significant for purposes of this opinion. We do not believe the fact that the provision is now constitutional as well as statutory is significant except insofar as it cannot be amended or repealed except by constitutional amendment.

Since the enactment of section 44-04-19 of the N.D.C.C. by the 1957 Legislature, this office has consistently adhered to a position that all meetings of public bodies must be open to the public unless a specific statutory or constitutional provision exists which specifies that such meetings may be closed. Some statutory exceptions do exist but we are unaware of any which apply to the State Water Commission. We thus necessarily conclude that private meetings of the Water Commission or other public or governmental bodies are not permissible except where specifically permitted by law.

The informal closed meeting at which no formal action is taken is prohibited since the provisions quoted above do not distinguish between meetings at which no formal action is taken. The Supreme Court of North Dakota recently addressed itself to this question. In July, 1975, the court issued its opinion in *Peters v. Bowman Public School District* 231 N.W.2d. 817. In that case a school board had held an executive session for the purpose of evaluation of the plaintiff's performance. No formal action was taken at the meeting. There was no statute permitting meetings to be conducted in executive session although the meeting following the notice of contemplated nonrenewal of a teacher's contract or notice of contemplated dismissal is to be an executive session unless both the school board and the teacher agree it shall be open. See section 15-47-38 of the N.D.C.C., as amended. Subsequent to the executive session, the board met in open meeting and took official action upon the recommendations made at the executive session. The North Dakota Supreme Court indicated that the executive session of the board violated the open meeting provisions of section 44-04-19. The court further stated, page 820 of the reported case.

"Without implying that in every case action taken upon the basis of information learned outside of an official and legal board meeting is void, we find the action of the school district in this case a clear attempt to evade section 44-04-19, N.D.C.C."

"When the official action of the school district is clearly the product of an illegal meeting, documented in the minutes, and not clearly denied in the testimony, such official action is invalid even though such official action is taken at an other wise legal meeting."

"The provisions of section 44-04-19, N.D.C.C. (requiring that all meetings of public or governmental bodies be open to the public, except as otherwise specifically provided by law) were violated by the school district and the action thereafter taken to not renew the contract of George Peters was void."

The Supreme Court therefore determined that action taken at a formal open meeting is void if based on discussion held at a previous meeting held contrary to the open meeting statute. The court decision was based on facts as found by the trial court and did not elaborate beyond that factual situation.

The Minnesota Supreme Court in 1974 construed a statute that was also enacted in 1957 and is almost identical to section 44-04-19, N.D.C.C.. That action was brought by a television station to compel a school board to comply with the open meeting statute. The trial court had granted an injunction prohibiting the school board from violating the law but enumerated eight circumstances in which the school board could hold a closed meeting. The television station appealed from that part of the trial court's order granting the exceptions. The Supreme Court discussed the various exceptions and held that they were either unwarranted, inappropriate or unnecessary and that bylaws of the school district which were repugnant to the open meeting law were of no force or effect. Because the Minnesota Supreme Court discussed each one of the exceptions allowed to the open meeting statute by the trial court, the opinion does appear to give some guidelines for use in Minnesota. While of interest to North Dakota, the Minnesota case is not controlling.

One of the exceptions allowed by the trial court in the Minnesota case does deserve discussion. That exception is worded as follows:

"Social gatherings at which no school board business is conducted."

Trial court has state, with respect to that exception:

"Finally it would appear that no one would complain at the lack of an invitation for attendance at a strict social get together of the Board members. The Court is confident that the Board of Education will not use the occasion for the advantage of a so-called closed meeting as a ruse to conduct business which otherwise should be considered only at an open meeting of the Board." See, Channel 10 Inc. v. Independent School Dist. No. 709 215 N.W.2d. 814 (Minn. 1974)

The Minnesota Supreme Court stated that the plaintiff television station's objection to such an exception was that the board would consider that discussion, debate, and all steps preliminary to voting were not "conducting business." However the Supreme Court noted

the statement of the trial court and stated it thought the plaintiff's fears were groundless in the light of the trial court's order. The Supreme Court also indicated that a "Strict social get-together" at which there was no discussion or consideration of "any matter proper to a public meeting" is so obviously not the kind of meeting that is to be prohibited by the open meeting law that it need not have been set forth as an exception. The obvious implication from the decision is that social events used as a subterfuge to conduct business which otherwise should be considered only at an open meeting of the public agency would be void.

We would not and could not conclude that every gathering at which two or more members of a public board are present is prohibited by the open meeting statute. Indeed such a conclusion might well impinge on the constitutional rights of such individuals. The same rationale necessarily leads to the conclusion that casual comments of a business nature by two or more members of a public body among one another at such a gathering are not prohibited by the open meeting law. On the other hand, as noted above, the decision of the North Dakota Supreme Court in *Peters supra*, leads us to conclude that deliberations as well as formal actions are governed by the open meeting law and the fact that no formal action is taken at a gathering of a public body does not exempt such gathering from the open meeting law if matters of concern to the board in the context of its duties and responsibilities to the public are deliberated at such a gathering. Such conclusion is supported by the decision of the California court in *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors* 263 Cal. App. 2d. 41, 69 Cal. Rptr. 480 (1968).

It is apparent that guidelines can only be applied to factual situations and each factual situation will vary. The spirit of the open meeting law requires that members of public governing bodies do not contrive artificial settings whereby the open meeting law may be circumvented. On the other hand, we cannot conclude that if two or more members of a public governing board are present at a given place and time through circumstances other than to contrive circumvention of the open meeting law, they cannot exchange comments concerning their service on that board.

A member or members of a public board not present at a given meeting have a right to be informed about what transpired at that meeting. We do not conclude that the North Dakota open meeting law prohibits the absent member from contact with those members present for the express and limited purpose of informing the absentee of what transpired during his absence. This "briefing" facet of the open meeting requirements is perhaps best illustrated as to propriety by breaking matters before the public board down into past, present and future action. Those matters that are past and presumably concluded are proper matters for briefing and information purposes. Those matters that are presently before the board or which may be before the board in the future, should be delayed for any type of discussion until such board meetings in formal, open session.

ALLEN I. OLSON
Attorney General