

March 31, 1978

The Honorable Burness Reed  
State Representative  
17th District  
211 Fenton Avenue  
Grand Forks, ND 58201

Dear Representative Reed:

This is in reply to your letter of March 17, 1978, in which you set forth the following facts and questions:

I am writing for an opinion on what appears to me to be a violation of the "open meetings" law as specified in NDCC 11-11-05.

The Grand Forks Board of County Commissioners met in regular meeting Tuesday morning, March 14, and recessed that meeting until 1:30 Thursday, March 16. At that time they planned to name a person to succeed County Commissioner James Rice who died last Friday.

I was in attendance at the 1:30 meeting at the County Court House, as an observer. After what seemed to me to be a 5 minute "cut and dried" selection -- (two names placed in nomination and voted on with a 4-2 decision), it was interesting to hear Chairman Christoffer tell a newsman that there had been a meeting at noon at the Town House Motel. I later called Chairman Christoffer to ask if notices had been sent to the Board members, since there had been no notice in the paper and he stated that he had called them the day before. The County Judge, County Treasurer and County Auditor had also been invited to this noon meeting, and he said, in compliance with the open meeting law, he also invited a Grand Forks Herald reporter, the morning of the scheduled noon meeting. There were no others in attendance.

In speaking with Judge Kosanda, he stated that they were told, "this is not a decision making meeting -- but only to acquaint us with the candidates so we know who we're voting for". They then reviewed each applicant, but held no interviews with any of the 17. 15 of these persons had indicated interest in being appointed.

I find no fault with their final selection, but do object to what is an apparent violation of the "open-meeting" law.

Your opinion on this will be greatly appreciated.

Section 11-11-05 of the NDCC provides:

**MEETINGS OF BOARD - TIME AND PLACE.**--The board of county commissioners shall meet and hold sessions for the transaction of business at the courthouse, or at the usual place of holding court, on the first Tuesday in January, April, July, and October of each year, and may adjourn such meetings from time to time. The county auditor shall have power to call special sessions when the interests of the county demand it. The chairman of the board, or a majority of the members thereof, may call special sessions upon giving five days' notice of the time and object of the meeting by publishing the notice in the official newspaper of the county, or by giving personal notice, in writing, to all the members of the board.

You refer to this in your letter as an "open-meeting" law. However, we find nothing in the above-quoted section which requires an "open meeting." The statute does provide for a special meeting upon five days' notice of the time and object of the meeting by publication in the official county newspaper "or by giving personal notice, in writing, to all the members of the board." If the appropriate officials were to call a special meeting by personal written notice to the members of the board, as permitted by the statute, the public would be without knowledge of the meeting. It is possible that if no written notice were given, the attendance without objection of the members would satisfy this provision since it seems to be for the benefit of the members rather than the public.

You may have had reference to Section 11-11-06 of the NDCC which provides:

**SESSIONS OF BOARD TO BE PUBLIC - COUNTY MATTERS HEARD AT SESSION ONLY.** -- The meetings of the board of county commissioners shall be open to the public. All matters pertaining to the affairs of the county shall be considered by the board in session only, but it may continue any business from a regular session to a day between regular sessions.

We also note section 44-04-19 of the NDCC, as amended, which provides as follows:

**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 subdivision of the state, organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be open to the public. The governing members of the above bodies, boards, commissions, agencies, or organizations meeting in violation of this section shall be guilty of an infraction for a first offense. A public or governmental body, board, bureau, commission, or agency meets in violation of this section if it refuses any person or persons access to such meeting, 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.

See also Article 92 of the Amendments to the North Dakota Constitution.

It appears to us that the question may well be one of proper notice rather than a question of a violation of the open meeting statutes. According to the open meeting provision, Section 44-04-19, a violation occurs if a board refuses access to any meeting to any person or persons. Your letter indicates a reporter for the Grand Forks Herald was informed of the meeting. The articles from the Grand Forks Herald enclosed with your letter indicate it was too late to notify the public of the noon meeting. Your letter also states that no other persons were in attendance. However, it does not state whether any other persons requested admission to the meeting but was refused admission. That, according to the statute, is the basis of a violation of the open meeting statute.

Prior to this time, this office has been urged to hold that any meeting of a public body of which prior public notice has not been given is a violation of the open meeting law. We have consistently refused to issue such an opinion since on several occasions bills requiring such notice have been presented to the legislature and defeated. The last example of a bill of this nature was SB2177 introduced into the 1977 Legislature which, after several amendments and conference committee reports, failed to pass in the House. We cannot supply what the Legislature has refused to enact since this office is not a legislative body.

Thus, considering that a representative of the news media was present and unless some person was refused access to the noon meeting, there would appear to be no violation of the open meeting law. The fact the public, generally, did not have knowledge of that meeting does not alter that conclusion unless the noon meeting was called for the express purposes of preventing the public from attending. Whether that was the purpose of the meeting is a question of fact and this office is not a fact-finding office. In addition, since a violation of the open meeting statute is an infraction, a criminal offense, this office cannot, by opinion, convict any person or board for a violation of the statute since they are entitled to a trial in court, the judicial branch of government. This office is, as you know, a part of the executive branch of government and we do not have judicial powers.

Insofar as whether there was improper notice of the meeting is concerned, we note that Section 11-11-05 of the NDCC governs meetings of the board of county commissioners. We assume, however, that this meeting was pursuant to Section 44-02-05 of the NDCC which provides as follows:

**VACANCY IN BOARD OF COUNTY COMMISSIONERS--HOW FILLED.--**

When a vacancy occurs in the board of county commissioners, the remaining members of the board, with the county judge and auditor, immediately shall appoint some suitable person to fill such vacancy from the district in which such vacancy occurred. If a majority of such officers fails to agree upon a person to fill such vacancy, the county treasurer shall be called in and shall act as an additional member of such board to fill the

vacancy. The appointee shall hold office until his successor is elected at the next general election and qualified.

In view of this provision there may be some question as to whether Section 11-11-05 applies since it is (1) a meeting of more than the board of county commissioners--it is a meeting of the county commissioners plus two additional county officials and (2) the statute provides that the vacancy shall be filled "immediately" which may, vitiate the five-day notice provision of Section 11-11-05.

If this meeting had been closed to the public, i.e., if access had been refused to any person or persons, the fact it was not to make any decisions would be immaterial. It would still be a violation of the open meeting statute. In Peters v. Bowman Public School District, 231 N.W.2d 817 (N.D. 1975), a school board met in executive session to evaluate a teacher's performance. No decision was made in that session but the board took action at a subsequent board meeting to send the teacher a notice of contemplated nonrenewal. The North Dakota Supreme Court held that the action taken at the open meeting was void and that the official action of a school board which was clearly the product of an illegal meeting is invalid even though taken at an otherwise legal meeting. In view of this holding, we would have no hesitation in holding that the appointment to fill the vacancy was void if it was the product of an illegal (closed) meeting. In this instance, because of the indicated factual circumstances involved, we cannot declare the noon meeting void because we do not know whether it was closed to other person or other persons did not attend because there was no publicity given the meeting. There is a distinction between the two and this office cannot declare lack of advance notice of a meeting a violation of the open meeting law where the legislature has previously refused to do so. The fact a reporter was informed of the meeting, although only a short time before it was held, while not conclusive, may be evidence that the meeting was not, in fact, closed to the public.

As we noted in a letter of December 22, 1977, to Mr. Thomas Jelliff, Grand Forks County State's Attorney, this office cannot rule an appointment to fill a vacancy invalid. Should some person with standing question the authority of the person appointed under these circumstances to hold the office, the ultimate decision will be made by the courts based on all facts and evidence introduced before the court.

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

Sincerely,

Gerald W. VandeWalle  
Chief Deputy Attorney General