

July 24, 1979

Honorable Wayne K. Stenehjem  
State Representative  
102 North 21st St.  
Grand Forks, North Dakota 58201

Dear Representative Stenehjem:

This is in response to your letter dated July 19, 1979, wherein you set forth the following facts and questions:

This letter is to request your opinion on the applicability of North Dakota's Open Meeting Laws to the deliberations of the Judicial Nominating Committee established by Governor Link by Executive Order 1979-6.

As you may be aware, the Committee at its first meeting in Harvey, North Dakota on July 14, determined to conduct the final selection process through the use of a secret ballot, despite the provisions of Chapter 478 of the 1979 Session Laws, which provide:

"Unless otherwise specifically provided by law, all votes of whatever kind taken at any public meeting governed by the provisions of section 44-04-19 must be open, public votes, and all nonprocedural votes must be recorded roll call votes, with the votes of each member being made public at the open meeting. The minutes shall show the results of every vote taken at the meeting, and shall show the recorded vote of each member on every recorded roll call vote."

Section 44-04-19 lists the bodies to which the open voting requirement applies, which are:

"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."

In defending the Committee's action, the chairman appears to contend that the group need not comply with the open voting requirement, because they consider themselves an "administrative advisory committee" and therefore do not fall within the definition of a "public or governmental body, board, bureau, commission, agency or organization" under the statute.

I would contend, however, that the legislature used the above sweeping terminology to assure that the widest range of groups would be sure they are covered by the law. Further, a group should not be able to avoid compliance with the law by choosing to call itself a name other than one specifically mentioned in the statute.

I would point out too, that the expenses of the committee are to be borne jointly by the State Bar Association and the general fund appropriations to the Governor's office and the Supreme Court.

My questions are these:

1. Is the Judicial Nominating Committee a public body within the scope of Section 92 of the North Dakota Constitution, Section 44-04-19 of the North Dakota Century Code, and Chapter 478 of the 1979 Session Laws?
2. Does Chapter 478 prohibit the use of secret ballots by the Judicial Nominating Committee?
3. If secret ballots are required, what might be the effect of continued refusal to abide by the open voting requirements?

As the Committee apparently intends to meet in the near future, I would respectfully request an expeditious response to these questions.

Initially, we note that a request for our formal opinion on the subject matter presented by your inquiry has not been requested either by Governor Link or the Judicial Nominating Committee as it may affect the Committee's powers and duties. However, we do offer the following review of Executive Order 1979-6, applicable constitutional, statutory and judicial authority, and our observations and conclusions in response to your inquiry.

By Executive Order 1979-6, dated June 15, 1979, Governor Link established a Judicial Nominating Committee to assist him in the process of selecting persons to be finally considered for appointment to fill judicial vacancies. (copy attached) (See Section 97, North Dakota Constitution.)

We will respond to your questions in the order in which they are presented:

1. Article 92 of the Amendments to the North Dakota Constitution states:

#### ARTICLE 92

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.

In addition to the foregoing constitutional provision, Section 44-04-19 of the North Dakota Century Code provides:

44-04-19. 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, or 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.

It is clear that the reason for the establishment of the Judicial Nominating Committee is to serve the public purpose of providing for a selection and reporting process resulting in **the** appointment of state judges. The Committee was established by the official and public act of the Governor by executive order as a standing committee. Its establishment and initial proceedings have been publicly reported. By terms of the Executive order the Committee's work will be "supported in whole or in part by public funds."

By a report dated July 16, 1979, prepared by the Committee and addressed "To all North Dakota Judges and Licensed Attorneys" procedures for submitting applications for the position of district judge were set forth, including the representation that its proceedings would be open the public except that "the voting on prospective nominees ... will be by secret ballot."

The North Dakota Supreme Court in its decision in the case of Dickinson Education Association v. Dickinson Public School District #1, 252 N.W.2d 205 (1977), applied the state's open meeting law to a teacher contract negotiating committee of a public school board, "regardless of negotiating committee com position."

From our review of the facts surrounding the establishment of the Committee and the law providing for open public meetings in this state, and finding no statutory or other legally authorized exception to the law, it is our conclusion that the Judicial Nominating Committee established by Executive Order 1979-6, is a public body or organization, supported by public funds appropriated by the Legislature to both the Executive and Judicial Branches of state government and it is, therefore, governed by the provisions of Article 92 of the Amendments to the North Dakota Constitution and Section 44-04-19 of

the North Dakota Century Code. (See also Attorney General letter of November 15, 1977, Stenehjem-Holmberg, copy attached.)

2. Chapter 478 of the 1979 Session Laws (to be codified as Section 44-04-21, N.D.C.C.) provides:

SECTION 1 . OPEN VOTING AT PUBLIC MEETINGS REQUIRED - RESULTS RECORDED IN MINUTES.) Unless otherwise specifically provided by law, all votes of whatever kind taken at any public meeting governed by the provisions of section 44-04-19 must be open, public votes, and all nonprocedural votes must be recorded roll call votes, with the votes of each member being made public at the open meeting. The minutes shall show the results of every vote taken at the meeting, and shall show the recorded vote of each member on every recorded roll call vote.

Having concluded that Article 92 and Section 44-04-19 govern the meetings and proceedings of the committee, it follows that the provisions of Section 44-04-21 apply to the Committee with regard to voting by its members. We find no law specifically excepting the Committee from the requirements of the open voting statute.

3. The effect of the possible refusal of the Committee to abide by the open voting requirements of Section 44-04-21 on its nominating report to the Governor of recommended applicants for the judicial positions subject to appointment is difficult to determine since the Governor has specifically provided in his Executive Order that he reserves the option not to appoint candidates submitted by the Committee and to call a special election to fill a vacancy. We find no constitutional or statutory authority requiring that the Governor be bound by the recommendations of the Committee.

The effect of the committee's stated policy of voting on prospective nominees by secret ballot may also be dependent upon and determined by whatever action, if any, may be taken to seek compliance with the applicable statutes.

It is hoped that the foregoing will be of assistance. Sincerely,

Gary S. Helgeson  
Deputy Attorney General

Enclosures