

**OPEN RECORDS AND MEETINGS OPINION
2006-O-11**

DATE ISSUED: July 7, 2006

ISSUED TO: State Board of Higher Education

CITIZEN'S REQUEST FOR OPINION

On April 25, 2006, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Senators Joel Heitkamp and Michael Every asking whether the State Board of Higher Education (SBHE or Board) violated N.D.C.C. § 44-04-19 by holding meetings regarding the employment of Chancellor Potts.

A request for an opinion based on allegations that a meeting occurred without the notice required by N.D.C.C. § 44-04-20 must be made within ninety days of the alleged violation.¹ Because the request was received April 25, this office determined whether any meetings were held without prior public notice from January 25 to April 25, 2006.

FACTS PRESENTED

On April 21, 2006, a newspaper story in The Forum reported that the SBHE was planning to ask the University System Chancellor, Robert Potts, to resign. The article quotes Senator Ray Holmberg as saying a Board member had told him that "the votes were there." This statement led the requestors to believe that the Board had met without providing public notice.

Senator Holmberg's statement to The Forum was based on his conversations with Beverly Clayburgh, one of eight members of the SBHE. According to Mrs. Clayburgh, her statement was based on her own personal opinion and perspective of the other Board members and not on actual knowledge of how each member would vote or because the members had agreed to a course of action.

By law, any opinion issued under N.D.C.C. § 44-04-21.1 must be based on the facts given by the public entity.² In this instance, the facts were provided to this office through interviews from all eight members of the SBHE.³ Others interviewed were several college and university presidents, Chancellor Potts, Pat Seaworth (attorney for

¹ N.D.C.C. § 44-04-21.1(1).

² N.D.C.C. § 44-04-21.1.

³ N.D. Const. art. VIII, § 6; N.D.C.C. § 15-10-02. The eight members at the time of the opinion request were Pam Kostelecky, president, (Dickinson); John Q. Paulsen, vice president, (Fargo); Bruce Christianson (Minot); Richard Kunkel (Devils Lake); Richie Smith (Wahpeton); Sue Andrews (Fargo); Beverly Clayburgh (Grand Forks); and Patricia Olson, student member (attends the University of North Dakota). John Q. Paulsen became the SBHE president on July 1, 2006.

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the University System), Senator Ray Holmberg, and Ron Rauschenberger (aide to the Governor). Through the interviews, it became apparent that there was widespread speculation that: 1) Chancellor Potts was going to be given the option to resign at the March 27 meeting; 2) removing Chancellor Potts as chancellor was one of three conditions necessary to retain Dr. Joseph Chapman at NDSU; and 3) Governor Hoeven flew to Arizona in a private jet to work with NDSU alumni to develop a strategy to meet Dr. Chapman's conditions for staying at NDSU. Each was examined in order to determine whether there was any relationship to a possible violation of the open meetings law by the SBHE.

Chancellor Potts was hired by the SBHE on July 1, 2004. Problems between the Chancellor and Dr. Chapman became evident after the funding equity issue was aired during the 2005 legislative session. In February 2006, Dr. Chapman announced that he was a finalist for a president's position at the University of Wyoming. Alumni groups and the NDSU Foundation discussed, during winter meetings in Arizona and elsewhere, ways to keep Dr. Chapman at NDSU. Many of the people interviewed for this opinion speculated that Governor Hoeven flew to Arizona on a private jet in order to be part of these discussions with NDSU alumni regarding Dr. Chapman. However, Ron Rauschenberger from the Governor's office explained that in February Governor Hoeven attended a function in Fargo and then rode on a private plane of an NDSU alumnus back to Bismarck. The alumnus flew on to Arizona. The Governor was not at the meetings of alumni gathered in Arizona, Rauschenberger explained.

This office also heard from several people interviewed for this opinion that, in order to stay at NDSU, Dr. Chapman demanded: 1) higher pay; 2) improved housing; and 3) the removal of Chancellor Potts. This office interviewed Dr. Chapman and asked him specifically whether he made these demands. Dr. Chapman admitted that he made the first two demands, but denied making the third.

On February 28, 2006, Board member Richie Smith, Wahpeton, received a call from Governor Hoeven's office asking him to meet the Governor and John Q. Paulsen in Fargo. According to Mr. Paulsen, the Governor did not want NDSU to lose a good president and had concerns about the leadership style of Chancellor Potts. After the meeting, Mr. Paulsen and Mr. Smith held further conversations about whether Chancellor Potts was a good fit for the University System. According to Mr. Paulsen, he and Mr. Smith decided that Mr. Smith would tell the chancellor that his leadership style was not working well within the North Dakota University System and discuss his future plans. During an interview with my office, Mr. Paulsen stated that he thought Mr. Smith had spoken with Chancellor Potts in Jamestown prior to the April 21, 2006, article in The Forum. While Mr. Smith did meet Chancellor Potts in Jamestown, the meeting occurred after the article appeared in The Forum. During their meeting in Jamestown, Mr. Smith told Chancellor Potts that he had met with the Governor about Potts' performance as chancellor. Mr. Smith did not, however, talk to the chancellor about the possibility of resigning.

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The university and college presidents met on March 26 to work on a resolution of support for a strong university system. Dr. Chapman did not attend the meeting, but he opposed the resolution, and was the only president not to endorse the resolution. During the meeting of the presidents, Dr. Donna Thigpen, president of Bismarck State College, spoke to Dr. Chapman by telephone and acted as a liaison between him and the other presidents, who favored the resolution.

According to Dr. Thigpen, during one of the phone calls with Dr. Chapman, he told her that during the morning break of the SBHE meeting on March 27 in Dickinson, Chancellor Potts would be taken aside by a Board member, who would tell him there were enough votes to fire him, and then suggest he consider resigning. Dr. Thigpen said Dr. Chapman was adamant that the presidents' resolution of support for a strong university system be delivered to the Board after the morning break at the Dickinson meeting so Chancellor Potts would not be given the impression, before the break, that the resolution was in support of him.

Dr. Thigpen's description of the scenario to ask Chancellor Potts to resign at the March 27 SBHE meeting in Dickinson was frequently repeated in interviews with this office by university and college presidents and others involved in the University System. Some heard about the alleged plan prior to the Dickinson meeting, but many heard about it after the fact. The source was consistently traced back to the above-referenced conversation between Dr. Thigpen and Dr. Chapman. During my interview with Dr. Chapman, I repeatedly asked him about this elaborate plan to force Chancellor Potts to resign on March 27. Dr. Chapman claimed he could not remember the conversation, but he did not say that Dr. Thigpen's account was inaccurate. In light of Dr. Chapman's lack of recall, I talked to Dr. Thigpen a second time in order to ascertain whether I had misunderstood her statement. Dr. Thigpen confirmed her recollection of the conversation with Dr. Chapman.

On the morning of March 27, Board members Beverly Clayburgh, Patricia Olson, John Q. Paulsen, Richie Smith, and Sue Andrews, along with University System staff, flew to the Board retreat in Dickinson. The Board members stated that they did not discuss Board business. Most of them could not recall exactly what they talked about. Patricia Olson, the student member of the Board, recalled that she and the other Board members on the plane discussed her post-graduation plans.

The purpose of the retreat was to discuss the ConnectND computer issue. The university and college presidents were not present at the meeting. According to Chancellor Potts and the Board members, nobody took him aside and asked him to resign.⁴

⁴ The copy of the resolution of the university and college presidents was never presented to the Board at the Dickinson meeting; rather, it was given to the Board

On the same day as the SBHE meeting in Dickinson, there was a student rally in Fargo in support of Dr. Chapman during which he announced his decision to stay at NDSU. After hearing the news that Dr. Chapman was planning to remain at NDSU, Dr. Thigpen called him and asked what had happened at the Board's meeting in Dickinson.⁵ Dr. Chapman told her that "if everybody does what they said they would do, he (Potts) will be gone before you (Thigpen)."⁶ When asked about the specific statement of Dr. Thigpen, Dr. Chapman stated that he did not remember that specific conversation with Dr. Thigpen, but was unwilling to deny making the statement.

Although Dr. Chapman's version of what was to take place during the Dickinson meeting on March 27 was apparently well known among those involved in the University System, none of the Board members was aware of the plan. All the Board members, including John Q. Paulsen and Sue Andrews, the two Board members who live in the same city as Dr. Chapman, expressed surprise to learn that Dr. Chapman believed a Board member was going to ask Chancellor Potts for his resignation at the March 27 meeting.

This office was not able to discover the reason Dr. Chapman believed Chancellor Potts was going to be asked to resign at the March 27 meeting of the Board in Dickinson. Dr. Thigpen's account of her conversation with Dr. Chapman prior to the March meeting was not contradicted by Dr. Chapman, who stated he could not deny that the conversation took place. Dr. Chapman stated that he was never told by a Board member that the Board would remove Chancellor Potts. Neither John Q. Paulsen nor Richie Smith told Dr. Chapman about Mr. Smith's intent to meet with Chancellor Potts and discuss his future with the University System.⁷

John Q. Paulsen and Richie Smith, like Sue Andrews, Beverly Clayburgh, and Dr. Richard Kunkel, said that there were times when they were dissatisfied with the way in which Chancellor Potts handled particular issues and that they mentioned their dissatisfaction to other Board members over a period of several months. In addition, it

president, Pam Kostelecky, at the end of the meeting in an envelope addressed to her. According to Dr. Lee Vickers, president of Dickinson State University, the resolution was delivered late in the day, not because he received directions by Dr. Chapman, but because it took time for Dr. Vickers to finalize language of the resolution. The other Board members had already left by the time President Kostelecky discovered that the envelope contained a resolution encouraging support for a strong university system so she sent them all copies of the resolution.

⁵ Dr. Thigpen could not recall whether she called Dr. Chapman on March 27 or March 28.

⁶ Dr. Thigpen retired from Bismarck State College in June 2006.

⁷ For the purposes of this opinion, this office was interested in Dr. Chapman's involvement only as it related to a possible open meetings violation by the SBHE.

is apparent that Governor Hoeven was concerned about Dr. Potts' performance. Besides meeting with Mr. Paulsen and Mr. Smith, Sue Andrews and Beverly Clayburgh also stated that the Governor made statements to them at social functions about his dissatisfaction with Chancellor Potts.⁸ John Q. Paulsen and Richie Smith stated that no other Board members were aware of their plan to talk to Chancellor Potts in Jamestown and none of the other Board members expressed knowledge of Paulsen and Smith's plan. Pam Kostelecky, Bruce Christianson, and Patricia Olson did not have discussions with other Board members about Chancellor Potts' performance. Every Board member said he or she occasionally talked to another Board member about public business either by telephone or at social gatherings, such as athletic events. None of the conversations, whether about Chancellor Potts or other public business, involved more than two Board members at a time and the topics of public business varied.

ISSUES

1. Whether meetings of two board members between themselves and with the Governor to discuss Chancellor Potts were subject to the open meetings law.
2. Whether various conversations between Board members regarding Chancellor Potts violated the open meetings law.

ANALYSES

Issue One:

All meetings of a public entity must be open to the public unless otherwise specifically provided by law and must be preceded by sufficient public notice.⁹ Under the open meetings law, "meeting" means:

[A] formal or informal gathering, whether in person or through electronic means such as telephone or videoconference, 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

⁸ Both of the statements made to Sue Andrews and Beverly Clayburgh took place in late 2005, beyond the scope of review for this opinion.

⁹ N.D.C.C. §§ 44-04-19 and 44-04-20.

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for the purpose of avoiding the requirements of section 44-04-19.¹⁰

Thus, the open meetings law not only applies to gatherings of a quorum of members of a governing body, but it also applies to 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.”¹¹ The North Dakota University System is a public entity.¹² The SBHE consists of eight members.¹³ Four members constitute a quorum.¹⁴

In the current case, two Board members, John Q. Paulsen and Richie Smith, met with Governor Hoeven on February 28 in Fargo to discuss Chancellor Potts, among other topics. This meeting did not involve a quorum and, as the 1998 opinion to the SBHE pointed out, “[b]y adopting the ‘quorum rule,’ the Legislature impliedly exempted from the open meetings law most conversations between two or three of the eight Board members.”¹⁵

The Governor, just as any member of the public, is free to talk to members of the Board about Board business. Because neither Governor Hoeven nor Dr. Chapman are members of the SBHE, their involvement in this situation was only of interest insofar as it related to the possibility that the Governor or Dr. Chapman acted as liaisons or intermediaries to circulate among the board members the opinions of the other Board members in order to circumvent the open meetings law.¹⁶ While in this case I did not find evidence to indicate that the Governor or Dr. Chapman acted as intermediaries among the Board, I agree with the Florida Attorney General’s opinions that warn that any device, including using a non-Board member to act as an intermediary or agent to convey or circulate information or opinions to the rest of the Board, could result in violation of the open meetings law.¹⁷

Paulsen and Smith met both with each other and the Governor to discuss public business. However, Paulsen and Smith were not a quorum of the Board. In addition, the other Board members were unaware of Paulsen and Smith’s meetings. Because Paulsen and Smith did not meet at the direction of the Board, they were not acting as a

¹⁰ N.D.C.C. § 44-04-17.1(8)(a) (emphasis added).

¹¹ N.D.C.C. § 44-04-17.1(8)(a)(2) (emphasis added); See N.D.A.G. 98-O-05.

¹² See N.D.A.G. 98-O-05.

¹³ N.D. Const. art. VIII, § 6.

¹⁴ See N.D.C.C. § 44-04-17.1(14) (definition of “quorum” is “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 N.D.A.G. 98-O-05.

¹⁶ See Florida Attorney General Opinions AGO 81-42 and AGO 75-59.

¹⁷ See id.

committee.¹⁸ Therefore, the meeting between the Governor, Paulsen, and Smith and the subsequent meetings between Paulsen and Smith were not subject to the open meetings law.

Issue Two:

Conversations between less than a quorum of Board members are generally not prohibited even if they relate to public business.¹⁹ “However, there is a threshold at which multiple conversations (in person or over the telephone) on a particular subject . . . have the potential effect of forming consensus or furthering the Board’s decision-making process on . . . [a] subject.”²⁰ Once that threshold is reached, there may be a violation of the open meetings law.

In 1998, the multiple conversations among a quorum of the members were orchestrated by Paul Ebeltoft and Chancellor Isaak with the purpose of forming a consensus among the Board members.²¹ Here, every member of the SBHE said they occasionally talked about public business with another board member; that is allowed under the law. Dr. Kunkel, Beverly Clayburgh, Sue Andrews, John Q. Paulsen, and Richie Smith all stated that they had expressed dissatisfaction with Chancellor Potts to another Board member at one time or another. Collectively, Kunkel, Clayburgh, Andrews, Paulsen, and Smith constitute a quorum. However, unlike the situation in 1998, the conversations were not organized in an effort to form a consensus among the collective quorum. In fact, I could find no evidence linking their individual, periodic expressions of occasional dissatisfaction that took place over several months with any plan by the SBHE to ask Chancellor Potts to resign.

In conclusion, it is my opinion that the various conversations between Board members did not reach the threshold of forming a plan or consensus to request Chancellor Potts to resign and that the various intermittent conversations between Board members about occasional dissatisfaction with Chancellor Potts were not organized to form a consensus among a quorum or to avoid the requirements of the open meetings law.

CONCLUSIONS

1. The meetings of Paulsen and Smith between themselves and with the Governor to discuss Chancellor Potts were not meetings subject to the open meetings law.
2. The various conversations between Board members did not reach the threshold of forming a plan or consensus to request Chancellor Potts to resign, and the

¹⁸ See N.D.C.C. § 44-04-17.1(6); N.D.A.G. 2005-O-02; N.D.A.G. 2005-O-03.

¹⁹ Id. See also N.D.A.G. 98-O-08.

²⁰ N.D.A.G. 98-O-05.

²¹ Id.

various intermittent conversations between Board members about dissatisfaction with Chancellor Potts were not organized to form a consensus among a quorum or to avoid the requirements of the open meetings law.

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