STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 96-F-09

Date Issued: April 4, 1996

Requested by: Fabian E. Noack
Carrington City Attorney

- QUESTIONS PRESENTED -

I.

Whether a meeting between the mayor and city department heads is subject to the open meetings law.

II.

Whether the presence of the other city council members at a meeting between the mayor and city department heads constitutes a meeting of the city council under the open meetings law if the mayor and other city council members merely listen and do not interact or participate in the discussion.

III.

Whether the public may make audio or video tape recordings of open city council meetings without the consent of the city council.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that meetings between the mayor and city department heads are generally not subject to the open meetings law unless either the mayor or the department heads have been delegated authority by the city council to perform an act on its behalf.

II.

It is my opinion that the presence of the other city council members at a meeting between the mayor and city department heads regarding city council business constitutes a meeting of the city council under the open meetings law, even if the mayor and other council members merely listen and do not interact or participate in the discussion.

III.

It is my opinion that the public may make audio or video tape recordings of open city council meetings unless the recording activity would unreasonably disrupt the meeting. That members of the city council may be inhibited, intimidated, or uncomfortable is not sufficient disruption to authorize the city council to limit the recording of its meetings. It is my further opinion that the city council may impose reasonable limitations, such as those in the examples given in this opinion, on the recording of its proceedings. A city council's limitations are unreasonable if they unduly interfere with the rights of the public to record the city council's meetings.

- ANALYSES -

I.

The facts provided indicate that the mayor, a member of the city council, has scheduled regular department head meetings on the mornings of the regular city council meetings. The purpose of the department head meetings is to discuss issues which have arisen in each department and develop possible solutions to be presented at the city council meeting. The department heads are required to be present, and an invitation to attend has been extended to the other city employees and city council members. The facts also indicate that no business is conducted at the department head meetings and that the department heads are not delegated any authority by the city council.

N.D.C.C. § 44-04-19 provides in relevant part:

> 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, must be open to the public.

See also N.D. Const. art. XI, § 5. A three-prong analysis should be used to determine whether a meeting is subject to the open meetings law and is open to the public. See 1993 N.D. Op. Att'y Gen. L-95. First, is the body holding the gathering subject to the open meetings law? Second, is the gathering a meeting? Finally, if the answer to both these questions is yes, is there a specific law providing that

the meeting is confidential or otherwise exempt from the open meetings law. If not, the meeting must be open to the public. Issue One involves the first prong of this analysis by asking whether city department heads are a separate public body subject to the open meetings law.

"Entities created through public or governmental process must be considered public or governmental in nature" and therefore are "subject to the requirements of the open meetings and open records laws." Letter from Attorney General Nicholas Spaeth to Lawrence DuBois (November 20, 1987). As one court has concluded, "meetings of" a public body do not include "voluntary meetings, conferences, or whatever they may be called, of department heads or employees who seek to improve with dispatch their performance or function of assisting in the conduct of public business." People ex rel. Cooper v. Carlson, 328 N.E.2d 675, 678 (Ill. App. Ct. 1975). See also Board of Health v. The Journal-Gazette Co., 608 N.E.2d 989, 993 (Ind. Ct. App. 1993). Under the facts provided, the city department heads as a group are not specifically recognized as a public body by state law or the city council. Thus, the department heads are not a separate public body under the open meetings law.

This conclusion would not be affected by the mayor's participation in the meeting. A meeting between one member of a public body and other individuals is generally not a meeting of that body. Letter from Attorney General Nicholas Spaeth to Gail Hagerty (March 29, 1985). See also Gavin v. City of Cascade, 500 N.W.2d 729, 732 (Iowa Ct. App. 1993) (information gathering by individual members is not a meeting). However, a meeting involving only one member of a public body is nevertheless subject to the open meetings law if the member has been delegated authority by the public body to act on its behalf. Letter to Hagerty, supra; see also 1967 N.D. Op. Att'y Gen. 244. Similarly, if the public body delegates authority to act on its behalf to a group of its employees, the group "assumes the color of a public body because of the delegation of such authority." 1967 N.D. Op. Att'y Gen. 244, 246. In both of these instances it is assumed that the public body itself would be subject to the open meetings law. See Advertiser Co. v. Wallis, 493 So.2d 1365, 1369-70 (Ala. 1986) ("meeting" applies to multi-member bodies rather than agencies administered by one person). Whether such authority has been delegated is a factual question that may only be determined on a case-by-case basis.

In conclusion, it is my opinion that meetings between the mayor and city department heads are generally not subject to the open meetings

law unless either the mayor or the department heads have been delegated authority by the city council to act on its behalf.

This conclusion is not an endorsement of a decision to deny public access to meetings between the mayor and the city department heads to which the other city council members have been invited. To the contrary, although inviting city council members to a meeting regarding city business may properly facilitate well-informed council decisions, denying the public access to meetings that are open to city council members despite the public's undeniable interest in city business would appear arbitrary and suggest that a subterfuge is being used to circumvent the open meetings law.

II.

The second issue presented is whether the presence of the other city council members at these meetings constitutes a meeting of the city council under the open meetings law if the mayor and other council members merely listen and do not interact or participate in the discussion. Because a gathering of city council members involves a public body, the question under the second prong of the analysis becomes whether the presence of the council members at these meetings constitutes a "meeting of" the city council.

This office has previously concluded that whether an entity is subject to the open meetings law is not based on the presence of public officials in the audience. Letter from Attorney General Nicholas Spaeth to Wayne Jones (January 28, 1985). However, that opinion involved a crime conference attended by public employees engaged in law enforcement. By analogy, the 1985 opinion indicates that whether the department heads constitute a public body is not based on the presence of city employees in the audience. The 1985 opinion does not address or apply to situations where the audience includes members of a public body subject to the open meetings law.

The term "meeting" is not defined in N.D.C.C. § 44-04-19. The plain meaning of "meeting" is "[a]n assembly or gathering of people, as for a business, social, or religious purpose." The American Heritage Dictionary 782 (2d coll. ed. 1991). This definition of "meeting" suggests that the purpose of the gathering is a factor that must be considered. In determining whether a meeting under the open meetings law exists, "the public's need to be informed must be balanced against the equally imperative public need for effective and efficient administration of government." Retzlaff v. Grand Forks Public School District No. 1, 424 N.W.2d 637, 644 n.9 (N.D. 1988).

This definition of "meeting" is not limited to "an assembly or gathering" formally convened by the governing body of a public entity, although statutes in certain other states distinguish between meetings of a public body and gatherings of members of that body. See Harris v. Nordquist, 771 P.2d 637, 640 (Or. Ct. App. 1989). The plain meaning of the term "meeting" applies to both a formally convened meeting of a public body and an informal gathering of the members of that body. See State ex rel. Newspapers v. Showers, 398 N.W.2d 154 (Wis. 1987) ("convening of members" does not require formal convening).

The North Dakota Supreme Court has indicated that the term "meeting" is also not limited to gatherings where formal action is taken on public business. In Peters v. Bowman Public School District, a school board held an executive (closed) session for the purpose of evaluating a teacher's performance but no formal action was taken at that meeting. 231 N.W.2d 817 (N.D. 1975). Subsequent to the executive session, the board held an open meeting and acted on the recommendations made at the executive session. The court concluded that the executive session of the board violated the open meetings provisions of N.D.C.C. § 44-04-19.

> 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 § 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 otherwise legal meeting.

Id. at 820. Relying on Peters, the Attorney General concluded 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 meeting 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.

Letter from Attorney General Allen Olson to Myron Atkinson (March 5, 1976).

Even if formal action is not required, some courts have concluded that a "meeting" does not exist if the public body merely receives information regarding public business and does not discuss or deliberate on the information at that time. See Harris, 771 P.2d at 640. Other courts have taken the opposite position that the term "meeting" applies to "every step of the deliberative and decision-making process when a governmental unit meets to transact public business." Brookwood Area Homeowners Ass'n v. Anchorage, 702 P.2d 1317, 1323 (Alaska 1985).

The Wisconsin Supreme Court has discussed this issue in a very similar situation to the one presented here. In State ex rel. Badke v. Village Board, members of the village board attended several meetings of the plan commission regarding a matter over which the board had final decision-making authority. 494 N.W.2d 408, 410-11 (Wis. 1993). A notice and agenda for the meetings of the plan commission were mailed to each board member. Two of the board members were also members of the commission. The other board members were simply attending the commission meetings "as interested observers and citizens." Id. at 411. In response to the argument that the open meetings law did not apply unless the board members interacted or participated in the discussion, the court stated:

> [I]nteraction between members of a governmental body is not necessary for a convening of a meeting to have taken place nor is interaction necessary for the body to have exercised its powers, duties, or responsibilities. Listening and exposing itself to facts, arguments, and statements constitutes a crucial part of a governmental body's decisionmaking.

Id. at 415. The court concluded that

> even if the Village Board members did not interact at the Plan Commission meetings, their presence at the meetings allowed them to gather information that influenced a decision about a matter over which they had decisionmaking authority. The public had a right to be made aware of the existence of this information as well. This is sufficient to trigger the open meeting law.

Id. The court also concluded that the board members' regular practice of attending these meetings defeated any argument that their attendance was by chance rather than coordination, especially when each board member received a notice and agenda for the meeting. Id. at 416.

Not every gathering of all the city council members is subject to the open meetings law. See Letter to Atkinson, supra. As State ex rel. Badke indicates, the open meetings law does not apply to a chance or social gathering, so long as the gathering is not used to circumvent the law and no city business is deliberated. 494 N.W.2d at 414, 416. See also Letter to Atkinson, supra; St. Cloud Newspapers v. Dist. 742 Community Schools, 332 N.W.2d 1, 7 (Minn. 1983). However, any discussion or information-gathering regarding city business by the city council members at such a social or chance gathering converts it into a "meeting" subject to the open meetings law. See Letter to Atkinson, supra; State ex rel. Badke, 494 N.W.2d at 418. City business includes any matter that could forseeably be brought before the city council in the context of its responsibilities to the public or over which the council has the potential to determine the outcome. See Letter to Atkinson, supra; St. Cloud Newspapers, 332 N.W.2d at 6; State ex rel. Badke, 494 N.W.2d at 418.

Applying the State ex rel. Badke decision, the gathering described in this opinion would be a "meeting" of the city council if the other members of the city council attend. According to the facts provided, problems and issues are discussed at the department head meetings that could forseeably be brought before the city council, including specific agenda items. The other city council members did not receive an agenda but were invited to attend the mayor's meeting with the city department heads. This invitation suggests that the attendance of other city council members at the mayor's meeting would not be a chance gathering, particularly if the council members have a history of attending those meetings. Even if it was a chance gathering, the members' presence during the discussion would allow them to gather information regarding city council business and therefore convert the gathering into a "meeting" under the open meetings law. Interaction or discussion is not required. In addition, it is difficult to imagine that no discussion would occur between city council members and the department heads, or among the city council members themselves, at such a meeting.

In summary, it is my opinion that the presence of the other city council members at a meeting between the mayor and city department heads regarding city council business constitutes a meeting of the

city council under the open meetings law, even if the mayor and other council members merely listen and do not interact or participate in the discussion.

While I do not believe a "meeting" of the city council exists if the council members are simply invited to a meeting between the mayor and city department heads and do not attend, the council members should be aware that their acceptance of the invitation and presence at the meeting would likely violate the open meetings law unless prior notice has been provided by the council under N.D.C.C. § 44-04-20 and the public is allowed to attend the meeting. In addition, any group inviting the city council members to attend its meeting should be aware that as a consequence of the invitation, its meeting will be open to the public if the council members attend.

III.

The final issue presented is whether the public may make audio or video tape recordings of open city council meetings without the consent and permission of the public body. N.D.C.C. § 44-04-19 does not specifically address this issue. Further, no North Dakota court decisions or previous North Dakota attorney general opinions address this issue. Decisions of other jurisdictions, however, indicate that the public may make audio or video tape recordings of open meetings, unless by so doing they disrupt the progress of the meeting.

In Mitchell v. Board of Education of the Garden City Union Free School District, the court addressed the propriety of a school board's resolution prohibiting use of tape recorders at its public meetings. 493 N.Y.S.2d 826 (App. Div. 1985). Noting that the board had offered no justifiable basis for prohibiting the use of unobtrusive, hand-held tape recording devices at its public meetings, the court found the board's resolution far too restrictive in light of the legislative scheme embodied in the open meetings law. The court explained that "the unsupervised recording of public comment by portable, hand-held tape recorders is not obtrusive, and will not distract from the true deliberative process of the body." Id. at 826. The court also found the board's argument that individuals attending the meeting would not freely speak out if their opinions were recorded to be "wholly specious." Id. at 827. Rejecting the argument that the recordings could be edited, altered, or used out of context, the court noted the same to be true of written notes of the board meeting. In fact, "[a] contemporaneous recording of a public meeting is undoubtedly a more reliable, accurate and efficient means of memorializing what is said at the proceeding." Id.

In Maurice River Township Board of Education v. Maurice River Township Teacher's Assoc., the court addressed whether the board of education could prohibit recordings of public meetings by means of videotapes. 475 A.2d 59 (N.J. Super. Ct. App. Div. 1984). Agreeing with the lower court, the appellate court found the use of the videotape to be neither distracting nor disruptive to the meeting. The court also rejected the argument that members of the public and the board would be uncomfortable with the eye of the camera pointed at them, stating "[t]he Board's vague suggestion that its members may be inhibited, intimidated or uncomfortable under the eye of the video camera, or that members of the public may be intimidated or reluctant to come forward and participate in the public meeting is not persuasive." Id. at 492-93. The court explained that "[t]o warrant a ban on the videotaping of the Board meetings, more than a potential for adversely affecting one or more persons must be shown." Id. at 493. Accordingly, the court found that members of the public had the right to videotape the proceedings of the board. The court also found, however, that the board could "formulate reasonable guidelines for the videotaping of its proceedings. Such guidelines should include the number and type of cameras permitted, the positioning of the cameras, the activity and location of the operator, lighting and other items deemed necessary to maintain order and to prevent unnecessary intrusions into the proceedings." Id.

Similarly, in Peloquin v. Arsenault, the court found a blanket ban on video recording of public meetings to be unreasonable. 616 N.Y.S.2d 716 (App. Div. 1994). The court explained that a ban would not be unreasonable if such recording was "obtrusive and distracting." Id. at 717. However, "a blanket ban on all cameras and camcorders when the sole justification is a distaste for appearing on public access cable television is unreasonable." Id.

I agree with the conclusions in the Mitchell, Maurice River, and Pelonquin cases just discussed. Thus, in light of the purposes of the open meetings law, one of which is to enable members of the public to listen to the deliberations and decisions that go into the making of public policy, it is my opinion that the public may make audio or video tape recordings of open city council meetings unless the recording activity would unreasonably disrupt the meeting. That members of the city council may be inhibited, intimidated, or uncomfortable is not sufficient disruption to authorize the city council to limit the recording of its meetings.

A meeting is not unreasonably disrupted when members of the public or the media unobtrusively make audio or video recordings of the meeting while sitting in their seats or standing at the back or side of the room. On the other hand, the city council may determine a meeting is unreasonably disrupted when, for example, numerous members of the public have placed their tape recording devices on the meeting table and repeatedly come up to the table to change tapes. Under these circumstances, the city council may reasonably limit the number of tape recorders on the meeting table. Another example of an unreasonable disruption may be when numerous people videotape a meeting while roaming around the meeting room. Again, the city council may determine that such roaming is unreasonably disruptive and, therefore, may reasonably limit the areas of the room from which a meeting may be videotaped. Thus, it is my further opinion that the city council may impose reasonable limitations, such as those in the examples given in this opinion, on the recording of its proceedings. A city council's limitations are unreasonable if they unduly interfere with the rights of the public to record the city council's proceedings.

- EFFECT -

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

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: Douglas A. Bahr
Assistant Attorney General

James C. Fleming
Assistant Attorney General

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