

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-11

Date Issued: April 30, 1998

Requested by: Mark T. Blumer, Dickey County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether a meeting held under N.D.C.C. § 44-04-05 to fill a vacancy on the county commission is required to be open to the public under N.D.C.C. § 44-04-19 unless otherwise specifically provided by law.

II.

Whether resumes and other personal information submitted by candidates for appointment to fill a vacant position on the county commission can be considered confidential and reviewed in an executive session.

III.

Whether members of the public must be allowed to participate at a meeting held under N.D.C.C. § 44-02-05 to fill a vacancy on the county commission.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that a meeting held under N.D.C.C. § 44-02-05 is required to be open to the public under N.D.C.C. § 44-04-19 unless otherwise specifically provided by law.

II.

It is my opinion that resumes and other personal information submitted by candidates for appointment to fill a vacant position on the county commission are not confidential and thus cannot be reviewed in an executive session.

III.

It is my opinion that neither N.D.C.C. § 44-02-05 nor N.D.C.C. § 44-04-19 require that the public be allowed to participate at a meeting held to fill a vacancy on the county commission, although an opportunity for public comment is not prohibited.

- ANALYSES -

I.

When a vacancy occurs on a county commission, N.D.C.C. § 44-02-05 requires the remaining county commissioners, the district judge for the county, and the county auditor to meet and determine by majority vote who shall fill the vacancy. 1993 N.D. Op. Att'y Gen. L-281. A gathering of a quorum of a "governing body" of a public entity regarding public business is a "meeting" required to be open to the public unless otherwise specifically provided by law. N.D.C.C. §§ 44-04-17.1(8), 44-04-19. The phrase "governing body" means "the multimember body responsible for making a collective decision on behalf of a public entity." N.D.C.C. § 44-04-17.1(6).

The multimember group described in N.D.C.C. § 44-02-05 is responsible for deciding, on behalf of the county, who shall fill the vacancy on the county commission. I am not aware of any statute authorizing an executive session to interview or review the persons who have applied for the vacant position. Therefore, it is my opinion that the group described in N.D.C.C. § 44-02-05 is a "governing body," and its meeting to fill the vacancy is a "meeting" required to be open to the public under N.D.C.C. § 44-04-19.

II.

County records are required to be open and accessible to the public upon request unless otherwise specifically provided by law. N.D.C.C. § 44-04-18. "Record" includes recorded information of any kind which is in the possession of a public entity and has been received for use in connection with public business. N.D.C.C. § 44-04-17.1(15). This definition covers resumes and other personal information submitted by a person applying for a position or office in a public entity. Thus, those records are open to the public under N.D.C.C. § 44-04-18 unless another statute specifically provides otherwise.

There is no general statute exempting resumes or other personal information from the open records law. Certain personal information of public employees is not required to be disclosed, N.D.C.C. § 44-04-18.1(2), but this exception is limited to information provided by an employee of a public entity in the course of the

April 30, 1998

Page 3

person's employment. Even if one of the candidates for the vacant position was currently a public employee, submitting a resume or other personal information would not be within the course of the candidate's current employment.

Job applications and other records pertaining to applicants are required to be open. Forum Publishing Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986); 1981 N.D. Op. Att'y Gen. 11. See also Hovet v. Hebron Public School Dist., 419 N.W.2d 189 (N.D. 1988) (personnel records); City of Grand Forks v. Grand Forks Herald, Inc., 307 N.W.2d 572 (N.D. 1981) (same); Letter from Attorney General Nicholas Spaeth to R.L. Rayl (April 21, 1988) (pretermination letter). Interviews by a governing body of candidates for a vacant position or office, like other personnel matters, are meetings that are also required to be open to the public. Letter from Attorney General Nicholas Spaeth to Sparb Collins (August 10, 1989). See also Letter from Attorney General Nicholas Spaeth to Michael McIntee (September 19, 1991) (city council meeting on disciplinary action against chief of police).

Because there is no applicable exception to N.D.C.C. § 44-04-18 for resumes and other personal information submitted by applicants for a vacant position on the county commission, it is my opinion that the records are not confidential and must be open to the public. Because the records are open, and because there is no applicable exception to N.D.C.C. § 44-04-19 for discussion of the records, it is my further opinion that meetings to interview or discuss the qualifications of applicants for the vacant position cannot be held in executive session.

III.

Whether the right to attend public meetings under N.D.C.C. § 44-04-19 includes the right to participate at those meetings has not been previously addressed in an opinion of the North Dakota Supreme Court or this office. N.D.C.C. § 44-04-19 does not expressly prohibit or require public participation during an open meeting.

Courts in states having similar laws have concluded that, unless there is a specific provision authorizing or requiring a public hearing, the right of members of the public to attend a meeting of a governmental entity does not include the right to intrude, interfere, or otherwise participate in the governing body's discussion. Hinds County Bd. of Supervisors v. Common Cause of Miss., 551 So.2d 107 (Miss. 1989); Wood v. Marston, 442 So.2d 934, 941 (Fla. 1983). Gutierrez v. City of Albuquerque, 631 P.2d 304, 307 (N.M. 1981); Puka

ATTORNEY GENERAL'S OPINION 98-11

April 30, 1998

Page 4

v. Greco, 464 N.Y.S.2d 349, 354 (Sup. Ct. 1983), aff'd 479 N.Y.S.2d 150 (App. Div. 1984).

There are times when public participation should be encouraged, and may even be required under certain statutes. However, the right to attend a public meeting does not necessarily include the right to participate in that meeting. It is my opinion that neither N.D.C.C. § 44-02-05 nor N.D.C.C. § 44-04-19 require that the public be allowed to participate at a meeting held to fill a vacancy on the county commission.

- EFFECT -

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

Heidi Heitkamp
ATTORNEY GENERAL

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