

## **N.D.A.G. Letter to Wentz (March 19, 1990)**

March 19, 1990

Honorable Janet Wentz  
State Representative  
District 41  
505 Eighth Avenue SE  
Minot, ND 58701

Dear Representative Wentz.

Thank you for your February 11, 1990, letter requesting an Attorney General's opinion concerning the applicability of the open meetings and open records laws to the Minot State University Faculty Senate Executive Committee and the Faculty Senate meetings. Your primary question is whether the open meetings law applies to the Faculty Senate Executive Committee meetings.

North Dakota's open meetings law essentially provides that meetings of public or governmental bodies, boards, bureaus, commissions, or agencies of state or political subdivisions of the state, as well as organizations or agencies supported in whole or in part by public funds or which expend public funds, must be open to the public. N.D. Const. art. XI, § 5; N.D.C.C. § 44-04-19. The applicability of this law to committees of public bodies is not expressly discussed by the statute nor the constitutional section. There are several previous opinions of this office which have wrestled with this question. I am enclosing a copy of a letter opinion to Representative Ulmer which was issued nearly a year ago concerning this very issue. In that letter opinion, I summarized previous opinions of this office discussing the applicability of the open meetings law to committees of public bodies. I also summarized court decisions from other jurisdictions and the general rule of law which has developed. Essentially, the majority of courts which have considered this issue have concluded that a committee which does not possess decision-making authority and acts only to furnish information, gather facts, or make recommendations to the governing or decision-making body, is not subject to the open meetings law. On the other hand, a committee which does possess decision-making authority is subject to the open meetings law.

I have located a case from the state of Washington which may be similar to the facts and legal issues presented in your letter. In Refai v. Central Washington University, 742 P.2d 137 (Wash. Ct. App. 1987), a university faculty senate executive committee met to discuss and suggest a plan for faculty layoffs in response to a series of state financial setbacks resulting in a reduction in the university's budget. The committee met in closed session to develop the layoff plan and then presented the plan to the university president who, after making some changes, implemented the plan. A university professor who was a victim of the layoff plan contested his loss of job on a number of grounds including the fact that the committee meetings were not open to the Public.

The Washington open meetings law then in effect required meetings of the governing body of a public agency to be open to the public. Id. A "governing body" was statutorily defined to include a "committee." Id. The court reviewed the committee's layoff plan and concluded that it did not constitute final decisions or policy, but a recommendation to the university president who made the final decision. Thus, the court concluded that the committee was not a governing body of the university and, therefore was not subject to the open meetings law. This conclusion, the court noted, was consistent with other court cases which have concluded that a state's open meetings law "was not designed to cover groups which meet to collect information and make recommendations, but have no authority to make final decisions." Id. at 145. The current Washington open meetings law now applies to committees of public agencies which conduct hearings or take testimony or public comment. Id. at 145 n.5.

In a phone conversation with a member of my staff, you indicated that the Faculty Senate Executive Committee is primarily a fact-finding body designed to gather information and make recommendations to the Faculty Senate. You also stated that you were unsure of the Executive Committee's decision-making authority. Because there may be some factual questions concerning the scope and extent of the Executive Committee's powers, I cannot issue an opinion resolving the primary issue presented in your letter. Instead, I must defer the task of determining the facts surrounding the operation of the Executive Committee and applying the rule of the law discussed above to the Minot State University officials.

Your letter also questions other requirements applicable to open meetings. Meetings required to be open to the public must be noticed in advance. N.D.C.C. § 44-04-20. Additionally, all non-procedural votes occurring at the meeting must be recorded roll call votes and minutes must show the results of every vote taken at that meeting and must show the recorded vote of each member on every recorded roll call vote. N.D.C.C. § 44-04-21.

However, these various requirements apply only if the meeting in question is subject to the open meetings law. They are not applicable to meetings which are not required to be open to the public pursuant to N.D.C.C. § 44-04-19. Thus, the determination of whether the Faculty Senate Executive Committee meeting is governed by N.D.C.C. § 44-04-19 will also determine the applicability of the requirements of N.D.C.C. §§ 44-04-20, 44-04-21.

Your letter also questions whether the open records law, N.D.C.C. § 44-04-18, requires members of the Faculty Senate to divulge verbally the discussion occurring at the meeting of the Faculty Senate's Executive Committee. N.D.C.C. § 44-04-18 requires that records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state supported in whole or in part by public funds or which expend public funds to be open and accessible for inspection during reasonable office hours. The statute does not address thought processes or personal knowledge. Because of the lack of a statutory definition of the term "records," it is difficult to determine whether this term includes non-written information.

Concededly, the North Dakota Supreme Court has suggested that no specific exception exists in our law which would allow matters such as "thought processes" to be withheld from public scrutiny. City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572, 578 (N.D. 1981). However, this discussion was dicta because the court did not directly address this issue in this case. Furthermore, research has failed to locate any court decision interpreting a state's open records law to require persons to tell all that they know concerning a particular subject.

For these reasons, I conclude that North Dakota's open records law is inapplicable to mental or thought processes where no writing has occurred.

Finally, your letter questions a meeting of the Minot State University Faculty Senate where a motion to reject the recommendations of the Faculty Senate Executive Committee was not accepted. Your letter notes that the vote on this motion occurred By secret ballot.

N.D.C.C. § 44-04-21 requires non-procedural votes to be open and recorded roll call votes if the meeting at which the votes occurred is an open meeting. As noted in the letter opinion to Representative Ulmer, a 1967 Attorney General's Opinion has concluded that the Faculty Senate at the University of North Dakota was a public body and that the meetings of such a group must be open to the public when it was exercising jurisdiction delegated to it by the State Board of Higher Education. When the Faculty Senate meets and does not exercise jurisdiction delegated to it by the Board of Higher Education, it has no color of a public body and its meetings need not be open to the public.

Your letter does not indicate whether the Faculty Senate was exercising delegated duties when it met to consider the Faculty Senate Executive Committee's recommendations. The presence of factual questions concerning the Faculty Senate's authority prevents me from issuing an opinion on this matter. However, the determination of this factual issue will determine whether the open meetings law is applicable to the Faculty Senate meeting. In turn, the determination of whether the Faculty senate meeting is an open meeting then determines whether the recorded roll call vote requirements of N.D.C.C. § 44-04-21 will apply to that meeting.

I am sorry that the various factual questions concerning meetings of the Faculty Senate and Faculty Senate Executive Committee prevent me from providing you with a more specific response to your questions. As you can see from the status of case law on this subject, the facts of each and every case are crucial in determining the applicability of open meetings and open records laws.

Although I cannot conclude whether the open meetings and open records laws apply to these factual situations, I believe that the spirit of these laws will be furthered by opening the meetings of the Faculty Senate and Faculty Senate Executive Committee. The purposes behind an open meetings law have been characterized by the Minnesota Attorney General as follows:

First, the law is designed to assure the public's right to be informed of what business is being considered, by whom, to what extent that business is discussed, and the factors that form the basis for determinations which are ultimately made. . . . Second, the law recognizes that decisions are best reached after free and open discussion, debate and clash of opinion. . . . Finally, the law is intended "to prohibit action being taken at a secret meeting where it is impossible for the interested public to . . . detect improper influences."

1975 Minn. Op. Att'y Gen. 10-b at 5 (citation omitted).

In 1975, the Minnesota attorney general concluded that advisory panels established by the Minnesota State Arts Council were subject to the Minnesota open meetings law. Minnesota law, unlike North Dakota laws, specifically requires committees of public bodies to open their meetings to the public. However, the Minnesota attorney general relied not only on the statute, but also on the public policy behind the open meetings law in concluding that advisory panels of a public body must conduct open public meetings. "Therefore, the purposes of the open meeting law can only be fulfilled if the meetings of these advisory panels are subject to the same public scrutiny as the meetings of the governing board itself." 1975 Minn. Op. Att'y Gen. 10-b at 5.

I concur with the Minnesota attorney general's conclusion that the purposes of the open meetings law, as well as the open records law, must be considered by public bodies especially in situations where committees or advisory groups are established to assist the board in conducting its public business. Therefore, I would strongly urge the Minnot State University Faculty Senate Executive Committee and the Faculty Senate to comply with the spirit of the open meetings law although it may be determined ultimately that the technical requirements of the law are not applicable.

Sincerely,

Nicholas J. Spaeth

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Enclosure