

## MEMORANDUM

October 5, 2011

**TO:** Search Committee Members  
**FROM:** Pat Seaworth, General Counsel  
**RE:** Search Committees and Open Meetings/Open Records

This memorandum discusses application of North Dakota's open meetings and open records laws to state board of higher education search committees.

### Open Meetings

NDCC § 44-04-19 states that all meetings of governmental bodies and organizations or agencies supported in whole or in part by public funds, or expending public funds, are open to the public in North Dakota, unless otherwise specifically provided by law. NDCC § 44-04-17.1 defines entities subject to the law to include “any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.” Accordingly, a search committee appointed or delegated functions by the State Board of Higher Education is subject to the open meetings law.

A “meeting” means any gathering of a quorum (defined to be one-half or more of the members of a group) regarding public business. A “gathering” includes telephone conference calls and any other events at which the members discuss public business, including events at which some other person reports to or briefs members about the business of the group, even if the members don’t contribute to the report or participate in a discussion. “Public business” is broadly interpreted to include all steps in the decision-making process, including information gathering, discussion, formulating or narrowing of options, or action. 1998 N.D. Op. Att’y Gen. 0-05 (March 3, 1998).

The open meetings law prohibits a series of gatherings, each involving less than one-half of the members of a group subject to the law but collectively involving one-half or more members, for the purpose of avoiding the law’s requirements. For example, if a board or committee subject to the open meetings law has five members, a member is not permitted to have a telephone call or other private conversation concerning business of the group with a second member followed by a separate private conversation on the same topic involving a third member of the group. A private conversation involving just two members of a five-member committee (or a private conversation involving less than one-half the members of a group) is okay; a series of private conversations on the same topic involving one-half or more members is not.

Subcommittees or other groups delegated tasks by a search committee are subject to the law. For example, if a search committee delegates to a subcommittee of three the task of interviewing references, any “gathering” or discussion involving two or more members of the subcommittee to perform the task is subject to the law and must be conducted in a public meeting. On the other hand, if this task is delegated to a single member or to several members acting individually and not as a group, interviews may be conducted outside of a public meeting.

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Search committees and subcommittees must provide notice of all meetings, including telephone or video conferences. Notice of the date, time, location and meeting agenda must be filed with the secretary of state and posted at the NDUS office and meeting location (for telephone or video conferences, the meeting location is the location of a speakerphone or monitor). The committee must notify media representatives (or others) who have requested to be notified. Minutes of all meetings are required, including a record of members in attendance, date and times the meeting is called to order and adjourned, topics discussed, a description of all motions and whether a motion was seconded, the results of all votes and the vote of every member on each roll call vote. Recorded roll call votes are required for all "nonprocedural" matters.

NDCC § 15-10-17(1) permits the board of higher education to go into executive session for the "consideration of the appointment or removal" of presidents and other institution employees. This exception is narrowly construed and an executive session is not permitted for candidate interviews or general discussion. The board may go into executive session only to discuss and decide on the appointment. Because a search committee does not have appointing authority and is authorized only to make a recommendation to the board, there is no authority for search committee executive sessions. All search committee meetings must be open to the public.

## **Open Records**

NDCC § 44-04-18 states that unless otherwise specifically provided by law, all records of governmental bodies and organizations or agencies supported by public funds, or expending public funds, are open and accessible to anyone. The term record means recorded information of any kind, regardless of the form by which the information is stored, which is in possession of a public entity or its agent and which has been received or prepared in connection with public business. If a government delegates a public duty to a third party, documents in possession of the third party connected with public business are public records. Forum Publishing Company v. City of Fargo, 391 N.W.2d 169 (N.D. 1986) (job applications in possession of a private consulting firm hired by the city to screen applicants for chief of police are public records).

All records in possession of a board or campus search committee and its members or staff related to the business of the committee are public records open to inspection. Records concerning the committee's work in possession of a private consultant or other agent paid with public funds are also public records. There are no exceptions applicable to employment applications, reference letters, reports, notes or any other records received or created by search committee members or a consultant. Unlike some other states, North Dakota does not allow candidates for college president positions to request that their names not be publicly disclosed until the search has progressed to a certain point, such as when a committee interviews finalists. Candidates should be informed that the committee may not withhold candidate names and application or nomination materials and all such information is open to the public.

A search consultant is not required to open all consultant files and records to public inspection. The open records law applies only to records created or received in connection with public functions delegated to the consultant. Search consultants likely have files concerning individuals who have not

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applied for a NDUS position. They may communicate with others to determine whether someone may be interested in applying or to encourage someone to do so. These records are not subject to the open records law. However, once a person has submitted an application, the application and related materials in possession of a consultant are open to the public.

Disclosure of reports and draft or working papers may be delayed under some circumstances. A record prepared at the express direction of, and for presentation to, a governing body may be withheld from the public "until the record is mailed or otherwise provided to a member of the body or until the next meeting of the body, whichever occurs first." NDCC § 44-04-18(8). Further, a preliminary draft or working paper may be withheld "until a final draft is completed, the record is distributed to a member of a governing body or discussed by the body at an open meeting, or work is discontinued on the draft but no final version has been prepared, whichever occurs first." Id.

Unless otherwise specifically provided by law, all public records must be open and accessible for inspection to anyone during regular office hours and copies must be provided upon request. NDCC § 44-04-18. A request for access or copies need not be made in person or in writing and the person requesting access or copies may not be required to state a reason for the request. Id. Requested copies must be provided within a "reasonable" time or an explanation given concerning why the request is denied. 1998 Op. N.D. Att'y Gen. O-99 (September 15, 1998).

### **E-mail and Other Electronic Communications**

E-mail communications, including e-mail concerning search committee business received at or sent from a committee member's home or business, is subject to the open records law. Committee members (and search consultants) should understand that any recorded communications relating to search committee business may be subject to open records requests.

Also, e-mail or other electronic communications may not be used to evade the open meetings law. In a 2007 opinion, the attorney general stated that members of a group subject to the law may not use a listserv to exchange e-mail messages and communicate their views on a matter pending before that group. N.D.A.G. 07-O-14 (December 5, 2007). Although use of e-mail to communicate information to a group is permitted, members of the group may not use the "reply all" function or other e-mail exchanges to communicate their views to a quorum of the group. In other words, use of e-mail or other electronic communications by committee members to exchange views or share opinions is the equivalent of a telephone conference call or series of telephone calls.