

OPEN RECORDS & MEETINGS TASK FORCE - MINUTES

July 13, 2016

- Meeting called to order: 1:03 PM
- Meeting adjourned: 4:45 PM

Members present: Attorney General Wayne Stenehjem, Tom Dennis, Stephanie Dassinger, Lisa Feldner, Jack McDonald, Chief David Todd, Matt Von Pinnon, Charlie Whitman, Dave Maring, Bill Devlin, and Jon Godfread. Assistant Attorneys General Mary Kae Kelsch and Sandy DePountis were present to assist the task force.

After calling the meeting to order, Attorney General Wayne Stenehjem asked for corrections on the draft minutes. Hearing none, Stenehjem called for a motion to approve the minutes of the April 14, 2016, meeting. Motion by McDonald, seconded by Maring, carried unanimously.

Maring provided information to the task force about other state's laws relating to protections for applications for University and agency head positions, and copies of bills presented to the North Dakota legislature in 2009 and 2013 proposing the same protections, which bills were defeated. After a very lengthy debate, no agreement was reached.

Maring presented a second proposal, to broaden the exemption for attorney consultation. Stenehjem reminded the task force that public entities belong to the tax payers and the public is entitled to be aware of what is going on. With regard to the exemption for attorney consultation, Stenehjem explained that the original statutory language was carefully crafted to make sure it was a very narrow exception. During the lengthy discussion, McDonald noted a concern that the "attorney consultation" exception is often misused by public entities which close meetings simply because the attorney is present in the meeting room. Whitman explained that there are several specific situations that are not covered by the current exemption. One example he gave was that there is no exception for him to advise his commission about a potential claim, so he is limited in his ability to resolve the issue before it develops into threatened or pending litigation – which is then covered by the exemption. The exemption in the open meetings law for executive sessions also does not cover the notes from discussions of negotiations. After further discussion, McDonald indicated he would not oppose narrowly worded amendments to address the specific concerns.

The issue of enforcement generated a lot of discussion and several suggestions for punitive action, compliance and options for the administrative review in § 44-04-21.1. McDonald reminded the task force that many of the public entities are volunteer based, and that it may be difficult to find people willing to stand for election to a township board or other local public entity if they may be subject to judicial penalties. Stenehjem raised the concern that imposing punitive action may create a problem for his office in reviewing complaints of alleged violations, because the individual members of the accused public entity may invoke their 5th Amendment right instead of cooperating with his office as they do now. Another concern raised was that if fines were levied against a public entity, the entity would have to use taxpayer funds to pay the

fine. The task force also considered expanding the “look back” period beyond 90 days for meetings held without notice and 30 days for all other violations, but several members expressed concern about the difficulty in gathering accurate information after so much time has passed would make an extended time frame less helpful. Other concerns were raised about the difficulties in responding to requests that are obviously designed to harass the public entity. Task force members asked for details about the current opinion process, which is exacting and takes approximately 180 days to complete. After a lengthy discussion that considered numerous suggestions and options, the task force decided to focus on education, encouraging compliance and the opinion review process rather than considering punitive actions.

In reviewing technology related issues, the task force discussed proposals relating to records posted online, access to database records, and allowing individuals to copy records using personal equipment. The task force also discussed the exemption for legislative records, with members representing the media suggesting the exemption should be repealed, while other members expressed concerns that the issue might better be addressed in a separate bill. Stenehjem reminded the task force that his office cannot issue opinions against the legislature. After much discussion, Stenehjem suggested that Von Pinnon, on behalf of the media, should work with his office, and the task force could further consider the issue at the next meeting.

The task force reviewed proposals for new exemptions to the open records laws for records relating to the types of leave, personal information about witnesses and victims contained in investigative records, references to medical conditions and treatment contained in investigative records, and records relating to internal investigations of employee misconduct. Representatives of the media opposed the proposal to exempt the contact information and date of birth of victims and witnesses, but after discussion of identity theft and security concerns, made suggestions for a limited exemption for further consideration at the next meeting. The task force discussed different options to clarify the section for record requests made to emergency services & communication systems. The task force members had no objections to the proposed changes to the meeting notice requirements and the technical correction to the domestic violence information statute.

Based on the discussion, at the next meeting the task force will:

- Vote on whether to go forward on proposals to
 1. Exempt applications for University and agency head positions; and
 2. Amend the exemption for legislative records

- Review additional proposed language for inclusion in an omnibus bill:
 1. Expanding the exemption for attorney consultation to cover potential claims and settlement agreements and the notes from discussions held in executive sessions for negotiation or strategy;
 2. Authorizing the Attorney General to mandate members of a public entity take training on the open records & meetings laws as a “remedy” for a violation, creating a summary opinion process for certain types of violations and adding

discretionary language in statute; and providing a process for a public entity to address harassment;

3. Exempting the contact information for victims/witnesses of crimes of violence or sexual assault.
 4. Exempting interviews and statements of child victims/witnesses of crimes of violence or sexual assault.
 5. Exempting records relating to a public entity's internal investigation of a complaint or charge against a public employee for misconduct, while the investigation is ongoing.
 6. Clarifying who has the obligation to respond to requests made to emergency services & communication systems.
- Take a final vote on the previously agreed upon changes.

Attorney General Stenehjem invited committee members to submit any additional items to his office for inclusion on the next meeting agenda. The meeting adjourned.