

**OPEN RECORDS AND MEETINGS OPINION  
2013-O-12**

DATE ISSUED: August 6, 2013

ISSUED TO: State Board of Higher Education

**CITIZEN'S REQUEST FOR OPINION**

This office received separate requests for an opinion under N.D.C.C. § 44-04-21.1 from Ryan Johnson, reporter for The Forum, and Nick Smith, reporter for the Bismarck Tribune, asking whether the State Board of Higher Education violated open meeting laws by holding meetings not open to the public.

**FACTS PRESENTED**

On June 12, 2013, three members of the State Board of Higher Education (SBHE), President Duaine Espegard, Vice President Kirsten Diederich, and Mr. Terry Hjelmstad, met with ten of the eleven North Dakota University System (NDUS) presidents, individually, on the campus of Bismarck State College.<sup>1</sup> The purpose of the meetings was for the SBHE to gain information and perspective from the president by “engag[ing] in a dialogue about their individual institutional priorities, the challenges they see in the system as a whole, and their recommendations regarding important characteristics and goals for the next chancellor.”<sup>2</sup> “It was assumed that the three members who participated in the meetings would share their findings with the [SBHE] at a later date.”<sup>3</sup>

Mr. Ryan Johnson and Mr. Nick Smith each allege that the June 12, 2013, meetings were subject to the state’s open meeting laws.

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<sup>1</sup> See Letter from Kirsten Diederich, Vice President of SBHE, to Attorney General’s office (June 28, 2013) (on file with author).

<sup>2</sup> See Memorandum from SBHE Chair, Vice Chair, and Trustee to SBHE Trustees and NDUS President (June 20, 2013) (on file with author).

<sup>3</sup> See Letter from Kirsten Diederich, Vice President of SBHE, to Attorney General’s office (June 28, 2013) (on file with author).

## ISSUE

Whether the meetings involving three of the eight members of the SBHE and NDUS presidents on June 12, 2013, were subject to open meeting laws.

## ANALYSIS

All meetings of a public entity must be open to the public unless otherwise specifically provided by law.<sup>4</sup> A “meeting” is defined as a “formal or informal gathering ... of [a] quorum of the members of the governing body of a public entity regarding public business.”<sup>5</sup> A “quorum” means “one-half or more of the members of the governing body, or any smaller number if sufficient for a governing body to transact business on behalf of the public entity.”<sup>6</sup>

The SBHE is subject to open meeting laws because it is the governing body of a public entity, the NDUS.<sup>7</sup> A “[g]overning body also includes any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.”<sup>8</sup> Under this definition, “any group of persons” delegated authority to perform any function on behalf of a governing body, including fact gathering, reporting or recommending action, as well as taking action, is subject to the state’s open meeting laws.<sup>9</sup> Thus, committees of a governing body have the same requirements to notice its meetings and prepare minutes because they are subject to the open meeting laws.

Because the SBHE is an eight-member board, a gathering of three SBHE members would generally not constitute a quorum.<sup>10</sup> However, a gathering of three members would be subject to the open meeting laws if the members were meeting pursuant to authority delegated to them by the SBHE.<sup>11</sup>

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<sup>4</sup> N.D.C.C. § 44-04-19.

<sup>5</sup> N.D.C.C. § 44-04-17.1(9).

<sup>6</sup> N.D.C.C. § 44-04-19.1(15).

<sup>7</sup> N.D.A.G. 2013-O-07; N.D.A.G. 2013-O-06; see also N.D. Const. art. VIII, § 6; N.D.C.C. §§ 15-10-01, 44-04-17.1(12)(a).

<sup>8</sup> N.D.C.C. § 44-04-17.1(6) (definition of “governing body”).

<sup>9</sup> Id. N.D.A.G. 2009-O-12; N.D.A.G. 2009-O-05; N.D.A.G. 2007-O-13; N.D.A.G. 2006-O-03.

<sup>10</sup> Four members is a quorum of the SBHE. N.D.A.G. 2013-O-07; N.D.A.G. 98-O-05.

<sup>11</sup> N.D.A.G. 2009-O-12; see also N.D.A.G. 2009-O-05 (“regardless of the label given to a group of persons, as long as there is a delegation of authority from the governing body, it is a committee”).

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According to the SBHE, it never delegated authority to Mr. Espegard, Ms. Diederich, or Mr. Hjelmstad to meet with the University presidents.<sup>12</sup> Rather, Ms. Diederich explains that it was Mr. Espegard and she who privately discussed the idea of meeting with the presidents “after listening to ... [a] consultant who led the [SBHE’s] training” during the SBHE’s annual retreat, held on June 2-3, 2013, in Medora, North Dakota.<sup>13</sup> Shortly after the retreat, Ms. Diederich received an e-mail from Minot State University president, Mr. David Fuller, which, among other things, requested the SBHE to “enlist the support of the presidents and the campuses” and to “arrang[e] a time for all the presidents to meet alone and discuss the current situation and to entertain suggestions for the [SBHE] and the NDUS.”<sup>14</sup> Ms. Diederich responded that she and Mr. Espegard had already discussed meeting with the presidents and relayed her hope to set up the meetings in the near future.<sup>15</sup> Ms. Diederich and Mr. Espegard scheduled the ten meetings on June 12, 2013, with the NDUS presidents.<sup>16</sup> Ms. Diederich and Mr. Espegard decided to invite the incoming SBHE vice-president, Mr. Hjelmstad, to the meetings but did not inform any other board members or even NDUS staff of the scheduled meetings.<sup>17</sup> Ms. Diederich, in her response to this office, explained that “[i]t was assumed that the three members who participated in the meetings would share their findings with the [SBHE] at a later date.”<sup>18</sup>

Attorney General’s opinions under N.D.C.C. § 44-04-21.1 must be based on the facts given by the public entity. Accordingly, this office cannot question the written assurance from the SBHE that at no time did the entire SBHE consent or otherwise delegate authority to three members to meet with NDUS presidents. I, therefore, conclude that the June 12, 2013, meetings between three SBHE members and NDUS presidents, were not “meetings” subject to open meeting laws because neither a quorum of the SBHE nor a committee thereof was present.

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<sup>12</sup> See Letter from Kirsten Diederich, Vice President of SBHE, to Attorney General’s office (June 28, 2013) (on file with author). A member of my office reviewed the detailed draft minutes from the June 2, 2013, meeting during the Medora retreat and found no indication of a delegation of authority.

<sup>13</sup> See Letter from Kirsten Diederich, Vice President of SBHE, to Attorney General’s office (June 28, 2013) (on file with author).

<sup>14</sup> See E-mail from David Fuller, President, Minot State University (June 5, 2013) (on file with author).

<sup>15</sup> See E-mail from Kirsten Diederich, SBHE Vice President, to David Fuller, President, Minot State University (June 5, 2013) (on file with author).

<sup>16</sup> See Letter from Kirsten Diederich, Vice President of SBHE, to Attorney General’ Office (June 28, 2013).

<sup>17</sup> Id.

<sup>18</sup> Id.

CONCLUSION

The meetings involving three SBHE members and the NDUS presidents on June 12, 2013, were not subject to open meeting laws.

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