

**OPEN RECORDS AND MEETINGS OPINION
2001-O-10**

DATE ISSUED: September 7, 2001

ISSUED TO: Robert Lamont, Attorney, Minot Area Development Corporation
Nevin Van de Streek, Minot City Attorney

CITIZEN'S REQUEST FOR OPINION

On June 18, 2001, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Jay Johnson on behalf of the Minot Daily News asking whether the Minot Area Development Corporation violated N.D.C.C. § 44-04-18 by refusing to provide a copy of its meeting agenda upon request and by refusing to deny the request in writing.

FACTS PRESENTED

On May 16, 2001, Jay Johnson, on behalf of the Minot Daily News, made a written request for the agenda and minutes of the May 2001 meeting of the board of directors of the Minot Area Development Corporation (MADC). Mr. Johnson further requested that any denial of his request be in writing and include an explanation of the legal authority for denying his request. On June 13, 2001, MADC denied Mr. Johnson's request for records and refused to put its denial in writing, asserting that MADC is not a "public entity" under N.D.C.C. § 44-04-17.1 and therefore is not subject to the state open records and meetings laws.

The MADC asserts it is merely a provider of services to the City of Minot. In response to the request for this opinion, the Office of Attorney General and the attorney for MADC exchanged correspondence on several occasions to identify the services performed by MADC, the amount of public funds it receives for those services, and how the amount of public funds paid to MADC is determined. The Office of Attorney General also received information from the Minot City Manager.

The financial records of MADC reveal an operating budget for the year 2000 of approximately \$450,000, of which \$312,300 was received under a contract between MADC and the City of Minot.¹ Of the remaining annual income, \$15,000 was provided by Ward County under a similar contract,² \$90,000 came from membership dues, and the remainder was derived from other non-public sources. The MADC's articles of

¹ This amount was \$320,769 for Fiscal Year 2001.

² The funds provided by the County do not affect the outcome of this opinion and are not addressed in this opinion.

incorporation state “[t]he purposes and objects for which this corporation is organized are to promote and facilitate the general development of the City of Minot and its trade area.” The contract between MADC and the City of Minot describes the services performed for the City of Minot in broad terms which are discussed later in this opinion.

More important than the amount paid under the contract is the method by which the City and MADC determine the annual amount the City will pay to MADC. According to the Minot City Manager, MADC prepares and submits an annual budget to the City. The “contract price” reflects MADC’s annual budget, as negotiated with the City, reduced by the revenue MADC receives from other sources (roughly twenty-five percent of MADC’s annual budget).

ISSUE

Whether the Minot Area Development Corporation is a "public entity" as defined in N.D.C.C. § 44-04-17.1 and is therefore subject to the state open records and meetings laws.

ANALYSIS

The state open records and meetings laws apply to all “records” and “meetings” of a “public entity.” N.D.C.C. §§ 44-04-18, 44-04-19. The definition of “public entity” in N.D.C.C. § 44-04-17.1 is not limited to entities that are traditionally viewed as “governmental.” Rather, as summarized in previous opinions of this office, there are a number of ways a “nongovernmental” organization may be nevertheless fully or partially subject to the open records and meetings laws:

1. The organization is delegated authority by a governing body of a public entity. See N.D.C.C. § 44-04-17.1(6) (definition of "governing body").
2. The organization is created or recognized by state law, or by an action of a political subdivision, to exercise public authority or perform a governmental function. See N.D.C.C. § 44-04-17.1(12)(a) (definition of "public entity").
3. The organization is supported in whole or in part by public funds or is expending public funds. See N.D.C.C. § 44-04-17.1(9), (12)(c) (definitions of "organization or agency supported in whole or in part by public funds" and "public entity").

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4. The organization is an agent or agency of a public entity performing a governmental function on behalf of a public entity or having possession or custody of records of the public entity. See N.D.C.C. § 44-04-17.1(12), (15) (definitions of "public entity" and "record").

N.D.A.G. 98-O-21.

The question presented in this opinion involves the convergence of two North Dakota Supreme Court decisions, each interpreting separate provisions of the open records and meetings laws.

The definition of "public entity" includes "organizations supported in whole or in part by public funds." N.D.C.C. § 44-04-17.1(12)(c). In Adams County Record v. Greater North Dakota Association, 529 N.W.2d 830 (N.D. 1995), the court, interpreting prior law, stated that "not every transfer of public funds to a private entity is support." Id. at 834. "If it was, every corporation, contractor, and association of the state would be subject to the open records law each time the government paid for services or goods or awarded a contract." Id. Current law, including 1997 amendments to the open records and meetings laws which largely replaced the GNDA decision with a fair market value test, supports MADC's position that the open records and meetings laws do not apply to every entity that does business with a North Dakota state agency or political subdivision. An organization is not supported by public funds if the public funds it receives are provided in exchange for goods or services having an equivalent fair market value. N.D.C.C. § 44-04-17.1(9).

Further, the definition of "public entity" also includes "agencies" of a state or political subdivision. N.D.C.C. § 44-04-17.1(12)(a), (b). The North Dakota Supreme Court has interpreted the term "agencies" to include a personnel firm doing business with a North Dakota city under a contract.

The City contends that even if these documents are subject to the open-record law, PDI is an independent contractor and not an agent of the City, and the documents were in the possession of PDI. However, whether PDI is an independent contractor or agent is not relevant because the issue of vicarious liability is not present. In Grand Forks Herald v. Lyons, 101 N.W.2d 543, 546 (N.D.1960), we construed the term "agencies" as used in Section 44-04-18, N.D.C.C., to mean a relationship created by law or contract whereby one party delegates the transaction of some lawful business to another.

PDI was hired by the City to screen and evaluate candidates for a public office. If the City had undertaken this task without hiring PDI, the

applications would clearly have been subject to the open-record law. We do not believe the open-record law can be circumvented by the delegation of a public duty to a third party, and these documents are not any less a public record simply because they were in the possession of PDI.

In Grand Forks Herald v. Lyons, supra, 101 N.W.2d at 546, we said that the purpose of the open-record law was:

"... to provide the public with the right and the means of informing itself of the conduct of the business in which the public has an interest, in order that the citizen and taxpayer might examine public records to determine whether public money is being properly spent, or for the purpose of bringing to the attention of the public irregularities in the handling of public matters...."

This purpose of the open-record law would be thwarted if we were to hold that documents so closely connected with public business but in the possession of an agent or independent contractor of the public entity are not public records. We conclude that the documents in this case are public records within the meaning of Section 44-04-18, N.D.C.C.

Forum Publishing Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986) (emphasis added). This decision was reached despite the fact the personnel firm was presumably providing services to the City at fair market value. In short, the fact a contractor is not supported by public funds does not negate the possibility that the contractor may be acting as an agent of a government entity.

I will address separately the application of both the "supported by public funds" test and the "agency of government" test.

Supported by Public Funds Test

The situation in this opinion does not involve the mere payment of membership dues to a local chamber of commerce, the funding of an identified project to be performed by a non-governmental organization, or the purchase of specific goods or services. The purpose of MADC, regardless of whether it contracts with the City of Minot, is to promote the Minot area to potential new employers. However, the City of Minot has seen fit to subsidize those ongoing efforts by making up the significant difference between the activity proposed by MADC and the revenue MADC generates from other sources. Indeed the facts obtained by this office in response to the opinion request

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indicate the City of Minot is funding the operations of MADC, and is therefore “supporting” the corporation, rather than simply purchasing services at fair market value.

The contract in this situation differs significantly from the documentation provided by contractors with a state agency as was involved in N.D.A.G. 98-F-19 (description of services in the contract plus documentation for reimbursement by the agency). In this situation, the contract’s description of the services required from MADC is vague. The contract simply states that MADC will “promote the job creation objectives and other objectives of the MAGIC Fund,” “travel extensively,” and work to “coordinate and enhance the Minot area’s ability to retain, expand, and attract businesses.” For the fair market value test to be met, there first must be a contract between the public entity and MADC that reasonably identifies the goods and services provided in exchange for the public funds. See, e.g., N.D.A.G. 98-F-19. Here, for example, there is no minimum number of hours specified in the contract and a person reading the contract would be unable to determine whether there is a fair-market-value exchange between the City and MADC.

It appears the City’s sole recourse if it is dissatisfied with MADC’s efforts would be to refuse to fund MADC for the next year. This suggests the City’s payments are support for MADC’s operations rather than a purchase of services.

The MADC relies on an exception to the fair market value test contained in N.D.C.C. § 44-04-17.1(9):

An exchange must be conclusively presumed to be for fair market value, and does not constitute support by public funds, when an organization or agency receives a benefit under any authorized economic development program.

Reliance on this provision in this situation is misplaced. The legislative history of this provision shows it was intended to apply to “economic development grants.” 1997 Senate Bill 2228 (Section-by-section analysis by the Office of Attorney General). The purpose of the provision is clear: a new employer or business accepting economic development funds for its general operations under an authorized economic development program is not required to have its financial records open to inspection by the public (and the business’ competitors).

Whether a nongovernmental organization is a “public entity” is a fact specific question and this opinion is limited to MADC. Considering the method by which MADC receives funds from the City (approval of an annual budget), it is my opinion that MADC is not a mere provider of services to the City of Minot but is instead supported by public funds. Because the public funds are provided in general support of MADC, rather than a

particular project or projects, all meetings of MADC's board of directors and all records of MADC pertain to public business (i.e. how the funds are spent) and are required to be open to the public unless otherwise specifically provided by law. N.D.A.G. 98-O-24.

Agency of Government Test

The "agency of government" test involves an analysis of the types of services provided by the firm and was discussed at length in the Forum Publishing case. Historically, the "agency of government" analysis has been limited to personnel firms providing services under contract to a city or school district. Forum Publishing, 391 N.W.2d at 172; N.D.A.G. 2001-O-02. However, nothing in the rationale of the Forum Publishing decision limits the holding to personnel matters. Rather, a number of services viewed as "governmental" may be provided by a state agency or political subdivision through a contract with a private provider. Recently, I concluded that a marketing firm promoting the position of a city governing body on an issue of public interest was an agent of the city, despite the fact the amount of public funds paid by the city was based on the fair market value of the services provided by the marketing firm and could not be considered "support." N.D.A.G. 2001-O-04. The firm was marketing the city council's position in place of the city, rather than simply providing services to the city.

The situation in this opinion is similar to the facts presented in N.D.A.G. 2001-O-04. According to MADC's attorney, the "MADC is hired by the MAGIC Fund to market the Minot area to prospective employers and to refer leads to the MAGIC Fund. . . . MADC makes recommendations to the MAGIC Fund regarding business prospects, and it is the City of Minot that expends the sales tax revenue." (Emphasis added). In other words, MADC is hired to make known the availability of a city economic development fund and to make recommendations to the City on how to spend that fund. But for the promotional efforts of MADC on the City's behalf, it would be the City's task to advertise its own program and do its own background research on the merits of an application for funds from the MAGIC Fund. This certainly appears to meet the "circumvention by delegation" standard in the Forum Publishing case, and the role played by MADC is much more like that of the personnel firm in the Forum Publishing case than that of a mere contractor. As such, I believe the MDAC performs a governmental function on behalf of the City of Minot and is a public entity under the "agency of government" test.

Exceptions for Economic Development

My conclusions should not be interpreted as opening all aspects of economic development in North Dakota to public scrutiny. To the contrary, the State Legislature has enacted N.D.C.C. § 44-04-18.4(5), which is a specific exception to the open records and meetings laws covering a significant amount of information in the possession of MADC and corporations performing similar functions.

N.D.C.C. § 44-04-18.4(5) provides a "safe haven" from the open records law for certain categories of economic development records and information. The first provision in this subsection authorizes a public entity to withhold from the public the identity, nature, and prospective location of a business or industry which is interested in locating, relocating, or expanding within the state when there has been no previous public disclosure of that interest. N.D.C.C. § 44-04-18.4(5)(a). The term "prospective" means "likely to happen" or "expected," and does not include a business which has already disclosed to the public its decision whether to locate, relocate, or expand within the state. The American Heritage Dictionary 995 (2d coll. ed. 1991). Therefore, subdivision (a) of N.D.C.C. § 44-04-18.4(5) applies only until such time that the industry or business discloses to the public its decision to locate, relocate, or expand within the state, or its decision not to do so.

...

The second subdivision in N.D.C.C. § 44-04-18.4(5) is both broader and narrower than the first provision. Subdivision (b) is a broader provision in the sense that it continues to apply even after the person, business, or industry receives financing or other economic development assistance. Subdivision (b) is narrower in the sense that it applies only to "[t]rade secrets and commercial or financial information received from a person, business, or industry" (Emphasis added). Although the terms "commercial" and "financial" are broadly defined to mean information pertaining to commerce or finances, 1998 N.D. Op. Att'y Gen. L-17 (Mar. 2 to Carol Olson) [*N.D.A.G. 98-L-17*], these terms would not include the identity of the person, business, or industry. Subdivision (b) also would not apply to records and information which are generated by the public entity itself rather than "received from" the person, business, or industry. C.f. Buffalo Evening News, Inc. v. Small Business Admin., 666 F.Supp. 467, 469 (W.D.N.Y. 1987) (exception under Freedom of Information Act for trade secret, commercial, and financial information "obtained from a person" does not apply to loan information generated by the Small Business Administration in the course of its involvement with its borrowers).

N.D.A.G. 2000-O-07. Subsection 1 of N.D.C.C. § 44-04-18.4 also may apply to certain privileged trade secrets and commercial information possessed by MADC.

CONCLUSION

The MADC is a “public entity” subject to the state open records and meetings laws and therefore violated N.D.C.C. § 44-04-18 by failing to provide the records requested by the Minot Daily News, by failing to respond within a reasonable time, and by refusing to put its denial in writing.

STEPS NEEDED TO REMEDY VIOLATIONS

The MADC must provide the requested records to Mr. Johnson, but may excise from the agenda and minutes any material which would be closed or confidential under N.D.C.C. § 44-04-18(5) or another applicable statute. If any information is excised, MADC must explain in writing its legal authority for not providing the information. As a “public entity,” MADC also must allow public access to its meetings, except for authorized executive sessions, and must post written notice in advance of its meetings.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued also will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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