

**OPEN RECORDS AND MEETINGS OPINION
2002-O-09**

September 17, 2002

Mr. Nevin Van de Streek
Minot City Attorney
201 Main St S Ste 200
Minot, ND 58701-3947

Mr. Lynn M. Boughey
Attorney At Law
PO Box 1206
Minot, ND 58702-1206

Mr. Gary H. Lee
Attorney At Law
PO Box 1180
Minot, ND 58702-1180

Gary H. Lee, counsel for the Minot Area Chamber of Commerce (Chamber), and Minot attorney Lynn M. Boughey, requested an opinion under N.D.C.C. § 44-04-21.1 regarding whether records and meetings of the Chamber's Task Force 21 (Chamber Task Force), a purported public entity are open.

The Minot Air Force Base (Base) located north of the City has approximately 4,350 military personnel, 5,300 dependents of military personnel and 1,200 civilian employees. See Letter from Gary Lee to Wayne Stenehjem (May 24, 2002). It is estimated that the Base has an economic impact of \$267,000,000 annually, or about 27% of the Minot area's economic activity. Id. Since the Base's opening in 1957, the Chamber has developed a good working relationship with Base personnel. Id. The Chamber purchased and donated land on which part of the Base is located. Id. The Chamber has regularly sponsored programs to enhance the relationship between the City and Base personnel. Id. About ten years ago as part of a streamlining of military forces, the Base was placed on a list of bases under consideration for closure. Id. The Chamber formed Task Force 96, a Chamber committee, to oppose closing the Base and lobby for its retention. Id. From the outset the Chamber has involved the mayor and other city officials in Base retention efforts. Id. These efforts were successful and the Base survived the first round of base closures. Id. In 1996, the Chamber created a second committee known as Task Force 21 (Chamber Task Force) for the specific purpose of working to retain the Base and oppose closure at the next round of base closures scheduled to begin in January 2005. Id. The Chamber Task Force Base retention efforts have included direct lobbying in Washington, DC, and at the Pentagon, appearances at hearings, and establishment and maintenance of relationships with military officials and personnel at the national and local levels. Id.

OPEN RECORDS AND MEETINGS OPINION 2002-O-09

September 17, 2002

Page 2

The Base retention efforts are an aspect of economic development which has become a vital role for local government. Id. According to the City, the Chamber Task Force Base retention efforts have been partially funded through the City budget process since 1991-92.

The City has reimbursed the Chamber for much of the Chamber Task Force activities. Id. The Chamber Task Force retains expert consultants who advise and assist it in carrying out its Base retention activities. Id. The Chamber Task Force pays the consultants' fees and then obtains reimbursement from the City for the fees and other Chamber Task Force expenses related to its Base retention efforts. Id. For the fiscal year 2001 the total Chamber revenue was \$539,541. Expenditures of the Chamber Task Force were \$89,627. The City reimbursed the Chamber Task Force in the amount of \$60,246. This is 67% of the total expenditures of the Task Force and 11 percent of the total Chamber revenues.

Mr. Boughey received copies of some Chamber Task Force bills and receipts reimbursed by the City but objected to the blacking out of "whole receipts, dates of invoices, and in some situations, almost the whole document." See Letter from Lynn Boughey to Wayne Stenehjem (June 23, 2002), at 3. Mr. Boughey contends that the Chamber Task Force is an organization supported by public funds and an agency of the City and thus a public entity subject to the open records law. Id. at 3-4, 6-7. He asserts that failure to provide copies of consultants' contracts, all records relating to expenditures reimbursed by the City and redacting or blacking out portions of records related to expenses is a violation of N.D.C.C. § 44-04-18, requiring that a public entity furnish upon request a copy of public records. Id. at 4, 15. The Chamber Task Force contends that it is not a public entity because it is not supported in whole or in part by public funds, or expending public funds. See Letter from Gary Lee to Wayne Stenehjem (May 24, 2002); see also N.D.C.C. § 44-04-17.1(12)(c), (13). The essential issue is whether the Chamber Task Force is a "public entity." Whether meetings of the Chamber Task Force are open to the public, a corollary issue, is answered by a determination of whether the Chamber Task Force is a "public entity." N.D.C.C. § 44-04-19.

The definition of public entity includes "[o]rganizations or agencies supported in whole or in part by public funds." N.D.C.C. § 44-04-17.1(12)(c). It also includes "agencies" of a state or political subdivision. N.D.C.C. § 44-04-17.1(12)(a), (b). Therefore, in determining whether a nongovernmental organization is a public entity, this office looks not only at the issue of whether public money is received by an organization but whether it functions as an agent of the public entity. See N.D.A.G. 2001-O-11, N.D.A.G. 2001-O-10. The open records and meetings laws do not apply to every private entity that does business with a North Dakota state agency or political subdivision. An organization is not supported by

OPEN RECORDS AND MEETINGS OPINION 2002-O-09

September 17, 2002

Page 3

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). N.D.A.G. 2001-O-10.

The reimbursement of the Chamber Task Force by the City dates from 1991-92. It has continued these practices by virtue of the budgetary process according to the City and Chamber. There is an understanding between the City and the Chamber, but there is no contract identifying specific services to be provided in exchange for public funds, which has been required by this office in the past to show the receipt of public funds is not support. See N.D.A.G. 2001-O-10, N.D.A.G. 98-F-19, and N.D.A.G. 98-F-18. The purpose for which the funds are to be used is described generally as being for base retention efforts. Even though the city does not make payments until bills are submitted, I am unable to determine whether the Chamber Task Force has a specific and definite obligation to provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms length contract for services between a vendor and a purchaser. The Chamber Task Force is not receiving “compensation,” but instead is receiving funds to support a public service. Under the circumstances here, I conclude the Chamber Task Force is not providing services for fair market value but is supported by public funds. See N.D.A.G. 2001-O-11 (the amount of public funds, coupled with the indistinct terms of the contract dealing with the purposes for which the funds are to be expended, lead me to conclude that the Fargo-Cass Economic Development Corporation is supported by public funds).

In addition, this office’s N.D.A.G. 2001-O-11 opinion finding the Fargo-Cass County Economic Development Corporation (FCCEDC) to be a public entity is applicable to the situation here. An issue in opinion O-11 was whether the FCCEDC was acting as an agency of Cass County. That opinion applied factors that were used to determine whether an organization is performing a governmental function as an agency of a public entity in News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So.2d 1029, 1031 (Fla. 1992) (hereafter Schwab). The Schwab factors evaluate whether a public entity is avoiding disclosure under the open records law “by contractually delegating to a private entity that which otherwise would be [a public entity’s] responsibility.” Schwab, 596 S.2d. at 1031. See also Forum Publishing Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986) (“the open-record law can[not] be circumvented by the delegation of a public duty to a third party”). In N.D.A.G. 2001-O-11, I found that the Schwab factors were helpful in determining whether an organization “is simply providing services to a government entity, or is acting in place of or on behalf of the entity.” (Emphasis in original.) I concluded in N.D.A.G. 2001-O-11 that under the totality of all the factors in the Schwab case that the FCCEDC was acting as an agency of Cass County.

The Schwab case identified several “non-exclusive factors to aid in determining whether a private organization is performing a governmental function.” 2001 N.D. Op. Att’y Gen. O-11. Those factors are 1) the level of public funding; 2) commingling of funds; 3) whether

OPEN RECORDS AND MEETINGS OPINION 2002-O-09

September 17, 2002

Page 4

the activity was conducted on publicly owned property; 4) whether services contracted for are an integral part of the public agency's chosen decision-making process; 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; 6) the extent of the public agency's involvement with, regulation of, or control over the private entity; 7) whether the private entity was created by the public agency; 8) whether the public agency has a substantial financial interest in the private entity; and 9) for whose benefit the private entity is functioning." Id. quoting Schwab at 1031.

In this case, the level of public funding is substantial. About 67 percent of the Chamber Task Force's annual expenditures are received from the City. (Factor 1). City funds are commingled with Chamber Task Force funds. (Factor 2). I received no information about whether Chamber Task Force activities are conducted on City property. (Factor 3). The Base retention activities are related to job retention, an economic development function of the City. Funds for Base retention activities are provided from the portion of the City's sales taxes as allocated to economic development by the City's Magic City Fund Committee. These Base retention activities are part of the City's vital role in influencing economic development. (Factors 4 and 5). While the extent of the City's regulation or control of Base retention efforts is unclear, it is clear that the City has been involved with the efforts from the beginning. Indeed, several City Council members are and have been on the Chamber Task Force. (Factor 6). The City did not create the Chamber Task Force but the City has a substantial financial interest in its work because it pays about 67% of its expenditures. (Factors 7 and 8). The Chamber Task Force Base retention functions serve the interest of both the City and the Chamber members. (Factor 9).

Considering the totality of the Schwab factors relating to this matter, it is my opinion that the Chamber Task Force is acting as an agent of the city to encourage the retention and oppose the closure of the Base, essentially an economic development function of the City.

The Chamber Task Force argues that if it is considered a public entity there is a "safe haven" for certain Base retention work. Letter from Gary Lee to Wayne Stenehjem (May 24, 2002). In particular it argues the strategies and plans of its expert consultant relating to Base retention activities is protected under N.D.C.C. § 44-04-18.4(1). This section provides that trade secrets and commercial information are confidential if the records are of a privileged nature and have not been previously publicly disclosed. The definition of "trade secret" includes any program or process prepared by a public entity which the public entity attempts to keep secret and from which the public entity may derive economic value if the information is not publicly disclosed. N.D.C.C. § 44-04-18.4(2)(b). See also N.D.A.G. 98-O-22.

The Chamber Task Force has indicated that competition for base retention is nation-wide, and keen. Letter from Gary Lee to Wayne Stenehjem (May 24, 2002). The loss of a base

OPEN RECORDS AND MEETINGS OPINION 2002-O-09

September 17, 2002

Page 5

severely affects the economy of any trade area surrounding the closed base. Id. The Chamber Task Force argues that to open all of its records and meetings to the public would create a severe competitive disadvantage. Id. If the work product of the expert consultant is an open record, it is argued, plans and strategies to oppose closure of the Base would place the Chamber Task Force and the City at a competitive disadvantage. Id. Other communities facing base closure would be able to pirate and use the expert's work and be able to counter and possibly defeat the Chamber Task Force's strategies. Id. Because the strategies or plans of the expert consultant related to Base retention activities has potential economic value to the Chamber Task Force, they may properly be considered trade secrets.

Arguably, the consultant's base retention strategies or plans are also commercial information which has been defined by this office as any information pertaining to the buying of services. N.D.A.G. 98-O-22.

Trade secret and commercial information is confidential (secret) if it is of a privileged nature and it has not been publicly disclosed. N.D.C.C. § 44-04-18.4(1). Because the consultant's strategies or plans have not been disclosed, the only question is whether it is of "a privileged nature."

The broad definitions of "trade secret" and "commercial information" are offset by the requirement that the records be "of a privileged nature" to be confidential under N.D.C.C. § 44-04-18.4. Trade secrets and commercial information of the [public entity] are confidential only if disclosure of the records is likely to 1) impair the [public entity's] ability to obtain necessary information in the future or 2) cause substantial harm to the competitive position of the [public entity]. N.D.A.G. 98-L-77 (June 17 letter to Douglas Johansen at p. 3); N.D.A.G. 98-L-17 (March 2 letter to Olson at pp. 5-6).

N.D.A.G. 98-O-22. Thus, if release of the consultant's strategies or plans would cause substantial harm to the competitive position of the Chamber Task Force, then that information is privileged and confidential under N.D.C.C. § 44-04-18.4.

The Chamber Task Force has indicated that release of the consultant's strategies or plans would cause substantial harm to the Chamber Task Force and the City in that it would place them at a competitive disadvantage. This determination is a factual decision to be made by the Chamber Task Force, which this office will not contradict. See N.D.A.G. 98-O-22. Because it has made this determination, the consultant's strategies or plans are confidential under N.D.C.C. § 44-04-18.4.

In summary, the Chamber Task Force is functioning as an agent of the City and supported by the City regarding Base retention activities; it is therefore a public entity under N.D.C.C.

§ 44-40-17.1(12)(c). Thus, the records of the Chamber Task Force are open except for the programs and reports of the consultants. N.D.C.C. §§ 44-04-18(1), 44-04-18.4(1).

Withholding from Mr. Boughey copies of contracts and receipts and invoices and blacking out portions of such records provided him relative to billings to the City for reimbursement of Base retention expenses of the Chamber Task Force was a violation of N.D.C.C. § 44-04-18(1), (2).

Except for strategies or plans of the consultants which are trade secrets or commercial information, all other records of the Chamber Task Force are open and accessible, unless another exception to the open records laws applies. Copies of open records of the Chamber Task Force requested by Mr. Boughey should now be furnished to him.

Because the Chamber Task Force is a public entity its meetings will be open except for executive sessions to consider confidential information. N.D.C.C. §§ 44-04-19, 44-04-19.2.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued 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.

Sincerely,

Wayne Stenehjem
Attorney General

tam/vkk