

**OPEN RECORDS AND MEETINGS OPINION
2003-O-01**

DATE ISSUED: January 30, 2003

ISSUED TO: Minot Public School Board

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from William Bergman, representing C&C Plumbing asking whether the Minot Public School Board violated N.D.C.C. § 44-04-21.1 by refusing to produce records showing figures detailing how the projected operational cost savings and capital avoidance were calculated.

FACTS PRESENTED

The Minot Public School District (hereinafter "Minot") entered into a Guaranteed Energy Savings Contract ("Contract") with Johnson Controls, Inc. ("Johnson Controls") pursuant to N.D.C.C. ch. 48-05. The Contract involved certain energy conservation measures and system improvements at North Plains Elementary and Dakota Elementary Schools.

The contract was awarded after Minot issued a Request for Proposals (RFP) pursuant to N.D.C.C. § 48-05-10. C&C Plumbing was an unsuccessful applicant for the Contract. After the contract was awarded to Johnson Controls, C&C Plumbing requested copies of Minot's records pertaining to specific information regarding the Contract with Johnson Controls. Minot eventually provided all information in their possession, including Facility Improvement Measure Evaluation Table. C&C Plumbing then requested the records detailing how the numbers included in the Table were calculated. It is this documentation that is the subject of this opinion request and will be hereafter referred to as the "requested document."

Minot denied C&C Plumbing's request for the requested document stating that it was not in their possession. Minot relayed the request for the document to Johnson Controls. Johnson Controls declined to turn over the requested document to Minot for disclosure to C&C Plumbing because Johnson Controls considers the document to be a "trade secret" as defined in N.D.C.C. § 44-04-18.4(2).

ISSUES

1. Whether the Minot School District must produce a record which is not in its possession.
2. Whether the requested document is a public record in the hands of Johnson Controls.

ANALYSES

Issue One

Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours. N.D.C.C. § 44-04-18. The Minot School District is a political subdivision as defined in N.D.C.C. § 44-04-17.1(10), and is therefore a “public entity” subject to N.D.C.C. § 44-04-18, the open records law. See N.D.C.C. § 44-04-17.1(12) (definition of “public entity”).

All records of a public entity are public records unless specifically exempted. N.D.C.C. § 44-04-18. We have previously stated that the open records law is limited to records of a public entity, and a public entity is not required to provide access to or copies of a requested record that does not exist or has not been kept. N.D.C.C. § 44-04-18(3); N.D.A.G. 98-O-04.

Minot, in response to an inquiry from this office, explained that during its discussions with Johnson Controls, Minot’s business manager and the Supervisor of Buildings and Grounds reviewed the requested document Johnson Controls provided from its file. After they reviewed it, it was returned to Johnson Controls. The RFP did not require the requested document to be attached to or included with the Johnson Controls proposal submitted to Minot.¹ Minot had no other contact with the requested document and does not have it in its

¹ C&C Plumbing alleges that the document must be disclosed by making reference to section II, paragraph 4E of the Request for Proposals which states: “Indicate your firm’s approach to providing the energy savings associated with the project. Provide the energy savings calculation document which will become an attachment to the guaranteed energy savings contract. Describe the methodology, formulas, and monitoring of energy savings. Describe the processes and tools used to effectively monitor energy savings.” In response, Minot states that Johnson Controls did attach the necessary documentation to the proposal including a facility improvement measure evaluation table for both schools involved, a financial cash flow analysis and a combined table that included figures relating

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possession. To the best of Minot's knowledge, the information contained in the document has never been publicly disclosed.

This situation is similar to that in an opinion this office issued to the Southwest Multi-County Correction Center (Center). In that situation, the Center did not have the requested document because it had returned the application for Job Development Authority (JDA) funds to the JDA without making a copy for themselves. Because there were no records to disclose, it was not a violation to deny a request for those records. N.D.A.G. 98-O-04. Likewise here, representatives from Minot may have reviewed the underlying documents at one time, but they do not have the records C&C Plumbing is requesting. It is my opinion that because N.D.C.C. § 44-04-18 does not require a public entity to provide a record that does not exist, Minot did not violate the open records law by denying C&C Plumbing's request.

Issue Two

The requested document is in the possession of Johnson Controls. Johnson Controls has refused to give the document to C&C Plumbing or Minot, claiming that the information is protected under N.D.C.C. § 44-04-18.4(2) as a trade secret. It must be determined whether the requested document is subject to the open records law. To be subject to the open records law, the record must be in the possession of a public entity or its agent. N.D.C.C. § 44-04-17.1(15) (definition of record).

A nongovernmental entity, such as Johnson Controls is subject to the open records law if it receives more public funds than the fair market value of the goods or services the entity provides in exchange for those public funds.

Johnson Controls is receiving public funds under a guaranteed energy savings contract with Minot. Under the contract, Johnson Controls is required to complete system improvements and implement energy conservation measures at two elementary schools. In other words, Minot is purchasing a service from Johnson Controls. When public funds are provided by a public entity to an organization as reimbursement for reasonably identified goods and services, the remaining question is whether the amounts paid by the public entity reflect the fair market value of those goods or services. N.D.A.G. 98-F-19. This is a question of fact that must be determined on a case-by case basis. Id. In a past opinion, this office has said that if a competitive bid or proposal process was used to award the contract and establish the reimbursement rates, the rates resulting from that process could be presumed to be "fair market value." N.D.A.G. 98-F-19. In this case, the contract was awarded pursuant to requirements set forth in N.D.C.C. §§ 48-05-09 through

to the annual utility savings and operational cost savings/capital avoidance figures. All of these documents have been subsequently requested from and released to C&C Plumbing.

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48-05-13 for guaranteed energy savings contracts. See N.D.A.G. 2002-L-42. Although there are no competitive bidding requirements, there is a process whereby Minot made a request for proposals. Because of the proposal process, it can be presumed that Minot is paying Johnson Controls the fair market value of the goods or services it is providing.

Even if a nongovernmental entity meets the fair market value test, as Johnson Controls does, it is still possible for them to be subject to the open record and meetings laws if they are acting as an agent of the government. See, N.D.A.G. 2001-O-04. A public entity cannot contractually delegate to a private entity that which otherwise would be an agency responsibility. N.D.A.G. 2001-O-11. In this case, Minot is not in the business of making system improvements that will lead to energy savings. Johnson controls will be providing services to Minot, not acting in Minot's place. It is my opinion that Johnson Controls is not acting as an agent of Minot in this situation.

The money Johnson Controls receives from Minot is for services being provided to Minot pursuant to a specific contract and does not make it a public entity subject to the open records law.² Therefore, Johnson Controls does not have to produce the requested record.

CONCLUSIONS

1. It is my opinion that the Minot School District does not have to produce a record that it does not have in its possession.
2. It is my opinion that Johnson Controls is not a public entity or an agent of a public entity and therefore is not subject to the open records law.

Wayne Stenehjem
Attorney General

Assisted by: Mary Kae Kelsch
Assistant Attorney General

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² Because I have determined that Johnson Controls is not a public entity or an agent of a public entity, it is not necessary to determine whether the requested document is a trade secret.