

**OPEN RECORDS AND MEETINGS OPINION
2003-O-10**

DATE ISSUED: September 4, 2003

ISSUED TO: Tri-County Crisis Intervention, Inc.

CITIZEN'S REQUEST FOR OPINION

This office received a timely request for an opinion under N.D.C.C. § 44-04-21.1 from D. Luke Davis asking whether Tri-County Crisis Intervention, Inc., violated N.D.C.C. § 44-04-18 by refusing to provide him with records he requested.

FACTS PRESENTED

D. Luke Davis made a request to Tri-County Crisis Intervention, Inc. (Tri-County) for the correct physical address of the Tri-County office and year-end balance/accounting statements for the last two fiscal years showing actual and projected revenue.

Tri-County is a non-profit organization that provides a number of services to victims and witnesses of domestic violence. It acts as an emergency shelter, provides a 24-hour crisis line, a 24-hour pager system, and a number of other services for domestic violence victims and their families. It receives funds from the county, state, and federal governments under a number of different programs. These programs include: Victims of Crime Act (state funds); Crime Victims Account (state funds); Federal Family Violence Prevention/Rape Crisis/Prevention (federal funds); Stop Violence Against Women Program (state and federal funds); Emergency Shelter Grant Program (federal funds); Edward Byrne grant (federal funds); Bremer (private funds); North Dakota general funds; and funds from Cavalier, Pembina, and Walsh Counties. Tri-County is a domestic violence sexual assault organization under N.D.C.C. ch. 14-07.1 and also receives grants from the state Domestic Violence and Sexual Assault Prevention Fund under N.D.C.C. § 14-07.1-16.

ISSUES

1. Whether Tri-County Crisis Intervention, Inc., is a public entity subject to N.D.C.C. § 44-04-18, the state open records law.
2. Whether Tri-County Crisis Intervention, Inc., violated N.D.C.C. § 44-04-18 by refusing to provide records.

ANALYSES

Issue One:

North Dakota's open records law, N.D.C.C. § 44-04-18, applies to records of a "public entity," as defined in N.D.C.C. § 44-04-17.1(12); N.D.A.G. 99-O-03. While there are several ways that a nongovernmental entity may be a public entity for purposes of the open records law, the only link between Tri-County, a non-profit corporation, and an agency or political subdivision of the state, is Tri-County's receipt of public funds from the state and three counties. See N.D.A.G. 99-O-03 (similar nonprofit domestic violence organization with similar funding was not a public entity under the other tests for determining whether a nongovernmental entity is a public entity for purposes of the open records laws). Thus, whether Tri-County is a public entity depends on whether it is supported in whole or in part by public funds. N.D.C.C. § 44-04-17.1(12)(c).

An entity is supported by public funds if it "has received public funds exceeding the fair market value of any goods or services given in exchange for the public funds. . . ." N.D.C.C. § 44-04-17.1(9). An organization receiving public funds under a contract with a state agency is not "supported in whole or in part by public funds," even if provided under a "grant agreement," if the goods or services provided in exchange for the funds are reasonably identified in the agreement and have a fair market value that is equivalent to the amount of public funds it receives. N.D.A.G. 99-O-03; N.D.A.G. 98-F-19.

Public funds means funds received from the state or any political subdivision of the state. N.D.C.C. § 44-04-17.1(13). It does not include funds paid directly by the federal government to Tri-County. N.D.A.G. 99-O-03, N.D.A.G. 98-O-23. Thus, the funds reviewed for the purposes of this opinion are funds Tri-County receives from the Stop Violence Against Women Program (STOP), Victims of Crime Act (VOCA), Crime Victims Account (CVA), the Domestic Violence and Sexual Assault Prevention Fund, as well as state general funds, and the money received from Cavalier, Pembina, and Walsh Counties.

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Except for the county funds, the funding sources for Tri-County are the same as the funding sources examined in N.D.A.G. 99-O-03 to determine whether a similar domestic violence organization was a public entity for open records law purposes. In that opinion, this office concluded that the STOP funds are provided on a reimbursement basis and, therefore, do not constitute support by public funds for purposes of the open records law. N.D.A.G. 99-O-03. According to the Department of Health, STOP funds are still provided on a reimbursement basis. The opinion also concluded that the VOCA and CVA grants did not constitute support because the VOCA and CVA grant applications included a detailed budget request indicating how these grants would be spent if approved. Id. The opinion concluded that the VOCA and CVA funds reflected the fair market value of goods or services given in exchange for them and were therefore not public funds for purposes of the open records law. Id. According to the Department of Corrections, applicants for VOCA and CVA grants are still required to submit detailed budget requests indicating how the funds will be spent. Accordingly, it is my opinion that the STOP, VOCA, and CVA grants to Tri-County are not support by public funds for purposes of the open records laws.

By contrast, N.D.A.G. 99-O-03 also concluded that funds received from the Domestic Violence and Sexual Assault Prevention Fund under N.D.C.C. § 14-07.1-16, along with state general funds, were for general support of the organization's activities. The funds were paid by the Department of Health without specifying any goods or services the domestic violence organization was required to provide in exchange for the funds and the organization had some discretion over the use of the funds. N.D.A.G. 99-O-03. Id. Likewise in this case, funds provided under N.D.C.C. § 14-07.1-16 and state general funds are paid to Tri-County without specifying any goods and services that must be provided in exchange for them. Tri-County has discretion over how it uses the funds. Thus, funds provided from the Domestic Violence Protection fund under N.D.C.C. § 14-07.1-16 and state general funds are for the general support of Tri-County's activities.

Tri-County also receives funds from Cavalier, Pembina, and Walsh counties. According to Tri-County the counties have not limited the use of these funds in any significant way and Tri-County uses the funds for its general support.

In N.D.A.G. 99-O-03 with regard to the payments made to the domestic violence organization for general support, the Attorney General said:

These subsidies are exactly the type of payment of public funds intended to be addressed by N.D.C.C. § 44-04-17.1(12)(c). Unless the public is allowed to have access to the records of the organization supported by the funds, there is no way for the public to know how its funds are being used. It is my opinion that the Coalition is "supported . . . by public funds" as a

result of its receipt of these unrestricted payments, and is therefore a “public entity” for purposes of the open records law.

N.D.A.G. 99-O-03.

Based on the above, it is my opinion that Tri-County is a public entity for purposes of the open records law because it receives money for its general support from the Domestic Violence and Sexual Assault Prevention Fund, state general funds, and county funds.

Issue Two:

As a public entity, all of Tri-County’s recorded information regarding its public business must be open to the public upon request unless otherwise specifically provided by law. N.D.C.C. § 44-04-18. In this context, the “public business” of Tri-County consists of all matters that relate or may foreseeably relate to how it spends the unrestricted public funds it receives from the state and the counties. N.D.C.C. § 44-04-17.1(11)(b); N.D.A.G. 99-O-03. There is an exception to the open records law for certain records of Tri-County regarding the location of a domestic violence shelter or the identity of clients receiving domestic violence services under N.D.C.C. ch. 14-07.1. N.D.C.C. § 14-07.1-18. Thus, Tri-County did not have to supply Mr. Davis with the physical address of the shelter.

Except for the information protected from public disclosure under N.D.C.C. § 14-07.1-18, all recorded information of Tri-County regarding its use of the unrestricted funds received from the state and counties must be open to the public. If those funds have been pooled with other revenue of Tri-County, and cannot be accounted for separately, then all financial records of Tri-County must be open to the public. See N.D.A.G. 99-O-03; N.D.A.G. 98-O-24.

A public entity violates the open records law if it either denies a request for records that are required to be open or fails to grant a request for open records within a reasonable time. N.D.C.C. §44-04-18(7). Here, Mr. Davis requested, on several occasions, the year-end balance/accounting statements for the last two fiscal years showing actual and projected revenue. It is my opinion that Tri-County violated N.D.C.C. §44-04-18 by refusing to provide to Mr. Davis the balance/accounting statements regarding its use of the unrestricted funds received from the state and counties.

CONCLUSIONS

1. Tri-County Crisis Intervention, Inc., is a public entity subject to the state open records law to the extent its records pertain to the unrestricted funds it receives from the state or counties. If those funds have been pooled with other revenue of

Tri-County, and cannot be accounted for separately, then all the financial records of Tri-County must be open to the public.

2. Tri-County violated N.D.C.C. § 44-04-18 by failing to grant Mr. Davis' request for balance/accounting statements within a reasonable time, but did not violate N.D.C.C. § 44-04-18 by refusing to supply Mr. Davis with the physical address of the shelter.

STEPS NEEDED TO REMEDY VIOLATION

Tri-County must provide Mr. Davis a copy of the year-end balance/accounting statements for the last two fiscal years showing actual and projected revenue to the extent they relate to Tri-County's use of the support it receives from the Domestic Violence and Sexual Assault Prevention Fund, state general funds, and funds received from Cavalier, Pembina, and Walsh Counties.

Failure by the organization supported by public funds to disclose a record as 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.

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