

**OPEN RECORDS AND MEETINGS OPINION  
2004-O-14**

DATE ISSUED: July 1, 2004

ISSUED TO: Fargo-Moorhead Chamber of Commerce

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Al Aamodt, News Director of WDAY television asking whether The Fargo-Moorhead Chamber of Commerce violated N.D.C.C. § 44-04-18 by refusing to allow the media into a meeting.

**FACTS PRESENTED**

On Thursday, March 25, 2004, the Fargo-Moorhead Chamber of Commerce (Chamber) held a meeting of its Board of Directors. A reporter from WDAY Television asked to attend the meeting, but the Chamber did not allow him to attend.

The Chamber is a North Dakota non-profit corporation. It has approximately 1,844 members, one of which is the City of Fargo (Fargo). For 2004, Fargo paid \$1,783 in membership dues, an amount based on a formula that considers the type of business and number of employees. The benefits of being a member include networking and exposure opportunities, advertising opportunities, training and informational programs to enhance business and professional skills, members-only programs, such as employee assistance programs and group health insurance, referrals, a membership directory, and collective clout for small businesses through membership in a organization that advocates pro-business public policy positions at the local, regional and national level. All dues received by the Chamber from any member are deposited in the Chamber's operating account. The Chamber is located in a building owned by the city of Moorhead, and the Chamber pays rent at a competitive rate.

The Chamber is a member of the F-M Air National Guard Support Group (Support Group). This group was formed in August of 2003 and its goal is to prevent the Air National Guard base from being closed during the next round of base closings. The Support Group is an independent group and not a committee of the Chamber. It holds meetings throughout the Fargo-Moorhead area. As of April 22, 2004, the roster of the

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Support Group lists the following members: Senator Kent Conrad, Senator Byron Dorgan, Congressman Earl Pomeroy, State of North Dakota/North Dakota Air National Guard, City of Fargo, Municipal Airport Authority/Hector International Airport, Chamber of Commerce of Fargo Moorhead, Fargo-Cass County Economic Development Corporation, North Dakota State University, Fargo Jet Center, Tom Kenville, and Darrol Schroeder.

Fargo contributed \$50,000 to the Support Group. The Chamber, in lieu of a monetary contribution, agreed to act as the fiscal agent for the group. Consequently, the Chamber has a separate bank account and any money donated to the Support Group is deposited into the account. The Chamber does not decide how to spend the money in the account. It is up to the Support Group to determine how to spend the money. None of the money in the account is used to support the Chamber and the money is not commingled with Chamber operating funds. David Martin, the public affairs director of the Chamber, donates his time to act as the coordinator for the Support Group. The Chair of the Support Group, Dick Walstad, is not affiliated with the Chamber. The Chamber has not been hired by the Support Group, or separately by Fargo, to act as a lobbyist.

### ISSUES

1. Whether the Fargo-Moorhead Chamber of Commerce is a public entity subject to the open records and meetings laws.
2. Whether the Fargo-Moorhead Chamber of Commerce violated the open meetings law when it refused to open its meeting to a member of the media.

### ANALYSES

#### Issue One

The state open records and meetings laws apply to "public entities." N.D.C.C. §§ 44-04-18, 44-04-19. A private, nonprofit entity such as the Chamber may be a public entity if it is supported, in whole or in part, by public funds, expends public funds, or if it acts as an agent or agency of government. N.D.C.C. § 44-04-17.1(9), 12(c); N.D.A.G. 2001-O-11; N.D.A.G. 2004-O-04.

#### Supported by Public Funds Test

The 1997 amendments to the open records and meetings laws codified the fair market value test. An organization is not supported by public funds, under the statutory definition in N.D.C.C. § 44-04-17.1(9), if the funds the organization has received were provided in exchange for goods or services having an equivalent fair market value. N.D.A.G.

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98-O-23. See also, Adams County Record v. Greater North Dakota Ass'n, 529 N.W.2d 830, 835-36 (N.D. 1995) (“the term support, as used in the open records law, means something other than an exchange of money for identifiable and specific goods and services”).

Public funds may be given through grants, membership dues, fees, or any other payment. N.D.C.C. § 44-04-17.1(9). The requestor believes the Chamber is supported by public funds due to the membership dues it receives from Fargo.

The Chamber receives yearly membership dues from Fargo. If the fair market value of the goods and services Fargo receives by being a member of the Chamber is less than the membership dues, the membership dues may be considered “support.” N.D.C.C. § 44-04-17.1(9). The services Fargo receives are listed in the “Facts Presented” portion of this opinion. The services are similar to what members of the Greater North Dakota Association (GNDA) received in the Adams County Record v. GNDA case. In exchange for membership dues, GNDA members were entitled to voting privileges, received the GNDA News, a subscription to the Horizon Magazine, Legislative Report, Legislation Link, Legislative Position Statements, and Wholesale and Manufacturer’s Update. Adams County Record v. Greater North Dakota Association, 529 N.W.2d at 836. In the second Adams County Record case, the North Dakota Supreme Court affirmed the district court’s finding that the membership payments were more than amply covered by the services received. Adams County Record v. GNDA, 564 N.W.2d 304, 305 (N.D. 1997). Likewise, here, it appears that the membership fee paid by Fargo is the fair market value for the amount of services it receives. Because there is a fair market value exchange between Fargo and the Chamber for the membership dues paid in exchange for services, it is my opinion that they do not constitute “support” for the purposes of the open records and meetings laws.

In addition to the membership fees, the requestor states that the Chamber is a public entity because it received \$50,000 from Fargo to lobby on behalf of the city in an effort to retain the Air National Guard base located in Fargo. In a past opinion, this office found the Minot Chamber of Commerce base retention taskforce committee was supported by public funds received from the City of Minot and therefore subject to the open records law. N.D.A.G. 2002-O-09. However, unlike the Minot situation, here, the Support Group is not a committee of the Chamber, but instead is an independent group. The money was not given to the Chamber, but instead, to the Support Group. Although the Chamber acts as the fiscal agent for the Support Group, it keeps the money in a separate account.<sup>1</sup> The facts indicate that the Chamber is nothing more than one of

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<sup>1</sup> Whether or not the account is subject to the open records law depends on whether the Support Group is a public entity. Such a determination is outside the scope of this opinion.

many members of the Support Group. Because the money from Fargo did not go to support the Chamber or a committee of the Chamber, it is my opinion that the Chamber is not supported by public funds.

#### Agent or Agency of Government Test

To determine whether an organization is performing a governmental function as an agent of a public entity, this office uses factors set forth in News and Sun-Sentinel Co. v. Schwab, Twitty & Hanswer Architectural Group, Inc., 596 So.2d 1029,1031 (Fla. 1992 (hereafter Schwab)). N.D.A.G. 2001-O-11, N.D.A.G. 2002-O-09. The Schwab factors analysis evaluates 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”). N.D.A.G. 2002-O-09. These factors help determine whether an organization is providing services to a government entity, or is acting in place of or on behalf of the entity. N.D.A.G. 2001-O-11.

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

Because Fargo gave \$50,000 to the Support Group and not to the Chamber, the money given to the Support Group will not be evaluated under the Schwab factors. Only the membership dues must be evaluated under Schwab to determine whether the Chamber is acting as an agent for the city of Fargo.

In this case, Fargo’s membership dues of \$1,783 do not provide a substantial level of funding to the Chamber. Fargo pays membership dues according to a pre-set fee schedule just like all the other 1,844 members. (Factor 1). All membership dues are deposited in the Chamber’s operating account. No other funds from Fargo are deposited in the account. (Factor 2). The Chamber’s offices are located in a public building owned by the City of Moorhead, not Fargo, and the Chamber pays competitive rent. (Factor 3).

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The benefits of being a member of the Chamber have nothing to do with Fargo's decision-making process. (Factor 4). The benefits provided by being a member of the Chamber include networking and exposure opportunities, advertising opportunities for one's business, training and informational programs to enhance business and professional skills, members-only programs, such as employee assistance programs and group health insurance, referrals, a membership directory, and collective clout for small businesses through membership in an organization that advocates pro-business public policy positions at the local level. Many of these functions Fargo would not otherwise provide if it were not a member of the Chamber. (Factor 5). Fargo has no regulation of, or control over, the Chamber. (Factor 6). The Chamber was not created by Fargo. (Factor 7). Fargo does not have a substantial financial interest in the Chamber. (Factor 8). The Chamber operates to benefit businesses within the Fargo-Moorhead area. This would be the case whether Fargo was a member or not. (Factor 9).

Almost all of the Schwab factors, indicate that the Chamber is not an agent of Fargo, but instead merely provides services to the city. In past opinions, this office found private organizations to be acting as agents of public entities when the public entity hired a private organization to perform a specific function normally performed by the public entity. See N.D.A.G. 2001-O-04 (Advertising company hired to perform an educational campaign on the city's behalf). N.D.A.G. 2002-O-09 (City's funding 67% of base retention activities related to job retention, an economic development function of the City.) N.D.A.G. 2001-O-11 (economic development corporation under contract to perform the governmental function of economic development). N.D.A.G. 99-O-02 (corporation managing a pool of government funds on behalf of several political subdivisions).

One of the powers of a city is to advertise the resources and opportunities in the city. See N.D.C.C. § 57-15-10.1. The broad function of the Chamber is to promote the Fargo business community. Although there is some overlap of the functions of both Fargo and the Chamber, when one considers the totality of the Schwab factors, the Chamber is not acting as Fargo's agent.

Because the Chamber is neither supported by public funds, nor an agent of the city of Fargo, it is my opinion the Chamber is not a public entity subject to the open records and meetings laws.

### Issue Two

Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public. N.D.C.C. § 44-04-19. The Chamber is not a public entity subject to the open records and meetings law and therefore is not required to hold meetings that are open to the public.

CONCLUSIONS

1. It is my opinion that the Fargo-Moorhead Chamber of Commerce is not a public entity subject to the open meetings and records laws.
2. It is my opinion that the Fargo-Moorhead Chamber of Commerce did not violate the open meetings law when it refused to open its March 25, 2004, meeting to a member of the media.

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