

**OPEN RECORDS AND MEETINGS OPINION
2006-O-01**

DATE ISSUED: January 9, 2006

ISSUED TO: Dale Zetocha, Executive Director
North Dakota State University Research Foundation

CITIZEN'S REQUEST FOR OPINION

On June 7, 2005, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Dean Hulse, Dakota Resource Council (DRC) Chair, asking whether the North Dakota State University Research Foundation (Foundation) violated N.D.C.C. § 44-04-18 by refusing to provide copies of records requested. On August 10, 2005, the Foundation provided most of the records that DRC had requested. On August 24, 2005, DRC supplemented its request for an opinion asking whether the Foundation violated N.D.C.C. § 44-04-18(8) by not providing the records requested within a reasonable time. On November 10, 2005, the Foundation provided the remaining requested records.

FACTS PRESENTED

In a letter dated May 5, 2005, Mr. Hulse, on behalf of DRC, made a request for copies of "all contracts, contract proposals, research requests, research proposals, and related correspondence between Monsanto and the NDSU Research Foundation or any of its subsidiaries." On May 10, 2005, the executive director of the Foundation, Dale Zetocha, replied, stating that the Foundation "is not a public entity within the meaning of the North Dakota Open Records Act. Therefore, the NDSU research foundation is under no obligation to respond to your open records request dated May 5, 2005." Mr. Hulse, on behalf of DRC, requested an opinion from this office asking whether the Foundation violated the open records law by refusing to provide the records and whether the Foundation was a public entity subject to the open records laws.

During the process of gathering information from the parties in order to write an opinion, this office requested certain information from the Foundation in order to determine whether the Foundation was a "public entity" subject to the open records law. The Foundation was reluctant to provide any information that would help to determine whether or not it was a "public entity." Rather than provide such information, the Foundation agreed to provide the requested records to DRC, but emphasized that by doing so, it was not admitting that it was a public entity subject to the open records law.

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On August 10, 2005, the Foundation provided 880 pages of records to DRC. The records provided did not include the draft contracts that were requested by DRC, because the Foundation determined that they would be of no use to DRC. After learning, from this office, that DRC did want the documents, the Foundation provided them to DRC on November 10, 2005.

The Foundation is a nonprofit organization created in 1989. The purposes of the Foundation, as set out in the Articles of Incorporation, included:

- A. To support and assist the North Dakota State University in its teaching, research, and public service missions;
- B. To develop linkages between various college and administrative units of North Dakota State University and the private sector;
- C. To facilitate involvement by North Dakota State University faculty and professional staff in corporate research and development activities;
- D. To cooperate with the North Dakota State University Development Foundation, and to enter into partnerships and joint ventures with other university-related foundations;
- E. To enhance the human and intellectual capital of North Dakota State University through activities supported by grants and contracts from both public and private sources; and
- F. To promote economic development and rural revitalization in the State of North Dakota and the North Central Region.¹

The Foundation Cooperation Agreement (Cooperation Agreement) between North Dakota State University (NDSU) and the Foundation states that “the Foundation exists solely to support the progress of the University and provide resources which will enhance the University’s ability to carry out its mission.”² Under the Cooperation Agreement, NDSU provides office space, office equipment, phones, computer hardware, tech support, and assignment of its patents and other intellectual property to the Foundation. The Foundation provides NDSU with a part-time executive director and administrative assistant, funding for some technology transfer activities and protection of intellectual property, grants to promote research, research endowments, operational software, and 50% of the supplies.

According to NDSU’s website, the Foundation manages the intellectual properties of the University. It processes proposals for new businesses and institutes as well as

¹ Articles of Incorporation of NDSU Research Foundation (June 6, 1989).

² Cooperation Agreement (Nov. 27, 2000).

processes patents, trademarks, and licensing agreements for the University.³ It facilitates the commercialization of research technologies developed by NDSU faculty and staff, helps expand NDSU's ability to work with private businesses on research supported by grants and contracts from public and private sources, and manages the intellectual property of NDSU through affiliations with public and private businesses and industries.⁴

At the time of the request, nine of the 15 Foundation board members were NDSU employees, including NDSU's president.

ISSUES

1. Whether the Foundation is subject to the open records law.
2. Whether the Foundation violated N.D.C.C. § 44-04-18 by failing to provide records within a reasonable time.

ANALYSES

Issue One

All records of a public entity are open to the public unless otherwise specifically provided by law.⁵ A nonprofit corporation may be subject to the open records law if:⁶

1. The organization is delegated authority by a governing body of a public entity;⁷
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;⁸
3. The organization is supported in whole or in part by public funds or is expending public funds;⁹ or

³ <http://www.ndsu.nodak.edu/ndsu/vpbf/fiscal/f2000-17.htm>.

⁴ Id.

⁵ N.D.C.C. § 44-04-18.

⁶ N.D.A.G. 99-O-02.

⁷ See N.D.C.C. § 44-04-17.1(6) (definition of "governing body").

⁸ See N.D.C.C. § 44-04-17.1(12)(a) (definition of "public entity").

⁹ 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").

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.¹⁰

The following discussion will focus on the fourth way a nonprofit corporation may be subject to the open records law, i.e., if the Foundation is an agent of NDSU performing a governmental function on behalf of NDSU.

The State Board of Higher Education may:

[a]dopt rules promoting research, encouraging development of intellectual property and other inventions and discoveries by university system employees, and protecting and marketing the inventions and discoveries. The rules must govern ownership or transfer of ownership rights and distribution of income that may be derived from an invention or discovery resulting from research or employment in the university system. The rules may provide for transfer of ownership rights or distribution of income to a private, nonprofit entity created for the support of the university system or one of its institutions.¹¹

This state law gives the State Board of Higher Education the authority to encourage the development of inventions and discoveries by its employees and to protect and market those inventions and discoveries. It also authorizes the “transfer of ownership rights or distribution of income to a private, nonprofit entity created for the support of the university system or one of its institutions.”¹²

The Foundation was created for the support of NDSU in its efforts to encourage the development, and protect and market, inventions and discoveries of NDSU employees. In effect, the State Board of Higher Education’s and NDSU’s public authority or duty regarding inventions and discoveries is transferred to the Foundation and the Foundation is acting as an agent for NDSU.

The North Dakota Supreme Court in Forum Publishing Co. v. City of Fargo,¹³ held that the open records law cannot be circumvented by delegating a public duty to a third party. Where a government entity has delegated a public duty to a third party,

¹⁰ See N.D.C.C. § 44-04-17.1(12), (15) (definitions of “public entity” and “record”).

¹¹ N.D.C.C. § 15-10-17(9) (emphasis added).

¹² N.D.C.C. § 15-10-17(9).

¹³ 391 N.W.2d 169, 172 (N.D. 1986).

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documents in possession of the third party connected with public business are public records within the meaning of N.D.C.C. § 44-04-18.¹⁴

The agent relationship between NDSU and the Foundation is similar to the relationship described in the 1999 opinion from this office regarding the North Dakota Insurance Reserve Fund (NDIRF). In that opinion, this office found that certain political subdivisions delegated to NDIRF the lawful business of establishing a self-insurance fund.¹⁵ This delegation made NDIRF an agent of the political subdivisions and subject to the open records law.¹⁶

The Supreme Court of Iowa recently considered the delegation of a public function by a university to a “private” foundation. It held that the Iowa State University Foundation was subject to the Iowa open records act because it was performing the governmental function of fundraising and management.¹⁷ The facts before the Iowa court were almost identical to the facts here. Both foundations are private and were created to support a university. Both have board members who are also employees of the universities. Both are located on state property and work under service contracts with the Universities. The Iowa Court, like the North Dakota Supreme Court in the Fargo Forum case, emphasized that a government body may not delegate or “contract away” its duties or functions in order to avoid disclosure of what would otherwise be a public record.¹⁸ The Iowa Court described the relationship between Iowa State University and the Iowa Foundation as a “highly interwoven and symbiotic relationship.”¹⁹ There are no facts in the case of NDSU that lead me to understand its relationship with the NDSU Foundation is any different than the relationship between the foundation and the university in the Iowa case.

In conclusion, the NDSU Foundation acts as an agent of NDSU performing a governmental function on behalf of NDSU. Therefore, it is my opinion that the Foundation is a “public entity” subject to the state open records and meetings laws.²⁰

¹⁴ N.D.A.G. 99-O-02 (citing Letter from Attorney General Nicholas Spaeth to Ken Solberg (August 2, 1991).

¹⁵ N.D.A.G. 99-O-02.

¹⁶ Id.

¹⁷ Gannon v. Board of Regents of the State of Iowa, 692 N.W.2d 31, 39 (Iowa, 2005).

¹⁸ Id. at 40.

¹⁹ Id. at 43.

²⁰ A good argument can be made that the Foundation is also subject to the open records and meetings laws because it is recognized by state law, i.e., N.D.C.C. § 15-10-17(9), to exercise public authority or perform a governmental function. See N.D.A.G. 98-O-17, N.D.A.G. 98-O-21, N.D.A.G. 2003-O-08, N.D.A.G. 2005-O-02.

Issue Two:

Dakota Resource Council alleges that the records were not provided within a reasonable time. A response to a request for copies must not be unreasonably delayed. N.D.C.C. § 44-04-18(8). "Once a person makes a request for open records, it is the responsibility of the public entity to respond to the request within a reasonable time. . . ." ²¹ "Whether a response has been provided within a reasonable time will depend on the facts of a given situation." ²² The breadth of a request may affect the time within which a public entity is required to respond to a request. ²³

The Foundation, in response to this office, points out that it provided 880 records to DRC within 15 days of agreeing to provide them. Considering that a large number of records had to be reviewed to remove confidential information, 15 days could be a reasonable turnaround time on a records request. However, those 15 days came after three months of refusing to provide the records. Even after the bulk of the records were provided to DRC, the Foundation failed to provide draft contracts and other documents because it unilaterally decided that DRC did not need them. It was not until November 10 that DRC received all of the records it requested.

DRC's request was broad, but not complicated. It took six months and two interventions from this office for DRC to finally receive all the records it requested. Accordingly, it is my opinion that the Foundation violated N.D.C.C. § 44-04-18 by failing to provide the records within a reasonable amount of time.

CONCLUSIONS

1. It is my opinion that the Foundation acts as an agent of NDSU and is therefore a "public entity" subject to the open records law.
2. It is my opinion that the Foundation failed to provide the records DRC requested within a reasonable time.

²¹ N.D.A.G. 2001-O-12.

²² N.D.A.G. 2003-O-09.

²³ See N.D.A.G. 2001-O-12.

STEPS NEEDED TO REMEDY VIOLATION

The Foundation has remedied its violation by providing the records requested.

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Attorney General

Assisted by: Julie A. Krenz
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