

**OPEN RECORDS AND MEETINGS OPINION  
2006-O-03**

DATE ISSUED: February 14, 2006  
ISSUED TO: Red River Valley Fair Association

**CITIZEN'S REQUEST FOR OPINION**

On February 9, 2006, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from The Forum asking whether the Red River Valley Fair Association violated N.D.C.C. § 44-04-18 by failing to provide copies of applications for the fair manager position and N.D.C.C. § 44-04-19 by holding an unauthorized executive session to discuss the applications.

**FACTS PRESENTED**

The Forum asked the Red River Valley Fair Association (Fair Association) for copies of applications it had received for the fair manager position. The Fair Association's attorney, Jonathan Garaas, denied the request claiming that the records were exempt personnel records under N.D.C.C. § 44-04-18.1. He also asserted that some of the information in the applications may be confidential or exempt personal information under that section. On February 8, 2006, the Fair Association's Search Committee (Committee) met in closed session for approximately 1½ hours to read the applications, citing N.D.C.C. § 44-04-19.1 and N.D.C.C. § 44-04-19.2.

**ISSUES**

1. Whether the Fair Association violated N.D.C.C. § 44-04-18 by refusing to provide copies of the applications to The Forum.
2. Whether the Fair Association violated N.D.C.C. § 44-04-19 by holding an unauthorized executive session.

## ANALYSES

### Issue One

All records of a public entity are open to the public unless otherwise specifically provided by law.<sup>1</sup> Under N.D.C.C. § 44-04-18.1, a record of a public employee's medical treatment or use of an employee assistance program is confidential<sup>2</sup> and personal information in an employee's personnel file is exempt.<sup>3</sup> Personal information is defined and includes items such as a person's home address, home telephone number, information about dependents, and bank account numbers.<sup>4</sup>

Section 44-04-18.1(3), N.D.C.C., also makes exempt nonconfidential information contained in a personnel record of an employee of a public entity as defined in N.D.C.C. § 44-04-17.1(12)(c). Mr. Garaas asserts that because the Fair Association is a public entity as defined in N.D.C.C. § 44-04-17.1(12)(c), the applications are exempt and the Fair Association therefore had the right to refuse to provide copies of them to The Forum.

In N.D.A.G. 2006-O-02, I determined the Fair Association was a public entity for two reasons; it was supported by public funds and it was recognized under state law to exercise the governmental function of managing and operating a county fair. The exemption in N.D.C.C. § 44-04-18.1(3) for personnel records only applies if the sole reason an organization is a public entity is because it is supported by public funds.<sup>5</sup> The Fair Association is a public entity not only because it is supported by public funds, but also because it is recognized by state law to perform a governmental function. It therefore cannot claim the exemption in N.D.C.C. § 44-04-18.1(3).

It is my opinion the Fair Association violated N.D.C.C. § 44-04-18 by failing to give The Forum copies of the applications.

### Issue Two

All meetings of a public entity must be open to the public unless otherwise provided by law.<sup>6</sup> "Meeting" is defined as "a formal or informal gathering . . . of . . . [a] quorum of the

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<sup>1</sup> N.D.C.C. § 44-04-18.

<sup>2</sup> N.D.C.C. § 44-04-18.1(1).

<sup>3</sup> N.D.C.C. § 44-04-18.1(2).

<sup>4</sup> Id.

<sup>5</sup> N.D.A.G. 2001-O-11 (the exception in subsection 3 of N.D.C.C. § 44-04-18.1 does not apply if the supported organization is also an agency of a political subdivision under N.D.C.C. § 44-04-17.1(12)(b)).

<sup>6</sup> N.D.C.C. § 44-04-19.

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members of the governing body of a public entity regarding public business . . . .”<sup>7</sup> Public business includes “all matters that relate . . . in any way to . . . any matter over which the public entity has supervision, control, jurisdiction, or advisory power, or [its] use of public funds.”<sup>8</sup>

“Governing body” includes any group of persons, regardless of membership, “acting collectively pursuant to authority delegated to that group by the governing body.”<sup>9</sup> As a result, committees created by a public entity’s main governing body are also governing bodies subject to the open meetings laws.<sup>10</sup> “[A] committee delegated authority to perform any function, including fact gathering, reporting, or recommending action, as well as taking action, on behalf of a governing body is subject to the state’s open meetings laws, including the requirements to notice its meetings and prepare minutes.”<sup>11</sup>

At its January 5, 2006, meeting, the nine-member board created the Search Committee to find candidates for the fair manager’s job. As a result, the Search Committee is a governing body subject to the open meetings laws and its meetings must be open to the public unless a law provides otherwise.

According to The Forum, the Search Committee cited N.D.C.C. §§ 44-04-19.1 and 44-04-19.2 as authority to close the February 8 meeting. Section 44-04-19.1(2), N.D.C.C., allows public entities to close meetings for attorney consultation. Attorney consultation is defined as:

any discussion between a governing body and its attorney in instances in which the governing body seeks or receives the attorney’s advice regarding and in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings or concerning pending civil or criminal litigation or pending adversarial administrative

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<sup>7</sup> N.D.C.C. § 44-04-17.1(8)(a)(1).

<sup>8</sup> N.D.C.C. § 44-04-17.1(11).

<sup>9</sup> N.D.C.C. § 44-04-17.1(6).

<sup>10</sup> N.D.A.G. 2005-O-03; N.D.A.G. 2003-O-13 (meeting of the employee relations committee of a city council); N.D.A.G. 2003-O-15 (meeting of a committee of an airport authority); N.D.A.G. 2005-O-02 (meeting of a committee of a county historical society). See also N.D.A.G. 98-O-13 (announcement at commission meeting by commission chairman that certain of the commissioners would meet with NDIRF constituted delegation to a committee by the commission); N.D.A.G. 96-F-09 (if a public body delegates authority to act on its behalf to a group of its employees, the group assumes the color of a public body because of the delegation of such authority).

<sup>11</sup> N.D.A.G. 2003-O-13, N.D.A.G. 2005-O-02.

proceedings. Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation.<sup>12</sup>

According to Mr. Garaas, during the closed session of the meeting the Search Committee members read the applications. Although Mr. Garaas was present, “[m]ere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation.”<sup>13</sup> No “attorney consultation” took place during the closed portion of the meeting. Consequently, the Fair Association was not entitled to close the meeting for that purpose.

The Search Committee also cited N.D.C.C. § 44-04-19.2 as authority to close the meeting. That section authorizes a public entity to close a meeting to discuss closed or confidential records. Since I determined in Issue One that the applications were not exempt under N.D.C.C. § 44-04-18.1(3), the Fair Association had no authority to close its meeting under this section of the law.

It is therefore my opinion that the Fair Association violated N.D.C.C. § 44-04-19 by closing the Fair Association Search Committee meeting.

#### CONCLUSION

1. The Fair Association violated N.D.C.C. § 44-04-18 by refusing to provide copies of the applications to The Forum.
2. The Fair Association violated N.D.C.C. § 44-04-19 by holding an unauthorized executive session.

#### STEPS NEEDED TO REMEDY VIOLATIONS

Given that the request for the applications was made last week, and a public entity has a duty under N.D.C.C. § 44-04-18(8) to provide the records within a reasonable time, the Fair Association must provide copies of all of the job applications free of charge to The Forum by 5 p.m., February 14, 2006, but may excise from the records any material that is closed or confidential under N.D.C.C. § 44-04-18.1 or another applicable statute. If any information is excised or not provided, the Fair Association must explain in writing its legal authority for not providing the information. The Fair Association has remedied the violation of the unauthorized Search Committee meeting because it recorded the February 8, 2006, meeting and has given a copy of the recording to The Forum.

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<sup>12</sup> N.D.C.C. § 44-04-19.1(5).

<sup>13</sup> N.D.C.C. § 44-04-19.1(5); N.D.A.G. 2002-O-01.

Failure to take the corrective measures described in this opinion 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.<sup>14</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>15</sup>

A handwritten signature in black ink, appearing to read "Wayne Stenehjem". The signature is written in a cursive, flowing style.

Wayne Stenehjem  
Attorney General

Assisted by: Julie A. Krenz  
Assistant Attorney General

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<sup>14</sup> N.D.C.C. § 44-04-21.1(2).

<sup>15</sup> Id.