

**OPEN RECORDS AND MEETINGS OPINION
2006-O-04**

DATE ISSUED: February 21, 2006

ISSUED TO: Bismarck-Mandan Orchestral Association

CITIZEN'S REQUEST FOR OPINION

On September 13, 2005, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Linda Olsrud asking whether the Bismarck-Mandan Orchestral Association (Association) was a public entity subject to the state's open records and meetings laws and, if so, whether it violated those laws by holding "secret" meetings, by failing to provide records she had requested, and by failing to provide her with notices of meetings.

FACTS PRESENTED

Ms. Olsrud, a former employee of the Association, requested a copy of her personnel file, a copy of the performance appraisal and other reports prepared by the Association's consultant, a copy of all minutes of the Association Board (Board) and personnel and executive committee meetings for "the last year" and documents disseminated at those meetings, and meeting notices for the executive and personnel committees for "the last year." She also alleged the Association was holding "secret" meetings, without proper notice to the public.¹ On August 29, 2005, she also asked to receive notices of future meetings of the Board and the personnel and executive committees.

According to its by-laws, the Association is governed by a board of directors, consisting of fourteen to eighteen members, as determined by the Board. The Board meets at least monthly, but does not regularly meet in June, July, and August unless a meeting is called in those months.

At the Board's annual meeting in May, the Board members elect a president, president-elect, secretary, and treasurer. These four officers, plus the immediate past president, constitute the executive committee. The president of the Board is the chief executive officer of the Association, has general authority over the affairs of the

¹ Ms. Olsrud also alleged the Association closed parts of meetings improperly. Since those meeting occurred more than to 30 days preceding Ms. Olsrud's request, our office cannot address this issue. See N.D.C.C. § 44-04-21.1(1).

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Association, and is charged with properly managing it. The Board has delegated duties to the executive committee and a personnel committee in the Association's Personnel and Office Policies Handbook.

According to the Association's attorney, except for executive sessions, the Board's meetings are open to the public. The Board and its executive and personnel committees keep minutes of their meetings. The Board and committees notify their members of meetings but do not give public notice of their meetings in the manner specified in N.D.C.C. § 44-04-20.

The Association is funded by grants from the Dakota West Arts Council (a nonprofit organization that receives grants from Bismarck), the North Dakota Council on the Arts (a state agency), private individual and business donations, and ticket sales. In 2005, Bismarck gave the Dakota West Arts Council \$25,000. This year the city budgeted \$50,000 for the Council. The grants it awarded to the Association were city funds. The Association also receives funds from Bismarck and Burleigh County to help defray costs of the Association's July 4th celebrations. The use of those funds is restricted by the county and city and may only be used to pay for the costs associated with those celebrations. According to the Association's attorney, the money for the July 4th celebration is disbursed directly from the grantor to the company that conducts the fireworks display.

ISSUES

1. Whether the Association is a "public entity" subject to the state's open records meetings laws.
2. Whether the Association violated N.D.C.C. § 44-04-18 by failing to provide copies of records.
3. Whether the Association violated N.D.C.C. § 44-04-20 by failing to give public notice of its meetings.
4. Whether the Association violated N.D.C.C. § 44-04-20 by failing to give notice of its meetings to an individual who requested to receive notice.

ANALYSES

Issue One: Whether the Association is a "public entity" subject to the state's open records and meetings laws.

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The state's open meetings and records laws apply to "public entities."² The definition of "public entity" in N.D.C.C. § 44-04-17.1 is not limited to entities traditionally viewed as "governmental." A private, nonprofit entity like the Association can be a public entity if it is supported, in whole or in part, by public funds, or is expending public funds.³ "Public funds" means "cash and other assets with more than minimal value received from the state or any political subdivision of the state."⁴

The term "minimal" is not defined in statute. Words not defined in statute are to be given their ordinary and commonly understood meaning.⁵ "Minimal" is defined as "smallest in amount or degree."⁶ In N.D.A.G. 98-O-23, this office indicated that minimal means "de minimis contributions of property or assets, such as occasional use of a public meeting room" because, even though the contribution would be for the general support of the organization, the contribution would have little or no economic value and the trivial amount of support would not justify opening all the financial records of a private corporation to public scrutiny.

In N.D.A.G. 98-O-24, this office determined that the use of school property free of charge to operate a latchkey program after school in conjunction with a \$7,500 grant constituted support with "public funds." In N.D.A.G. 2004-O-04, this office determined a \$45,000 contribution from a mill levy to a hospital constituted cash assets with more than minimal value, thus meeting the definition of public funds, even though that amount represented only 1.3% of the hospital's annual revenue. Thus, in order to be minimal, the cash or other assets given must have very little value.

The Association receives public funds in the form of grants from the North Dakota Council on the Arts and from Bismarck through the Dakota West Arts Council. It also received public funds from Bismarck and Burleigh County for the Association's annual July 4th celebration in Bismarck. The money for the July 4th celebration is dedicated by the city and county and may only be used for that purpose. The grant money from the arts councils, however, is not dedicated for any specific use. Rather, it is used for

² N.D.C.C. §§ 44-04-18, 44-04-19.

³ N.D.C.C. § 44-04-17.1(9), (12)(c); N.D.A.G. 2001-O-10 and N.D.A.G. 2001-O-11.

⁴ N.D.C.C. § 44-04-17.1(13).

⁵ N.D.C.C. § 1-02-02; N.D.A.G. 2004-L-65 (words in a statute are to be understood in their ordinary sense unless a contrary intention plainly appears). See also Kim-Go v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694, 696 (N.D. 1990) ("[u]nless words in a statute are defined in the code, they are to be given their plain, ordinary, and commonly understood meaning").

⁶ The American Heritage Dictionary 799 (2d coll. ed. 1991).

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general operating expenses for the Association's activities over any given year.⁷ The funds are used to support ongoing operations and are therefore for the "general support" of the Association.⁸

Information from the grant applications indicates the Association has a budget of about \$350,000 to \$525,000 annually. In 2004 and 2005, the Association received \$1,200 and \$1,160, respectively, from the Dakota West Arts Council. For July 1, 2004, through June 30, 2005, the Association received \$8,180 from the North Dakota Council on the Arts. The following year it received \$7,800. Although the grant amounts as a percentage of the Association's total budget are relatively small, they are not trivial or de minimis. It is my opinion, they constitute cash assets with more than "minimal" value. Consequently, it is my further opinion that the Association is supported in part by "public funds" and is a public entity subject to the open records and meetings laws.

Issue Two: Whether the Association violated N.D.C.C. § 44-04-18 by failing to provide copies of records.

Generally, all records of a public entity are open for inspection by the public.⁹ This rule is different, however, for records of entities that are subject to the open records law solely because they are "supported by public funds." For this type of "public entity," generally only those records pertaining to or dealing with the use of public funds will be open.¹⁰ However, if the public funds were commingled with other entity funds and not used for any specific purpose, then all of the entity's records must be open, unless a specific law provides otherwise.¹¹

⁷ Letter from Gary Wolberg, the Association's attorney, to this office (Dec. 20, 2005). See also, e.g., Dakota West Arts Council 2004 and 2005 Re-Grant Program Applications and Grant Evaluations made by the Association; North Dakota Council on the Arts Institutional Support Grant Program, Association Grant Application Form for FY 2004/05 and Final Reports dated July 28, 2004, and July 19, 2005.

⁸ N.D.A.G. 2004-O-04 (public funds constitute "general support" if they are used to subsidize and fund ongoing operations).

⁹ N.D.C.C. § 44-04-18(1).

¹⁰ Hearing on S.B. 2228 Before the Senate Comm. on the Judiciary, 1997 N.D. Leg. (Feb. 5) (Statement of Attorney General Heidi Heitkamp). Attorney General Heitkamp's written testimony stated: "This bill clarifies that only when an entity receives money in excess of the fair market value of the goods or services it provides the public agency from which it receives funds would any of its records be open. In that situation, only those records which relate to the function it was performing for the government or to the funds received would be open."

¹¹ N.D.A.G. 2003-O-10 (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

In this case, the grant funds were applied for and granted on the basis that they would be used for general operating expenses of the Association for the year. The funds were commingled with all other funds and not used for any specific purpose. Consequently, all of the records of the Association are open unless a specific law provides otherwise.

Ms. Olsrud requested a copy of her personnel file, a copy of the performance appraisal and other reports prepared by the Association's consultant, a copy of all Board and committee minutes for "the last year" and documents disseminated at those meetings, and meeting notices for the executive and personnel committees for "the last year." When a request for copies of public records is made, the public entity must furnish the requester one copy of each record requested.¹²

The Association denied the request stating that because litigation by Ms. Olsrud was "certain and imminent," any request for documents must be made through the discovery process. There is no authority in the law for a public entity to deny records when litigation is "certain and imminent."

The Association also stated that it considered personnel records to be confidential or exempt from the open records law. 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 (EAP) is confidential and is not to become part of an employee's personnel record.¹³ Section 44-04-18.1, N.D.C.C., also makes exempt from the open records law, for entities that are "public" because they are supported in whole or in part with public funds, "[n]onconfidential information contained in a personnel record of an employee."¹⁴ Exempt information can be released at the discretion of the public entity.¹⁵

"Personnel record" is not defined in state law. Courts have construed the term to mean documents that directly pertain to employment and an employee's ability to perform a job, including applications and performance ratings or evaluations.¹⁶ Those kinds of

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); N.D.A.G. 2003-O-02; N.D.A.G. 99-O-03; N.D.A.G. 98-O-24.

¹² N.D.C.C. § 44-04-18(2).

¹³ N.D.C.C. § 44-04-18.1(1).

¹⁴ N.D.C.C. § 44-04-18.1(3); N.D.A.G. 2006-O-03 (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).

¹⁵ N.D.C.C. § 44-04-17.1(5).

¹⁶ Baltimore City Police Dept. v. Maryland, 857 A.2d 148, 153 (Md. 2004); Wakefield Teachers Ass'n v. School Committee of Wakefield, 731 N.E.2d 63 (Mass. 2000); Pivero

documents would include records used to determine qualifications for employment, promotions, or demotions; notices of commendations or warnings; and records of pay raises or termination or other disciplinary action.¹⁷ These kinds of records of entities that are “public” solely because they are supported with public funds, are “personnel records” and are exempt from the open records law. Thus, records of medical treatment and use of an EAP are confidential, and personnel records of Association employees are exempt from the open records law. Therefore, the Association did not violate the open records law by refusing to give copies of personnel records to Ms. Olsrud.

Ms. Olsrud also requested a copy of the performance appraisal and other reports prepared by the Association’s consultant, a copy of all Board and committee minutes for the last year” (i.e., from August 24, 2004, through August 24, 2005) and documentation disseminated at those meetings, and meeting notices for the executive and personnel committees for “the last year.” The Association must give Ms. Olsrud this information. A public entity may not deny a request for an open record because the record contains confidential or closed information.¹⁸ Rather, the entity is required to disclose the record with the confidential or closed information redacted.¹⁹ Therefore, the Association must redact information that is confidential and may redact personnel information that is exempt, under N.D.C.C. § 44-04-18.1. It is my opinion that the Association violated N.D.C.C. § 44-04-18 by failing to provide to Ms. Olsrud the reports, minutes, meeting notices, and other information, with any required or optional redactions of information authorized by N.D.C.C. § 44-04-18.1.

Issue Three: Whether the Association violated N.D.C.C. § 44-04-20 by failing to give public notice of its meetings.

Unless otherwise provided by law, all “meetings” of a governing body of a public entity must be noticed in accordance with N.D.C.C. § 44-04-20. “Governing body” includes any group of persons acting collectively pursuant to authority delegated to that group by the governing body.²⁰ As a result, committees delegated duties by a public entity’s main

v. Largy, 722 A.2d 461, 462 (N.H. 1998) (personnel file means personnel records created and maintained by an employer and pertaining to an employee including employment applications, internal evaluations, disciplinary documentations, payroll records, injury reports, and performance assessments, wherever located).

¹⁷ Id.

¹⁸ N.D.C.C. § 44-04-18.10(2).

¹⁹ N.D.C.C. § 44-04-18.10; N.D.A.G. 98-O-22.

²⁰ N.D.C.C. § 44-04-17.1(6).

governing body are also subject to the meeting notice requirements.²¹ The Association Board has delegated various duties to its executive and personnel committees. Neither the Board, nor its committees has given notice of meetings as required by N.D.C.C. § 44-04-20. It is therefore my opinion the Association violated N.D.C.C. § 44-04-20 by failing to provide notice of its and its committees' meetings in accordance with that section.

Issue Four: - Whether the Association violated N.D.C.C. § 44-04-20 by failing to give notice of its meetings to an individual who requested to receive notice.

A governing body must provide notice of a meeting to any person requesting notice at the same time other members of the governing body are given notice.²² When a request for notice of meetings is made, the request is effective for one year, unless a different time period is specified.²³ On August 29, 2005, Ms. Olsrud requested to be notified of any future Board or executive or personnel committee meetings. The Association Board and executive committee have met since this request was made, and have failed to provide copies of its meeting notices to Ms. Olsrud. It is therefore my opinion that the Association violated N.D.C.C. § 44-04-20 by failing to notify Ms. Olsrud of its meetings.

CONCLUSIONS

1. The Association is supported in part with "public funds" and is a public entity subject to the open records and meetings laws.
2. The Association did not violate N.D.C.C. § 44-04-18, the open records law, by refusing to provide copies of "personnel records" because personnel records of a nonprofit corporation such as the Association, which is a public entity solely because it is supported in whole or in part by public funds, are exempt from the open records law. The Association violated N.D.C.C. § 44-04-18 by refusing to give copies of other records requested, with confidential or personnel information redacted.

²¹ N.D.A.G. 2005-O-02 (meeting of the executive committee of the board of directors of an historical society); 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).

²² N.D.C.C. § 44-04-20(5).

²³ N.D.C.C. § 44-04-20(5).

3. The Association and its committees violated N.D.C.C. § 44-04-20 by failing to give public notice of the Association's and its committees' meetings in accordance with that section.
4. The Association violated N.D.C.C. § 44-04-20 by failing to give notice of its meetings to Ms. Olsrud.

STEPS NEEDED TO REMEDY VIOLATIONS

The Association must provide to the requestor copies of all of the records requested. The Association must redact information that is confidential and may redact personnel information that is exempt, under N.D.C.C. § 44-04-18.1 or other applicable law.

In addition to providing copies of notices and minutes for meetings occurring from August 24, 2004, through August 24, 2005, the Association must provide to Ms. Olsrud copies of notices and minutes for meetings occurring from August 24, 2005, to the present, and must, in future, provide notice of its meetings to the public and Ms. Olsrud prior to its Board and committee meetings, in accordance with N.D.C.C. § 44-04-20.

Failure to take the corrective measures 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. § 44-04-21.2.²⁴ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁵

Sincerely,

Wayne Stenehjem
Attorney General

²⁴ N.D.C.C. § 44-04-21.1(2).

²⁵ Id.