

**OPEN RECORDS AND MEETINGS OPINION
2008-O-26**

DATE ISSUED: November 12, 2008

ISSUED TO: CommunityWorks North Dakota
North Dakota Housing Finance Agency

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Susan Beehler asking whether CommunityWorks North Dakota and the North Dakota Housing Finance Agency violated the open records law by claiming that certain documents relating to the Library Square II development in Mandan, North Dakota, were confidential.

FACTS PRESENTED

Ms. Beehler went to the office of CommunityWorks North Dakota (hereafter, "CommunityWorks"), which is co-located with the Lewis and Clark Regional Development Council, to inquire about several matters relating to the planned Library Square II housing development in Mandan. Ms. Beehler requested a copy of a feasibility study, copies of documents concerning other locations examined for the development, and a copy of the application that was submitted to receive income tax credits for the development through the North Dakota Housing Finance Agency. A CommunityWorks employee said he would copy the records and provide them at a later date, but Ms. Beehler subsequently received a letter from CommunityWorks stating that the records were confidential.

Although Ms. Beehler was told that copies of a feasibility study and documents concerning other locations examined for the development would be provided to her, CommunityWorks told this office that the individual speaking with Ms. Beehler was a relatively new employee, and he simply assumed such documents existed, but they did not, in fact, exist.¹

¹ This office must accept the facts provided by the entity whose records are being sought. See N.D.C.C. § 44-04-21.1(1).

Ms. Beehler also went to the North Dakota Housing Finance Agency and requested a copy of the application for tax credits for Library Square II. She was told that the application was confidential and not available to the public. The North Dakota Housing Finance Agency approved income tax credits for Library Square II's private investors because the development will provide housing to low income senior citizens.

CommunityWorks is on file with the North Dakota Secretary of State as a North Dakota nonprofit corporation. The Lewis and Clark Regional Development Council, a regional planning council under N.D.C.C. ch. 54-40.1, is a public entity.²

Library Square II is being developed by MDI Limited Partnership #100 (hereafter, "Partnership"), a limited partnership between CommunityWorks, as the general partner, and MetroPlains Development, a Minnesota for-profit business corporation, as the limited partner.³ The Partnership will construct and own the Library Square II development.⁴ The two phases of the Library Square development are designed to provide affordable housing to low income, elderly residents in Mandan, with the added benefit of assisting the reconstruction of Mandan's downtown area, which was affected by an underground fuel leak.⁵

ISSUES

1. Whether CommunityWorks North Dakota is a public entity subject to the open records laws. If so, whether it violated N.D.C.C. § 44-04-18 by denying Ms. Beehler a copy of the records she requested.
2. Whether the North Dakota Housing Finance Agency violated N.D.C.C. § 44-04-18 by refusing to provide Ms. Beehler with a copy of the records she requested.

² See N.D.C.C. ch. 54-40.1; N.D.A.G. Letter to Mahoney (Oct. 3, 1991); N.D.A.G. 97-F-07.

³ Letter from Paul Rechlin, Executive Director of CommunityWorks, to Assistant Attorney General Mary Kae Kelsch (Dec. 10, 2007).

⁴ Id.

⁵ See <http://www.communityworksnd.org/about.html>, accessed on July 21, 2008.

ANALYSIS

Issue One

Records of a public entity are open to the public unless a law provides otherwise.⁶ A “public entity” includes public or governmental bodies or agencies of the state, public or governmental bodies or agencies of political subdivisions of the state, and “[o]rganizations or agencies supported in whole or in part by public funds, or expending public funds.”⁷

CommunityWorks is a non-governmental organization. It is a North Dakota nonprofit corporation that provides affordable housing and related assistance for low and moderate income individuals.⁸ It was incorporated by several individuals in 1995.⁹ Although “Lewis and Clark” was initially in its name, the name was changed in 2005 to “CommunityWorks North Dakota.”¹⁰ In 2002, CommunityWorks’ articles of incorporation were amended to give it authority to serve residents anywhere in North Dakota, and in parts of South Dakota.¹¹ In contrast, the Lewis and Clark Regional Development Council has authority over a ten-county region in North Dakota.¹²

Further, CommunityWorks North Dakota currently has 17 people on its board of directors, none of whom are elected public officials.¹³ In contrast, the board for the Lewis and Clark Regional Development Council includes 35 members, the majority of whom are elected public officials.¹⁴ CommunityWorks and the Lewis and Clark Regional Development Council separately pay rent to their common landlord, and they each pay a separate salary to their shared executive director, Mr. Paul Rechlin.¹⁵ The two entities ensure that funds are not commingled by holding accounts at entirely

⁶ See N.D.C.C. § 44-04-18.

⁷ N.D.C.C. § 44-04-17.1(12).

⁸ See <http://www.communityworksnd.org/about.html>, accessed on July 21, 2008.

⁹ Id.

¹⁰ In 1995 its name was “Lewis and Clark Community Housing Development Organization.” In 2000, the name was changed to “Lewis and Clark CommunityWorks.” See nonprofit corporation filings on file with the North Dakota Secretary of State.

¹¹ See nonprofit corporation filings on file with the North Dakota Secretary of State.

¹² Letter from Paul Rechlin to Assistant Attorney General Edward Erickson (Aug. 8, 2008).

¹³ Id.

¹⁴ Id. See also N.D.C.C. § 54-40.1-03.

¹⁵ Letter from Paul Rechlin to Assistant Attorney General Edward Erickson (Aug. 8, 2008).

different financial institutions.¹⁶ Based on this information, it is my opinion that CommunityWorks is a non-governmental organization.

Even though CommunityWorks is a non-governmental organization, it still could be subject to the open records laws. The following two tests can be used to determine whether a non-governmental organization is a public entity subject to the open records laws. The first is whether it is an agency or agent of government, and the second is whether it is supported by public funds.¹⁷

Agency or Agent of Government Test

Under this test, a non-governmental organization can be a public entity under the open records law if it is acting as an agent or agency of government.¹⁸ This is determined by examining the types of services the non-governmental organization provides to the governmental entity, and whether the governmental entity has delegated its authority to the non-governmental organization.¹⁹

CommunityWorks shares office space with the Lewis and Clark Regional Development Council. They both employ Mr. Paul Rechlin as an executive director, and one individual is a member of both organizations' boards.²⁰ These ties between the two entities may lead a person to question whether CommunityWorks is acting as an agent or agency of the Lewis and Clark Regional Development Council.

The actual relationship between these two entities, however, does not show that CommunityWorks is acting as an agency or agent of the Lewis and Clark Regional Development Council. The Lewis and Clark Regional Development Council and CommunityWorks perform separate functions in their respective spheres of operation.²¹ Under state law, regional planning councils, like the Lewis and Clark Regional Development Council, have the broad authority to:

[c]oordinate planning and development within the region for all matters of regional concern as determined by the regional council, including land use, social and economic planning, economic development,

¹⁶ Letter from Paul Rechlin to Assistant Attorney General Edward Erickson (Aug. 22, 2008).

¹⁷ N.D.A.G. 2003-O-02; N.D.A.G. 2001-O-11; N.D.A.G. 2001-O-10.

¹⁸ Id.

¹⁹ N.D.A.G. 2003-O-02.

²⁰ Letter from Paul Rechlin to Assistant Attorney General Edward Erickson (Aug. 8, 2008).

²¹ Id.

transportation, health, environmental quality, water and sewerage, solid waste, flood relief, parks and open spaces, hospitals, and public buildings.²²

In contrast, CommunityWorks' focus is almost entirely on providing affordable housing.²³

There is no delegation of authority from the Lewis and Clark Regional Development Council to CommunityWorks and there are no agreements between CommunityWorks and the Lewis and Clark Regional Development Council regarding Library Square II.²⁴

Therefore, CommunityWorks is not acting as an agent or agency of government, and it is not subject to the open records laws under the first test.

Supported by Public Funds Test

Under the second test, a non-governmental organization is subject to the open records laws if it is supported in whole or in part by public funds.²⁵ "Public funds," under the open records laws, means "cash and other assets . . . received from the state or any political subdivision of the state;" but funds received from the federal government are excluded from this definition.²⁶ An entity is not supported by public funds if the public funds it receives are provided in exchange for goods or services having an equivalent fair market value, or if the public funds it receives are benefits under any authorized economic development program.²⁷

CommunityWorks administers the DREAM Fund, a flexible lending program that provides affordable loans to mostly low income borrowers to buy, build, or rehabilitate their homes.²⁸ CommunityWorks has indicated that the only non-federal public funds it

²² N.D.C.C. § 54-40.1-04(2).

²³ Letter from Paul Rechlin to Assistant Attorney General Edward Erickson (Aug. 8, 2008). See also nonprofit corporation filings in the North Dakota Secretary of State's office.

²⁴ Letter from Paul Rechlin to Assistant Attorney General Mary Kae Kelsch (Dec. 10, 2007); Letter from Paul Rechlin to Assistant Attorney General Edward Erickson (Aug. 8, 2008).

²⁵ N.D.A.G. 2003-O-02; N.D.A.G. 2001-O-11; N.D.A.G. 2001-O-10.

²⁶ N.D.C.C. § 44-04-17.1(13). See also N.D.A.G. 98-O-23.

²⁷ N.D.C.C. § 44-04-17.1(9). See also N.D.A.G. 2001-O-11; N.D.A.G. 2001-O-10; N.D.A.G. 98-O-23.

²⁸ Letter from Paul Rechlin to Assistant Attorney General Edward Erickson (Aug. 8, 2008).

OPEN RECORDS AND MEETINGS OPINION 2008-O-26

November 12, 2008

Page 6

receives are related to the DREAM Fund.²⁹ These funds are received from counties, local development corporations, job development authorities, and cities as a condition of gaining access to the DREAM Fund.³⁰

But, because DREAM Fund monies were not used for the Library Square II development,³¹ the openness of records relating to the DREAM Fund is not helpful in determining whether the application for income tax credits related to Library Square II is an open record.³² To determine whether the application for the income tax credits is open, I must consider CommunityWorks' role as the general partner for the Partnership developing Library Square II. Specifically, I must consider the public funds CommunityWorks is receiving in its capacity as general partner for the Partnership.

This office has reviewed materials submitted by the North Dakota Housing Finance Agency and CommunityWorks concerning public funds received by CommunityWorks in relation to the Library Square II development. In addition to federal funds, the investors in the Library Square II development will receive the low income housing tax credits approved by the North Dakota Housing Finance Agency for supporting the construction of rent-managed affordable senior apartments. The provision of the low income housing tax credits is an authorized economic development program.³³ Thus, the receipt of these tax credits does not constitute support in whole or in part by public funds.

The city of Mandan also has an agreement with the Partnership to provide tax increment financing as a business incentive.³⁴ The provision of tax increment financing

²⁹ Id. CommunityWorks also receives federal funding, but the receipt of federal funding is not relevant to questions concerning the applicability of North Dakota's open records and meeting laws. See N.D.C.C. § 44-04-17.1(13).

³⁰ Letter from Paul Rechlin to Assistant Attorney General Edward Erickson (Aug. 22, 2008); Letter from Paul Rechlin to Assistant Attorney General Edward Erickson (Aug. 8, 2008).

³¹ Id.

³² CommunityWorks keeps its DREAM Funds segregated from its other funds. Letter from Paul Rechlin to Assistant Attorney General Edward Erickson (Aug. 22, 2008); Letter from Paul Rechlin to Assistant Attorney General Edward Erickson (Aug. 8, 2008). If it was determined that CommunityWorks was a "public entity" because of the funds it receives from local public entities for access to the DREAM Fund, only those records relating to the DREAM Fund would be open. See N.D.A.G. 2006-O-04; N.D.A.G. 2004-O-04.

³³ See N.D.A.G. 2001-O-10; N.D.A.G. 98-O-23.

³⁴ See Business Incentive Agreement between City of Mandan and MDI Limited Partnership #100 (Nov. 20, 2007).

is an authorized economic development program.³⁵ Thus, the receipt of this benefit does not constitute support in whole or in part by public funds.

Another benefit provided to the Partnership is the acquisition of the old public library property, which was sold by the city of Mandan to the Partnership for \$1.³⁶ The city previously had requested proposals for the sale of the old public library, but no proposals were received.³⁷ Also, the Partnership must incur the costs of demolishing the building.³⁸ Given this information, the sale of the land and building for \$1 may be presumed to be for fair market value.³⁹ Thus, the sale of the land and building does not constitute support in whole or in part by public funds under the open records law.

Based on the above analysis, it is my opinion that CommunityWorks, in its capacity as general partner for the Partnership developing Library Square II, is not supported in whole or in part by public funds and CommunityWorks' records relating to Library Square II are not subject to the open records laws. Therefore, it is my opinion that CommunityWorks did not violate N.D.C.C. § 44-04-18 by denying Ms. Beehler a copy of the records she requested.⁴⁰

Issue Two

The North Dakota Housing Finance Agency is a division of the Industrial Commission of North Dakota.⁴¹ Therefore, it is a public entity subject to the open records laws.⁴² Certain records of the North Dakota Housing Finance Agency are confidential, as the following state law provides:

³⁵ See N.D.C.C. § 40-58-02(2).

³⁶ Mandan City Commission Minutes (Nov. 20, 2007).

³⁷ Id.

³⁸ See Purchase Agreement between City of Mandan and MDI Limited Partnership #100 (Nov. 20, 2007).

³⁹ Cf. N.D.A.G. 98-F-19 (if a competitive bid process was used, the bid amount can be presumed to be "fair market value").

⁴⁰ CommunityWorks stated that it did not provide copies of the application for income tax credits to Ms. Beehler because N.D.C.C. § 54-17-07.8 made the records confidential. However, N.D.C.C. § 54-17-07.8 applies to records of the North Dakota Housing Finance Agency, and does not apply to records of CommunityWorks. Although the reason CommunityWorks did not provide the records to Ms. Beehler was incorrect, this opinion concludes that the records requested did not need to be provided under the open records law.

⁴¹ N.D.C.C. § 54-17-01 and N.D.C.C. §§ 54-17-07.1 through 54-17-07.11.

⁴² See N.D.C.C. § 44-04-17.1(12).

54-17-07.8. Confidentiality of housing finance agency records.

The following records of the housing finance agency are confidential and are not public records:

1. Personal or financial information of a participant in any of the housing finance agency's programs, obtained directly or indirectly, except for routine credit inquiries or as required by court order.

....

(Emphasis added.) A previous Attorney General concluded that “[p]ersonal or financial information’ under N.D.C.C. § 54-17-07.8 covers any information pertaining to a participant’s relationship with the NDHFA [North Dakota Housing Finance Agency]” except that “the identity of recipients and amounts of tax credits may be disclosed”⁴³

The low income housing tax credit program is administered by the North Dakota Housing Finance Agency. Based on the referenced Attorney General’s conclusion, the application the North Dakota Housing Finance Agency received from CommunityWorks⁴⁴ is confidential under N.D.C.C. § 54-17-07.8. Because the identity of recipients and amount of tax credits may be disclosed, the Industrial Commission released information on July 23, 2007, that CommunityWorks North Dakota would receive a low income housing tax credit of \$524,679 for construction of Library Square II.⁴⁵

It is my opinion that the North Dakota Housing Finance Agency did not violate N.D.C.C. § 44-04-18 when it refused to provide Ms. Beehler a copy of CommunityWorks’ application for income tax credits concerning Library Square II.

CONCLUSIONS

1. CommunityWorks North Dakota, in its capacity as general partner for the Partnership developing Library Square II, is not a public entity and did not violate the open records law when it denied access to its records regarding the Library Square II development.

⁴³ Letter from Attorney General Nicholas J. Spaeth to Howard Swindle (Oct. 25, 1991).

⁴⁴ CommunityWorks North Dakota made the application on behalf of MDI Limited Partnership #100 of which CommunityWorks North Dakota is the general partner.

⁴⁵ Industrial Commission of North Dakota, news release: Tax Credits Allocated for Affordable Housing Development Projects (July 23, 2007).

2. The North Dakota Housing Finance Agency did not violate the open records law by refusing to provide records that are made confidential by statute.

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Attorney General

Assisted by: Edward E. Erickson
Assistant Attorney General

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