

**OPEN RECORDS AND MEETINGS OPINION
2008-O-29**

DATE ISSUED: December 12, 2008

ISSUED TO: North Dakota High School Activities Association

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Mark Thelen asking whether the North Dakota High School Activities Association ("Association" or "NDHSAA") violated N.D.C.C. §§ 44-04-18 and 44-04-20 by failing to provide an electronic copy of requested records and by failing to provide electronic notice of future board meetings.

FACTS PRESENTED

On June 18, 2008, Mark Thelen renewed a request¹ for an e-mailed copy of all board² meeting minutes for regular or special meetings held since November 1, 2007. Mr. Thelen also requested any records the Association had about sanctioning softball and a copy of all future agendas and board information on softball and class A football as the board receives it. Mr. Thelen's request did not specify an electronic format for the e-mailed records.

On June 20, 2008, Sherman Sylling, executive secretary of the Association, replied stating that the Association was of the opinion that posting agendas and a summary of minutes and approved minutes on the Association's website satisfied Mr. Thelen's initial request. Mr. Sylling also stated that he was going to make an oral report to the board regarding softball.³

¹ In March 2008, Mr. Thelen had requested an e-mailed copy of all board minutes for regular or special meetings held since November 1, 2007, and all future minutes and agendas as they are e-mailed to the board.

² The Association is governed by a board of directors made up of school representatives.

³ Since the report was an oral report, there is no "record" of this information. See N.D.C.C. § 44-04-18(4); N.D.A.G. 2008-O-17 (a public entity is not required to create a record that does not exist); N.D.A.G. 2001-O-04 (same). Mr. Sylling did, however, voluntarily create a summary of his oral softball report, which he e-mailed to Mr. Thelen.

Mr. Sylling further wrote that he was waiting for an opinion from the Association's attorney addressing whether the Association was required to produce the requested documents electronically. Mr. Sylling advised that in the meantime, he would provide Mr. Thelen with a hard copy of the records requested for a fee. Before receiving any additional response, Mr. Thelen filed a complaint with this office alleging the Association was in violation of the open records laws.

ISSUES

1. Whether the North Dakota High School Activities Association is a public entity subject to the open records laws.
2. Whether the North Dakota High School Activities Association violated the open records law by failing to e-mail a copy of electronically stored records to a person who requested an electronic copy of the records.
3. Whether the North Dakota High School Activities Association violated the open records law by failing to agree to provide an electronic copy of the notice of board meetings.

ANALYSIS

Issue One: The Association is a public entity.

"Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours."⁴ For purposes of the open records laws, a public entity includes entities that are recognized by state statutes to exercise public authority or perform a governmental function, and also includes entities supported in part by public funds or expending public funds.⁵

The North Dakota Supreme Court has concluded that the Association is primarily supported by public funds and that "the Association has been recognized by the Legislature as performing a valid, needed function in administering interscholastic activities and as such is acting in a manner comparable to a quasi-governmental body."⁶ The Association is recognized by statute as performing governmental functions and it is supported by public funds: school districts are specifically allowed to join the Association;⁷ some of its professional staff are allowed to participate in the Teachers' Fund for Retirement;⁸ and membership in the Association permits certain school

⁴N.D.C.C. § 44-04-18(1).

⁵ N.D.C.C. § 44-04-17.1(12).

⁶ Crandall v. N.D. High Sch. Activities Ass'n, 261 N.W.2d 921, 924-25 (N.D. 1978).

⁷ N.D.C.C. § 15.1-09-33(18).

⁸ N.D.C.C. § 15-39.1-04(11)(b).

officials to inspect otherwise confidential juvenile court records.⁹ Thus, it is my opinion that the Association is a public entity. To the extent N.D.A.G. 95-L-104 and N.D.A.G. Letter to Snortland (Jul. 27, 1979) hold that the Association is not bound by an opinion of this office regarding the open records laws, those opinions are overruled.

Issue Two: Mr. Thelen has a right to an electronic copy of records.

Upon a request for a copy of specific public records, a public entity must furnish the requester one copy of the records requested.¹⁰ A copy of an electronically stored record must be provided at the requester's option in either a printed document or through any other available medium.¹¹ A public entity is not required to provide an electronically stored record in a different structure, format, or organization, except as reasonably necessary to reveal the organization of data contained in the record.

Mr. Thelen requested meeting minutes, agendas, and other records. The Association argues through its attorney that N.D.C.C. § 44-04-18(4) does not require the Association to e-mail Mr. Thelen a copy of public records that are posted and accessible on the Association's website. Specifically, the Association believes that since Mr. Thelen has access to both printed and electronically stored records of all agendas and minutes of the Association's meetings, he is not entitled to a third form, namely e-mails, on demand.

Public entities often provide the public with access to public records through the Internet. Generally, a website will provide the public with a "link" to a record that may be opened if the user has the same program or application. Thus, viewing an electronically stored record in its "native format" requires that the party doing so have the correct program application, e.g., Microsoft Word, e-mail, Excel, PowerPoint, etc.¹²

In this case, the Association's website indicates that meeting minutes and agendas are available on its website by clicking on the relevant link. The documents are accessible in portable document format ("PDF"), a file format which is freely available on the Internet.¹³ It is my understanding, and the Association has not indicated to the contrary, that files which are formatted as a PDF file are easily attachable to an e-mail and may be transmitted without having to make structural, formatting, or organizational changes.

Mr. Thelen could have access to the records he requested if he were to go to the Association's website: <http://www.ndhsaa.org/board> and [committee minutes](http://www.ndhsaa.org/committee).

⁹ N.D.C.C. § 27-20-51(2)(b).

¹⁰ N.D.C.C. § 44-04-18(2).

¹¹ N.D.C.C. § 44-04-18(4).

¹² See generally WIREdata, Inc. v. Village of Sussex, 729 N.W.2d 757 n.6 (Wis. App. 2007), aff'd in part and remanded on other grounds, 751 N.W.2d 736 (Wis. 2008).

¹³ <http://www.adobe.com/products/acrobat/adobe.pdf.html>.

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44-04-18(4), however, allows Mr. Thelen to request a copy of an electronically stored record in a printed document or through any other available medium; Mr. Thelen chose e-mail. If there is no structural, format, or organizational change required to transmit an electronic record, the law does not allow the Association to dictate the medium by which records are transmitted to a requester. Thus, it is my opinion that the Association's refusal to provide an electronic copy of specifically requested board minutes is a violation of N.D.C.C. § 44-04-18(4).

Issue Three: Mr. Thelen has a right to an electronic notice of meetings.

"Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity" ¹⁴ A governing body's presiding officer is responsible for assuring that public notice is given at the same time as the governing body's members are notified, and that the notice is available to anyone requesting the information. ¹⁵ "When a request is made for notice of meetings, the request is effective for one year unless a different time period is specified." ¹⁶

Mr. Thelen asked to receive a copy of the agenda for future board meetings by e-mail at the same time board members receive a copy of the agenda. The Association answered that because notices of board meetings are posted on its website, no individual notice is required.

The open records law expressly provides, and previous opinions of this office have confirmed, that an individual has a right to obtain a copy of the notice of meetings (which includes the agenda) at the same time the governing body's members are notified. ¹⁷ Accordingly, because Mr. Thelen has a right to receive a copy of the notice of board meetings, and a right to receive an electronic copy of records, he has a right to receive an electronic copy of the notice of board meetings regardless of whether the Association chooses to post them on its website.

Based on the foregoing, it is my opinion that the Association violated N.D.C.C. § 44-04-18(4) by failing to provide an electronic copy of specifically requested records and violated N.D.C.C. § 44-04-20(5) by failing to agree to provide an electronic copy of the notice of board meetings at the same time notice is provided to the Association's board members.

CONCLUSIONS

1. The North Dakota High School Activities Association is a public entity.

¹⁴ N.D.C.C. § 44-04-20.

¹⁵ N.D.C.C. § 44-04-20(5).

¹⁶ Id.

¹⁷ N.D.C.C. § 44-04-20(5); N.D.A.G. 2007-O-02; N.D.A.G. 2003-O-08.

2. The North Dakota High School Activities Association violated the open records law by failing to e-mail a copy of electronically stored records to Mr. Thelen.
3. The North Dakota High School Activities Association violated the open records law by failing to provide an electronic copy of the notice of board meetings to Mr. Thelen.

STEPS NEEDED TO REMEDY VIOLATION

The North Dakota High School Activities Association has now provided Mr. Thelen with an electronic copy of the meeting minutes he requested and NDHSAA must e-mail a copy of the agenda for future board meetings to him at the same time the agenda is distributed to board members for one year from the date he requested notice as set forth by law or a lesser time period dictated by Mr. Thelen.

Wayne Stenehjem
Attorney General

mjm/pg