

**OPEN RECORDS AND MEETINGS OPINION
2013-O-10**

DATE ISSUED: June 25, 2013

ISSUED TO: North Dakota University System Foundation

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Rob Port asking whether the North Dakota University System Foundation violated N.D.C.C. § 44-04-18 by failing to provide a copy of revenue and expenditure records.

FACTS PRESENTED

On January 9, 2013, Mr. Rob Port requested records showing the North Dakota University System Foundation's (Foundation) revenues and expenditures from January 1, 2012, to present, from Linda Donlin, Director of Communications and Media Relations for the North Dakota University System (NDUS).¹ Ms. Donlin consulted legal counsel for the NDUS, who determined the Foundation is not a public entity as defined under N.D.C.C. § 44-04-17.1 because it is a private, non-profit foundation, that carries out non-governmental functions, and is funded by private contributions.² Ms. Donlin replied to Mr. Port on January 11, 2013, reiterating counsel's position, and denying the records request as "those records are not subject to North Dakota's Open Records Law because the foundation is not a public entity as defined at N.D.C.C. 44-04-17.1."³ Mr. Port disagreed with this conclusion and requested an opinion from this office. Although NDUS counsel does not believe the Foundation to be subject to open record laws, a revenue and expense record was provided to Mr. Port on March 23, 2013.

¹ See E-mail from Rob Port to Linda Donlin, NDUS Dir. of Communications and Media Relations (Jan. 9, 2013, 9:34 am CST) (on file with author).

² See Letter from Claire Holloway, NDUS general counsel, to Attorney General's office, (Feb. 20, 2013) (on file with author).

³ See E-mail from Linda Donlin, Dir. of Communications and Media Relations, to Rob Port (Jan. 11, 2013, 2:45 pm CST) (on file with author).

This office requested certain information from the Foundation in order to determine whether it was a “public entity” subject to open record laws.⁴ The Foundation does not have any employees, so NDUS responded and, although cooperative, NDUS was only able to provide sparse details about the Foundation’s formation. According to the Foundation By-laws, the Foundation was created on May 20, 1991,⁵ and:

[f]ormed for exclusively charitable, scientific, and educational purposes, including, for such purposes, the making of distributions to organizations...including, but not limited to, the support, enrichment, advancement, and improvement of higher education in the State of North Dakota, the assistance of students, faculty, employees and officers in public higher education in North Dakota, and support of any of the programs, activities or services of the North Dakota University System.⁶

Based on conversations with NDUS staff and a review of the by-laws and Foundation meeting minutes, the Foundation was originally created for situations where a private donor wanted to provide scholarship money without a specific institution designation. According to the by-laws, the Foundation’s purpose is to solicit funding and support the NDUS and State Board of Higher Education (SBHE).⁷ Currently, it is used primarily to provide compensation for the NDUS and SBHE expenses that exceed the state’s per diem rates.⁸ At a recent meeting, the Foundation’s trustees discussed the need to continue funding the Foundation because it was important to have “resources available to assist the Chancellor and others in promoting the NDUS, similar to access presidents have through their campus foundations,” and considered asking for contributions from the foundations of the individual universities.⁹

ISSUE

Whether the Foundation violated open record laws by denying a request for the Foundation’s revenue and expense records.

⁴ Because the address for the Foundation is the same as NDUS, questions were directed to Ms. Donlin at NDUS.

⁵ This office was able to confirm the exact date of creation through a review of the Articles of Incorporation on file with the Secretary of State’s Office.

⁶ By-Laws of the NDUS Found.; see also Letter from Claire Holloway, NDUS general counsel, to Atty. Gen’s. Office (Feb. 20, 2013) (on file with author).

⁷ See By-Laws of NDUS Found.; see also Min., NDUS Found., (Mar. 27, 2013).

⁸ Min., NDUS Found., (Mar. 27, 2013).

⁹ Id.

ANALYSIS

All records of a “public entity” are open to the public unless otherwise specifically provided by law.¹⁰ This office has summarized the ways in which a nonprofit corporation may be subject to the open record and meeting laws:¹¹

1. The organization is delegated authority by a governing body of a public entity.¹²
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.¹³
3. The organization is supported in whole or in part by public funds or is expending public funds.¹⁴
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.¹⁵

The North Dakota Supreme Court has held that the open record laws cannot be circumvented by delegating a public duty to a third party.¹⁶ Where a government entity has delegated a public duty to a third party, documents in possession of the third party connected with public business are public records within the meaning of N.D.C.C. § 44-04-18.¹⁷

This office has previously issued two opinions regarding non-profit corporations created as foundations in support of two state universities.¹⁸ Both opinions found the respective foundations to be subject to the open records law by way of the fourth factor listed above, i.e., the foundations were acting as agents of the universities by performing a governmental function on their behalf. In both opinions, the universities delegated the

¹⁰ N.D.C.C. § 44-04-18.

¹¹ N.D.A.G. 99-O-02; N.D.A.G. 98-O-21.

¹² See N.D.C.C. § 44-04-17.1(6) (definition of “governing body”).

¹³ See N.D.C.C. § 44-04-17.1(13)(a) (definition of “public entity”).

¹⁴ See N.D.C.C. § 44-04-17.1(10), (13)(c) (definitions of “organization or agency supported in whole or in part by public funds” and “public entity”).

¹⁵ See N.D.C.C. § 44-04-17.1(13)(a), (16) (definitions of “public entity” and “record”).

¹⁶ Forum Pub'g Co. v. City of Fargo, 391 N.W.2d 169 (N.D. 1986).

¹⁷ N.D.A.G. 2009-O-08; N.D.A.G. 2006-O-01.

¹⁸ See N.D.A.G. 2009-O-08 (UND Alumni Assoc. and UND Found.) and N.D.A.G. 2006-O-09 (N.D. State Research Found).

governmental functions of fundraising and management to the private foundations by way of contractual agreements.¹⁹ Written operating agreements between an institution and its foundation setting forth a description of any government functions delegated to the foundation are now required by policy 340.2 of the SBHE.²⁰

Here, there is no written agreement between the NDUS and the Foundation. Without the presence of a contract that defines the relationship between the two entities, it is difficult to utilize the agency analysis previously used by this office. Thus, the following discussion will focus on whether the Foundation is subject to the open records law because it is supported by public funds, expends public funds, or possesses public records.²¹

Based upon the information provided to this office, the Foundation is completely dependent on the NDUS for its operation and administration. The Foundation does not have its own staff, the Foundation trustees are all appointed and approved by the SBHE, and a quorum of the SBHE members sit as trustees on the Foundation.²² In replying to requests such as that from Mr. Port and this office, the Foundation utilized the NDUS's legal counsel and staff members. The trustees of the Foundation meet intermittently, but do not approve or otherwise appear to have any authority over NDUS's use of the funds the Foundation supposedly manages.²³ The Foundation's secretary is also the NDUS Vice Chancellor for Administrative Affairs and handles the yearly filings and issues checks on the Foundation's behalf using the NDUS's office, supplies, and computers.²⁴ Other than using Foundation funds for the annual filing fee to the Secretary of State's office, no funds appear to be used to reimburse the NDUS for the use of its staff or supplies.

Therefore, due to the symbiotic nature of the relationship between the NDUS and the Foundation as described above, it is my opinion that NDUS expends public funds for the Foundation's administration. Because of the use of public funds to administer the Foundation and because of the NDUS's unrestricted use of and access to the Foundation's funds, it is further my opinion that the Foundation records, specifically the

¹⁹ Id.; See also Gannon v. Bd. of Regents, 692 N.W.2d 31, 41 (Iowa 2005).

²⁰ State Board of Higher Education Policy 340.2, (April 6, 2011).

²¹ See SBHE Policy 340.2(3)(i) (Apr. 6, 2011)

<http://www.ndus.nodak.edu/makers/procedures/sbhe/default.asp> (the open records law will apply to any foundation records that relate to activities paid for with public funds).

²² See also, By-Laws of NDUS Found. and Min., NDUS Found. (Mar. 27, 2013).

²³ See, NDUS Foundation minutes, (Mar. 27, 2013) (Trustee's questioned how the Foundation's funds were being used).

²⁴ Telephone conversation between Office of Att'y Gen. staff and Laura Glatt, NDUS staff.

revenue and expense records at issue here, relate to the public business of the NDUS.²⁵ The Foundation initially violated N.D.C.C. § 44-04-18 by refusing to provide a copy of the Foundation's revenues and expense records to Mr. Port.

CONCLUSION

The Foundation violated N.D.C.C. § 44-04-18 when it denied a request for the Foundation's revenues and expenditure's records.

STEPS NEEDED TO REMEDY VIOLATION

The Foundation has remedied its violation by providing the record requested and therefore no other action need be taken.

Wayne Stenehjem
Attorney General

slv/vkk

²⁵ The information contained in the revenue and expense reports would otherwise be available through the NDUS. Because the Foundation is a "public entity," it is also subject to open meeting laws. N.D.C.C. § 44-04-19.