

**OPEN RECORDS AND MEETINGS OPINION
2013-O-16**

DATE ISSUED: November 8, 2013

ISSUED TO: Jamestown/Stutsman County Development Corporation

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Keith Norman, on behalf of The Jamestown Sun, asking whether the Jamestown/Stutsman County Development Corporation violated N.D.C.C. §§ 44-04-19.2, 44-04-19, and 44-04-18 by taking final actions during an executive session, by holding an executive session which was not authorized by law, and by failing to provide salary information.

FACTS PRESENTED

The Executive Committee of the Jamestown/Stutsman County Development Corporation (JSDC) Board of Directors held a meeting on January 30, 2013.¹ During this meeting, the committee went into an executive session “to discuss proprietary information” and received updates on several projects.² No decisions were made by the Executive Committee during the open portions of the January 30, 2013, meeting.³ The JSDC Board of Directors met on February 4, 2013, and received recommendations from the Executive Committee about one of the projects.⁴

The JSDC Executive Committee held two executive sessions during its February 20, 2013, meeting.⁵ One of the executive sessions was held to discuss an employee evaluation and salary of JSDC Chief Executive Officer, Connie Ova.⁶

¹ See Minutes, JSDC Exec. Comm. (Jan. 30, 2013). The Executive Committee consists of six members of the Bd. of Dir.

² Id.

³ See Id., see also Letter from Keith Norman, Staff Reporter, The Jamestown Sun, to Atty. Gen. office (Mar. 1, 2013) (on file with author).

⁴ See Minutes, JSDC Bd. of Dir. (Feb. 4, 2013).

⁵ See Minutes, JSDC Exec. Comm. (Feb. 20, 2013).

⁶ Id.

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On February 20, 2013, the JSDC Business Development Coordinator received a request for minutes of the January 30, 2013, JSDC Executive Committee meeting and salary information of the Chief Executive Officer.⁷ JSDC provided the minutes as soon as they were prepared on February 21, 2013, along with information that the Chief Executive Officer was approved for a 4.5% raise.⁸ Mr. Norman then requested the actual salary figure for the Chief Executive Officer on February 22, 2013.⁹ The JSDC never responded to Mr. Norman and no salary information was ever provided.

ISSUES

1. Whether the JSDC is a “public entity” subject to the state open records and meetings law.
2. Whether the JSDC’s Executive Committee violated N.D.C.C. § 44-04-19.2 by making final decisions in executive session during its January 30, 2013, meeting.
3. Whether the JSDC’s Executive Committee violated N.D.C.C. § 44-04-19.2 by holding an unauthorized executive session to discuss personnel records on February 20, 2013.
4. Whether the JSDC violated N.D.C.C. § 44-04-18 when it failed to provide salary information to Mr. Norman.

ANALYSIS

Issue One

The state open records and meetings law applies to all “records” and “meetings” of a “public entity.”¹⁰ The definition of “public entity” in N.D.C.C. § 44-04-17.1(13) is not limited to entities that are traditionally viewed as “governmental.”¹¹ Rather, as summarized in previous opinions of this office, there are a number of ways a “nongovernmental” organization may be fully or partially subject to open records and meetings law:

⁷ See Letters from JSDC to Asst. Atty. Gen. Sandra Voller (Mar. 28, 2013, Apr. 12, 2013, and Apr. 25, 2013) (on file with the author).

⁸ Id.

⁹ See Email from Keith Norman to DeAnn Brunner, JSDC Dev. Coordinator (Feb. 22, 2013, 8:04 am) (on file with author).

¹⁰ N.D.C.C. §§ 44-04-18, 44-04-19; N.D.A.C. 2001-O-10.

¹¹ N.D.A.G. 2001-O-10.

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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 or
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

JSDC does not dispute that it is a public entity subject to the open records and meetings law, but it does dispute the reason it is subject to the law. It argues it is only a “public entity” because it is an organization supported by public funds as defined in N.D.C.C. § 44-04-17.1(13)(c).¹⁶ It receives funding from sales and use tax from the city of Jamestown, and from Stutsman County mill levies.¹⁷

JSDC denies it is an agent or agency of a public entity performing a governmental function on behalf of a public entity. JSDC bases this position on a past opinion from

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), (b) (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), (16) (definitions of “public entity” and “record”).

¹⁶ Whether JSDC is a public entity only by virtue of it being supported by public funds is important as there is an exception under open records law for “personnel records” of entities that are public only because they are supported by public funds under N.D.C.C. § 44-04-18.1(3).

¹⁷ See Letter from JSDC to Asst. Atty. Gen. Sandra Voller (Apr. 12, 2013) (on file with author); see also Jamestown City Code, Sec. 25.5-24(2) Art. III; Agreement between The City of Jamestown, N.D. and Stutsman Cnty., N.D., and Jamestown/Stutsman Dev. Corp. (Sept. 8, 2008); JSDC Budget (2012); Minutes, Jamestown City Council (Aug. 6, 2012); and Minutes, Stutsman Cnty. Comm. (July 24, 2012 and Oct. 2, 2012).

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the Attorney General's office, N.D.A.G. 2007-L-17, which analyzed whether the JSDC was exempt from real property taxation.¹⁸ JSDC relies on one paragraph in the opinion:

The Corporation originated as a private non-profit corporation and, despite its links to the City of Jamestown and Stutsman County, it remains just a private non-profit corporation. Neither you nor the Corporation's counsel have provided any specific statutory authority for this Corporation to be found to be an agency of the city, the county, or both. Therefore, in reliance on the information provided to me, it is my further opinion that the Corporation is not a political subdivision, nor is it an agency of the City of Jamestown or Stutsman County.¹⁹

The 2007 opinion was based, in large part, on the lack of a contract, or any other agreement, creating or otherwise connecting JSDC to the City of Jamestown or Stutsman County. However, on September 8, 2008, the City of Jamestown and Stutsman County entered into an agreement with JSDC, pursuant to N.D.C.C. § 40-57.4-04, to promote economic and job development for the political subdivisions.²⁰ The City of Jamestown passed a resolution, approving the agreement, on September 8, 2008.²¹ Pursuant to the agreement, JSDC adopted a Policy and Procedures Statement for the Economic Development Fund (Policy and Procedures Statement), approved by Jamestown City Council on June 6, 2011, and the Stutsman County Commission on June 7, 2011, which further contracts the legal rights, responsibilities, and other expectations among the parties.²² The agreements entered into subsequent to the 2007 opinion between JSDC, the City of Jamestown, and Stutsman County were required in order to be compliant with N.D.C.C. § 40-57.4-04 and thereafter established the JSDC as the city's job development authority.

¹⁸ JSDC incorrectly relies on the "government agency test" for tax exemption purposes rather than the "agent or agency of government" test under open records and meetings law. See N.D.A.G. 2007-L-17 versus N.D.A.G. 2009-O-14; N.D.A.G. 2008-O-26. The government agency test for tax exemption purposes is a statute specific analysis to determine whether the JSDC could qualify for tax exemption by virtue of statutory authority rendering them a governmental agency or a division thereof. The agent or agency of government test utilized in open records and meetings law analyzes the types of services provided and whether the organization is acting in place of the public entity rather than providing services to the public entity. N.D.A.G. 2001-O-10.

¹⁹ See N.D.A.G. 2007-L-17.

²⁰ See Agreement between the City of Jamestown, N.D., Stutsman Cnty., N.D., and JSDC (Sept. 8, 2008).

²¹ See City of Jamestown, N.D., Resolution (Sept. 8, 2008).

²² See Jamestown/Stutsman Dev. Corp. Policies and Procedures Statement for the Econ. Dev. Fund. (June, 2011).

I have previously concluded that economic development corporations providing economic development services under contract with government entities were performing a governmental function and were therefore “agencies of government” under the North Dakota Supreme Court holding in Forum Publ’n Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986) (“[w]e do not believe the open-record law can be circumvented by the delegation of a public duty to a third party”).²³

Here, the JSDC is exercising the functions and powers of a city job development authority pursuant to N.D.C.C. § 40-57.4-06. It “has been designated by the City Council and County Commission to seek out, examine and process applications for purposes of making recommendations to the City Council and County Commission concerning worthy projects for utilization of the Economic Development Fund.”²⁴ Jamestown City Council and the Stutsman County Commission provide final approval for all projects recommended by JSDC.²⁵ Thus, like other economic development corporations,²⁶ JSDC acts as an agent of the City of Jamestown and Stutsman County in performing the governmental function of promoting economic development on their behalf.

Finally, the definition of “public entity” includes entities recognized by a resolution of a political subdivision to perform a governmental function.²⁷ Here, the Jamestown City Council passed a resolution on September 8, 2008, to enter into a written contract for the promotion of economic development with JSDC and the Stutsman County Commission.²⁸ This Resolution recognizes JSDC as performing the governmental function of promoting economic development through collaboration and funding from the City of Jamestown and Stutsman County.²⁹

²³ See N.D.A.G. 2001-O-11 (Fargo-Cass Cnty. Econ. Dev. Corp. is an agency of Cass Cnty., Fargo, and West Fargo because the organization was funded by the entities and was contracted to carry out the bulk of economic development efforts of the three political subdivisions); N.D.A.G. 2001-O-10 (Minot Area Dev. Corp. is an agency of government because Minot delegated authority to MADC to promote the city economic development fund and to make recommendations to Minot on how to spend that fund).

²⁴ Jamestown/Stutsman Dev. Corp. Policies and Procedures Statement for the Econ. Dev. Fund (June 2011).

²⁵ Id.

²⁶ See N.D.A.G. 2001-O-11 (Fargo-Cass Cnty. Econ. Dev. Corp.) and N.D.A.G. 2001-O-10 (Minot Area Dev. Corp.).

²⁷ See N.D.C.C. § 44-04-17.1(13)(b).

²⁸ See Resolution attached as Exhibit 7 to April 12, 2013, letter from JSDC to Atty. Gen.’s office.

²⁹ See N.D.A.G. 98-O-23.

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Because JSDC is supported by public funds, is an agency of the City of Jamestown and Stutsman County, and is recognized by resolution of a political subdivision to perform a governmental function, it is my opinion that the JSDC is a public entity subject to open records and meetings law.³⁰

Issue Two

Mr. Norman alleges final action was taken during an executive session at a meeting of JSDC's Executive Committee, held on January 30, 2013.³¹ Generally, any final action concerning the topics discussed or considered during an executive session must be taken at a meeting open to the public.³² "Final action" is defined as "a collective decision or a collective commitment or promise to make a decision on any matter, including formation of a position or policy...."³³

JSDC's Executive Committee held an executive session during its January 30, 2013, meeting to discuss various topics involving proprietary information.³⁴ JSDC admits, and a review of the tape of the executive session confirms, final action was taken by the Executive Committee during executive session.³⁵ Accordingly, it is my opinion that the Executive Committee violated N.D.C.C. § 44-04-19.2(2)(e).

³⁰ As a public entity, the JSDC Bd. of Dir. is the governing body of JSDC and the committees thereof are subject to the open meeting laws. See N.D.C.C. § 44-04-17.1(6); N.D.A.G. 2009-O-12 ("A 'governing body' includes any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body. Under this definition, a committee that is delegated authority to perform any function on behalf of a governing body, including fact gathering, reporting, or recommending action, as well as taking action, is subject to the state's open meetings law.").

³¹ Mr. Norman limited his question on the Jan. 30, 2013, meeting to whether final action was taken and not to the validity of the executive session.

³² N.D.C.C. § 44-04-19.2(2)(e); N.D.A.G. 2013-O-02.

³³ N.D.C.C. § 44-04-19.2(2)(e).

³⁴ See Letters from JSDC to Atty. Gen.'s office (Mar. 28, 2013, and April 12, 2013) (on file with author); see also Min. Exec. Comm. (Jan. 30, 2013).

³⁵ See Letters from JSDC to Atty. Gen.'s office (Mar. 28, 2013, and April 12, 2013) (on file with author); see also Min. Exec. Comm. (Jan. 30, 2013).

Issue Three

Mr. Norman alleges an executive session, held on February 20, 2013, by the Executive Committee to discuss an employee evaluation was unauthorized under N.D.C.C. § 44-04-19.1.³⁶

A governing body of a public entity, or committee thereof, may hold an executive session to consider closed or confidential information.³⁷ A closed record is “all or part of an exempt record that a public entity in its discretion has not opened to the public.”³⁸ For most public entities, personnel records are generally not exempt or confidential.³⁹ There is an exception, however, in N.D.C.C. § 44-04-18.1(3) for public entities that are subject to the open records and meetings law only because they are “supported by public funds.”⁴⁰ For this type of public entity, “nonconfidential information contained in a personnel record⁴¹ of an employee” is exempt.⁴²

As determined previously, JSDC is a public entity not only because it is supported by public funds, but also because it is an agency of political subdivisions and recognized by resolution of a political subdivision. JSDC cannot therefore claim this exception to open records and meetings law and its personnel records are open to the public unless otherwise specifically provided by law. Thus, the Executive Committee’s discussion regarding a personnel matter was not automatically exempt. Accordingly, it is my opinion that the Executive Committee violated N.D.C.C. § 44-04-19.2 by holding an executive session not authorized by law.

³⁶ Mr. Norman limited his question on the February 20, 2013, meeting to the executive session held to review employee evaluation and salary and not to the validity of other executive sessions and/or topics.

³⁷ N.D.C.C. § 44-04-19.2(1).

³⁸ N.D.C.C. § 44-04-17.1(2).

³⁹ N.D.A.G. 2006-O-14; see also N.D.A.G. 2011-O-10; N.D.A.G. 2008-O-02

⁴⁰ N.D.C.C. § 44-04-18.1(3); N.D.A.G. 2006-O-14.

⁴¹ “Personnel records” means documents that directly pertain to employment and an employee’s ability to perform a job, including performance ratings or evaluations; records used to determine qualifications for employment, promotions, or demotions; notices of commendations or warnings; and records of termination or other disciplinary action. N.D.A.G. 2006-O-14; N.D.A.G. 2006-O-04.

⁴² N.D.C.C. § 44-04-18.1(3); N.D.A.G. 2006-O-14; N.D.A.G. 2006-O-04; 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).

Issue Four

Finally, Mr. Norman alleges that JSDC violated N.D.C.C. § 44-04-18 by not providing salary information upon request.⁴³ Mr. Norman requested the actual salary figure from Ms. Brunner on February 22, 2013.⁴⁴ JSDC did not respond to Mr. Norman.

Once a request for records is made to a public entity under N.D.C.C. § 44-04-18, the public entity must either provide the records or explain why the request is not being satisfied, within a reasonable time.⁴⁵ As stated previously, for most public entities, personnel records, including salary amounts, are not exempt or confidential.⁴⁶ It is my opinion that JSDC violated N.D.C.C. § 44-04-18 when it did not provide any response to Mr. Norman.

CONCLUSIONS

1. The JSDC is a “public entity” subject to open records and meetings law because it is supported by public funds, is an agency of political subdivisions, and is recognized by resolution of a political subdivision.
2. The JSDC’s Executive Committee violated N.D.C.C. § 44-04-19.2 by taking final action in executive session during its January 30, 2013, meeting.
3. The JSDC’s Executive Committee violated N.D.C.C. § 44-04-19.2 by holding an unauthorized executive session to discuss personnel records on February 20, 2013.
4. The JSDC violated N.D.C.C. § 44-04-18(7) when it failed to respond to Mr. Norman.

⁴³ Mr. Norman limited his question to whether the JSDC violated open records law by not providing salary information upon request and not to the response and timeliness of the request for the Jan. 30, 2013, meeting minutes.

⁴⁴ See Email from Keith Norman to DeAnn Brunner, JSDC Dev. Coordinator (Feb. 22, 2013).

⁴⁵ N.D.C.C. § 44-04-18. Because JSDC believed its personnel records were protected under N.D.C.C. § 44-04-18.1(3), it is likely JSDC did not think it was obligated to provide the information. However, even if JSDC believed its personnel records were protected, N.D.C.C. § 44-04-18(7) still requires a response denying the records request. See Letter from Gary Riffe, JSDC Bd. Pres. to Asst. Atty. Gen. Sandra Voller (Mar. 28, 2013) (on file with author).

⁴⁶ N.D.A.G. 2008-O-04.

STEPS NEEDED TO REMEDY VIOLATIONS

JSDC must amend its January 30, 2013, Executive Committee meeting minutes to include a summary of any motions made and roll call vote of each member, taken during executive session, without identifying any confidential or proprietary information.

JSDC must also amend its February 20, 2013, Executive Committee minutes to include the employee evaluation of Ms. Ova. I note that the tape recorder malfunctioned during the employee evaluation of Ms. Ova. However, the Executive Committee did keep a record of comments made during the evaluation, along with employee performance appraisals. These documents are considered public records that should be provided to anyone requesting them.

Copies of the amended January 30, 2013, and February 20, 2013, Executive Committee meeting minutes, along with the comments and employee performance appraisal relating to Ms. Ova's evaluation, and records showing Ms. Ova's actual salary must be provided to Mr. Norman at no cost.

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. § 44-04-21.2.⁴⁷ It may also result in personal liability for the person or persons responsible for the noncompliance.⁴⁸

Wayne Stenehjem
Attorney General

slv/vkk

⁴⁷ N.D.C.C. § 44-04-21.1(2).

⁴⁸ Id.