

**OPEN RECORDS AND MEETINGS OPINION
2003-O-08**

DATE ISSUED: July 22, 2003

ISSUED TO: Dakota Center for Independent Living

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Madonna Logosz asking whether the Dakota Center for Independent Living (Center) violated N.D.C.C. §§ 44-04-18 and 44-04-20 by refusing to provide records and notice of its meetings.

FACTS PRESENTED

Madonna Logosz requested the following records from the Center: an advance copy of all board of directors' agendas and related material for meetings; advance notice of scheduled, cancelled, or rescheduled meetings; board of director minutes and attachments of all meetings; the Center's newsletter; and "other communications with consumers." Ms. Logosz received a response to her records request from the Center's attorney, who contends that the Center is a private non-profit organization and, as such, is exempt from the open records and meetings laws.

The Center is a nonprofit corporation. It was incorporated May 12, 1993, in Bismarck, North Dakota. It is one of four independent living centers in the state.

In 1993, the legislature enacted N.D.C.C. ch. 50-06.5 to strengthen and coordinate the work of the independent living centers. The legislation was also the state's response to the federal Rehabilitation Act of 1973 which required states to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society through independent living centers and services, among other things, by October 1, 1993. 29 U.S.C.A. § 701(1)(B).

Chapter 50-06.5, N.D.C.C., creates a statewide independent living council (Council) and names Vocational Rehabilitation, a division of the Department of Human Services, as the designated state agency to work with the Council. N.D.C.C. §§ 50-06.5-01(4) and

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50-06.5-02. Members of the Council are appointed by the Governor. N.D.C.C. § 50-06.5-03(1). The Council and Vocational Rehabilitation must develop a statewide, comprehensive plan addressing how to support, provide for, and coordinate independent living services. N.D.C.C. §§ 50-06.5-04(1) and 50-06.5-05.

In addition to receiving state money, independent living centers receive a federal grant from the Department of Education. The Dakota Center for Independent Living also receives a grant from the Developmental Disabilities Council, an Otto Bremer grant, a Medicaid Infrastructure Grant, a Family Support Grant and income from fees and donations.

ISSUES

1. Whether the Dakota Center for Independent Living is a public entity subject to the open records and meetings laws.
2. Whether the Dakota Center for Independent Living violated N.D.C.C. §§ 44-04-18 and 44-04-20 by refusing to provide records and notice of its meetings.

ANALYSES

Issue One

The North Dakota open records law, N.D.C.C. § 44-04-18, applies to “records” of a “public entity” as those terms are defined in N.D.C.C. § 44-04-17.1(12), (15). N.D.A.G. 99-O-03. The Center is subject to the open records and meetings laws if it is created or recognized by state law, or by an action of a political subdivision, to exercise public authority or perform a governmental function. See N.D.C.C. § 44-04-17.1(12)(a) (definition of “public entity”); See N.D.A.G. 98-O-23; N.D.A.G. 98-O-21. It also is a public entity if it is supported in whole or in part by public funds or expends public funds. See N.D.C.C. § 44-04-17.1(9), (12)(c) (definitions of “organization or agency supported in whole or in part by public funds” and “public entity”); Id.

Recognized by state law to perform a governmental function.

An organization is a public entity for purposes of the open records and meetings laws if it is recognized by state law to exercise public authority or perform a governmental function. N.D.C.C. § 44-04-17.1(12)(b). The facts here are similar to those addressed in N.D.A.G. 98-O-21. That opinion involved the North Dakota Association of Soil Conservation Districts (Association), a nonprofit corporation formed in 1952 to serve public interests

related to soil and water conservation. In 1957, the Legislature adopted state laws placing certain land in control and possession of the Association. The Attorney General determined that the Association was therefore “recognized by state law.” N.D.A.G. 98-O-21. The Association also performed the governmental function of managing public lands for soil conservation purposes and was therefore a public entity. Id.

As stated previously, the Center existed prior to the enactment of N.D.C.C. ch. 50-06.5. Chapter 50-06.5 contains specific references to the centers for independent living. It creates a relationship between the Vocational Rehabilitation division of the Department of Human Services and the Center. Providing independent living core services and other assistance to the disabled is a governmental function. N.D.C.C. ch. 50-06.5. By the enactment of chapter 50-06.5, the Center was recognized by state law. It also provides the governmental function of providing services to the disabled and is therefore a public entity.

Supported in whole or in part by public funds.

An organization can also be a public entity if it is supported in whole or in part by public funds or expends public funds. The Center argues that it is not supported by public funds because the state funds it receives are for services provided at fair market value. In a 1998 opinion, this office explained that an organization was not supported by public funds, even if the funds are provided under a “Grant Agreement,” as long as the goods and services provided in exchange for those funds are reasonably identified in the agreement and have a fair market value that is equivalent to the amount of public funds it receives. N.D.A.G. 98-F-19. That opinion also explained that if a competitive bid or proposal process was used to award the contract and establish the reimbursement rates, the rates resulting from the process could be presumed to be “fair market value.” Id.

This office has examined the agreements between the Center and the Department of Human Services. Although the agreement allocating funds to the Center from Vocational Rehabilitation is entitled “Grant Agreement,” it can be distinguished from the kind of contract discussed in the 1998 opinion mentioned above, N.D.A.G. 98-F-19. The grant agreement in this case is not a contract arrived at through a competitive process. The Center does not “compete” with the other centers for the money from Vocational Rehabilitation. Vocational Rehabilitation, by statute, must allocate funds from the sums appropriated by the Legislature to support the operation of centers for independent living pursuant to the state plan.¹ N.D.C.C. § 50-06.5-08(2). Vocational Rehabilitation includes a line item for the independent living centers in its budget. The allocation from the

¹ The state plan states that “[t]he Council will pursue its commitment to use state dollars to support Centers for Independent Living and the delivery of services to people with disabilities.” State Plan for Independent Living, Fiscal Years 201-2004, Attachment 1, pg.9.

Legislature is divided among the four centers in the state regardless of the details of how each center chooses to use the money.

In order to not be considered general support, the goods and services provided in exchange for funds must be reasonably identified in the agreement and must have a fair market value that is equivalent to the amount of funds it receives. Id. The only requirement to receive the allocation from Vocational Rehabilitation is that the Center meet the basic requirement of assisting individuals with severe disabilities. The "Scope of Service" provided for in the agreement with Vocational Rehabilitation is very general.² It cannot be ascertained from reading the grant agreement what specific services the Center will provide in exchange for the funds. The discretion given to the Center to decide how to use the funds also indicates the funds are for general support, rather than an exchange for services provided at fair market value. See, N.D.A.G. 99-O-03.

The funding in this case resembles a legislative appropriation for general support of an agency or division of an agency, rather than a contract for services. This office has explained that such funds for general support are exactly the type of payment of public funds intended to be addressed by N.D.C.C. § 44-04-17.1(12)(c). Id.³ Unless the public is allowed access to the records of the organization supported by the funds, there is no way for the public to know specifically how its funds are being used. Id.

It is my opinion that because the Center is recognized by state statute to perform a governmental function and is supported by public funds, it is a public entity for purposes of the open records and meetings laws.

Issue Two

Section 44-04-20(5), N.D.C.C., requires that notice of meetings be given to any member of the public who requests it, at the same time the governing body's members are notified.

² The Center must use the funds to "continue a program of services designed to assist individuals with severe disabilities whose ability to function independently in the family, community, or whose ability to obtain or maintain employment is substantially limited." The services offered by the Grantee will be, at a minimum, the four core services..." Addendum to Master Grant Agreement, July 1, 2001, page 1 (master contract #005-01703, addendum #700-04324).

³ As stated in the facts, the Center also receives a grant from the State Council on Developmental Disabilities Council, a public entity. Unlike the grant from Vocational Rehabilitation, the grant with the Developmental Disabilities Council meets the criteria set forth in N.D.A.G. 98-F-19 because the money it receives is fair market value for a reasonably identified service.

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N.D.A.G. 99-O-10. Therefore, the Center must provide Ms. Logosz with notice of its meetings at the same time it provides notice to the members of its governing body.

As a public entity, all records of the Center are open records, unless made exempt or confidential by state or federal law. N.D.C.C. § 44-04-18. The meeting agendas, material for meetings, board of director minutes and attachments, and newsletters are all open records. Ms. Logosz could ask for this information prior to every meeting, however, she has made a standing request for such records and notices instead. The North Dakota Supreme Court has examined a standing request by an insurance support organization to receive individual driver's information on a monthly basis. Robot Aided Manufacturing, Inc. v. Moore, 589 N.W.2d 187 (N.D. 1999). The Court held that a standing request is valid but that the company must periodically submit written requests for the specific documents it sought. Id. at 190. It is reasonable, in light of the Robot case, that the Center choose a reasonable length of time during which it will honor standing requests. After expiration of that time period, the requestor will have to renew the request.

Ms. Logosz also requested copies of "other communications with consumers." The open records law provides that a request be for "specific public records." N.D.C.C. § 44-04-18(2); N.D.A.G. 2001-O-12 (a request for large number of records is not, by definition, overbroad); N.D.A.G. 2003-O-04. The public entity must be able to reasonably identify the records sought by the requestor. It is my opinion that Ms. Logosz's request for "other communications with consumers" is overbroad and that Ms. Logosz should clarify what specific records she is seeking from the Center. Therefore, it was not a violation of the open records law to deny that part of her request.

The Center may charge a reasonable fee for making or mailing the copies, or both. N.D.C.C. § 44-04-18(2). It may also require payment before making or mailing the copies. Id.

It is my opinion that the Center violated the open records law and notice of meetings law when it refused to provide the requestor with copies of records other than records of "communications with consumers," and notice of meetings she requested.

CONCLUSIONS

1. The Dakota Center for Independent Living is a public entity subject to the open records and meetings laws.
2. The Dakota Center for Independent Living violated N.D.C.C. §§ 44-04-18 and 44-04-20 by refusing to provide records and notice of its meetings. It was not a

violation of N.D.C.C. § 44-04-18, however, to deny Ms. Logosz's request for "other communications with consumers."

STEPS NEEDED TO REMEDY VIOLATION

The Center must provide Ms. Logosz with copies of the minutes of all Board of Director meetings, together with their attachments, from March of 2002 to the present. The Center must also provide Ms. Logosz with the copies of the following records for a reasonable period of time, to be determined by the Center, at the same time the records are provided to the board members: notice of scheduled, cancelled, or rescheduled meetings; agendas with related material; meeting minutes and attachments; and the newsletter. The Center does not have to provide Ms. Logosz with "other communications with consumers" unless she clarifies the specific public records she is seeking.

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. N.D.C.C. § 44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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