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**LETTER OPINION**  
**2022-L-04**

Ms. Sandra DePountis, Executive Director  
North Dakota Board of Medicine  
4204 Boulder Ridge Road Ste 260  
Bismarck, ND 58503

Dear Ms. DePountis:

Thank you for your letter requesting an opinion on whether the North Dakota Professional Health Program (“NDPHP”) is a public entity pursuant to North Dakota Century Code (N.D.C.C.) § 44-04-17.1(13), and is therefore subject to open records and meetings laws. It is my opinion the NDPHP is a public entity subject to open records and meetings laws.

**BACKGROUND FACTS**

The physician health program was established as part of the North Dakota Board of Medicine (“Board”) to facilitate and monitor the treatment of physicians for chemical addictions or abuse, mental illnesses, and behavioral disorders. The program aims to protect the public from the unsafe practice of medicine. In 2013, the Legislative Assembly adopted legislation which moved the physician health program from within the Board to a stand-alone entity.<sup>1</sup> That legislation was codified as N.D.C.C. ch. 43-17.3, which defines the physician health program as “a board-sanctioned program for the detection, intervention, and monitoring of licensees with conditions that could result in impairment.”<sup>2</sup> “Impairment” is defined as “the presence of any physical, mental, or behavioral disorder or pattern of alcohol or substance abuse which interferes with a [physician or other health professional under the jurisdiction of the Board of Medicine]’s ability to engage safely in professional activities.”<sup>3</sup> The reasons underpinned the shift of the program from within the Board of Medicine to a separate entity, including staffing concerns, restraints for the Board, and a push to make the program more accessible for physicians.<sup>4</sup>

Pursuant to the Board’s authority under N.D.C.C. § 43-17.3-02, the Board contracts with the NDPHP to provide the services set forth in N.D.C.C. ch. 43-17.3. The most recent contract with the NDPHP was executed in 2021 and lists specific services to be provided by NDPHP in exchange for a monthly payment. The contract states the NDPHP may use the funds from the Board only to fulfill

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<sup>1</sup> S.B. 2135, 2013 N. D. Leg.

<sup>2</sup> N.D.C.C. § 43-17.3-01(5).

<sup>3</sup> N.D.C.C. § 43-17.3-01(3).

<sup>4</sup> Hearing on S.B. 2135 Before the S. Gov’t and Veterans Comm., 2013 N.D. Leg. (Jan. 25) (Written Testimony of Duane Houdek).

the services required by the agreement, not for the benefit of any other individuals for whom NDPHP may be providing services.<sup>5</sup> The Board provided 95% of the NDPHP's total funding in 2021.<sup>6</sup>

#### ANALYSIS

Records and meetings of public entities are open to the public unless otherwise specifically provided by law.<sup>7</sup> “The definition of ‘public entity’ is not limited to entities that are traditionally viewed as ‘governmental.’”<sup>8</sup> As summarized in previous opinions, there are a variety of ways a private, nonprofit, “nongovernmental” organization may be fully or partially subject to open records law including the following:<sup>9</sup>

1. The organization is created or recognized by state law, or by an action of a political subdivision;<sup>10</sup>
2. The organization is delegated authority by a governing body of a public entity;<sup>11</sup>
3. 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;<sup>12</sup> or
4. The organization is supported in whole or in part by public funds or is expending public funds.<sup>13</sup>

The Legislative Assembly gave the Board authority to contract with the NDPHP function that was previously performed only by the Board, a governmental entity. Chapter 43-17.3, North Dakota Century Code, specifically dictates the terms of the contract between the Board and the NDPHP;<sup>14</sup> the procedures that must be developed by the NDPHP to carry out its contractual obligations;<sup>15</sup> which records held by the NDPHP are confidential;<sup>16</sup> and the circumstances under which the records held by the NDPHP may be disclosed.<sup>17</sup> The presumption the NDPHP is a public entity

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<sup>5</sup> Contract between N.D. Bd. of Med. and NDPHP, Section 2(b)(4) (2021).

<sup>6</sup> NDPHP 2020 Form 990.

<sup>7</sup> N.D.C.C. § 44-04-18(1); N.D.C.C. § 44-04-19.

<sup>8</sup> N.D.A.G. 2015-O-05, citing N.D.A.G. 2013-O-16; N.D.A.G. 2006-O-05; N.D.A.G. 2001-O-10.

<sup>9</sup> N.D.A.G. 2015-O-05; N.D.A.G. 2013-O-16; N.D.A.G. 2001-O-10; *see also* N.D.A.G. 2014-O-04; N.D.A.G. 2006-O-05; N.D.A.G. 2006-O-04.

<sup>10</sup> N.D.C.C. § 44-04-17.1(13)(a), (b).

<sup>11</sup> N.D.C.C. § 44-04-17.1(6).

<sup>12</sup> N.D.C.C. § 44-04-17.1(13), (16).

<sup>13</sup> N.D.C.C. § 44-04-17.1(10), (13)(c).

<sup>14</sup> N.D.C.C. § 43-17.3-03.

<sup>15</sup> *Id.*

<sup>16</sup> N.D.C.C. § 43-17.3-07.

<sup>17</sup> *Id.*

subject to open records requests is inherent in the Legislative Assembly's decision to designate records of the NDPHP as confidential and codify the circumstances under which the NDPHP's records may be disclosed.

The NDPHP satisfies each of the four, different scenarios above, and satisfying any one of them renders an organization a public entity for open records and meetings laws. First, the physician health program was created by state statute and is recognized by state statute.<sup>18</sup> Second, in accordance with state law, the Board, which is a governing body of a public entity, delegated authority to the NDPHP to perform governmental functions on behalf of the Board. Third, pursuant to the contract executed by the Board and NDPHP, the NDPHP is acting as an agent of the Board in its performance of the physician health program, which is a governmental function of the Board. As previously stated by my office:

The application of the open records law is not limited to a public entity itself; it also applies to recorded information regarding public business which is in the possession of an "agent" of the public entity. The North Dakota Supreme Court has held that the open records law cannot be circumvented by delegating a public duty to a third party. Where a government entity delegates 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. "[The] purpose of the open-record law would be thwarted if we were to hold that documents so closely connected with public business but in the possession of an agent or independent contractor of the public entity are not public records."<sup>19</sup>

The Legislative Assembly mandated the Board "[e]stablish a mechanism for dealing with a licensee who abuses or is dependent upon or addicted to alcohol or other addictive chemical substances, [and] to enter an agreement, at its discretion, with a professional organization whose relevant procedures and techniques it has evaluated and approved for the organization's cooperation or participation."<sup>20</sup> The ultimate responsibility for managing a licensee who abuses or is dependent upon or addicted to alcohol or other chemical substances therefore lies with the Board.<sup>21</sup> The Board satisfies the statutory mandate by contracting with the NDPHP to execute this inherently governmental function for the Board. The Board's previous direct management of licensees struggling with chemical dependency issues underscores the conclusion that performing that duty is a government function.<sup>22</sup> The Board's delegation of that function to the NDPHP renders the NDPHP an agent of the Board subject to the requirements of the open records and meetings laws.

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<sup>18</sup> N.D.C.C. ch. 43-17.3.

<sup>19</sup> N.D.A.G. 2014-O-24 (citations omitted).

<sup>20</sup> N.D.C.C. § 43-17-07.1(6).

<sup>21</sup> *See id.*

<sup>22</sup> Hearing on S.B. 2135 Before the S. Gov't and Veterans Comm., 2013 N.D. Leg. (Jan. 25) (Written testimony of Duane Houdek).


Fourth, the NDPHP is a public entity because it is supported in whole, or in significant part, by the Board of Medicine's public funds.

An organization is supported in whole or in part by public funds when it "receive[s] public funds exceeding the fair market value of any goods or services given in exchange for the public funds, whether through grants, membership dues, fees, or any other payment." However, as long as the goods and services provided in exchange for those funds are reasonably identified in an agreement or contract and have a fair market value that is equivalent to the amount of public funds it receives, the organization is not considered to be "supported" by public funds and is not considered to be subject to open records and meetings law.<sup>23</sup>

The NDPHP has a contract with the Board of Medicine which specifies specific services to be provided, pursuant to state law.<sup>24</sup> The Board pays the NDPHP \$26,000 per month to perform the specified services.<sup>25</sup> The NDPHP, as of January 28, 2022, only serviced forty-three Board of Medicine licensees, no one else.<sup>26</sup> Per the NDPHP's financial disclosures, in addition to the Board's monthly payment, the NDPHP only receives minimal additional grant funding, and a negligible amount from participants for the services rendered.<sup>27</sup> It is clear the NDPHP exists in significant part because of the public funds it receives from the Board.

#### CONCLUSION

The NDPHP was created by state law; is supported in whole or significant part by public funds; and is performing governmental functions delegated by the Legislature and the North Dakota Board of Medicine. Therefore, it is my opinion the NDPHP is a public entity as defined by N.D.C.C. § 44-04-17.1(13) and is subject to open records and open meetings laws.

Regards,  
  
Drew H. Wrigley  
Attorney General

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.<sup>28</sup>

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<sup>23</sup> N.D.A.G. 2015-O-05 (citations omitted).

<sup>24</sup> N.D.C.C. § 43-17.3-03.

<sup>25</sup> Contract between N.D. Bd. of Med. and NDPHP, Section 2(a) (May 27, 2021).

<sup>26</sup> Minutes, N.D. Bd. of Med. (Jan. 28, 2022).

<sup>27</sup> NDPHP 2020 Form 990

<sup>28</sup> See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).