

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 98-O-21**

DATE ISSUED: September 22, 1998

ISSUED TO: Wes Tossett, President, North Dakota Association of Soil Conservation Districts
Gary Puppe, Executive Vice-President, North Dakota Association of Soil Conservation Districts

CITIZEN'S REQUEST FOR OPINION

On July 7, 1998, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Shorty Hoerauf and Roxanne Johnson asking whether the open meetings law was violated when the Board of Directors of the North Dakota Association of Soil Conservation Districts met in two different executive (or closed) sessions on June 29, 1998.

FACTS PRESENTED

The North Dakota Association of Soil Conservation Districts (hereafter "Association") is a nonprofit corporation initially formed by soil conservation district supervisors in 1952. The original purpose of the Association, according to its Articles of Incorporation, was to "further the widespread application of sound and practical soil and water conservation practices on North Dakota farms and ranches." The current Articles of Incorporation specify the purpose and objectives of the Association as follows:

1. Disseminate information relating to the administration and operation of soil conservation districts.
2. Promote cooperation between such districts.
3. Cooperate with the State Soil Conservation Committee and all other state agencies charged with soil and water conservation and other natural resources responsibilities.
4. Cooperate with the United States Soil Conservation Service and other federal agencies charged with soil and water conservation and other natural resources responsibilities.
5. Promote the welfare of soil conservation districts and the people therein.
6. Promote interest and activities of civic and other organizations in the conservation of North Dakota soil and water resources.

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7. Assume active leadership in promoting conservation education in the state.
8. Otherwise coordinate activities in North Dakota in the conservation of soil and water resources.

...

The Articles of Incorporation also state: "The Association is organized to serve public interests. Accordingly, it shall not be operated for the benefit of private interests, such contributors or members of the Association, or persons controlled directly or indirectly by such private interests."

Members of the Association are those supervisors of North Dakota's soil conservation districts¹ whose districts have paid the \$60 per district per year membership dues. The membership dues generate less than one percent of the income of the Association. All other income is generated from operations of Lincoln-Oakes Nurseries, owned and operated by the Association.

The Board of Directors (hereafter "Board") of the Association consists of two soil conservation district supervisors elected from each of five areas of the state, as designated in the Association's bylaws. The Board elects a president and a vice-president, and appoints a secretary and a treasurer. The president presides at all meetings of the Association and the Board. One of the powers of the Board is to employ personnel to further the work of the Association. The Association employed 153 people in 1997.

In 1957, the state of North Dakota accepted certain land in Burleigh County and declared the land to be held in trust for the soil conservation districts of the state for use in carrying out the soil conservation program. 1957 N.D. Sess. Laws ch. 93, codified at N.D.C.C. § 4-22-51. This state law provides, in part,

The lands, having been conveyed to the state of North Dakota by the United States of America for use in carrying out the soil conservation program of the soil conservation districts of the state, are further subject to the condition that they must be used for public purposes and if at any time cease to be so used must revert to and become revested in the United States. . . .

The control, custody, possession, supervision, management, operation, and transfer of the trust lands and any replacement lands is

¹ Soil conservation districts are governmental subdivisions of the state. N.D.C.C. § 4-22-02(3).

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hereby vested in the North Dakota association of soil conservation districts for use in carrying out the soil conservation program of the soil conservation districts of the state and the association in such control, custody, possession, supervision, management, operation, and transfer shall hold all accumulations of personal property or surplus funds derived from said lands in trust for the soil conservation districts of the state for use in carrying out the soil conservation program. . . . Any funds generated through bonuses, leases, royalties, or otherwise generated by minerals reserved by the association or funds generated from the sale of minerals must be held in trust as provided in this section.

N.D.C.C. § 4-22-51 (emphasis added).

At a regular meeting in Bismarck on June 29, 1998, the Board held two executive sessions: one at 11:30 a.m. and one late in the afternoon. Neither of these executive sessions was scheduled on the agenda; they were added to the agenda under the agenda item, "Consider Additions to the Agenda." Association Executive Vice President Gary Puppe has informed this office that the first executive session was held to discuss correspondence received by the president and some Board members which the president felt had created internal misunderstandings and miscommunications among the Board members, and the second executive session was held to evaluate Mr. Puppe's job performance.

ISSUES

1. Whether the Board of Directors of the North Dakota Association of Soil Conservation Districts is subject to North Dakota's open meetings law.
2. Whether the Board of Directors violated the open meetings law by holding two executive sessions on June 29, 1998.
3. Whether the law requiring notice was violated as the result of the executive sessions not being listed on the Board's regular meeting agenda.

ANALYSES

Issue One:

A non-governmental organization, including a nonprofit corporation, is subject to North Dakota's open meetings and records laws, at least in part, under any of the following four circumstances:

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1. The organization is delegated authority by a governing body of a public entity. See N.D.C.C. § 44-04-17.1(6) (definition of "governing body").
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. See N.D.C.C. § 44-04-17.1(12)(a) (definition of "public entity").
3. The organization is supported in whole or in part by public funds or is expending 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").
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. See N.D.C.C. § 44-04-17.1(12), (15) (definitions of "public entity" and "record").

In this case, there are three possible ways in which the Association and its Board could be subject to North Dakota's open meetings law. First, the Association could be created or recognized to exercise public authority or perform a governmental function. Second, the Association could be supported in whole or in part by public funds. Third, the Association could be acting as an agency of another public entity.

"Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public." N.D.C.C. § 44-04-19. The open meetings law is violated when any person is denied access to a meeting that is required to be open. N.D.C.C. § 44-04-19(1). As used in the open meetings law, "public entity" means:

- a. Public or governmental bodies, boards, bureaus, commissions, or agencies of the state, including any entity created or recognized by the Constitution of North Dakota, state statute, or executive order of the governor to exercise public authority or perform a governmental function;
- b. Public or governmental bodies, boards, bureaus, commissions, or agencies of any political subdivision of the state and any entity created or recognized by the Constitution of North Dakota, state statute, executive order of the governor, resolution, ordinance, rule, bylaw, or executive order of the chief executive authority of a political subdivision of the state to exercise public authority or perform a governmental function; and

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- c. Organizations or agencies supported in whole or in part by public funds, or expending public funds.

N.D.C.C. § 44-04-17.1(12).

As indicated in the FACTS PRESENTED portion of this opinion, the Association has been authorized by the North Dakota Legislature to perform the governmental function of having "[t]he control, custody, possession, supervision, management, operation, and transfer of the trust lands and any replacement lands . . . for use in carrying out the soil conservation program of the soil conservation districts of the state" N.D.C.C. § 4-22-51. Soil conservation through soil conservation districts is a governmental function. See N.D.C.C. ch. 4-22. Thus, the Association is recognized by state law to perform a governmental function.

In addition, both N.D.C.C. § 4-22-51 and the history of the Association reflect the fact that the Association acts as an agency of its member soil conservation districts. Since 1957, the Association has been a trustee of the soil conservation districts, and has held and managed the property on behalf of the soil conservation districts. The Association has been further required to use any income generated by the property for the same purposes. In addition, the articles and bylaws of the Association reflect that its corporate purposes are predominantly to further the cause of soil conservation in general and the functions of the soil conservation districts in particular. Only soil conservation district supervisors may serve as members of the Association.

The North Dakota Supreme Court, interpreting statutory language similar to the language currently found in N.D.C.C. § 44-04-17.1(12)(b), has held that a non-governmental organization performing a governmental function on behalf of a political subdivision is an "agency" of that subdivision and therefore subject to the open records law. Forum Publishing Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986). See also Grand Forks Herald v. Lyons, 101 N.W.2d 543, 546 (N.D. 1960) ("agencies of the state" indicates a relationship whereby the state delegates the transaction of some lawful business to another). This office reached a similar result concerning the North Dakota Insurance Reserve Fund (NDIRF), concluding that, because the governmental entities participating in NDIRF could establish their own self-insurance fund, an organization performing that governmental function on behalf of a "pool" of governmental entities was an "agency" of those entities and therefore subject to the open records and meetings laws. Letter from Attorney General Nicholas Spaeth to Ken Solberg (August 2, 1991). See also N.D.A.G. 98-O-04 (joint enterprise of several counties is an "agency" of those counties).

The reasoning in Forum Publishing and the 1991 opinion regarding NDIRF apply to the situation presented in this opinion. Soil conservation districts are "political subdivisions" as defined in N.D.C.C. § 44-04-17.1(10). The soil conservation districts, under their

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broad statutory authority in N.D.C.C. § 4-22-26, could develop and coordinate their conservation activities without forming an association, but chose many years ago to incorporate the Association to perform that function. The State of North Dakota aided that joint effort by transferring property to the Association under N.D.C.C. § 4-22-51 as a way of supporting the conservation efforts of all the soil conservation districts. The purposes and membership of the Association continue to reflect the close relationship between the Association and the soil conservation districts, which is a link that distinguishes the Association from any other nonprofit organization engaged in tree-planting or other soil conservation.

Based on the authorities cited above, and the relationship between the Association and the soil conservation districts as political subdivisions, it is my opinion that, because the Association is recognized by state law and is an agency of a political subdivision under N.D.C.C. § 44-04-17.1(12)(b), the Association is a "public entity" and therefore subject to the open meetings law.²

Issue Two:

Two executive sessions were held by the Board of Directors on June 29, 1998. The first executive session was held to discuss correspondence received by the president and some Board members which the president felt had created internal misunderstandings and miscommunications among the Board members. The second executive session was held to evaluate Gary Puppe's job performance.

As a public entity, any "meeting" of the Association is required to be open to the public unless an executive (closed) session is specifically authorized by law. N.D.C.C. § 44-04-19. "Meeting" means a gathering of the governing body of a public entity regarding the entity's "public business," which is further defined as the public entity's performance of a governmental function or use of public funds. N.D.C.C. § 44-04-17.1(8)(a), (11). Thus, whether all or part of a gathering of the Board of Directors of the Association is required to be open to the public unless otherwise provided by law depends on whether the gathering pertains to the Association's "public business." Based on the discussion above in Issue One, the "public business" of the Association is its soil conservation activities and its management of the property with which it was entrusted under N.D.C.C. § 4-22-51.

Regarding the first executive session, the relationship and communications between Board members is relevant to the manner in which the Board makes decisions regarding 1) the property described in N.D.C.C. § 4-22-51 and 2) the Board's actions on

² In light of this conclusion, it is not necessary to determine whether the Association is supported in whole or in part by public funds and therefore is also a public entity under N.D.C.C. § 44-04-17.1(12)(c).

behalf of the interests of all soil conservation districts. There is no state law that authorizes the Board to hold an executive session for the purpose of discussing correspondence resulting in misunderstandings and miscommunications between Board members. Therefore, it is my opinion that the executive session held to discuss correspondence received by the president and some Board members which the president felt had created misunderstandings and miscommunications between Board members was a violation of the open meetings law.

The second executive session was held to evaluate the job performance of the Association's executive vice-president. Such an evaluation would necessarily include an evaluation of the executive vice-president's duties in relation to the Association's management of the property recognized in N.D.C.C. § 4-22-51 and the Board's actions on behalf of the soil conservation districts' interests. There is no state law that authorizes the Board to hold an executive session for the purpose of discussing an evaluation of the executive vice-president. Therefore, it is my opinion that the executive session held to discuss an evaluation of the executive vice-president of the Association was a violation of the open meetings law.

Issue Three:

All topics anticipated to be considered at a meeting of a governing body of a public entity must be included on the agenda and notice compiled before the meeting, including topics anticipated to be discussed in a lawfully authorized executive session. N.D.C.C. § 44-04-20. However, if, at the time of the regular meeting, it is determined that an executive session needs to be held that was not anticipated before the meeting, the fact that the executive session and topic to be considered in the executive session are not listed on the agenda and notice does not prohibit the governing body from holding the executive session. The agenda can be amended on the day of the regular meeting or even during the meeting.

Therefore, it is my opinion that the law requiring notice of topics to be considered at a regular meeting was not violated as the result of the executive sessions not being listed on the Board's regular meeting agenda.

CONCLUSIONS

1. It is my opinion that the Board of Directors of the North Dakota Association of Soil Conservation Districts is subject to the open meetings law.
2. It is my opinion that the Board of Directors violated the open meetings law by holding two executive sessions on June 29, 1998.

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3. It is my opinion that the law requiring notice of topics to be considered at a regular meeting was not violated as the result of the executive sessions not being listed on the Board's regular meeting agenda.

STEPS NEEDED TO REMEDY VIOLATIONS

The Board must prepare detailed minutes of what transpired at each of the executive sessions that occurred at the Board's June 29, 1998, regular meeting. The Board must prepare a notice that these executive sessions occurred and that detailed minutes of what transpired at the executive sessions are available at no cost to any member of the public. This notice must be posted in accordance with N.D.C.C. § 44-04-20 at the Board's or Association's principal office and filed in the office of Secretary of State within seven days of the date of this opinion. In addition, the Board must send copies of the detailed minutes to Shorty Hoerauf and Roxanne Johnson, the Adams County Soil Conservation District Supervisors who requested this opinion.

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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