

**OPEN RECORDS AND MEETINGS OPINION  
2017-O-07**

DATE ISSUED: August 25, 2017

ISSUED TO: University of North Dakota School of Law – Moot Court Association

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Christopher W. Nelson asking whether the University of North Dakota School of Law – Moot Court Association violated N.D.C.C. § 44-04-18 by denying a request for records.

**FACTS PRESENTED**

On April 2, 2017, Christopher Nelson sent a request for records relating to the 2017 University of North Dakota School of Law's (Law School) Carrigan Cup<sup>1</sup> competition to the Law School's Moot Court Association (Association).<sup>2</sup> The Law School and the Association denied the request claiming the Association was not considered a "public entity" subject to the open records law because it is a "student organization."<sup>3</sup>

**ISSUE**

Whether the UND School of Law – Moot Court Association is a public entity subject to open records law.

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<sup>1</sup> The Carrigan Cup is an internal trial advocacy competition at the Univ. of N.D. Sch. Of Law.

<sup>2</sup> Letter from Christopher Nelson to Univ. of N.D. Sch. Of Law Moot Court Ass'n (Apr. 2, 2017).

<sup>3</sup> Email from Univ. of N.D. Sch. Of Law Moot Court to Christopher Nelson (Apr. 12, 2017, 7:19 pm). Mr. Nelson sent follow up letters arguing his position that the Univ. of N.D. Sch. Of Law Moot Court is subject to the open records law. See Letters from Christopher Nelson to Univ. of N.D. Sch. Of Law Moot Court (Apr. 13, 2017, and Apr. 24, 2017). The Univ. of N.D. Sch. Of Law and Univ. of N.D. Sch. Of Law Moot Court continued to deny the request. See email from Univ. of N.D. Sch. Of Law Moot Court Ass'n to Christopher Nelson (Apr. 19, 2017, 7:35 pm); email from Jason Jenkins, Asst. Att'y Gen for N.D. Univ. Sys., to Christopher Nelson (Apr. 28, 2017, 3:56 pm).

## ANALYSIS

All “records”<sup>4</sup> of a “public entity”<sup>5</sup> are open to the public unless otherwise specifically provided by law.<sup>6</sup> The analysis of whether a student organization is subject to the open records law would be the same as any other organization. The definition of “public entity” is not limited to entities that are traditionally viewed as “governmental.”<sup>7</sup> As summarized in numerous opinions, there are a number of ways an organization may be subject to open records law, including:

1. The organization is delegated authority by a governing body of a public entity;<sup>8</sup>
2. The organization is created or recognized by state law, or by an action of a political subdivision;<sup>9</sup>
3. The organization is supported in whole or in part by public funds or is expending public funds;<sup>10</sup> 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.<sup>11</sup>

The Association is not created by state law nor delegated authority by a governing body. Therefore, this opinion will focus on whether the Association is an agent of a public entity or supported by public funds.

### **Agent of a Public Entity Test**

The Law School, as a public university, is subject to the open records law. 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”

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<sup>4</sup> N.D.C.C. § 44-04-17.1(16) (definition of “record”).

<sup>5</sup> N.D.C.C. § 44-04-17.1(13) (definition of “public entity”).

<sup>6</sup> N.D.C.C. § 44-04-18(1).

<sup>7</sup> N.D.A.G. 2015-O-05; N.D.A.G. 2013-O-16; N.D.A.G. 2001-O-10.

<sup>8</sup> N.D.C.C. § 44-04-17.1(6) (definition of “governing body”).

<sup>9</sup> N.D.C.C. § 44-04-17.1(13)(a) and (b) (definition of “public entity”).

<sup>10</sup> N.D.C.C. § 44-04-17.1(10) and (13)(c) (definition of “organization or agency supported in whole or in part by public funds” and definition of “public entity”).

<sup>11</sup> N.D.C.C. § 44-04-17.1(13) and (16) (definition of “public entity” and definition of “record”).

of the public entity.<sup>12</sup> The terms “agent” or “agency” refers to an arrangement in which a public entity delegates the transaction of some lawful business to another.<sup>13</sup> The North Dakota Supreme Court has held that the open records law cannot be circumvented by delegating a public duty to a third party and documents in possession of the third party connected with public business are public records.<sup>14</sup> “[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>15</sup> Where a public entity delegates its public duty or business to a third party and the third party performs such services on behalf of and in place of the public entity, it is an “agent” of the public entity subject to open records law.<sup>16</sup>

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<sup>12</sup> N.D.C.C. § 44-04-17.1(16) (definition of “record”).

<sup>13</sup> N.D.A.G. 2015-O-14; N.D.A.G. 2014-O-24; N.D.A.G. 2009-O-08; N.D.A.G. 2001-O-04

<sup>14</sup> *Grand Forks Herald v. Lyons*, 101 N.W.2d 543, 546 (ND 1960); *Forum Publ’g Co. v. City of Fargo*, 391 N.W.2d 169, 172 (N.D. 1986).

<sup>15</sup> *Forum Publ’g*, 391 N.W.2d at 172.

<sup>16</sup> N.D.A.G. 2016-O-03 (NDSU Alumni Association and Development Foundation delegated public function of searching for a new President/CEO to private search firm who acted as “agent” subject to open records law); N.D.A.G. 2015-O-14 (State Board of Dental Examiners hired a lobbyist to perform its public business of lobbying on its behalf and lobbyist was considered “agent” subject to open records law); N.D.A.G. 2014-O-24 (local taxi company hired to perform governmental function was subject to open records law); N.D.A.G. 2009-O-08 (UND Foundation and Alumni Association became agents of UND through a contract permitting the Alumni Association and Foundation to maintain an alumni database on behalf of UND); N.D.A.G. 2006-O-01 (North Dakota State University Research Foundation acted as an agent of NDSU when it managed the intellectual properties of the University; the delegation of public business made the Foundation an agent of NDSU subject to open records law); N.D.A.G. 2001-O-11 (delegating to a private entity that which otherwise would be an agency responsibility and acting in place of or on behalf of the public entity renders the private entity an agent subject to open record laws); N.D.A.G. 2001-O-10 (an organization providing economic development services under a contract with a government entity is performing a government function and is therefore an “agency of government” subject to open records laws); N.D.A.G. 2001-O-04 (a marketing firm promoting the position of a city governing body on an issue of public interest was an agent of the city because it was marketing the city council’s position in place of the city, rather than simply providing services to the city); N.D.A.G. 99-O-02 (a corporation managing a pool of government funds on behalf of several political subdivisions is acting as an “agency of government” and subject to open records laws).

The Association at issue in this opinion is comprised of five law school student members,<sup>17</sup> with a law school professor acting as an advisor to the Association, rendering support and advice.<sup>18</sup> The Association administers three courses for which the students receive credit.<sup>19</sup> Students register for the courses as they would any other course offered by the Law School.<sup>20</sup> The professor who serves as the advisor to the Association teaches the classroom component of several of the courses and enters the satisfactory/unsatisfactory grades for the participants.<sup>21</sup>

The Law School is a public university subject to open records law, and an obvious part of its public duty is to provide coursework and study for credit to its students. Here, the Law School delegated part of its public duty to the Association. When the Association administers three courses on behalf of and in place of the Law School it is acting as an agent of the Law School.

### **Supported by Public Funds Test**

The definition of “public entity” includes “[o]rganizations or agencies supported in whole or in part by public funds, or expending public funds.”<sup>22</sup> “Organization or agency supported in whole or in part by public funds” means “an organization or agency in any form which has received public funds exceeding the fair market value of any goods or services given in exchange for the public funds.”<sup>23</sup> For the fair market value test to be met, there must first be a contract, or some agreement between the public entity and the organization that reasonably identifies the goods and services provided in exchange

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<sup>17</sup> Students that comprise Univ. of N.D. Sch. of Law Moot Court Ass’n receive a credit for performing their duties and responsibilities.

<sup>18</sup> Email from Professor Kirsten Dauphinais, to Sandra L. DePountis, Asst. Att’y Gen. (May 24, 2017, 2:08 pm); see also Memorandum from Univ. of N.D. Sch. of Law Moot Court Ass’n outlining UND Moot Court Board Positions and Responsibilities (on file with UND).

<sup>19</sup> Email from Professor Kirsten Dauphinais, to Sandra L. DePountis, Asst. Att’y Gen. (May 24, 2017, 2:08 pm). Courses include the internal moot court competition (participants receive one credit) and the Carrigan Cup (participants receive one credit), and Univ. of N.D. Sch. of Law Moot Court Ass’n selects the participants for the external moot court competitions (participants receive three credits).

<sup>20</sup> Email from Professor Kirsten Dauphinais to Sandra L. DePountis, Asst. Att’y Gen. (May 24, 2017, 2:08 pm); see also Memorandum from Univ. of N.D. Sch. of Law Moot Court Ass’n outlining UND Moot Court Board Positions and Responsibilities.

<sup>21</sup> Email from Professor Kirsten Dauphinais, to Sandra L. DePountis, Asst. Att’y Gen. (May 24, 2017, 2:08 pm)

<sup>22</sup> N.D.C.C. § 44-04-17.1(13)(c).

<sup>23</sup> N.D.C.C. § 44-04-17.1(10).

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for the public funds.<sup>24</sup> In past opinions, this office explained that public funds constitute general support, thus rendering an entity subject to open records law, if the use of the funds is unrestricted and the entity is given discretion over how the funds are spent.<sup>25</sup> The more discretion the organization has over the use of public funds, the more likely it is that the funds are for the entity's general support rather than for purchasing goods or services at fair market value.<sup>26</sup>

Here, the Association receives its funding directly from the Law School. In 2016-2017, the Association members received scholarships and had discretion over the use of an operational budget with possible additional money available for participation in the NALSA Moot Court competition.<sup>27</sup> The Association is supported entirely by public funds and has discretion over the use of those funds to administer the courses it is tasked with implementing and is therefore considered to be "supported by public funds."<sup>28</sup>

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<sup>24</sup> N.D.A.G. 2015-O-01; N.D.A.G. 2001-O-10.

<sup>25</sup> N.D.A.G. 2015-O-01; N.D.A.G. 2004-O-04; N.D.A.G. 2003-O-02; N.D.A.G. 99-O-03.

<sup>26</sup> This office has issued numerous opinions on this issue. See generally N.D.A.G. 2015-O-01 (humane society had discretion over how mill levy funds and general funds from taxation are used and was considered supported by public funds); N.D.A.G. 2006-O-14 (funds from the Dept. of Health, state general funds, and county funds for general support; discretion over the fund use); N.D.A.G. 2006-O-04 (grant money for general use and ongoing operating expenses); N.D.A.G. 2006-O-02 (unrestricted money received from the county); N.D.A.G. 2004-O-04 (public funds subsidize and fund ongoing operations); N.D.A.G. 2003-O-10 (state general funds received for general support without specification; discretion over funds); N.D.A.G. 2003-O-08 (funds used for general support; no specific services specified); N.D.A.G. 2001-O-11 (indistinct contract terms); N.D.A.G. 2001-O-10 (vague contract, funds used for general operations).

<sup>27</sup> 2016-2017 Moot Court Budget.

<sup>28</sup> Other jurisdictions also recognize that student organizations that derive authority and responsibility from universities, perform public functions in place of the universities, and receive public funds such as tuition fees, are subject to the open records law. *Red & Black Publ'g Co. v. Bd. of Regents*, 427 S.E.2d 257 (Ga. 1993) (student court stood in place of Board of Regents and University and was subject to open records law); *Carter v. Fench*, 322 So.2d 305 (1st Cir. Ct. of Appeals La. 1975) (tuition fees paid to the University are public funds and when student organization receives the funds it is subject to open records law); Ark. Op. Att'y Gen. No. 90-086 (1990) (student organization created under and governed by a constitution approved by the Universities Board of Trustees and funded by public funds was subject to open records law); and Ill. Op. Att'y Gen. No. 14-006 (2014) (student government organization funded by university and records held within the organization regarding the use of the funds are considered public records).

### CONCLUSION

The Association is an “agent” of a public university and supported by public funds and is subject to the open records law.

### STEPS NEEDED TO REMEDY VIOLATION

The Association, after consultation with this office, provided records responsive to Mr. Nelson’s request. Therefore, no further action is required.

Wayne Stenehjem  
Attorney General

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cc: Christopher Nelson (via email only)