

**OPEN RECORDS AND MEETINGS OPINION  
2019-O-13**

DATE ISSUED: July 18, 2019

ISSUED TO: Dickinson Public School District

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Riley Kuntz asking whether the Dickinson Public School District's response to an open records request violated N.D.C.C. § 44-04-18.

**FACTS PRESENTED**

On April 19, 2019, Riley Kuntz made an open records request to Dickinson Superintendent Shon Hocker, asking for various records regarding advertising or promoting the "vote yes" school bond referendum and "records relating to school bond funding by a Government Agency."<sup>1</sup> Superintendent Hocker responded to Mr. Kuntz that the school did not have most of the records he requested, because the records related to the "Vote Yes" group which is a private, citizen organization not "managed, supervised, or overseen in any capacity by the school district."<sup>2</sup> Superintendent Hocker asked Mr. Kuntz for clarification on the remaining request for records related to school bond funding. Mr. Kuntz clarified his request<sup>3</sup> and Superintendent Hocker emailed the records that were responsive to the clarified request on May 15, 2019.<sup>4</sup>

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<sup>1</sup> Email from Riley Kuntz to Shon Hocker, Superintendent, Dickinson Pub. Schs. (Apr. 19, 2019, 8:51 AM); see also Email from Riley Kuntz to Att'y Gen.'s Office (Apr. 25, 2019, 8:49 PM).

<sup>2</sup> Email from Shon Hocker, Superintendent, Dickinson Pub. Schs., to Riley Kuntz (Apr. 24, 2019, 3:15 PM).

<sup>3</sup> Mr. Kuntz did not take issue with the school's response on the denial of the other records requested in his email clarifying the request for school bond funding. Email from Riley Kuntz to Shon Hocker, Superintendent, Dickinson Pub. Schs. (Apr. 24, 2019, 8:17 PM).

<sup>4</sup> Email from Shon Hocker, Superintendent, Dickinson Pub. Schs., to Att'y Gen.'s Office (May 15, 2019, 9:01 AM).

## ISSUE

Whether the Dickinson Public School District properly responded to a records request.

## ANALYSIS

“Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours.”<sup>5</sup> The definition of “record” includes “recorded information of any kind . . . which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business.”<sup>6</sup> Thus, the open records law is limited to records in the possession of a public entity and the public entity generally has no obligation to obtain records it does not have.<sup>7</sup> An exception to this rule is if the record is in possession of an “agent” of a public entity.<sup>8</sup> Under open records law, the terms “agent” or “agency” refers to an arrangement in which a public entity delegates the transaction of some lawful business to another.<sup>9</sup> When a private corporation enters into a contract with a public entity and performs governmental functions and public services on behalf, or in place, of the public entity, it is an agent of the public entity subject to open records law.<sup>10</sup> If the agent holding the record on behalf of the public entity fails to produce a public record relating to the public services it performs on behalf of the entity, the public entity has the responsibility to produce the record.<sup>11</sup>

Here, Dickinson Public School District did not have the requested records regarding the “Vote Yes” organization.<sup>12</sup> Superintendent Hocker informed Mr. Kuntz that the school did not have the records and that the records were “associated with a private, citizen organized group who identifies as the 'Vote Yes' group” which is “not managed,

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<sup>5</sup> N.D.C.C. § 44-04-18; see also N.D.C.C. §§ 44-04-17.1(13) (definition of “public entity”) and (16) (definition of “record”).

<sup>6</sup> N.D.C.C. § 44-04-17.1(16) (definition of “record”) (emphasis added).

<sup>7</sup> *Id.*, see also, N.D.A.G. 2014-O-22; N.D.A.G. 2010-O-02; N.D.A.G. 2004-O-05.

<sup>8</sup> N.D.A.G. 2017-O-01; N.D.A.G. 2015-O-14; N.D.A.G. 2014-O-04.

<sup>9</sup> N.D.A.G. 2015-O-14 (citing *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) (The North Dakota Supreme Court 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>10</sup> N.D.A.G. 2017-O-01; N.D.A.G. 2016-O-03; N.D.A.G. 2014-O-24.

<sup>11</sup> N.D.A.G. 2015-O-14.

<sup>12</sup> Letter from Shon Hocker, Superintendent, Dickinson Pub. Schs., to Att’y Gen.’s Office (May 7, 2019).

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supervised, or overseen in any capacity by the school district.”<sup>13</sup> In response to questions from this office, the School District confirmed it does not have any contract, involvement, or participation with the “Vote Yes” organization and has not appropriated any money to the private organization.<sup>14</sup> It is therefore my opinion that there is no “agency” relationship between the Dickinson Public School District and the “Vote Yes” group that would require the school to obtain the records from the “Vote Yes” group in response to an open records request.<sup>15</sup>

It is further my opinion that it was not a violation of open records law when the Dickinson Public School District denied a request for records it did not possess.

CONCLUSION

The Dickinson Public School District properly denied a request for records it did not have in its possession.

Wayne Stenehjem  
Attorney General

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cc: Riley Kuntz (via email only)

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<sup>13</sup> Email from Shon Hocker, Superintendent, Dickinson Pub. Schs., to Riley Kuntz (Apr. 24, 2019, 3:15 PM).

<sup>14</sup> Letter from Shon Hocker, Superintendent, Dickinson Pub. Schs., to Att’y Gen.’s Office (May 7, 2019); Email from Shon Hocker, Superintendent, Dickinson Pub. Schs., to Att’y Gen.’s Office (May 15, 2019, 3:28 PM). Opinions issued under N.D.C.C. § 44-04-21.1 must take the facts of the public entity.

<sup>15</sup> In his request for an opinion, Mr. Kuntz also questioned the lack of response to a records request made to Outdoor Advertising regarding payments made for billboards from the Vote Yes organization. The open records law only applies to records in possession of public entities and this office cannot address a response of private companies under opinions issued pursuant to N.D.C.C. § 44-04-21.1. Mr. Kuntz also alleges the School’s response violates N.D.C.C. §§ 16.1-08.1-01 and 16.1-08.02.4. These are not issues this office is authorized to review under an open record opinion issued pursuant to N.D.C.C. § 44-04-21.1.