

**OPEN RECORDS AND MEETINGS OPINION
2001-O-11**

DATE ISSUED: September 13, 2001

ISSUED TO: Greg Selbo, Attorney, Fargo-Cass County Economic Development Corporation

CITIZEN'S REQUEST FOR OPINION

On August 22, 2001, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Matt Von Pinnon on behalf of the Fargo Forum asking whether the Fargo-Cass County Economic Development Corporation violated N.D.C.C. §§ 44-04-18 and 44-04-19 by refusing Mr. Von Pinnon's request for information regarding an audit of the corporation and by refusing to allow him to attend a meeting of the corporation's executive committee on August 21, 2001.

FACTS PRESENTED

The executive committee of the Fargo-Cass County Economic Development Corporation (FCCEDC) held a meeting on August 21 to discuss a supplemental audit report by the investigative unit of an auditing firm. Mr. Von Pinnon was not allowed to read the supplemental audit report or attend the meeting. The next day, August 22, Mr. Von Pinnon made a written request for a copy of the annual audit and the supplemental audit. Later that day, Mr. Von Pinnon requested an opinion from this office.

On August 24, the FCCEDC denied the August 22 request for the audit report, stating it was not a "public entity" as defined in N.D.C.C. § 44-04-17.1 and therefore not required to follow the state open records and meetings laws. See N.D.C.C. §§ 44-04-18; 44-04-19. In response to Mr. Von Pinnon's opinion request, this office requested information from the FCCEDC regarding the allegations in the opinion request. The FCCEDC responded on September 4, identifying the sources and amounts of public funds received by the FCCEDC and also providing a copy of the FCCEDC's annual budget for the fiscal year ending July 31, 2001. Additional information was requested by this office and was provided by the FCCEDC on September 10.

The FCCEDC is a North Dakota nonprofit corporation and exempt from federal income tax under § 501(c)(3) of the Internal Revenue Code. The FCCEDC's articles of incorporation state that its charitable purpose is "[t]o promote the social welfare of the people of Cass County, North Dakota, by lessening the burdens of government by alleviating unemployment, . . . and otherwise promoting the common good . . . by facilitating economic development for the City of Fargo, and Cass County, and the State of North Dakota"

OPEN RECORDS AND MEETINGS OPINION 2001-O-11

September 13, 2001

Page 2

The FCCEDC's annual budget shows a total expected annual revenue of \$1.3 million. In response to the request for this opinion, the FCCEDC identified three sources of public funds it has received during the current fiscal year: \$100,000 from the Dakota Certified Development Corporation (DCDC), approximately \$225,000 from the Skills and Technology Training Center (STTC) of the North Dakota State College of Science, and \$175,000 from Cass County.¹ This office has obtained and reviewed the contracts under which these payments are made.

The contract between the FCCEDC and Cass County identifies the work performed in exchange for county funds as follows:

1. Description of Work. FCCEDC shall:
 - (a) Development of Goals. Establish policies and goals for economic development in Cass County and regularly evaluate these policies and goals.
 - (b) Business Retention. Develop and administer a business retention program to increase the quality of life and number of opportunities for the people of Cass County by facilitating retention and expansion of existing companies to insure a base of primary sector businesses.
 - (c) National Marketing. Continue to implement a national marketing program to targeted industries to locate in Cass County, North Dakota.
 - (d) Workforce Development. Develop labor recruitment programs as well as training for underemployed. Collect data information regarding unemployment, employer studies, student surveys, and migration analysis.

The contract requires the FCCEDC to provide a year-end audited financial statement to Cass County.

In a separate arrangement, Cass County and the Cities of Fargo and West Fargo have pooled their funds to participate in loans under the PACE program. See N.D.C.C. ch. 6-09.14. A 1997 memorandum of understanding among the three political subdivisions provides that the funds will be held by the Growth Initiative Fund, Inc. (GIF) and

¹ Cass County has budgeted an additional \$40,000 to the FCCEDC for a work force development project. However, the FCCEDC has not yet requested these funds from the County.

managed by the FCCEDC. The GIF is also a North Dakota nonprofit corporation. Under the memorandum of understanding, the GIF functions as the "community" under the PACE program. The directors of the FCCEDC are members of the GIF and originally appointed the GIF Board of Directors, although the memorandum of understanding indicates the GIF board members will be appointed by the three political subdivisions. The memorandum also indicates the FCCEDC will provide staff and administrative services to the GIF without charge.

In its supplemental response to the request for this opinion, the FCCEDC acknowledges it "manages and administers" the GIF.

ISSUES

1. Whether the FCCEDC is a "public entity" subject to the state open records and meetings laws.
2. Whether the FCCEDC violated N.D.C.C. § 44-04-18 by denying a request for the audit report of the corporation and related information.
3. Whether the FCCEDC violated N.D.C.C. § 44-04-19 by denying access to the August 21 meeting of its executive committee.

ANALYSES

Issue One:

The state open records and meetings laws apply to "public entities." An economic development corporation can be a public entity if it is supported by public funds or if it is acting as an agency of government. N.D.C.C. § 44-04-17.1(12)(b), (c); N.D.A.G. 2001-O-10.

Supported by Public Funds Test

An organization is not supported by public funds for purposes of the open records and meetings laws if the public funds it receives are provided in exchange for goods or services having an equivalent fair market value. N.D.C.C. § 44-04-17.1(9); N.D.A.G. 2001-O-10.²

² Benefits provided under an authorized economic development program are conclusively presumed to be fair market value. N.D.C.C. § 44-04-17.1(9). However, this provision does not apply to the FCCEDC under the facts presented in this opinion

According to the FCCEDC, the government funds it receives from the DCDC are exclusively federal, and therefore do not fall under the definition of "public funds" in N.D.C.C. § 44-04-17.1(13) ("funds received from the state or any political subdivision of the state"). The funds from the STTC are paid as reimbursement for management services provided by employees of the FCCEDC and appear to represent a fair-market-value exchange of goods and services for the public funds received by the FCCEDC.

The \$175,000 payment to FCCEDC from Cass County is made in exchange for the purposes described in the Facts Presented portion of this opinion. I recently concluded that a development corporation performing similar services for a government entity in Minot was "supported" by public funds. N.D.A.G. 2001-O-10. However, in that situation, the corporation merely presented its budget to the city for approval. Here, the amount of the \$175,000 payment was determined in a different manner. The FCCEDC described to Cass County the activities it plans to undertake and suggests a contract price for those activities.

A July 17, 2000, letter from the FCCEDC to a Cass County official states "[l]ast year the county's participation in our budget was \$175,000." Letter from FCCEDC President John A. Kramer to Debra Ness, Cass County Treasurer's Office. "For the fair market value test to be met, there first must be a contract between the public entity and the [economic development corporation] that reasonably identifies the goods and services provided in exchange for the public funds." N.D.A.G. 2001-O-10.

The amount of public funds devoted to FCCEDC as a percentage of its total budget is relatively small, especially compared to that involved in N.D.A.G. 2001-O-10, and this supports the argument of FCCEDC that it is not "supported by public funds."

However, the total amount of public dollars involved here, coupled with the indistinct terms of the contract dealing with the purposes for which the funds are to be expended, lead me to conclude that the FCCEDC is, in fact, supported by public funds. Therefore, it is my opinion that Cass County is supporting the efforts of FCCEDC, rather than purchasing services.

Agency of Government Test

Under similar facts, I recently concluded that an organization providing economic development services under a contract with a government entity is performing a governmental function and was therefore an "agency of government" under the North Dakota Supreme Court holding in Forum Publishing Co. v. City of Fargo, 391 N.W.2d

because the funds are not provided to the FCCEDC as a grant to a new employer or business. See N.D.A.G. 2001-O-10.

OPEN RECORDS AND MEETINGS OPINION 2001-O-11

September 13, 2001

Page 5

169, 172 (N.D. 1986) ("[w]e do not believe the open-record law can be circumvented by the delegation of a public duty to a third party"). N.D.A.G. 2001-O-10. This office has also held that a corporation managing a pool of government funds on behalf of several political subdivisions is acting as an "agency of government" under the Forum Publishing decision. N.D.A.G. 99-O-02.

These opinions apply to this situation as well. The FCCEDC develops policies and carries out economic development efforts not only for the benefit of the residents of Cass County, but also on behalf of the Cass County government. Although the funds in the PACE loan pool are provided to GIF, the FCCEDC has stated it "manages and administers" the GIF. It follows from this statement that the FCCEDC manages the public funds on behalf of the three political subdivisions.

The delegation of government functions to private contractors raises significant questions on the application of the state open records and meetings laws to the contractor. To date, the Forum Publishing case is the only North Dakota Supreme Court precedent addressing whether the open records and meetings laws can be avoided by delegating government functions to private contractors. However, the Florida open records and meetings laws are very similar to those in North Dakota. Appellate courts in Florida have considered on several occasions whether the Florida open records and meetings laws apply to a contractor and have identified several non-exclusive factors to aid in determining whether a private organization is performing a governmental function:

- 1) the level of public funding;
- 2) commingling of funds;
- 3) whether the activity was conducted on publicly owned property;
- 4) whether services contracted for are an integral part of the public agency's chosen decision-making process;
- 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform;
- 6) the extent of the public agency's involvement with, regulation of, or control over the private entity;
- 7) whether the private entity was created by the public agency;
- 8) whether the public agency has a substantial financial interest in the private entity; and
- 9) for whose benefit the private entity is functioning.

News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So.2d 1029, 1031 (Fla. 1992) (hereafter Schwab). See also Memorial Hospital–West Volusia v. News-Journal Corporation, 729 So.2d 373 (Fla. 1999). "Rather than relying on any one of these factors, the courts generally have made the determination based on the 'totality of factors.'" Id.

Applying these factors ensures that contractors do not become subject to the open records and meetings laws "merely by entering into a contract to provide professional services to the agency," but also ensures "that a public agency cannot avoid disclosure

OPEN RECORDS AND MEETINGS OPINION 2001-O-11

September 13, 2001

Page 6

under the Act by contractually delegating to a private entity that which otherwise would be an agency responsibility." Schwab, 596 So.2d at 1031. These goals match very closely the North Dakota Supreme Court holdings in this area. See Forum Publishing, 391 N.W.2d at 172; Adams County Record v. Greater North Dakota Association, 529 N.W.2d 830 (N.D. 1995). Therefore, I think the Schwab factors are helpful in interpreting the North Dakota open records and meetings laws. These factors help determine whether a corporation is simply providing services to a government entity, or is acting in place of or on behalf of the entity.

Applying the Schwab factors to the situation presented in this opinion, it becomes clear that the FCCEDC is acting as an "agency of government" for Cass County and the cities of Fargo and West Fargo. The funding provided by Cass County, though a relatively small percentage of its total budget, is substantial, especially when considering the indistinct services to be provided by FCCEDC. (Factor 1). From the financial statement provided to this office by the FCCEDC, it appears the funds received from Cass County are pooled with other revenue of the corporation. (Factor 2). The FCCEDC performs two governmental functions: economic development under the contract with Cass County and management of the pool of government funds held by the GIF. (Factor 5). In performing these two functions, the FCCEDC carries out the bulk of the economic development efforts of the three political subdivisions. (Factor 4). Five of the FCCEDC directors belong to the governing body of one of the three subdivisions. (Factor 6). Finally, the purpose of the FCCEDC is the same as the purpose of local government economic development programs: to promote the public good by developing a strong local economy. (Factor 9).

Considering the "totality of factors," as well as the prior opinions of this office, it is my opinion the FCCEDC acts as an "agency of government" under Forum Publishing and is therefore a "public entity" under N.D.C.C. § 44-04-17.1(12)(b).

Issue Two:

All recorded information of a "public entity" regarding "public business" is open to the public unless otherwise specifically provided by law. For the reasons discussed in Issue One of this opinion, I have concluded that the FCCEDC is a "public entity" as defined in N.D.C.C. § 44-04-17.1(12)(b) and (c). The funds from Cass County are pooled with the other revenue of the FCCEDC. See N.D.A.G. 2001-O-10 (if public funds are used for general support, all financial records of the supported entity pertain to public business). As a result, all recorded information regarding the FCCEDC's performance of its governmental functions and finances pertains to public business and is required to be open to the public under N.D.C.C. § 44-04-18 unless otherwise specifically provided by law.

The audit report involves to the FCCEDC's finances and the job performance of its chief executive. Both these subjects pertain to how the FCCEDC carries out its

governmental functions and uses the financial support it receives from Cass County. There is no exception to the open records law that closes the audit report or related documents in their entirety.³ When the FCCEDC denied Mr. Von Pinnon's request, it is my opinion that most, if not all, of the audit report and related documents were required to be open to the public under N.D.C.C. § 44-04-18. Accordingly, it is my opinion the FCCEDC violated N.D.C.C. § 44-04-18 by refusing to provide access to the open portions of the audit report.

Issue Three:

The definition of "meeting" applies to all gatherings of a "governing body" of a public entity. N.D.C.C. § 44-04-17.1(8)(a).

"Governing body" means the multimember body responsible for making a collective decision on behalf of a public entity. "Governing body" also includes any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.

N.D.C.C. § 44-04-17.1(6). The main governing body of the FCCEDC is its board of directors. However, the definition of "governing body" also applies to the executive committee of the FCCEDC's board of directors. Therefore, meetings of the executive committee are open to the public as are the meetings of the board of directors itself.

There is no open meetings exception that would apply to consideration of the audit report, or to general discussions of personnel matters by the FCCEDC. Accordingly, it is my opinion the August 21 meeting of the executive committee was required to be open to the public and the FCCEDC violated N.D.C.C. § 44-04-19 by refusing to allow the public to attend the meeting.

I want to reiterate that this opinion does not conclude all records and meetings of the FCCEDC board or executive committee are open to public inspection. As summarized in N.D.A.G. 2001-O-10, there are broad exceptions to the open records and meetings laws for the identity, nature, and location of businesses that are interested in locating, relocating, or expanding within the state. N.D.C.C. § 44-04-18.4(5)(a). Even after a business receives financing or other economic development assistance, any trade secrets or commercial or financial information received by a public entity from the

³ The FCCEDC cites as authority for denying Mr. Von Pinnon's records request the exception for "personnel records" in N.D.C.C. § 44-04-18.1(3) for employees of organizations supported by public funds. However, an audit report is not a personnel record. In addition, the exception in subsection 3 does not apply if the supported organization is also an agency of a political subdivision under N.D.C.C. § 44-04-17.1(12)(b).

business can be closed. N.D.C.C. § 44-04-18.4(5)(b). Finally, marketing strategies and other marketing information of a public entity engaged in economic development are confidential under the exception in N.D.C.C. § 44-04-18.4(1) for trade secrets and proprietary information if public disclosure of those records or information would cause a substantial risk of competitive injury to the public entity.

CONCLUSIONS

1. The Fargo-Cass County Economic Development Corporation is a "public entity" as defined in N.D.C.C. § 44-04-17.1(12)(b) and (c).
2. The Fargo-Cass County Economic Development Corporation violated N.D.C.C. § 44-04-18 by refusing to allow public access to its audit report.
3. The Fargo-Cass County Economic Development Corporation violated N.D.C.C. § 44-04-19 by refusing to allow the public to attend the August 21 meeting of its executive committee.

STEPS NEEDED TO REMEDY VIOLATIONS

The FCCEDC must make the audit report and supplemental audit report available to any member of the public who requests it, subject to any applicable open records exceptions for the material contained in the report such as the identity of business which are interested in locating, relocating, or expanding within the state. The FCCEDC must begin providing public notice of the meetings of its board and its executive committee. If minutes were kept of the August 21 executive committee meeting, those minutes must be provided to Mr. Von Pinnon and made available as an open record.

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.

Wayne Stenehjem
Attorney General

Assisted by: James C. Fleming
Assistant Attorney General