

**LETTER OPINION
2002-L-15**

February 28, 2002

Dr. Kermit Lidstrom
Chairman
Education Factfinding Commission
630 Remington Avenue
Bismarck, ND 58503-1041

Dear Dr. Lidstrom:

Thank you for your letter asking when the participants in a factfinding hearing under N.D.C.C. § 15.1-16-15 are required to release the hearing report to the public. Enclosed with your letter was a hearing report recently issued by the Commission, which consists of the findings and recommendations issued by the Commission under N.D.C.C. § 15.1-16-15. You indicate the Commission believes the participants in the hearing should have a “natural right” to view the hearing report “before it becomes public knowledge.”

Each factfinding under N.D.C.C. § 15.1-16-15 involves two parties: a public school district and a “representative organization” as defined in N.D.C.C. § 15.1-16-01(3). I will approach your question separately for each party.

Two state laws affect the release of the hearing report. The first is N.D.C.C. § 15.1-16-15(4), which states: “No sooner than ten nor later than twenty days after its findings and recommendations are delivered to the board and the representative organization, the commission shall make its findings and recommendation public if the impasse is not resolved.” The second statute is the state open records law, N.D.C.C. § 44-04-18, which requires that all records of public entities be open to the public upon request unless “otherwise specifically provided by law.” These statutes do not prohibit or require release of the hearing report by a “representative organization.”¹

¹ A “representative organization” is not a “public entity” as defined in N.D.C.C. § 44-04-17.1(12) because it represents the interests of its individual members and does not exercise public authority or perform a governmental function.

Sections 15.1-16-15 and 44-04-18, N.D.C.C., also do not prohibit a school district from releasing the hearing report. However, a question arises whether a school district is required to release the report upon request under N.D.C.C. § 44-04-18 from the moment the district receives the report from the Commission.

When the Commission delivers its hearing report to the school district, the record is then possessed by two public entities: the Commission and the school district. "When two entities possess the same record, each entity usually possesses the record in its own capacity and 'has an independent duty to determine whether the record is an open record.'" 1998 N.D. Op. Att'y Gen. L-73, quoting 1994 N.D. Op. Att'y Gen. L-1. Exceptions to N.D.C.C. § 44-04-18 must be specific and generally are limited by their express language to one public entity. 2000 N.D. Op. Att'y Gen. F-09. The express terms of N.D.C.C. § 15.1-16-15 are limited to the Commission and do not mention the obligations of the participating school district regarding the report.

Section 15.1-16-15 does not authorize the school district to refuse to release the hearing report if it is requested. This section only addresses when the Commission shall make the hearing report public. It imposes an affirmative duty on the Commission to "make" its hearing report "public." The Commission is not allowed to wait for the report to be requested by a member of the public, which is substantially different from the general requirement in N.D.C.C. § 44-04-18 that the Commission make its records available for inspection upon request.

One might argue that the Legislature intended to make the report a closed record in the possession of the school district. However, this interpretation would also authorize an executive session by the school board to discuss the report, N.D.C.C. § 44-04-19.2, which arguably could include contract negotiations. Such an executive session might even include a joint executive session by the board and the representative organization. See N.D.C.C. § 44-04-17.1(1) (any parties who are necessary to further the purpose of an executive session may be admitted to the session). This conflicts with a decision of the North Dakota Supreme Court holding that the open meetings laws "require that all school board-teacher contract negotiating sessions, regardless of negotiating committee composition, shall be open to the public." Dickinson Education Ass'n v. Dickinson Public School Dist., 252 N.W.2d 205, 212 (N.D. 1977). The letter of a statute may not be disregarded under a pretext of pursuing its spirit. N.D.C.C. § 1-02-05. Section 15.1-16-15, N.D.C.C., is silent on the obligations of a school district regarding requests for access to the report after it is received from the Commission and I conclude there is no "specific" exception to the open records law authorizing a school district to deny a request for access to or a copy of the report under N.D.C.C. § 44-04-18 prior to publication of the report by the Commission.

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In conclusion, it is my opinion state law does not prohibit the release of a hearing report by the participants in a factfinding hearing under N.D.C.C. § 15.1-16-15 before the report is made public by the Commission under that statute. It is my further opinion that a participating "representative organization" is not required at any time to release its copy of the report, but the participating school district is required to allow public access and copying of its copy of the report upon request under N.D.C.C. § 44-04-18 from the first day the report is delivered by the Commission to the members of the board of the district.

Sincerely,

Wayne Stenehjem
Attorney General

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