

**OPEN RECORDS AND MEETINGS OPINION  
2004-O-04**

DATE ISSUED: January 22, 2004

ISSUED TO: Les O. Urvand, Administrator, St. Luke's Hospital

**CITIZEN'S REQUEST FOR OPINION**

On October 30, 2003, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Maxine Smithberg and others asking whether St. Luke's Hospital in Crosby violated N.D.C.C. § 44-04-19 by refusing to allow them to attend a meeting of its board of directors on October 23, 2003.

**FACTS PRESENTED**

The board of directors of the St. Luke's Hospital (hereafter "Hospital") held its regularly scheduled monthly meeting on October 23, 2003. Ms. Smithberg and others went to the Hospital to attend the meeting. They wanted the board to explain why it had suddenly dismissed a particular doctor. Two representatives from Ms. Smithberg's group were allowed to address the board; the rest were denied access to the meeting. The Hospital does not believe that it is a public entity subject to the state's open meetings law.

The Hospital is a private nonprofit corporation formed in 1958. It provides medical and surgical care and treatment to the sick and injured in the northwest part of the state, including Divide County. The Hospital's primary funding sources are Medicare, Medicaid, Blue Cross/Blue Shield of North Dakota (Noridian), and other private health care insurance providers. The monies received from these sources represent payment for services rendered directly to the beneficiaries of the private insurance carriers and federal and state third-party funding sources. Some portion of the Medicaid money received by the Hospital for services rendered to qualifying patients comes from the state of North Dakota. This state-provided Medicaid funding is directly related to services provided to North Dakota residents who are Medicaid eligible. The Hospital occasionally receives funds from the Hospital Foundation and the Hospital Auxiliary. These funds are not public funds.

The Hospital also receives funds from the Northwest Hospital District (hereafter "District"), a political subdivision under N.D.C.C. ch. 23-30. The District comprises the geographical area of Divide County. The District assesses a property tax and provides approximately

\$45,000 annually to the Hospital. See N.D.C.C. §§ 57-15-26.4, 23-30-07. The \$45,000 represents approximately 1.3% of the Hospital's \$3,450,000 annual revenue. The District's board of directors has a contract with the Hospital relating to the use of the District's tax proceeds. The contract states, among other things, that the "Hospital is in need of financial support in order to maintain service to the community and to insure its very existence" and "[i]t is in the best interests of the District to assist in maintaining the viability of [the] Hospital." Agreement between Northwest Hospital District and St. Luke's Hospital, dated June 16, 1999 (hereafter "Hospital Agreement"). The contract further provides:

2. That the purposes for which the financial assistance shall be applied shall be determined by the District board of directors after consultation with the Hospital board of directors.

....

4. That the board of directors of District and Hospital shall consult sufficiently in order to permit District to formulate a budget to insure the appropriate tax levy.
5. That Hospital in return for said financial assistance shall continue to provide medical and hospital services to the area comprising Northwest Hospital District.

Id. (Emphasis added.)

The Hospital has received money from the District since 1995. The administrator of the Hospital meets with the District's board of directors each year to discuss how the District's tax monies have been and will be used by the Hospital. By agreement, the tax monies received from the District are placed in the Hospital's "depreciation fund." This depreciation fund is not the Hospital's general fund, but is a separate fund dedicated to the purchase of capital improvements and new or upgraded equipment for the Hospital. The tax monies received by the Hospital from the District have been used only for capital improvements and equipment. The tax monies are placed in the depreciation fund until used for the specific purpose discussed and agreed upon by the District and the Hospital. The depreciation fund includes other Hospital monies as well. The Hospital has indicated that the tax proceeds received from the District are accounted for separately by the Hospital.

## ISSUES

1. Whether the Hospital is a "public entity" subject to the state's open meetings law.

2. Whether the Hospital violated N.D.C.C. § 44-04-19 by denying access to the October 23, 2003, meeting of its board of directors.

## ANALYSES

### Issue One

The state open meetings and records laws apply to “public entities.” N.D.C.C. §§ 44-04-18, 44-04-19. The definition of “public entity” in N.D.C.C. § 44-04-17.1 is not limited to entities traditionally viewed as “governmental.” A private, nonprofit entity like the Hospital can be a public entity if it is supported, in whole or in part, by public funds, or is expending public funds. N.D.C.C. § 44-04-17.1(9), (12)(c); N.D.A.G. 2001-O-10 and 2001-O-11.

An organization is not supported by public funds for purposes of the open meetings and records laws if the public funds it receives are provided in exchange for goods or services having a fair market value equivalent to the amount of public funds received. N.D.C.C. § 44-04-17.1(9); N.D.A.G. 98-F-19, 2001-O-10 and 2001-O-11. See also Adams County Record v. GNDA, 529 N.W.2d 830, 835 (N.D. 1995) (If the relationship is, in fact, a fee-for-service [or goods] agreement then, clearly, an entity is not maintained or supported by public funds.).

“Public funds” means “cash and other assets with more than minimal value received from the state or any political subdivision of the state.” N.D.C.C. § 44-04-17.1(13). Thus, any funds the Hospital receives directly from the federal government are not considered “public funds.” See N.D.A.G. 98-O-23.

According to the Hospital, the only state money it receives is a portion of the Medicaid money for services rendered to qualifying patients. This Medicaid funding provided to the Hospital by the state constitutes reimbursement for services rendered and, therefore, appears to represent a fair market value exchange of goods and services for the public funds received by the Hospital. See N.D.A.G. 2001-O-11 (public funds received by nonprofit corporation as reimbursement for management services is fair market value exchange of goods and services for public funds received).

The Hospital also receives approximately \$45,000 per year in property tax proceeds from the District. See N.D.C.C. ch. 23-30. In my opinion, this \$45,000 per year constitutes cash assets with more than minimal value, and, therefore, it meets the definition of “public funds.”

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The Hospital and the District have a contract relating to its use of the tax proceeds. The relevant language in the contract is quoted in the "Facts Presented" portion of this opinion. The contract states that "the purposes for which the financial assistance shall be applied shall be determined by the District board of directors after consultation with the Hospital board of directors." Hospital Agreement.

Even though the Hospital has historically deposited the tax proceeds in a depreciation fund and used the funds only for capital improvements and equipment, the contract language does not limit the use of the funds. The lack of specificity in the contract indicates the Hospital has discretion over how the public funds will be used. In past opinions, this office explained that public funds constitute general support if the use of the funds is unrestricted, giving the entity discretion over how the funds are spent. N.D.A.G. 99-O-03; N.D.A.G. 2003-O-02. The more discretion an entity has over how public funds are used, the more likely it is that the funds are for the entity's general support, rather than for a purchase of goods or services.

The underlying policy of the state's open records law is to allow a taxpayer to see how public funds are used. Adams County Record, 529 N.W.2d at 836. Without a specific contract setting forth specific goods or services to be provided in exchange for public money, there is no way for the public to know how its funds are being used. Id. (the only way a taxpayer can see how public funds are used is to access the private organization's records to see how that organization used the money).

This office has also said that public funds constitute "general support" if they are used to subsidize and fund ongoing operations, rather than simply purchasing services at fair market value. N.D.A.G. 2001-O-10. The Agreement states that the funds are being provided to "maintain the viability of the Hospital" and "insure its very existence." Hospital Agreement. Given this contract language and the discretion the Hospital has over the use of the funds, it is my opinion that the funds given to the Hospital are for its general support, rather than for a purchase of goods or services. As a result, the Hospital is a public entity.

All meetings of public entities must be open to the public unless otherwise specifically provided by law. N.D.C.C. §44-04-19. "Meeting," as used in the open meetings law, means a gathering of "[a] quorum of the members of the governing body of a public entity regarding public business." N.D.C.C. § 44-04-17.1(8)(a) (emphasis added). "Public business" means:

all matters that relate or may foreseeably relate in any way to:

- a. The performance of the public entity's governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power; or

b. The public entity's use of public funds.

N.D.C.C. §44-04-17.1(11) (emphasis added). These statutes indicate that only those records that relate to the function the entity is performing for the government or the funds received will be open.<sup>1</sup> Payments from the District are deposited into the Hospital's depreciation fund and the District's funds are accounted for separately. Thus, only those portions of the Hospital's board of directors' meetings dealing with the expenditure of District funds are open under the open meetings law.

Issue Two

On October 23, 2003, Ms. Smithberg and others attempted to attend the Hospital board of directors' meeting to discuss the termination of a particular doctor. While the Hospital is a "public entity" and is subject to the open meetings law regarding the use of the tax proceeds received from the District, this matter did not relate to the use of the tax proceeds. Therefore, it is my opinion that the Hospital board of directors did not violate the open meetings law when it prohibited Ms. Smithberg and others from attending its meeting to discuss the termination of the doctor.

CONCLUSIONS

1. The Hospital is a "public entity" subject to the open meetings law to the extent it addresses the use of the tax proceeds received from the District.
2. The Hospital did not violate N.D.C.C. § 44-04-19 by refusing to allow Ms. Smithberg and others to attend its October 23, 2003, meeting of its board of directors.

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<sup>1</sup> See Hearing on S.B. 2228 Before the Senate Comm. on the Judiciary, 1997 N.D. Leg (Feb. 5) (Statement of Attorney General Heidi Heitkamp). Attorney General Heitkamp's written testimony stated: "This bill clarifies that only when an entity receives money in excess of the fair market value of the goods or services it provides the public agency from which it receives funds would any of its records be open. In that situation, only those records which relate to the function it was performing for the government or to the funds received would be open."

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