

**OPEN RECORDS AND MEETINGS OPINION
2008-O-15**

DATE ISSUED: July 1, 2008

ISSUED TO: Fargo Public School District
Fargo Park District

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Matthew Von Pinnon, editor of The Forum, asking whether the Fargo Public School District and the Fargo Park District violated N.D.C.C. § 44-04-18 by not providing copies of e-mails that were on the private home computers of their appointees serving on the Board of Directors of Metro Sports Foundation, Inc.

FACTS PRESENTED

On October 5, 2007, The Forum, through its reporter, Helmut Schmidt, asked the Fargo Public School District ("School District") for written correspondence of its employees, Dan Huffman, Assistant Superintendent for Business Services, and Ed Lockwood, Director of Student Activities, regarding the Urban Plains Center ("UP Center"), a hockey arena to be located in south Fargo. It also asked the Fargo Park District ("Park District") for written correspondence of its employee, Jim Larson, Director of Finance and Human Resources, and Park District Commissioner, Ron Sorvaag, Vice-president of the Park District Board, regarding the UP Center. At the time of the request, all four men had been appointed to, and sat on, the 11-member Board of Directors ("Board") of Metro Sports Foundation, Inc. ("Foundation"), which oversees the UP Center. The Articles of Incorporation ("Articles") of the Foundation state that the purpose of the Foundation is to own, manage, and provide services "with respect to the design, funding, development, use, operation and maintenance of an athletic arena . . . primarily intended for use in the Fargo . . . area by (a) public and private high schools and middle schools in connection with athletic events and training, (b) youth athletic leagues, (c) the City of Fargo . . . and its Park District in connection with athletic and recreational programs . . . and (d) . . . the general public"¹

¹ Articles of Incorporation of Metro Sports Foundation, Inc., ¶ 5.1.1.

OPEN RECORDS AND MEETINGS OPINION 2008-O-15

July 1, 2008

Page 2

The Foundation Board is made up of 11 directors: a) four youth athletic league directors, who are appointed by and represent the youth athletic leagues in Fargo, b) three School District directors, c) two Park District directors, and d) two independent directors, appointed by the Brandt Family Foundation.² Regarding the three School District directors, the Articles state that the Foundation Board shall include three school directors “representing the high schools and middle schools in the Fargo . . . area”³ Two of the school directors are appointed by the governing board of the Fargo School District, and one school director is appointed by the governing board of the Fargo Catholic Schools Network.⁴ The Articles also state that the two Park District directors are appointed by the governing board of the Fargo Park District.⁵ The Articles provide that the appointees serve “at the pleasure of, and for the term determined by,” the organizations that appointed them, and the appointees may be removed at any time.⁶

The Articles also provide that, upon dissolution of the Foundation, the remaining assets will go to the School District.⁷ If the School District disclaims the right to receive the assets, then the Park District will receive the assets.⁸

In response to the records request, Mr. Huffman, Mr. Lockwood, and Mr. Larson provided to the requester copies of e-mails that were located on their work computers. The Park District has stated, “[i]t’s our understanding that Mr. Sorvaag provided both Park District e-mails and e-mails from his personal computer.”⁹

On October 11, 2007, The Forum made the same request to Mr. Huffman, Mr. Lockwood, and Mr. Larson, specifically asking for e-mails regarding the UP Center that were located on their home computers. The School District and the Park District denied the request.

The Forum is not asking whether the Metro Sports Foundation, Inc., is subject to the open records law, but whether the records sent and received by the four Foundation Board members who were appointed by public entities are open records.

² Articles of Incorporation of Metro Sports Foundation, Inc., ¶¶ 8.1 and 8.2.

³ Articles of Incorporation of Metro Sports Foundation, Inc., ¶ 8.2.2 (emphasis added).

⁴ Articles of Incorporation of Metro Sports Foundation, Inc., ¶ 8.2.2.

⁵ Articles of Incorporation of Metro Sports Foundation, Inc., ¶ 8.2.3.

⁶ Articles of Incorporation of Metro Sports Foundation, Inc., ¶¶ 8.2.1, 8.2.2, 8.2.3, 8.2.4, and 8.3.1.

⁷ Articles of Incorporation of Metro Sports Foundation, Inc., art. 13.

⁸ Id. The Park District may also disclaim the right to receive the assets.

⁹ Letter from Gregory Selbo, Fargo Park District Attorney, to Mary Kae Kelsch, Assistant Attorney General (Dec. 13, 2007).

ISSUE

Whether the School District and the Park District violated the open records law by not providing copies of e-mails that were on the home computers of their appointees serving on the Board of Directors of Metro Sports Foundation, Inc.

ANALYSIS

“Except as otherwise specifically provided by law, all records of a public entity are public records . . .”¹⁰ Upon request, a public entity must provide a copy of public records.¹¹ “Public entity” includes school districts and park districts.¹² “Record” means:

[R]ecorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, 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.¹³

First, it must be determined whether the appointees are “agents” of the School District and Park District. If they are agents, then it must be determined whether the requested records relate to public business. If the appointees are agents and the requested records relate to public business, then the requested records fall within the statutory definition of record, and are subject to the open records law.

This office has previously held that a contractor hired to do work on behalf of a city,¹⁴ and an attorney doing work for a township¹⁵ were both agents of public entities and, therefore, subject to the open records law. In the matter before us, the Foundation’s Articles indicate that the persons appointed to the Foundation Board by the School District and the Park District are appointed to represent the interests of the School District and the Park District. To represent means “[t]o serve as the official and

¹⁰ N.D.C.C. § 44-04-18(1) (emphasis added).

¹¹ N.D.C.C. § 44-04-18(2).

¹² N.D.C.C. § 44-04-17.1(10), (12)(b) (definitions of “political subdivision” and “public entity”), N.D.A.G. 98-L-128 (a public school district is a public entity), and N.D.A.G. 98-O-22 (a city park district is a public entity).

¹³ N.D.C.C. § 44-04-17.1(15) (emphasis added).

¹⁴ See N.D.A.G. 2001-O-04 (an advertising company hired by a city to perform an educational campaign on behalf of the city was an “agent” of the city and, therefore, its records relating to its work for the city were subject to the open records law).

¹⁵ See N.D.A.G. 2007-O-07 (an attorney who drafted a revised zoning ordinance for a township was an “agent” of the township and, therefore, his records relating to that duty were subject to the open records law).

OPEN RECORDS AND MEETINGS OPINION 2008-O-15

July 1, 2008

Page 4

authorized delegate or agent for.”¹⁶ The School District and Park District meeting minutes indicate that these public entities understood that their appointees would represent the School District and Park District’s interests on the Foundation Board.¹⁷ It is my opinion that the persons appointed by the School District and Park District to the Foundation Board are agents of the School District and the Park District.

The remaining issue is whether the records in the possession of the agents constitute public business. Under the open records law, public business means “all matters that relate or may foreseeably relate in any way to [t]he performance of the public entity’s governmental functions . . . or [t]he public entity’s use of public funds.”¹⁸

As discussed above, the agents sit on the Board to represent the interests of the public entities that appointed them. According to the Articles of Incorporation, the UP Center is to be used by the Park District and the School District, among others. Thus, the four agents of the public entities are representing the interests of major users of the facility. The UP Center fills specific needs of both the School District and the Park District for such a facility. As the School District’s representative Dan Huffman explained in a memo to the School District Board members “[t]his facility will be an excellent venue for our high school participants, and it solves a significant capital need for both the park district and the school district. With this facility in place our two entities will not have to commit capital resources to the construction of a hockey facility or to the renovation of the Coliseum as a game facility.”¹⁹

It is my opinion that the UP Center relates to the governmental functions of both the School District and the Park District, and is, therefore, a matter of public business. It is further my opinion that the records requested are in the possession of agents of the School District and Park District and have been received or prepared in connection with public business or contain information relating to public business. Thus, the records requested of Mr. Huffman, Mr. Lockwood, Mr. Larson, and Mr. Sorvaag that relate to

¹⁶ The American Heritage Dictionary 1049 (2d coll. ed. 1991).

¹⁷ The March 27, 2007, School District Board minutes provide: “Ed Lockwood and Dan Huffman were appointed the two Fargo School District representatives on the Metro Sports Foundation Board of Directors. . . .” The April 10, 2007, Park District Board minutes provide: “It was noted that Commissioner Ron Sorvaag and Director of Finance Jim Larson would be the Park District’s representatives on the . . . [Metro Sports Foundation Board].” After these members ceased serving, the Park District Board needed to appoint two more members: the December 11, 2007, Park District Board minutes provide: “Discussion ensued regarding nominating two individuals to represent the Park Board’s interest on the Metro Sports Foundation Board.”

¹⁸ N.D.C.C. § 44-04-17.1(11).

¹⁹ Board of Education Memo #107, April 10, 2007. The School District Board took action on this matter at its April 10, 2007, Board meeting.

the UP Center fall within the definition of “record” and are, therefore, subject to the open records law. These records are subject to the open records law irrespective of whether the records are located on the appointees’ private home computers.²⁰ It is possible that certain information in the e-mails may need to be redacted based on specific statutes that make certain information exempt or confidential.

CONCLUSIONS

It is my opinion that the School District and the Park District violated the open records law by not providing copies of e-mails that were on the home computers of their appointees serving on the Board of Directors of Metro Sports Foundation, Inc.

STEPS NEEDED TO REMEDY VIOLATIONS

The School District and the Park District must provide to the requester, free of charge, copies of all records on their appointees’ home computers that relate to the records request with the exception of any information in the e-mails that may need to be redacted because it is exempt or confidential under specifically applicable statutes.

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. § 44-04-21.2.²¹ It may also result in personal liability for the person or persons responsible for the noncompliance.²²

Wayne Stenehjem
Attorney General

vkk

²⁰ See N.D.A.G. 2008-O-07.

²¹ N.D.C.C. §44-04-21.1(2).

²² Id.