

**OPEN RECORDS AND MEETINGS OPINION
2009-O-14**

DATE ISSUED: August 14, 2009

ISSUED TO: State Department of Health¹

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Jeremy Mattison asking whether the North Dakota Emergency Medical Services Association (Association) violated the open meetings law when the Association's board of directors held an executive session to discuss the preliminary report of an outside auditor and consult with the Association's lawyer concerning a grant from the North Dakota Department of Health (Department).

FACTS PRESENTED

The Association is a private, non-profit trade association under the Internal Revenue Code, section 501(c)(6), that promotes emergency medical services and supports "the development, maintenance and improvement of . . . a continuing education program for all members and others involved in the emergency health care field" in the state of North Dakota.² The Association's funding sources include grants, membership dues, conference and testing certification fees, and sponsorships. The Association conducts regional and statewide training conferences for emergency medical technicians (EMTs).

The Department provides money to the Association through its Division of Emergency Medical Services (DEMS). The Department is statutorily required to assist in the training of emergency medical services personnel of certain emergency medical services operations as determined by the Department.³ The DEMS licenses emergency medical services operations.⁴ In order to "foster EMS training for volunteers" and "to reduce the financial burden on EMT students," the DEMS provides a "conference registration reduction grant" (conference grant) and a "Bismarck test site registration

¹ This opinion is provided to the State Department of Health under N.D.C.C. § 44-04-21.1(1).

² North Dakota EMS Association, Articles of Incorporation and Bylaws, art. 2, § 1.

³ N.D.C.C. § 23-27-04.2.

⁴ See N.D.C.C. § 23-27-01.

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reduction grant” (test grant) to the Association.⁵ The Association is the only organization that receives these grants.

The Department has historically authorized payments to the Association for these grants based on the number of participants attending Association conferences or individuals who are tested by the Association. In order to receive the money, the Association fills out short Department forms. The conference grant form states that DEMS will award a grant for each qualified person who attends the conference under certain conditions: each conference must provide a certain number of training hours; the grant award must decrease the registration fee dollar for dollar for EMS providers; the grant application must be made on the form provided and submitted within a certain number of days; the Association may only be awarded a maximum of \$92,000 of grants per year; and the Association must determine which conference attendees are eligible.⁶ The test grant form is similar, but indicates that the grant award must “decrease” the testing fee, although the amount of the reduction is not specified and grants cannot exceed \$25,000 per year.

The Department pays the Association \$75 for each person who attends a regional conference and up to \$135 for each person who attends the statewide conference. In return, the Association sets the conference admission price at a rate that, along with the money from the Department, is intended to result in a minimal out-of-pocket cost for volunteer EMTs attending the conferences. Similarly, the Department pays \$175 to the Association per participant to reimburse the Association for its role in administering the EMTs’ initial practical test. The test administered must be consistent with the Department’s rules.⁷ The Department pays the Association approximately \$100,000 per year for both the conferences and testing.

⁵ Bismarck Test Site Registration Reduction Grant, SFN 54437 and Conference Registration Reduction Grant, SFN 54436, North Dakota Department of Health, Division of Emergency Medical Services.

⁶ Conference Registration Reduction Grant, SFN 54436. See also the minutes of April 29-30, 2008, Legislative Council Public Safety Committee. In 2007 the legislature appropriated \$1.24 million for EMS training grants. The minutes indicate, “[t]he Department will directly pay \$75 per person to attend a regional conference and up to \$90 to attend the statewide conference.”

⁷ See N.D.C.C. § 23-27-04.3 (the State Health Council adopts rules that set forth the minimum training, testing, certification, licensure, and quality review standards for emergency medical services personnel, instructors, and training institutions).

From 2004 through 2008, the Association also received a Hospital Preparedness Program grant from the Department and a Bioterrorism Preparedness grant.⁸ Both of these grants had detailed and specific grant language setting forth clear scopes of service and reporting requirements. The Association submitted monthly expenditure reports to the Department regarding these grant activities.⁹

In August 2008, Eide Bailly, LLP, was hired by the Association's board of directors to conduct an audit of the Association's use of and accounting for the bioterrorism grant funds.¹⁰ A field audit was conducted at the Association's office and Eide Bailly prepared a draft audit report.¹¹ The audit report was scheduled to be reviewed at the Association's regular board meeting on October 17, 2008. At the meeting the board voted to go into executive session to "receive the draft audit results and consult with counsel regarding any potential legal consequences of the audit."¹² Members of the public were asked to leave the meeting when the board went into executive session.¹³ The meeting was not tape recorded.¹⁴

ISSUES

1. Whether the Association is a public entity subject to the open meetings law.
2. Whether the October 17, 2008, executive session was authorized by law.

ANALYSIS

Issue One

Unless otherwise specifically provided by law, all meetings of a public entity must be open to the public.¹⁵ A "public entity" includes public or governmental bodies or agencies of the state, public or governmental bodies or agencies of political subdivisions of the state, and "[o]rganizations or agencies supported in whole or in part by public funds, or expending public funds."¹⁶ "Public funds" means funds "received

⁸ See, e.g. Dep't of Health Contract No. 08-484, Grant Award to the North Dakota EMS Association (for the period from December 19, 2007, through August 8, 2008) for "the administration of emergency medical services emergency preparedness activities" including as outlined in Attachment A "the identification, training, and exercising of regional response teams with an emphasis on the capability to accomplish a hospital evacuation."

⁹ Letter from Brenda Blazer, Vogel Law Firm, to Mary Kae Kelsch, Assistant Attorney General (Feb. 19, 2009).

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ See N.D.C.C. § 44-04-19.2(5) (executive sessions must be tape recorded).

¹⁵ N.D.C.C. § 44-04-19.

¹⁶ N.D.C.C. § 44-04-17.1(12)(c); N.D.A.G. 2008-O-26.

from the state or any political subdivision of the state.”¹⁷ A nongovernmental organization may also be a “public entity” if it acts as an agent or agency of government.¹⁸

Supported in whole or in part by public funds

As explained in the “Facts” portion of this opinion, the Association receives public funds from the Department for various purposes. These public funds will only make the Association a public entity subject to the open records and meetings laws if the public funds exceed the fair market value of any goods or services given in exchange for the public funds whether through grants, membership dues, fees, or any other payment.¹⁹ The Association argues that all of the funds it has received from the Department since 2004 have been for reimbursements, grants, or contracts that do not constitute general or partial support.

I agree with the Association that the Hospital Preparedness Program²⁰ and the bioterrorism grants do not constitute general or partial support. These grants were awarded to the Association because of its unique knowledge and resources related to the role of emergency medical services in responding to public health emergencies. Both grants include a detailed budget request indicating how the grant would be spent if approved. These documents identify the specific goods and services provided by the Association in exchange for the specific public funds it received under these grant awards. These grants are similar to the type of grants that, in past opinions, have not been found to constitute support by public funds for purposes of the open records law.²¹

In contrast, the arrangement between the Department and the Association regarding the conference grant and the test grant indicates that these programs may constitute partial or general support of the Association. The Association describes the arrangement as a “pass through” and not as a funding source for the Association. The Association considers the arrangement to be a “favor” to the Department so that the Department does not have to write individual checks to each conference attendee. The Department explains that it provides money directly to the Association after every conference and testing. The Association was not selected for these grants under a bid process so it is unclear how the parties arrived at the reimbursement amounts. Additionally, according to the Department forms, only the Association is eligible for the DEMS conference and test grants.

¹⁷ N.D.C.C. § 44-04-17.1(13); N.D.A.G. 2008-O-26.

¹⁸ N.D.C.C. § 44-04-17.1(9), 12(c); N.D.A.G. 2004-O-04; N.D.A.G. 2001-O-11.

¹⁹ N.D.C.C. § 44-04-17.1(9) (definition of organization or agency supported in whole or in part by public funds).

²⁰ The Department discontinued this grant in September 2008.

²¹ See N.D.A.G. 99-O-03 and N.D.A.G. 98-F-19.

The current arrangement between the Association and the Department with respect to the conference and test grants gives the impression that the Department might be supporting the efforts of the Association, rather than purchasing services.²² Based on the foregoing, however, I am unable to determine conclusively on the basis of the information available to this office that the Association is receiving support beyond that provided in exchange for goods or services having an equivalent fair market value.

Agent or agency of government test

Since it is inconclusive whether the Association is supported by public funds, it is appropriate to analyze whether it is acting as an agent of the Department by performing a governmental function.²³

To determine whether an organization is performing a governmental function as an agent of a public entity, this office uses factors set forth in News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.²⁴ The Schwab factors help determine whether an organization is providing services to a government entity, or is acting in place of or on behalf of the entity.²⁵

The Schwab case identified several “non-exclusive factors to aid in determining whether a private organization is performing a governmental function.”²⁶ Those factors are:

- 1) the level of public funding; 2) whether there is 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.²⁷

²² See N.D.A.G. 2001-O-10; N.D.A.G. 2001-O-11; N.D.A.G. 2003-O-02.

²³ N.D.A.G. 2001-O-10 (organization providing economic development services under a contract with a government entity is performing a government function and was an agency of government under the holding in Forum Publ’g. Co. v. City of Fargo, 391 N.W.2d 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. 99-O-02 (nonprofit corporation managing an insurance pool of political subdivisions is an agency of government).

²⁴ Schwab, 596 So.2d 1029, 1031 (Fla. 1992). See N.D.A.G. 2001-O-11; N.D.A.G. 2002-O-09.

²⁵ N.D.A.G. 2004-L-25; N.D.A.G. 2001-O-11.

²⁶ N.D.A.G. 2001-O-11.

²⁷ Schwab, 596 So.2d 1029, 1031 (Fla. 1992).

The level of funding received by the Association is significant – more than \$100,000 a year for training and testing. (Factor 1.) Training and testing grant funds are commingled with the Association's other funds. (Factor 2.) The Association's office is not located on government property. However, the testing is held at the Law Enforcement Training Academy (LETA) which is a North Dakota Highway Patrol building.²⁸ The Association selects the dates and the Department schedules the site. LETA allows the Association to use the facility at no charge if there is a Department employee in attendance. (Factor 3.) Although the services contracted for are not an integral part of the Department's decision-making process, training and testing of emergency medical service providers is an important statutory duty of the Department.²⁹ The Department approves all of the educational material used by the Association at the training conferences. (Factor 4.) The Department previously organized and handled all of the logistics for practical testing before it contracted out this service to the Association. Thus the Association is performing a function which the Department would otherwise perform.³⁰ (Factor 5.) Under the grant award for training and testing, the Department must approve the Association's course curriculum.³¹ Therefore, the Department is directly involved with approving the content of the training provided by the EMS Association. (Factor 6.) The Department did not create the Association, but the revenue received from the Department constitutes a large portion of the Association's gross revenue. In fact, the funds from the Department are a major source of the Association's operating funds. Without the funds from the Department, the Association could have a large deficit at the end of each fiscal year. (Factors 7 and 8.) The Association serves the interest of both its members and the Department. It provides services to the Department under both training and testing grants that benefit both the Department and (particularly with respect to the training and testing grants) its member emergency medical service providers. (Factor 9.)

Considering the totality of the Schwab factors as they relate to this matter, it is my opinion that the Association is acting as an agent of the Department for the purpose of providing the governmental functions of training and testing to emergency medical

²⁸ See N.D.C.C. § 39-03-13.1.

²⁹ N.D.C.C. § 23-27-04.2 (“[t]he state department of health shall assist in the training of emergency medical services personnel . . . [which] must be within the limits of legislative appropriation [and] [t]he department shall adopt criteria for eligibility for assistance in the training of emergency medical services personnel . . .”).

³⁰ Interview of Edward Gregoire, Department of Health EMS Training Coordinator (May 27, 2009).

³¹ N.D.A.C. § 33-36-01-02 (“[the] department shall establish training, testing, and certification requirements for [first responder, emergency medical technician, etc.] emergency medical service courses . . .”). The Department confirms that it approves the training for each conference provided by the Association. Interview of Edward Gregoire (May 27, 2009).

service providers.³² This, coupled with the fact that the Department appears to be supporting the Association and the indistinct terms of the contract with the Department, makes the Association a public entity for the purposes of the open records and meetings law.

Issue Two

As stated in “Issue One,” under the current arrangement with the Department, the Association is an organization supported in whole or in part by public funds.³³ As a public entity, all meetings of the Association’s governing body must be open to the public unless otherwise provided by law.³⁴

A governing body of a public entity may only hold an executive session to consider or discuss exempt or confidential records.³⁵ Attorney consultation is exempt from the open meetings law; however, the “[m]ere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation.”³⁶ In order to hold an executive session for “attorney consultation,” the governing body must be receiving the attorney’s advice regarding and in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings.³⁷

According to the Association’s attorney, the purpose of the executive session held on October 17, 2008, was to “receive the draft audit results and consult with counsel regarding any potential legal consequences of the audit.”³⁸ There is no open meetings exception that would apply to consideration of the audit report.³⁹ Additionally, there is no basis in the law to close a meeting to discuss “potential legal consequences.” Rather, the attorney’s advice must pertain to litigation or an adversarial administrative proceeding that is “pending” or “reasonably predictable.” The use of the phrase “reasonably predictable” in N.D.C.C. § 44-04-19.1 requires more than a simple possibility of litigation or adversarial administrative proceedings.⁴⁰ The possibility of

³² See N.D.A.G. 2004-L-25 (finding the Barnes & Noble Bookstore at the University of North Dakota was a “public entity” under the “agency of government” test); N.D.A.G. 2001-O-10 (finding a contractor was a “public entity” under the “agency of government” test).

³³ N.D.C.C. § 44-04-17.1(12)(c).

³⁴ N.D.C.C. § 44-04-19.

³⁵ N.D.C.C. § 44-04-19.2.

³⁶ N.D.C.C. § 44-04-19.1(5).

³⁷ N.D.C.C. § 44-04-19.1(5) (definition of attorney consultation).

³⁸ Letter from Brenda Blazer to Assistant Attorney General Mary Kae Kelsch (Feb. 19, 2009).

³⁹ See N.D.A.G. 2001-O-11.

⁴⁰ N.D.A.G. 2001-O-15.

litigation or a proceeding by or against the governing body must be realistic and tangible.⁴¹

In this case, the Association anticipated an unfavorable audit that raised issues about expense documentation. However, the fear of the Department's reaction to a negative audit is not the same as a threat of litigation or administrative action. Nothing indicates that, at the time of the meeting, there was a threat of any sort of legal action against the Association. Thus, it is my opinion that the October 17, 2008, executive session was not authorized by law and the Association violated N.D.C.C. § 44-04-19 by refusing to allow the public to attend the meeting.

CONCLUSIONS

1. The Association is a public entity subject to the open meetings law.
2. The executive session held by the Association on October 17, 2008, was not authorized by law.

STEPS NEEDED TO REMEDY VIOLATION

The Association board must prepare minutes from the portion of the executive session of the October 17, 2008, meeting where the board received and reviewed the audit. The minutes must be provided to Mr. Mattison. A copy of the audit report has already been provided to Mr. Mattison, so no further remedy is necessary.

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. § 44-04-21.2.⁴² It may also result in personal liability for the person or persons responsible for the noncompliance.⁴³

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Attorney General

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⁴¹ Id.

⁴² N.D.C.C. §44-04-21.1(2).

⁴³ Id.