

**OPEN RECORDS AND MEETINGS OPINION
2014-O-04**

DATE ISSUED: April 24, 2014

ISSUED TO: Dickinson State University Foundation

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Katherine Lymn asking whether the Dickinson State University Foundation violated N.D.C.C. § 44-04-18 by failing to provide copies of requested records.

FACTS PRESENTED

On November 19, 2013, Ms. Katherine Lymn sent an email with an attached open records request to Mr. Kevin Thompson, CEO of the Dickinson State University (DSU) Foundation.¹ Ms. Lymn requested emails to or from Mr. Thompson between October 1, 2013, and November 19, 2013, that contained the following words or phrases: "Hawk Square," "Hawks Point," "Dickinson Investment Company," "Beaver," "Brinkman," "Oasis," "Ebeltoft," or "Edgewood."² Mr. Thompson denied the records request on November 22, 2013, on the grounds that the emails were not "public records" involving "public business" or related to any use of "public funds" that were subject to the open records law.³

ISSUES

1. Whether the DSU Foundation is subject to the open records law.
2. Whether the DSU Foundation violated the open records law by denying a request for records.

¹ Email from Katherine Lymn to Kevin Thompson, CEO, Dickinson State Univ. Found. (Nov. 19, 2013, 2:45 PM).

² Letter from Katherine Lymn to Kevin Thompson, CEO, Dickinson State Univ. Found. (Nov. 19, 2013).

³ Email from Kevin Thompson, CEO, Dickinson State Univ. Found. to Katherine Lymn (Nov. 22, 2013, 11:56 AM).

ANALYSES

Issue One

Although state universities are unquestionably “public entities” subject to the open records and meetings law, the extent to which their supporting foundations are also “public entities” is a recurring question both in opinions and inquiries to this office.⁴ To determine whether a foundation is a public entity, this office may consider whether:

1. The organization is delegated authority by a governing body of a public entity.
2. The organization is created or recognized by state law, or by an action of a political subdivision, to exercise public authority or perform a governmental function.
3. The organization is supported in whole or in part by public funds or is expending public funds.
4. The organization is an agent or agency of a public entity performing a governmental function on behalf of a public entity [or] having possession or custody of records of the public entity.⁵

Foundations traditionally become “public entities” by way of the fourth factor, i.e., the foundations were typically determined to be agents of the state universities by performing governmental functions on their behalf. These functions are usually outlined in agreements between the foundation and the university it supports, agreements that are mandatory under State Board of Higher Education policy 340.2.

In 2009, I determined that the University of North Dakota (UND) Foundation and Alumni Association acted as agents for UND by performing governmental functions, delegated by way of a Master Agreement, on UND’s behalf.⁶ The Agreement delegated the responsibilities of raising, receiving, investing and administering funds for UND to the

⁴ N.D.A.G. 2013-O-10 (NDUS Found.); N.D.A.G. 2009-O-08 (UND Alumni Ass’n and UND Found.); and N.D.A.G. 2006-O-01 (NDSU Research Found.).

⁵ N.D.C.C. § 44-04-17.1(13)(a), (16) (definitions of “public entity” and “record”); N.D.A.G. 2013-O-10; N.D.A.G. 2006-O-01.

⁶ N.D.A.G. 2009-O-08.

UND Foundation and the responsibility of maintaining a database to the Alumni Association.⁷

In 2006, I determined that the North Dakota State University (NDSU) Research Foundation acted as an agent of NDSU when it managed the intellectual properties of the University, pursuant to a contract called a “Cooperation Agreement.”⁸ The authority and duty of the State Board of Higher Education (SBHE) and NDSU regarding inventions and discoveries were transferred to the foundation in accordance with the Cooperation Agreement, and this delegation of public business made the NDSU Research Foundation an agent of NDSU subject to the open records law.

Whether affiliated foundations are subject to the open records law has also been litigated in various jurisdictions. These courts recognize that the receipt and solicitation of gifts and fundraising are indispensable functions of any institution of higher learning and an integral part of its continuing viability.⁹ State universities are “public entities” and the solicitation and receipt of donations for the university, promoting and aiding the

⁷ Id. These delegated responsibilities are “governmental functions” and when the two organizations perform these functions on behalf of UND, they act as agents of UND.

⁸ N.D.A.G. 2006-O-01. “The Foundation was created for the support of NDSU in its efforts to encourage the development, and protect and market, inventions and discoveries of NDSU employees.” N.D.C.C. § 15-10-17(9) gives the State Board of Higher Education authority to transfer “ownership rights or distribution of income to a private, nonprofit entity created for the support of the university system or one of its institutions.”

⁹ See N.D.A.G. 2006-O-01 (citing Gannon v. Bd. of Regents of the State of Iowa, 692 N.W.2d 31 (Iowa 2005)) (“[t]he receipt and solicitation of gifts . . . is an indispensable function of any institution of higher learning” and are governmental functions; when a university “contracts away” this function to an affiliated foundation, the foundation is subject to the open records law). See also State ex rel. Toledo Blade Co. v. Univ. of Toledo Found., 602 N.E.2d 1159 (Ohio 1992) (private, nonprofit foundation was not a mere supplementary benefactor of the university but rather acted as major gift-receiving and soliciting arm of the university and was therefore a “public office” subject to the open records law); East Stroudsburg Univ. Found. v. Office of Open Records, 995 A.2d 496 (Pa. Commw. Ct. 2010) (foundation, pursuant to an agreement with the affiliated university, carried out fundraising on behalf of the university, making any records related to performing fundraising activities open records); Cape Publ’ns Inc. v. Univ. of Louisville Found. Inc., 260 S.W.3d 818 (Ky. 2008) (foundation was fundraising arm of state university because it solicits, receives, and spends money and other assets on behalf of the university; the public’s legitimate interest in the university’s operations logically extend to foundation operations, making the foundation subject to the open record laws).

university, fundraising for the university, and keeping records of such activities are vital and indispensable government functions.¹⁰ Foundations that undertake these activities on behalf of universities perform government functions, despite their status as private, nonprofit corporations.¹¹

Utilizing the above guidance from past opinions and case law, I must next determine whether the DSU Foundation is subject to the open records law by analyzing the relationship between the DSU Foundation and DSU. In 2007, these entities entered into an Operating Agreement (Agreement),¹² along with the DSU Alumni Association. Although the Agreement states the Foundation is an “independent, non-profit corporation,” the Foundation agrees to assume various responsibilities, including, among other things, to “support and assist . . . the University,” “[stimulate] the interest and encourage[] the involvement of alumni and friends in activities of the University,” “[promote] the University,” “[provide] direct and ancillary staff support,” and “[provide]

¹⁰ See supra n.9.

¹¹ See supra n.9. In 2005, the Supreme Court of Iowa determined the Iowa State University (ISU) Foundation was subject to Iowa open records law because it was performing the governmental function of fundraising and management, functions outlined in a “Service Agreement” between the foundation and the university. Although the ISU Foundation employed its own personnel, was headquartered off of ISU property, styled itself not as part of ISU but as a wholly independent and private not for profit corporation, its activities to support, organize, raise, and manage private gift funds for the university and various other activities it does pursuant to the Agreement, were deemed governmental functions subject to the open records law. Gannon v. Bd. of Regents of the State of Iowa, 692 N.W.2d 31 (Iowa 2005).

¹² See Operating Agreement between Dickinson State University and Dickinson State University Foundation, Inc. [and] Dickinson State University Alumni Association (signed by the respective parties in January 2007). The DSU Foundation claims this Agreement has been dissolved. See Email from Paul Ebeltoft, atty. for DSU Found., to Sandra Voller, Asst. Atty. Gen. (Jan. 22, 2014, 5:15 PM). Although opinions issued by this office must be based on information obtained from the public entity, I will not base opinions on assertions contradicted by facts. I received no set of definitive facts or evidence confirming that this Agreement has been legally dissolved; rather, I received evidence showing that, although the Agreement is in the process of being updated, it is treated by the parties as effective. The Agreement details how it may be terminated and having received no evidence to support that the termination terms have been met, I will operate under the assumption that the Agreement, although in the process of being updated, is still in force and effect. See also N.D.A.G. 2000-L-62 (recognizing the need for SBHE policy 340.2 and acknowledging, in the absence of an express contract, an implied contract can be assumed from the acts and conduct of the parties).

private financial support for the advancement of the University.”¹³ The Agreement dictates that the President of DSU will serve as an ex officio, nonvoting member of the Board of Directors and on the executive committee for the Foundation and that the Executive Director of the Foundation will serve as a member of the DSU President’s Cabinet and as DSU’s Director of the Office of Alumni and Foundation.¹⁴ It also contains provisions setting out mechanisms by which DSU will communicate its needs and budget requests to the Foundation to help establish Foundation priorities and direct its spending.¹⁵ In addition, the Agreement allows the DSU Foundation license to use “DSU” and university identifying marks and logos.¹⁶

The By-Laws of the Foundation, in keeping with the Agreement, reiterate the purpose of the Foundation to:

- (a) Stimulate and foster support for Dickinson State University;
- (b) Secure, manage and disburse funds to benefit the University and its students;
- (c) Secure, manage and disburse funds to assure the corporation’s successful operation;
- (d) To do so in such a way as will maintain a consistent flow of financial support for these purposes; . . .¹⁷

The Agreement and By-Laws establish an intertwined relationship between DSU and the DSU Foundation in which the Foundation carries out several government functions on behalf of and in coordination with DSU.

In addition to the Agreement and By-Laws, it is appropriate to review the actual practice, function, and purpose of a foundation to determine whether it performs governmental functions on behalf of its affiliated university. The DSU Foundation was created and continues to operate for the sole purpose of supporting DSU, and it does so with guidance from DSU. One of the DSU Foundation’s primary duties is to solicit and receive donations for a public university from private donors. It is because of the

¹³ Operating Agreement Between Dickinson State Univ. and Dickinson State Univ. Found., Inc. [and] Dickinson State Univ. Alumni Ass’n (signed by the respective parties in Jan. 2007).

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

¹⁷ By-Laws of the Dickinson State Univ. Found. (amended Dec. 12, 2008).

Foundation's affiliation with DSU that it is able to receive and capitalize on its receipt of donations.¹⁸ The DSU Foundation does not retain any profit but uses any income from the donations or other investments for the good of the public by promoting and financially assisting the university, taking into account DSU's prioritized budget requests.

External factors further underscore the intertwined relationship between North Dakota's public institutions of higher education and their affiliated foundations. The foundations' financial statements are rolled into the North Dakota University System's financial statements and the universities' Composite Financial Indicator score, which is used for accreditation purposes because the financial health of the foundations is deemed integral to the financial health of the universities.¹⁹ Further, in 2007, affiliated foundations were added to N.D.C.C. § 44-04-18.15 as entities that can claim exemptions for certain donor information.²⁰ If foundations were not in fact "public entities" subject to the open records law, there would have been no need to add them as organizations that can claim such an exemption.

In light of the Agreement between DSU and the DSU Foundation, the DSU Foundation By-Laws, the intertwined relationship between DSU and the DSU Foundation, and the purpose and actual functions performed by the DSU Foundation, it is my opinion that the DSU Foundation is a "public entity" subject to the state open records law because it acts as an agent of DSU by performing governmental functions on behalf of DSU.

¹⁸ As a further example, DSU actively directs donations to the Foundation. In accessing the DSU website, there is a link to "Give to DSU." The link takes you directly to the DSU Foundation website for the donation. (<http://www.dickinsonstate.edu/>)

¹⁹ Email from Paul Ebeltoft, atty. for DSU Found., to Sandra Voller, Asst. Atty. Gen. (Jan. 22, 2014, 5:15 PM). Other factors show interdependence between the foundations and affiliated universities. The DSU Foundation is established as a tax-exempt, charitable organization under an IRS Section 501(c)(3) status and in order to be recognized as such, the organization must be organized and operated exclusively, meaning primarily, for an exempt purpose. See DSU Found. Restated Articles of Inc. dated Nov. 11, 2008; see also Exemption Requirements – Section 501(c)(3) Organizations, www.irs.gov. Foundations supporting universities qualify under this exempt status because they usually meet the definition of "charitable" by advancing educational or scientific endeavors.

²⁰ N.D.C.C. § 44-04-18.15; 2007 N.D. Sess. Laws ch. 387, § 1; S.B. 2160, 2007 N.D. Leg.

Issue Two

All records of a public entity regarding “public business” are open to the public unless otherwise specifically provided by law.²¹ As I have concluded that the DSU Foundation is a “public entity,” I next turn to the issue of whether the records requested relate to the DSU Foundation’s “public business” and, therefore, are subject to the open records law.

In past opinions, I recognized that only records “in the possession of an agent of a public entity that have been ‘received or prepared for use in connection with public business or that contain information relating to public business’” are public records.²²

“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.²³

This statute indicates that “only those records that relate to the function the entity is performing for the government or the funds received will be open.”²⁴

Any records related to the governmental functions the DSU Foundation performs on behalf of DSU, such as, but not limited to, funding scholarships, projects and employee awards; supporting, promoting, and assisting DSU; soliciting and managing funds on

²¹ N.D.C.C. § 44-04-18.

²² N.D.A.G. 2007-O-07. See also N.D.A.G. 2003-O-02 (the public business of the Senior Center consists of all matters that relate or may foreseeably relate to how it spends the public funds it receives from the county mill levy; however, if those funds are commingled with other revenue, then all financial records must be open to the public); N.D.A.G. 2001-O-11 (all recorded information regarding the Fargo-Cass County Economic Development Corporation’s performance of its governmental functions and finances pertain 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).

²³ N.D.C.C. § 44-04-17.1(12) (definition of “public business”).

²⁴ N.D.A.G. 2004-O-04.

behalf of DSU; and providing private financial support to DSU, are subject to the open records law.²⁵

Following the general denial given to Ms. Lymn and in response to questions posed by my staff, the DSU Foundation gave various reasons for denial of the records requested. The DSU Foundation first alleges the records do not contain any “public business” because the request relates to “the Foundation’s involvement as an investor in two privately owned housing facilities performing no ‘governmental function’ for or delegated by Dickinson State University to the Foundation and involving no public funds.”²⁶

The records request relates to the DSU Foundation’s involvement as an investor in two buildings - Blue Hawk Square and Hawks Point. The DSU Foundation markets the Blue Hawk Square building as “our new state-of-the-art student housing facility.”²⁷ The Hawks Point building, utilized as a senior living apartment community, is on DSU property, contains classrooms for DSU student use, and offers internship opportunities

²⁵ The DSU Foundation attempts to characterize itself as both a private and public organization, asserting some of its activities are not performed on behalf of DSU but rather as private interests of the DSU Foundation. This conclusion is unsupported by the terms of the Agreement with DSU, its By-Laws, and the actual functions the DSU Foundation performs on behalf of DSU. The DSU Foundation exists solely to support and aid DSU. Any activities that the DSU Foundation performs on DSU’s behalf, such as aiding or supporting DSU, are “governmental functions” subject to the open records law. Even the alleged “private investments” by the DSU Foundation would result in promoting and providing profit that would be used to aid DSU.

²⁶ See Letter from Paul Ebeltoft, atty. for DSU Found., to Sandra L. Voller, Asst. Atty. Gen. (Jan. 2, 2014).

²⁷ See DSU Found. website (<http://dsufamily.com>). The DSU Foundation claims that it no longer has an arrangement with DSU regarding the apartment building and that it is now a building operated and managed by a private investor. See Email from Paul Ebeltoft, atty. for DSU Found., to Sandra Voller, Asst. Atty. Gen. (Jan. 6, 2014, 6:14 PM). No such arrangement is required to make the DSU Foundation’s actions in promoting and investing in the building subject to the open records law, because any actions the DSU Foundation performs on behalf of DSU that promote, assist, or otherwise provide funding for the university would be “public functions” subject to the open records law.

to DSU students.²⁸ The DSU Foundation's role as investor and marketer of these two buildings relates to its public business to support, assist, promote, stimulate interest in, and provide financial support on behalf of and for DSU. Any such records are public records subject to the open records law.

The DSU Foundation also contends that the records requested relate to a pending legal dispute and are therefore "attorney work product" exempt from disclosure under N.D.C.C. § 44-04-19.1(6).²⁹ In order to be protected as "attorney work product:"

1. The record must have been prepared by, or at the express direction of, the public entity's representing attorney;
2. The record must reflect a mental impression, conclusion, litigation strategy, or legal theory of the attorney or public entity; and
3. The record must have been prepared exclusively for active or reasonably predictable civil or criminal litigation or adversarial administrative proceedings.³⁰

All three of the above elements must be met in order to protect the requested emails as "attorney work product."³¹ I question whether every email that uses the words "Hawk Square," "Hawks Point," or other keywords would fit into the above definition. The DSU Foundation must do an analysis, subject to review by this office, of every record to

²⁸ See N.D.A.G. 2005-L-05: The land the Hawk Point building is located on is owned by the State Board of Higher Education, and leased to the DSU Foundation pursuant to a ground lease, entered into in 2004. Id.; see also Dickinson State Univ. Found. – Ground Lease, dated Apr. 16, 2004. The DSU Foundation subleased the property to Dickinson Investors, LLC who developed a senior living facility on the property. Pursuant to agreement with SBHE and DSU, the building is used in part for academic and research purposes and because of this arrangement and affiliation with DSU, the building is exempt from ad valorem taxation under N.D.C.C. § 57-02-08(34). N.D.A.G. 2005-L-05; see also Email from Paul Ebeltoft, atty. for DSU Found., to Sandra Voller, Asst. Atty. Gen. (Feb. 11, 2014, 6:10 PM).

²⁹ See Letter from Paul Ebeltoft, atty. for DSU Found., to Sandra Voller, Asst. Atty. Gen. (Jan. 2, 2014). The DSU Foundation also alleges the records are "attorney consultation" not subject to the open records law. "Attorney consultation," as defined by N.D.C.C. § 44-04-19.1(2) and (5) only protects "discussions" and is therefore correctly used to close a meeting in executive session, rather than used to protect any "record."

³⁰ See N.D.C.C. § 44-04-19.1(6).

³¹ N.D.C.C. § 44-04-19.1(6); see also N.D.A.G. 2003-O-17.

determine whether the above exception to the open records law can correctly be used to withhold any requested record.

Finally, the DSU Foundation claims the records all relate to “active investigatory work product” and are therefore exempt under N.D.C.C. § 44-04-19.1(3) and (7).

“Investigatory work product” means records obtained, compiled, or prepared by a public entity in an effort to monitor and enforce compliance with the law or an order. Investigatory work product must be considered active as long as it is related to monitoring or enforcement activity conducted with a reasonable good-faith belief that it will lead to enforcement of law or an order.³²

This exception to the open records law applies to public entities charged by law with the duty to monitor and enforce some law or order.³³ The DSU Foundation is not an entity tasked with this duty. When asked which law or order the DSU Foundation claims makes the above records exempt, it claims it is attempting to enforce municipal codes related to construction of the Hawks Point and Blue Hawk Square buildings. DSU is not charged with the enforcement of building codes, rather, if felt aggrieved, the DSU Foundation would need to bring a civil suit and then claim exception under the above “attorney work product” or other exemption.

Based on the above, it is my opinion that the DSU Foundation denied the records request on insufficient legal grounds. The DSU Foundation must go through each record responsive to the request and, subject to review by this office, determine whether it fits into the “attorney work product” exemption or other relevant exemption specifically provided by law. Without an exemption, the records are public records open and available to any member of the public.

³² N.D.C.C. § 44-04-19.1(7).

³³ Id. Public entities tasked with the duty to monitor or enforce law or order have a time period before they determine whether a violation has been committed and whether to charge in a civil or criminal suit. The time period in which the entity does investigatory work to build the case is what this exemption was designed to protect because at this stage, the likelihood of litigation is unknown and the records therefore cannot be exempt as “attorney work product.” See Hearings on H.B. 1286, 2005 N.D. Leg.

CONCLUSIONS

1. The DSU Foundation acts as an agent of DSU by performing governmental functions on DSU's behalf and is therefore a "public entity" subject to the open records law.
2. It is my opinion that the DSU Foundation did not provide a correct legal reason for denying the records request and therefore violated the open records law.

STEPS NEEDED TO REMEDY VIOLATION

The DSU Foundation must conduct an analysis, subject to review by this office, on whether the requested records fit into the exception to the open records law for "attorney work product." Any such records not exempt or made confidential under law must be provided to the requester, free of charge.

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. § 44-04-21.2.³⁴ It may also result in personal liability for the person or persons responsible for the noncompliance.³⁵

Wayne Stenehjem
Attorney General

slv/cjn

³⁴ N.D.C.C. §44-04-21.1(2).

³⁵ Id.