

**OPEN RECORDS AND MEETINGS OPINION
2014-O-07**

DATE ISSUED: July 28, 2014

ISSUED TO: North Dakota State University Development Foundation

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Rob Port asking whether the North Dakota State University Development Foundation violated N.D.C.C. § 44-04-18 by denying a request for expenditure records.

FACTS PRESENTED

On December 23, 2013, Mr. Port requested the following records from the North Dakota State University (NDSU) Development Foundation:

1. A[n] itemized copy of all payments to or on behalf of NDSU President Dean Bresciani from the foundation in 2013 through December 23rd. . . .
2. A copy of all expenditures by the NDSU foundation in general for 2013 through December 23rd.¹

Having received no response, Mr. Port contacted the NDSU Development Foundation again on December 30, 2013, requesting acknowledgment of receipt of his open records request.² On January 7, 2014, the NDSU Development Foundation provided records regarding NDSU President Dean Bresciani's discretionary account supported by the foundation's resources, in response to the first set of records requested.³ However, the NDSU Development Foundation denied Mr. Port's second request regarding foundation expenditures because "most of our expenditures are non-public

¹ Email from Rob Port, Editor, SayAnythingBlog.com, to Doug Mayo, NDSU Dev. Found. President (Dec. 23, 2013; 10:07 PM). At the end of the email, Mr. Port stated that if the NDSU Development Foundation had any questions regarding his request, it should call or email.

² See Email from Rob Port, Editor, SayAnythingBlog.com, to Doug Mayo, NDSU Dev. Found. President (Dec. 30, 2013, 8:19 AM).

³ See Email from Doug Mayo, NDSU Dev. Found. President, to Rob Port, Editor, SayAnythingBlog.com (Jan. 7, 2014, 10:09 AM).

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fund expenditures; we have our own staff (non-public employees) and our Trustee's [sic] make independent decisions on how to expend our resources."⁴ Instead, the NDSU Development Foundation directed Mr. Port to review the audited financial statements publically available on the foundation's website.⁵ Mr. Port submitted a request for an opinion to this office on whether the NDSU Development Foundation properly denied his request for expenditure records.⁶

On February 12, 2014, the NDSU Development Foundation provided this office with additional reasons for its denial of the records request that were not included in its original denial to Mr. Port. Included in this reasoning were allegations that the request was "exceptionally broad," it "would be cost prohibitive and a strain on the personnel resources of the NDSU Foundation to produce a copy of all expenditures" of the foundation, some expenditure records would "likely . . . fall within exemptions" to the open records law although "no specific documents have been identified as exempt or confidential," and that the NDSU Development Foundation is "not a public entity."⁷

After this office issued an opinion on April 24, 2014, regarding the extent to which foundations affiliated with public universities are "public entities" subject to open records law, the NDSU Development Foundation was given an opportunity to amend or otherwise supplement its response to this office for its denial of the expenditure records.⁸ In its supplemental responses, the NDSU Development Foundation reiterated its previous arguments and further contended that some of its functions are not "governmental functions" performed on behalf of NDSU and records related to such nongovernmental functions would therefore not be subject to open records law. Finally,

⁴ Id.

⁵ Id.

⁶ Email from Rob Port, Editor, SayAnythingBlog.com, to Attorney General's office (Jan. 14, 2014, 10:47 AM).

⁷ Letter from Christopher McShane, counsel for NDSU Dev. Found., to Sandra L. Voller, Ass't. Att'y Gen. (Feb. 12, 2014).

⁸ N.D.A.G. 2014-O-04.

the NDSU Development Foundation argues any student scholarship records in its possession are protected.⁹

ISSUE

Whether the NDSU Development Foundation violated open records law by denying a request for expenditure records.

ANALYSIS

All records of a “public entity” are open to the public unless otherwise specifically provided by law.¹⁰ Any records that relate to the public business of a public entity are subject to the open records law.¹¹ “Once a person makes a request for open records, it is the responsibility of the public entity to respond to the request within a reasonable time and the requester is not required to contact the entity again to find out when the records will be provided or made available.”¹² Once a request for records is made, a public entity does not have discretion to decide whether the request is meritorious and may only deny the request if a law specifically provides that the record is either exempt or confidential.¹³

This office recently issued an opinion providing guidance on the extent to which foundations affiliated with public institutions are subject to open records law. In that opinion, the Dickinson State University (DSU) Foundation was considered a public

⁹ Email from Christopher McShane, counsel for NDSU Dev. Found., to Rob Port, Editor, SayAnythingBlog.com (May 9, 2014, 8:01 AM). It appears the NDSU Development Foundation is attempting to claim some of its expenditure records are confidential pursuant to the Family Education Rights and Privacy Act (FERPA). It is questionable whether scholarship records are in fact protected under FERPA. If the foundation has previously released information on recipients of scholarships, it cannot now claim an exemption. Further, under FERPA, “directory information” may be disclosed which includes a student’s name, honors, and awards received, as this information is not generally considered harmful or an invasion of privacy. 34 CFR § 99.3. In any event, this office requires public entities claiming a FERPA exception to do an analysis on whether the record can be disclosed by redacting personally identifiable information. N.D.A.G. 2013-O-08. The NDSU Development Foundation provides no proof it has done this required analysis.

¹⁰ N.D.C.C. § 44-04-18.

¹¹ Public business is defined to include “all matters that relate or may foreseeably relate in any way to [t]he performance of the public entity’s governmental functions.” N.D.C.C. § 44-04-17.1(12).

¹² N.D.A.G. 2005-O-05 (citations omitted); see also N.D.A.G. 2004-O-20.

¹³ N.D.A.G. 2013-O-17.

entity subject to open records law because it acted as an agent of its affiliated university, DSU, performing governmental functions on DSU's behalf.¹⁴ This office recognizes that the solicitation and receipt of donations for a public university, along with promoting, aiding, and fundraising for the university, are governmental functions and when foundations undertake these activities on behalf of universities, they become "public entities," despite their status as private, nonprofit corporations.¹⁵ The DSU Foundation's sole purpose, as demonstrated by its By-Laws and an Agreement with DSU, was to support and assist DSU.¹⁶ All functions performed by the DSU Foundation were "governmental functions," rendering it a public entity subject to open records law.¹⁷

Like the DSU Foundation, the NDSU Development Foundation's sole purpose and function, as outlined in its By-Laws¹⁸ and numerous agreements¹⁹ with NDSU, is to support and assist NDSU. The NDSU Development Foundation is a public entity subject to open records laws because it performs governmental functions on behalf of NDSU.

Here, the NDSU Development Foundation did not provide records of its expenditures because it claims some of the work done by the foundation is not "public business" or does not relate to its "governmental functions" and, therefore, is not subject to the open records law.²⁰ As an example, the foundation contends that its electricity bill is not "public business" and analyzing all of its expenditures to extract such records would be cost prohibitive. Records related to expenditures for resources a public entity needs to

¹⁴ N.D.A.G. 2014-O-04.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ North Dakota State University Development Foundation Bylaws (as amended Oct. 5, 2012). "The purpose of this Foundation is to aggressively acquire resources for the support of North Dakota State University of Agriculture and Applied Science. . . ."

¹⁹ There are numerous agreements between the NDSU Development Foundation and NDSU. The agreement that exemplifies the broad delegation of government functions from NDSU to the NDSU Development Foundation is titled: Agreement Between North Dakota State University[,] The North Dakota State University Development Foundation and The North Dakota State University Alumni Association, signed by the respective parties on December 6, 2011. The Agreement provides that NDSU asks the Foundation and Alumni Association to assume primary responsibilities of, among other things, acquiring resources to support NDSU, assist NDSU in building endowment and addressing long-term academic priorities of NDSU, identify potential donors and nurture the relationships of such persons with NDSU, and to solicit support, accept gifts, and fundraise on behalf of NDSU.

²⁰ See Letters from Christopher McShane, counsel for NDSU Dev. Found., to Sandra L. Voller, Asst. Att'y Gen. (Feb. 12, 2014 and May 5, 2014).

operate, such as electricity, relate to the entity's public business.²¹ The NDSU Development Foundation failed to provide evidence that it retains any expenditure records unrelated to its public business or the governmental functions it performs on behalf of NDSU, nor has it cited any law suggesting its expenditure records are exempt or confidential.²²

As explained in the "facts" section, the NDSU Development Foundation also objects that the request was "too vague," would be "cost prohibitive," and a "strain on the personnel resources" to fulfill. Such allegations are not exceptions to the open records law and are not legal bases for denying a records request. The amount of work needed to respond to a records request may affect the time necessary to respond, but it does not render the request insufficient under N.D.C.C. § 44-04-18.²³ Additionally, and as explained in past opinions, if a public entity does not understand a request, it has a duty to contact the requester for clarification in a timely manner.²⁴ Here, it was only after prompting from this office, approximately four months later, that the NDUS Development Foundation sought clarification from the requester.

It was not until May 22, 2014, five months after Mr. Port's initial request, and only after numerous interventions from this office, that the NDSU Development Foundation produced any sort of expenditure records to the requester.²⁵ The NDSU Development Foundation spent more time trying to avoid the open records request than determining

²¹ N.D.C.C. § 44-04-17.1(12) (definition of "public business" includes "all matters that relate or may foreseeably relate in any way to [t]he performance of the public entity's governmental functions.") See also, N.D.A.G. 2013-O-17; N.D.A.G. 2013-O-10; and N.D.A.G. 2002-O-09; see also N.D.A.G. 94-L-103. ("No state statute provides a specific exemption under the open records law for a city checkbook. If the checkbook contains any information which is specifically exempted from the open records law by statute, access to that information may be denied. The remainder of the checkbook remains an open record.")

²² See N.D.A.G. 2003-O-10 and N.D.A.G. 99-O-03. (If public funds have been pooled with other revenue of a private, non-profit corporation, and not segregated in a separate account, then all financial records must be open to the public.)

²³ See N.D.A.G. 2001-O-12. (A request for a large number of records is not, by definition, overbroad. The breadth of request affects the time within which a public entity is required to respond, but not whether the request is sufficient under N.D.C.C. § 44-04-18.) As a public entity, the NDSU Development Foundation may charge the allowable amounts under N.D.C.C. § 44-04-18(2), in order to defray some of the costs associated with providing public records.

²⁴ See N.D.A.G. 2013-O-17. (If the public entity is unclear on what records were being requested, it has a duty to contact the requester for clarification in a timely manner.)

²⁵ Email from Christopher McShane, counsel for NDSU Dev. Found., to Rob Port, Editor, SayAnythingBlog.com (May 22, 2014, at 4:13 PM).

how to fulfill the request and, instead of working with its requestor, continually denied the request on incorrect legal grounds.²⁶

CONCLUSION

The NDSU Development Foundation violated the open records law when it denied a request for expenditure records on incorrect legal grounds and when it delayed its response by months, even after acknowledging that it had responsive records.

STEPS NEEDED TO REMEDY VIOLATION

Although the NDSU Development Foundation produced some records related to its 2013 expenditures, the foundation must now communicate with Mr. Port about any further records it has in its possession that relate to its 2013 expenditures. The NDSU Development Foundation must provide a copy of any requested records, free of charge, although the foundation may charge the appropriate fee for locating any records as allowed by N.D.C.C. § 44-04-18. Any further denials of expenditure records will be subject to review by this office.

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. § 44-04-21.2.²⁷ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁸

Wayne Stenehjem
Attorney General

slv/vkk

²⁶ If it were not for Mr. Port's request for an opinion, and intervention from this office, I doubt any expenditure records would have ever been produced by the Foundation. It was only after several interventions from this office that any records were produced, several months later.

²⁷ N.D.C.C. § 44-04-21.1(2).

²⁸ Id.