

**OPEN RECORDS AND MEETINGS OPINION
2014-O-24**

DATE ISSUED: December 26, 2014

ISSUED TO: Bis-Man Transit

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from S. Paul Jordan asking whether the Bis-Man Transit violated N.D.C.C. § 44-04-18 by denying requests for records.

FACTS PRESENTED

Throughout the month of September, S. Paul Jordan sent numerous emails to Bis-Man Transit (BMT) Director Robin Werre requesting a variety of records relating to transit drivers and route schedules. Ms. Werre responded to Mr. Jordan by providing some information and records. Ultimately Ms. Werre denied several of Mr. Jordan's requests because the records were in the possession of Taxi 9000, the company responsible for providing the transit services and employing the drivers, and Taxi 9000 was a private corporation not subject to open records laws.

ISSUE

Whether Bis-Man Transit violated open records law by failing to provide records in the possession of its contractor.

ANALYSIS

"Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours."¹ The definition of "record" includes "recorded information of any kind . . . 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."² The definition of "public entity" includes agencies of the state or political subdivision who exercise public authority or perform a governmental function and who are supported by and expending public funds.³

¹ N.D.C.C. § 44-04-18; see also N.D.C.C. §§ 44-04-17.1(13) (definition of "public entity") and (16) (definition of "record").

² N.D.C.C. § 44-04-17.1(16) (definition of "record") (emphasis added).

³ N.D.C.C. § 44-04-17.1(13) (definition of "public entity").

OPEN RECORDS AND MEETINGS OPINION 2014-O-24

December 26, 2014

Page 2

BMT contracts with the City of Bismarck to provide public transportation services and receives public funds from the cities of Bismarck and Mandan, the state and federal government, and other supporting agencies for performing such services.⁴ BMT does not deny it is a public entity subject to the open records law; however, it questions whether Taxi 9000, the private company it contracts with to perform the transit services and operations, is subject to such laws.

The application of the open records law is not limited to a public entity itself; it also applies to recorded information regarding public business which is in the possession of an “agent” of the public entity.⁵ The North Dakota Supreme Court has held that the open records law cannot be circumvented by delegating a public duty to a third party.⁶ Where a government entity delegates a public duty to a third party, documents in possession of the third party connected with public business are public records within the meaning of N.D.C.C. § 44-04-18.⁷ “[The] purpose of the open-record law would be thwarted if we were to hold that documents so closely connected with public business but in the possession of an agent or independent contractor of the public entity are not public records.”⁸

When a private corporation enters into a contract with a public entity and performs governmental functions and public services in place of the public entity, it is an “agent” of the public entity subject to open records law.⁹ Here, BMT contracted with the City of

⁴ See Letter from Robin Werre, Exec. Dir., Bis-Man Transit, to Mary Kae Kelsch, Asst. Att’y Gen. (Oct. 6, 2014); see also Agreement between City of Bismarck and Bis-Man Transit Board (May 22, 2012).

⁵ N.D.C.C. § 44-04-17.1(16) (definition of “record”).

⁶ Forum Publ’g Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986).

⁷ N.D.A.G. 2009-O-08.

⁸ Forum Publ’g, 391 N.W.2d at 172.

⁹ Not all contractual relationships with a public entity will render a private corporation subject to open records law. However, when a public entity delegates its public business and duties to a private corporation, and the corporation performs such services on behalf of and in the place of the public entity, the private corporation becomes an agent of the public entity, subject to open records law. See N.D.A.G. 2009-O-08 (UND Foundation and Alumni Association became agents of UND through a contract permitting the Alumni Association and Foundation to maintain an alumni database on behalf of UND); N.D.A.G. 2006-O-01 (North Dakota State University Research Foundation acted as an agent of NDSU when it managed the intellectual properties of the University; the delegation of public business made the Foundation an agent of NDSU subject to open records law); N.D.A.G. 2001-O-11 (delegating to a private entity that which otherwise would be an agency responsibility and acting in place of or on behalf of the public entity renders the private entity an agent subject to open record laws); N.D.A.G. 2001-O-10 (an organization providing economic development services under a contract with a government entity is performing a government function and is therefore an “agency of government” subject to open records laws); N.D.A.G. 2001-O-04 (a marketing firm promoting the position of a city governing body on an issue of public interest was an agent of the city because it was marketing the city council’s position in place of the city, rather than simply providing services to the city); N.D.A.G. 99-O-02 (a corporation managing a pool of government funds on behalf of several political subdivisions is acting as an “agency of government” and subject to open records laws).

Bismarck to provide transit services for the Mandan and Bismarck areas.¹⁰ Pursuant to such contract, BMT is allowed to contract with local, private, for-profit or non-profit transportation providers to perform the actual transit services.¹¹ BMT contracted with Taxi 9000 to perform the actual transit services on its behalf.¹² BMT's delegation of its public duty to Taxi 9000, and Taxi 9000 performing such functions on behalf of and in place of BMT, render Taxi 9000 an "agent" of BMT, subject to open records law. Thus, any records relating to the public business Taxi 9000 performs on behalf of BMT, pursuant to their contractual agreement, are subject to open records law.

It is my opinion that Taxi 9000 acts as an agent of BMT when it performs contractual transit services on behalf of and in place of BMT. Accordingly, the open records law applies to the records relating to these contractual duties. It was therefore a violation of open records law when BMT denied Jordan's request for records relating to its public business in the possession of Taxi 9000.

CONCLUSION

It was a violation of open records law when Bis-Man Transit denied requests for records in the possession of its agent, Taxi 9000.

STEPS NEEDED TO REMEDY VIOLATION

Bis-Man Transit must produce requested records in the possession of Taxi 9000 relating to the contractual transit services that are subject to the open records law.

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. § 44-04-21.2.¹³ It may also result in personal liability for the person or persons responsible for the noncompliance.¹⁴

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Attorney General

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¹⁰ See Agreement between City of Bismarck and Bis-Man Transit Board (May 22, 2012).

¹¹ Id.

¹² See Contract for Services between Bis-Man Transit and Bismarck-Mandan Transp, Co. (June 14, 2012). Pursuant to such contract, Taxi 9000 is obligated to keep certain records, such as records relating to route services and employees.

¹³ N.D.C.C. § 44-04-21.1(2).

¹⁴ Id.