

**OPEN RECORDS AND MEETINGS OPINION  
2015-O-05**

DATE ISSUED: April 6, 2015

ISSUED TO: North Dakota Council of Educational Leaders

**CITIZEN'S REQUEST FOR OPINION**

This office received separate requests for an opinion under N.D.C.C. § 44-04-21.1 from C.T. Marhula and Representative Jim Kasper asking whether the North Dakota Council of Educational Leaders violated N.D.C.C. § 44-04-18 by denying record requests.

**FACTS PRESENTED**

On November 25, 2014, C.T. Marhula requested copies of the applications for the four finalists of the Superintendent of the Year award from the North Dakota Council of Educational Leaders (NDCEL).<sup>1</sup> The NDCEL replied that it was not a public entity subject to open records law, but provided some records relating to the application and selection process for the award and also directed Mr. Marhula to contact the school district of each finalist for the records.<sup>2</sup>

On December 22, 2014, Representative Jim Kasper requested records from the NDCEL related to finances associated with Common Core in North Dakota.<sup>3</sup> The NDCEL denied having any records responsive to the request and further explained it was not a public entity subject to open records law.<sup>4</sup>

**ISSUES**

Whether the NDCEL is a “public entity” subject to open records law.

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<sup>1</sup> Email from C.T. Marhula to Dr. Aimee Copas, Exec. Dir., NDCEL (Nov. 25, 2014, 11:34 AM).

<sup>2</sup> Email from Dr. Aimee Copas, Exec. Dir., NDCEL, to C.T. Marhula (Dec. 12, 2014, 1:41 PM).

<sup>3</sup> Email from Rep. Jim Kasper to Dr. Aimee Copas, Exec. Dir., NDCEL (Dec. 22, 2014, 4:46 PM).

<sup>4</sup> Email from Dr. Aimee Copas, Exec. Dir., NDCEL, to Rep. Jim Kasper (Dec. 22, 2014, 5:12 PM); see also Email from Paul Myerchin, attorney for NDCEL, to Rep. Jim Kasper (Dec. 31, 2014, 12:49 PM).

## ANALYSIS

All records of a “public entity”<sup>5</sup> are open to the public unless otherwise specifically provided by law.<sup>6</sup> Because NDCEL promptly informed Representative Jim Kasper that it did not have the records he requested, it had no further obligation because a public entity does not have to create or compile a record that it does not have or that does not exist.<sup>7</sup> Accordingly, no further analysis is necessary regarding the request from Representative Kasper. However, NDCEL did possess the records requested separately by Mr. Marhula, but refused to provide them contending that NDCEL is not a public entity subject to the open records law. Therefore, for that request, it is necessary to determine the status of NDCEL.

The definition of “public entity” is not limited to entities that are traditionally viewed as “governmental.”<sup>8</sup> Rather, as summarized in previous opinions, there are a number of ways a private, nonprofit, “nongovernmental” organization may be fully or partially subject to open records law which may include the following:<sup>9</sup>

1. The organization is delegated authority by a governing body of a public entity;<sup>10</sup>
2. The organization is created or recognized by state law, or by an action of a political subdivision;<sup>11</sup>
3. The organization is supported in whole or in part by public funds or is expending public funds;<sup>12</sup> or
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.<sup>13</sup>

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<sup>5</sup> N.D.C.C. § 44-04-17.1(13) (def. of “public entity”).

<sup>6</sup> N.D.C.C. § 44-04-18(1).

<sup>7</sup> N.D.C.C. § 44-04-18(4).

<sup>8</sup> N.D.A.G. 2013-O-16; N.D.A.G. 2006-O-05; N.D.A.G. 2001-O-10.

<sup>9</sup> N.D.A.G. 2013-O-16; N.D.A.G. 2001-O-10; see also N.D.A.G. 2014-O-04; N.D.A.G. 2006-O-05; N.D.A.G. 2006-O-04.

<sup>10</sup> N.D.C.C. § 44-04-17.1(6) (def. of “governing body”).

<sup>11</sup> N.D.C.C. § 44-04-17.1(13)(a) and (b) (definition of “public entity”).

<sup>12</sup> N.D.C.C. § 44-04-17.1(10), (13)(c) (definition of “organization or agency supported in whole or in part by public funds” and definition of “public entity”).

<sup>13</sup> N.D.C.C. § 44-04-17.1(13), (16) (definition of “public entity” and definition of “record”).

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The NDCEL, as a non-profit corporation, is an association for superintendents, principals, and other school administrators “devoted exclusively to protecting educational leaders’ interests and making their interests known in educational matters in North Dakota.”<sup>14</sup> The purpose of the NDCEL, as laid out in its Constitution and By-Laws, is to (i) establish communications among the members of the constituent associations; (ii) achieve mutual goals; (iii) achieve higher standards; (iv) give sound counsel to state and community leaders; and (v) improve the status of school administrators in North Dakota.<sup>15</sup>

The NDCEL was not created by state law or by any action of a political subdivision; rather, the NDCEL is a “separate and distinct association – organized by our members and at no request of any governmental agency.”<sup>16</sup> No public entities have any jurisdiction, regulation, or control over the NDCEL and the NDCEL has not been delegated any authority by a governing body of a public entity.<sup>17</sup> The NDCEL does not have any contract with a public entity to perform a governmental function on a public entity’s behalf.<sup>18</sup> Therefore, whether the NDCEL is supported in whole or in part by public funds as defined in N.D.C.C. § 44-04-17.1(10) will determine whether it is subject to open records law.

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<sup>14</sup> Letter from Dr. Aimee Copas, Exec. Dir., NDCEL, to Sandra L. DePountis, Asst. Att’y Gen. (Jan. 28, 2015). The NDCEL was formed in 1980 from individual members of six affiliated organizations: N.D. Assoc. of School Admin’rs; N.D. Assoc. of Secondary School Principals; N.D. Assoc. of Elementary School Principals; N.D. Assoc. of Cnty Superintendents; N.D. Assoc. of School Bus. Officials; and N.D. Assoc. of High School Athletic Directors. Since its inception five additional state affiliated organizations joined the NDCEL and one organization changed its name. They include the N.D. Assoc. of Tech. Leaders, N.D. Career and Tech’l Educ. Admin’rs.; N.D. Special Educ. Study Council; N.D. Reg’l Educ. Agency Leaders; and the Educ. Sec’y’s Assoc. of N.D. The N.D. Assoc. of High School Athletic Dirs. changed to the N.D. Interscholastic Athletic Admin’rs. Assoc.

<sup>15</sup> Letter from Dr. Aimee Copas, Exec. Dir., NDCEL, to Sandra L. DePountis, Asst. Att’y Gen. (Jan. 28, 2015); see also NDCEL Constitution and By-Laws.

<sup>16</sup> Letter from Dr. Aimee Copas, Exec. Dir., NDCEL, to Sandra L. DePountis, Asst. Att’y Gen. (Jan. 28, 2015).

<sup>17</sup> Id.

<sup>18</sup> The agent or agency of government test examines the types of services provided by the organization and whether a governmental agency has delegated its authority to a non-governmental organization. N.D.A.G. 2003-O-02. See also N.D.A.G. 2002-L-15 (“A ‘representative organization’ is not a ‘public entity’ as defined in N.D.C.C. § 44-04-17.1[13] because it represents the interests of its individual members and does not exercise public authority or perform a governmental function.”).

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An organization is supported in whole or in part by public funds when it “receive[s] public funds exceeding 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.”<sup>19</sup> However, as long as the goods and services provided in exchange for those funds are reasonably identified in an agreement or contract and have a fair market value that is equivalent to the amount of public funds it receives, the organization is not considered to be “supported” by public funds and is not considered to be subject to open records and meetings law.<sup>20</sup>

The NDCEL is primarily funded by the dues of its 768 members and the registration costs of members to attend NDCEL conferences. Most of its members consist of superintendents, principals, and other school administrators who are members by their own choice and pay their own dues and registration fees.<sup>21</sup> Such dues paid directly from the members out of their own pocket are not “public funds.”

In other instances, the membership dues and registration fees are paid by the school districts or other public entities directly to the NDCEL on behalf of their employees.<sup>22</sup> In

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<sup>19</sup> N.D.C.C. § 44-04-17.1(10) (definition of “organization or agency supported in whole or in part by public funds”).

<sup>20</sup> See N.D.A.G. 2015-O-01 (“In past opinions, this office explained that public funds constitute general support, thus rendering an entity subject to open records and meetings law, if the use of the funds is unrestricted and the entity is given discretion over how the funds are spent. The more discretion the organization has over the use of public funds, the more likely it is that the funds are for the entity’s general support, rather than for purchasing goods or services at fair market value.”).

<sup>21</sup> Letter from Dr. Aimee Copas, Exec. Dir., NDCEL, to Sandra L. DePountis, Asst. Att’y Gen. (Jan. 28, 2015).

<sup>22</sup> The NDCEL explains that in some districts, it is part of an administrator’s negotiated salary package to have a small fund for professional development, conference attendance, and memberships of professional organizations. NDCEL also references it has 12 members who are state employees, representing state entities such as the University of North Dakota, the Department of Public Instruction (DPI), and North Dakota State University. The state entities will directly pay NDCEL for its state employees to be members. The employees of the state entities and schools work out the logistics with their employers on whether the dues are paid directly by the state entities or if it is the responsibility of the state employees; however, the dues are still being paid for individual members to be part of NDCEL, not the entities themselves. <sup>22</sup> Letter from Dr. Aimee Copas, Exec. Dir., NDCEL, to Sandra L. DePountis, Asst. Att’y Gen. (Jan. 28, 2015); see also Email from Mavis Christianson, Admin. Asst., NDCEL, to Sandra DePountis, Asst. Att’y Gen. (Feb. 6, 2015, 12:23 PM).

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exchange for payment of the membership dues from the public funds, the members enjoy a variety of services and benefits including:

1. professional and personal legal assistance (when outside legal support is needed, the first \$1,000 in fees is covered by the NDCEL);
2. professional development opportunities (several conferences and trainings hosted by the NDCEL every year);
3. graduate level instruction for some administrators;
4. legislative outreach;
5. publications (including publications that give administrators the opportunity to publish their own work and research);
6. liaison services between administrators and other state education agencies and associations;
7. professional support in the form of consultant, research, and information services;
8. network opportunities with other school administrators both within North Dakota and nationally; and
9. NDCEL acting as a hub for coordination of efforts to support efforts such as administrative mentorship, legislative support subcommittee work, etc.<sup>23</sup>

The dues for a standard membership with the NDCEL are \$370.<sup>24</sup> I find the above services outweigh the cost of the membership dues exchanged for such services and therefore the public funds are considered to be paid at or below the fair market value for the amount of services received.

The conference registration fees also are paid at the fair market value in exchange for participation in the training and conferences services offered to the members. Because there is a fair market value exchange for the public funds paid in exchange for services,

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<sup>23</sup> Letter from Dr. Aimee Copas, Exec. Dir., NDCEL, to Sandra L. DePountis, Asst. Att'y Gen. (Jan. 28, 2015).

<sup>24</sup> Id. State employees pay reduced membership dues of \$110.

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it is my opinion that the funds do not constitute “support” for the purposes of open records and meeting law.<sup>25</sup>

The NDCEL also acts as a fiscal agent in directing membership dues to affiliated associations.<sup>26</sup> Members of the NDCEL who are also members of the NDCEL’s affiliated organization, such as the North Dakota Association of Elementary School Principals and the North Dakota Association of School Administrators, can pay the affiliated organization’s membership dues through the NDCEL. While the money is in the NDCEL’s control, it is kept in a separate account.<sup>27</sup> The money does not go to the NDCEL and does not support the organization.

The NDCEL also receives specific funds from state entities for advertising on the NDCEL newsletter and website and to set up booths at NDCEL conferences. These funds are received for a specific purpose at fair market value and are not considered to be supporting the NDCEL.

Finally, the NDCEL co-sponsors various workshops and conferences with other entities, including state agencies.<sup>28</sup> The NDCEL organizes the workshops and retains the registration fees in a separate account to pay for workshop expenses including speaker fees, facility fees, meals, etc. The only proceeds the NDCEL retains itself from the co-sponsored workshops is to pay for the time spent by its employees to put on and organize the workshops, but such fees are to pay for these specific services and are not used to generally fund the NDCEL.<sup>29</sup> The NDCEL also receives grants from DPI for

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<sup>25</sup> N.D.A.G. 2004-O-14 (Membership fees paid by the City of Fargo to the Chamber of Commerce were for the fair market value exchange for services and therefore the Chamber was not considered “supported” by public funds for the purposes of open records and meetings law).

<sup>26</sup> Letter from Dr. Aimee Copas, Exec. Dir., NDCEL, to Sandra L. DePountis, Asst. Att’y Gen. (Jan. 28, 2015); Email from Mavis Christianson, Admin. Asst., NDCEL, to Sandra DePountis, Asst. Att’y Gen. (Feb. 6, 2015, 12:23 PM).

<sup>27</sup> Letter from Dr. Aimee Copas, Exec. Dir., NDCEL, to Sandra L. DePountis, Asst. Att’y Gen. (Jan. 28, 2015); Email from Mavis Christianson, Admin. Asst., NDCEL, to Sandra DePountis, Asst. Att’y Gen. (Feb. 6, 2015, 12:23 PM).

<sup>28</sup> Letter from Dr. Aimee Copas, Exec. Dir., NDCEL, to Sandra L. DePountis, Asst. Att’y Gen. (Jan. 28, 2015); see also Email from Mavis Christianson, Admin. Asst. NDCEL, to Sandra DePountis, Asst. Att’y Gen. (Feb. 6, 2015, 12:23 PM).

<sup>29</sup> It may be conceivable that the NDCEL’s records relating to the co-sponsored workshops are public records considering the NDCEL acts in conjunction with the state agencies to provide the workshops. This would have limited applicability as it would only apply to records relating to the workshops. The record requests at issue in this opinion, however, do not relate to any workshops.

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reimbursement on some of the workshops and conferences expenses.<sup>30</sup> The grants include detailed budget requests to DPI on how the grant would be spent if approved. The NDCEL co-sponsors the workshops and conferences and the grant money is kept in a separate account with the NDCEL acting as a fiscal agent. These documents identify the specific goods and services provided by the NDCEL in exchange for the public funds it receives under these grant awards and the grant money may only be used for the designated purposes provided in the budget requests. Accordingly, the grant money does not constitute support by public funds for the purposes of the open records law.

Based on the foregoing, it is my opinion that the NDCEL is not “supported by public funds” and is not a public entity subject to open records law. Therefore, NDCEL did not violate the open records law when it denied the record requests of Mr. Marhula.

CONCLUSION

The NDCEL is not a public entity subject to open records law and it was therefore proper to deny requests for public records.

Wayne Stenehjem  
Attorney General

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cc: C.T. Marhula (via email only)  
Representative Jim Kasper (via email only)

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<sup>30</sup> Letter from Dr. Aimee Copas, Exec. Dir., NDCEL, to Sandra L. DePountis, Asst. Att’y Gen. (Jan. 28, 2015) (Requests for Funds and Grant Awards).