

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 96-F-18

Date Issued: September 13, 1996

Requested by: Representative Gerald O. Sveen

- QUESTIONS PRESENTED -

I.

Whether a report on a personnel matter of International Peace Garden, Inc., and a meeting of its board of directors to discuss the report and the personnel matter in general, are open to the public under the open records and meetings laws.

II.

Whether a report prepared at the direction of the board of directors of International Peace Garden, Inc., but in the possession of the private investigator who prepared the report, is a record of the corporation for purposes of the open records law.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that International Peace Garden, Inc., is both expending public funds and supported in whole or in part by public funds, and therefore is subject to the open records and meetings laws. It is my further opinion that a report of International Peace Garden, Inc., on a personnel matter, and a meeting of its board of directors to discuss the report and the personnel matter in general, are open to the public.

II.

It is my opinion that a report prepared at the direction of the board of directors of International Peace Garden, Inc., but in the possession of the private investigator who prepared the report, is a record of the corporation for purposes of the open records law.

- ANALYSES -

I.

The facts provided indicate that a private investigator has prepared a report for the board of directors (Board) of International Peace Garden, Inc. (Corporation) on a personnel matter involving an employee of the Corporation. The Corporation's bylaws apparently provide that it shall comply with North Dakota's open records and meetings laws. See N.D. Const. art. XI, §§ 5, 6; North Dakota Century Code (N.D.C.C.) §§ 44-04-18, 44-04-19. The analysis in this opinion applies to the Corporation and the Board regardless of whether this provision is included in the Corporation's bylaws.

A three-prong analysis should be used to determine whether a record or meeting is subject to the open records or meetings laws and is open to the public. 1996 N.D. Op. Att'y Gen. 38, 39; 1993 N.D. Op. Att'y Gen. L-95. First, is the entity that is maintaining the document or holding the gathering subject to the open records and meetings laws? Second, is the document a record or the gathering a meeting of that entity? Third, if the answer to both of these questions is yes, is there a specific law providing that the record or meeting is confidential or exempt from the open records or meetings laws?

The answer to the questions presented depend largely on the first prong of this analysis: whether the Corporation and its Board are subject to the open records and meetings laws. The open records and meetings laws both apply to the same three categories of entities:

1. Public or governmental bodies, boards, bureaus, commissions, or agencies of the State of North Dakota;
2. Public or governmental bodies, boards, bureaus, commissions, or agencies of any political subdivision of the State of North Dakota;
3. Organizations supported in whole or in part by public funds, or which expend public funds.

"Entities created through public or governmental process must be considered public or governmental in nature" and therefore fall into the first two categories of entities. 1996 N.D. Op. Att'y Gen. 38, 39; Letter from Attorney General Nicholas Spaeth to Lawrence DuBois (November 20, 1987). An organization is not "supported in whole or in part by public funds," and thus not included in the third category of public entities, when the organization receives public funds in a bargained-for exchange of money for identifiable and specific goods

and services. Adams County Record v. Greater North Dakota Association, 529 N.W.2d 830, 836 (N.D. 1995); Id. at 840 (Meschke, dissenting).

One of the purposes of the open records and meetings laws is to allow the public to see how public funds are used. Adams County Record, 529 N.W.2d at 836. The Corporation has received an appropriation directly from the State Legislature. See 1995 N.D. Sess. Laws ch. 44; 1993 N.D. Sess. Laws chs. 13, 20. The funds are not provided through a grant or other contract between the Corporation and a state agency. Therefore, it is my opinion that the Corporation itself is expending the appropriated public funds.

In addition, the legislative appropriations to the Corporation do not identify the specific goods or services to be provided in exchange for the appropriated funds. See 1995 N.D. Sess. Laws ch. 44; 1993 N.D. Sess. Laws chs. 13, 20. Instead, the funds are simply transferred to the Corporation at the beginning of each fiscal year.¹ Without access to the Corporation's meetings and records, the public has no way to determine how its funds are being spent.

Whether a grant from a state agency without an agreement identifying the specific goods and services provided in exchange for those funds constitutes support is unclear. See Adams County Record, 529 N.W.2d 830. However, it is my opinion that a direct appropriation of public funds to a private organization for unspecified goods and services, as was made to the Corporation, constitutes support under the open records and meetings laws. See Id. at 843 (Meschke, dissenting).

Because the Corporation is both expending public funds and supported in whole or in part by public funds, it is subject to the open records and meetings laws. As an entity subject to the open records and meetings laws, records and meetings of the Corporation and the Board must be open to the public unless a specific exception is provided by law.

No specific exception exists for the records and meetings addressed in this opinion. An investigation of potential criminal acts would not fall under the law enforcement exception in N.D.C.C. § 44-04-18.7 unless the information was compiled or collected by a "criminal

¹ The current "Memorandum of Agreement" between the Corporation and the State Historical Society indicates the general purposes for which the money is to be spent but does not identify the specific goods or services provided in exchange for the appropriated funds.

justice agency" as the term is defined in that section. Likewise, the attorney work product exception in N.D.C.C. § 44-04-19.1 would not apply unless, among other things, the report was prepared at the direction of the Corporation's attorney. To constitute attorney consultation under that section, a discussion would have to involve the Corporation's attorney and pertain to "imminent civil or criminal litigation," N.D.C.C. § 44-04-19.1(4), which does not appear to be the case in the meeting addressed in this opinion. Finally, the courts have not recognized a right to privacy in the personnel record of a person employed by an entity subject to the open records and meetings laws. See Hovet, 419 N.W.2d at 192; City of Grand Forks, 307 N.W.2d at 580 (VandeWalle, concurring specially). Consequently, no specific exception to the open records and meetings laws applies and the records and meetings addressed in this opinion must be open to the public.

II.

The second question presented depends on the definition of "record" as used in the open records laws. The term "record" as used in the open records law should be given an "expansive meaning" and includes the personnel file of an employee of an entity subject to the open records and meetings laws. Hovet v. Hebron Public School Dist., 419 N.W.2d 189 (N.D. 1988); Forum Publishing Company v. City of Fargo, 391 N.W.2d 169 (N.D. 1986); City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572 (N.D. 1981). In Forum Publishing Company, the court concluded that a record possessed by a third party under contract with the City of Fargo was subject to the open records law, because the law applied to relationships created by contract where an entity delegates the transaction of some lawful public business to a third party. 391 N.W.2d at 172 ("documents are not any less a public record simply because they were in the possession of [a third party contractor]"). Similarly, just as an internal report of the Corporation regarding a personnel matter would be an open record, it is my opinion that a report in the possession of a private investigator but prepared at the direction of the Board would also be a "record" of the Corporation under N.D.C.C. § 44-04-18.

ATTORNEY GENERAL'S OPINION 96-18
September 13, 1996
Page 5

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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