

LETTER OPINION
98-L-73

June 8, 1998

Mr. Jim Heck
Information Services Division
600 E Boulevard Ave
Bismarck, ND 58505-0100

Dear Mr. Heck:

Thank you for your letter asking whether the Information Services Division of the Office of Management and Budget (ISD) is required to respond to an open records request for information in ISD's possession but belonging to another state agency.

Confidential or closed records received by ISD from another state agency to fulfill the purposes of N.D.C.C. ch. 54-44.2 continue to be closed or confidential in ISD's possession. N.D.C.C. § 54-44.2-06. However, this section does not specify whether open records received by ISD from another agency must be disclosed to the public by ISD upon request.

Your question is largely answered by the definition of "record" as used in N.D.C.C. § 44-04-18, the North Dakota open records law.

"Record" means recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, 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.

N.D.C.C. § 44-04-17.1(15) (emphasis added).

Assuming that records in ISD's possession can nevertheless belong to or be owned by another state agency, the definition of "record" quoted above indicates that a public entity need only possess or have custody of a record. Ownership of a record is not necessary for a public entity to be required to disclose that record under N.D.C.C. § 44-04-18 unless a statute specifically provides otherwise.

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However, as recognized in N.D.C.C. § 54-44.2-06, ISD is not the only agency whose interests are implicated by a request for records ISD has received from another agency to fulfill the purposes of N.D.C.C. ch. 54-44.2. ISD holds records in one of two capacities: as a division of the Office of Management and Budget, or on behalf of the agency providing the records. When two public entities possess the same record, each entity usually possesses the record in its own capacity and "has an independent duty to determine whether the information is an open record." See 1994 N.D. Op. Att'y Gen. L-1, L-2. However, when ISD receives records from another agency under N.D.C.C. ch. 54-44.2, it holds those records not in its own capacity, but on behalf of the agency from which the records were received.

ISD's receipt of records from another agency pursuant to N.D.C.C. ch. 54-44.2 is not the only example of a state agency generating or maintaining records for another agency. Loss control records of the Risk Management Division of the Office of Management and Budget and hearing files of the Office of Administrative Hearings are also records that are kept on behalf of another agency.

Having possession or custody of records on behalf of another agency is a two-edged sword. On one hand, the records are subject to the same open records exceptions that would apply if the records were in the agency's possession. See N.D.C.C. § 54-44.2-06. However, if no exception applies to the requested records, it is my opinion that ISD is required to disclose the records on behalf of the agency that has provided the records to ISD and cannot refer the requester to the other agency. See N.D.C.C. § 44-04-17.1(15) ("record" includes recorded information possessed by an agent of a public entity); Forum Publishing Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986) (same).

If the request is for "exempt records" as defined in N.D.C.C. § 44-04-17.1(5), ISD may have to contact the agency providing the records to determine whether ISD should disclose the records. However, regardless of whether the records are open, exempt, or confidential, ISD must either provide the requested records on behalf of the agency, or explain the legal authority for not granting the request within a reasonable time. N.D.C.C. § 44-04-18(6). When the legal authority for not granting a request is based on an exception to N.D.C.C. § 44-04-18 that applies to ISD only because it is acting on behalf of another agency, that fact must be included in ISD's explanation to the requester. If there are doubts whether the requested records are open to the public, the burden is on ISD rather than the requester to resolve the doubt by contacting the agency.

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Sincerely,

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ATTORNEY GENERAL

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