

LETTER OPINION
93-L-271

September 16, 1993

Mr. Vernon W. Goodin
Executive Director
North Dakota Council on the Arts
Black Building, Suite 606
118 Broadway
Fargo, ND 58102

Dear Mr. Goodin:

Thank you for your August 2, 1993, letter concerning the legality of the North Dakota Arts Council incorporating a foundation or similar organization to be governed by the 15-member Council.

You advise that the Council wants to establish a separate entity to pursue certain goals that are "currently outside of [its] present staffing/funding possibilities." You advise that the Council has from time to time needed a separate organization to administer special projects such as an arts education task force, the development of a presenter's network for touring arts events, and a fundraising mechanism to seek contributions to the North Dakota Cultural Endowment Fund. Efforts to contract for these projects with an arts support organization have not been successful because the organization is an independent organization with its own board of directors, "giving the Council on the Arts little direct influence on its day to day operations." You suggest that a separate foundation governed by the Council would give the Council direct supervision of the special projects. You envision that operating costs of this separate entity would be covered by federal or special grant funds.

Governmental units are creatures of legislative action, and as such have only such authority or power as is granted to them or necessarily implied from the grant. First Bank of Buffalo v. Conrad, 350 N.W.2d 580, 584-585 (N.D. 1984). While the Council is given broad duties to foster "the arts in the life of our

communities [so that the arts] will play an evermore significant part in the . . . experience of our citizens," there is no statute which either directly authorizes or from which the authority is necessarily implied to form and govern a separate entity. North Dakota Century Code (N.D.C.C.) ? 54-54-01, 54-54-05, 54-54-06.

Practically, members of the Council, as individuals, could incorporate a non-profit corporation or foundation in which some or conceivably all the Council members were members of the board of directors. This separate entity could then contract with the Council to carry out special projects. N.D.C.C. ? 54-54-06. Nevertheless, such an arrangement is fraught with conflicts, and I recommend that the Council members not pursue this course of action.

Contracts between the Council and a separate entity would be subject to the purview of N.D.C.C. ? 12.1-13-03 which makes it a class A misdemeanor for a public servant to be "interested individually" in a contract made in an official capacity, alone or in conjunction with other public servants. Whether the statute applies and whether a person is interested individually in a contract are questions of fact. State v. Robinson, 2 N.W.2d 183, 185 (N.D. 1942).

The Council operates on funds from private as well as public sources and is designated the "official agency of this state to receive and disburse any funds made available by the national foundation on the arts." N.D.C.C. ?? 54-54-06, 54-54-07. This very fact creates a real potential for a conflict of interest which is the chief reason my predecessor discouraged the formation of non-profit corporations and foundations by governmental employees. See Memorandum to State Agencies and Institutions from Nicholas J. Spaeth (January 30, 1991), a copy of which is enclosed. The seeds of such a conflict are contained in your letter. You advise that the purpose of establishing a separate entity to be governed by the Council is to "accomplish goals that are currently outside of [the Council's] present staffing/funding possibilities." A separate entity you state "would allow [the Council] to hire consultants and pay operating costs [from] federal or special grant funds." I assume in many instances that the same federal or special grant funds that would be available

to the separate entity would be available to the Council. If the Council were eligible to obtain the same federal or special funds, Council members serving on the board of directors of the separate entity might well have a conflict in deciding whether the Council or the separate entity should seek and qualify for such funds.

As you suggest in your letter, there is also the potential for negative reaction by the Legislature which might view creation of a separate entity "as an intent to increase administrative costs outside of the legislative review process.

For the foregoing reasons, I recommend that a separate foundation or entity not be created by members of the Council.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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Enclosure