



STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

www.attorneygeneral.nd.gov

(701) 328-2210

Drew H. Wrigley
ATTORNEY GENERAL

OPEN RECORDS AND MEETINGS OPINION
2024-O-06

DATE ISSUED: September 11, 2024

ISSUED TO: Southwest Healthcare Services

CITIZEN'S REQUEST FOR OPINION

The law firm of Ebeltoft Sickler Lawyers, PLLC, on behalf of its client, Kevin Thompson, requested an opinion from this office under N.D.C.C. § 44-04-21.1 asking whether Southwest Healthcare Services violated N.D.C.C. § 44-04-18 by improperly denying a request for records.

FACTS PRESENTED

On January 28, 2022, Mr. Thompson, by and through his attorney, Adam Bothun of Ebeltoft Sickler, requested the following records from Southwest Healthcare Services (Southwest):

Any and all records from January 1, 2020, to the present regarding the City of Bowman's ("Bowman") healthcare sales tax proceedings including, but not limited to, receipts, expenditures, meeting minutes, memos, reports, outlines, notes, employee salary, and all recorded information regardless of the physical form (e.g. paper, email, computer file, photograph, audiotape or recording, video, text message, etc.).¹

Southwest denied Mr. Thompson's request on February 16, 2022. In response to later communication with this office, Southwest stated the records were "denied because Southwest Healthcare Services is not a public entity subject to the open records statutes."²

Southwest further responded that it is a non-government entity.³ Its services include a clinic, hospital, ambulance, and assisted and independent living.⁴ Southwest is licensed as a critical access

¹ Letter from Adam Bothun, Att'y, Ebeltoft Sickler Laws. PLLC, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Mar. 9, 2022). This was a renewed request from one made by Mr. Thompson to Southwest for similar information on Oct. 15, 2021, after that request had been denied. Letter from Andrew J.Q. Weiss, Wild & Weiss Law Off., PC, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Apr. 12, 2022).

² Letter from Andrew J.Q. Weiss, Wild & Weiss Law Off., PC, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Apr. 12, 2022).

³ *Id.*

⁴ *Id.*

hospital and rural health clinic.⁵ Southwest is governed by a board of trustees that represent the communities Southwest serves.⁶ Most of Southwest's revenue is "in the form of net patient revenue," the majority from Medicare and Medicaid.⁷ Southwest also contracts with commercial insurance companies for payment.⁸ Additionally, Southwest's revenue for 2021 included \$95,000 (1%) from mill levy money.⁹

Southwest may apply for city sales tax funds from the City Health Board, which the City Health Board may either approve or deny.¹⁰ Bowman's healthcare sales tax funds are limited to the scope of applied for funds and are only spent "towards the reason stated in the application for the funds."¹¹

ISSUES

1. Whether Southwest is a public entity subject to open records laws.
2. Whether Southwest violated N.D.C.C. § 44-04-18 by denying a request for records.

ANALYSIS

Issue 1

Open records laws apply to all public entities.¹² The definition of public entity includes "[o]rganizations or agencies supported in whole or in part by public funds, or expending public funds."¹³ An organization is a public entity if it "is supported in whole or in part by public funds;"¹⁴ or "[t]he organization is an agent or agency of a public entity performing a governmental function

⁵ *Id.*

⁶ *Id.* "The surrounding churches have delegates that attend the annual meeting to vote on board members to replace members who have had served two terms consecutively."

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² N.D.A.G. 2004-O-04.

¹³ N.D.C.C. § 44-04-17.1(13)(c). *See also* N.D.A.G. 2004-O-04, *citing* N.D.C.C. §§ 44-04-17.1(9), (12)(c), N.D.A.G. 2001-O-10 and 2001-O-11; N.D.A.G. 2015-O-01.

¹⁴ *See*, N.D.A.G. 2004-O-04, "'Public funds' means 'cash and other assets with more than minimal value received from the state or any political subdivision of the state.'" *Citing* N.D.C.C. § 44-04-17.1(13), N.D.A.G. 98-F-19, N.D.A.G. 2001-O-10 and N.D.A.G. 2001-O-11. Thus, any funds Southwest receives directly from the federal government are not considered "public funds." *See* N.D.A.G. 2015-O-01. *See also*, N.D.A.G. 98-O-23.

on behalf of a public entity or having possession or custody of records of a public entity.”¹⁵ However, if the public funds received are “in exchange for goods or services having a fair market value equivalent to the amount of public funds received” the organization is not supported by public funds for the purposes of open records laws.¹⁶ Previous opinions have applied two tests to analyze if an entity is a public entity, the Supported by Public Funds Test and Agency of Government Test.¹⁷

Supported by Public Funds Test

A non-governmental organization is subject to North Dakota open records laws if it is supported in whole or in part by public funds.¹⁸ “Public funds” are defined as, “cash and other assets with more than minimal value received from the state or any political subdivision of the state.”¹⁹ Federal funds are not included in the definition of public funds.²⁰ In a past opinion this office determined that a mill levy contribution of \$45,000 annually was more than “minimal”²¹ and met the definition of public funds.²²

Here, Southwest argues that it is not a public entity as it does not have access to public funds, nor the discretion to spend these funds, but rather Southwest “receives public funds under an authorized economic development program or by making a request of the City Health Board, which may be granted or denied at the City’s discretion.”²³ Southwest has a process where they

¹⁵ N.D.A.G. 2013-O-16 *citing* N.D.C.C. § 44-04-17.1(13), (16) (definitions of “public entity” and “record”). *See also*, N.D.A.G. 2015-O-01.

¹⁶ N.D.A.G. 2004-O-04, *citing* N.D.C.C. § 44-04-17.1(9), N.D.A.G. 98-F-19, N.D.A.G. 2001-O-10, and N.D.A.G. 2001-O-11, *Adams Cnty. Rec. v. Greater N.D. Ass’n*, 529 N.W.2d 830, 835 (N.D. 1995).

¹⁷ N.D.A.G. 2003-O-02; N.D.A.G. 2001-O-11; N.D.A.G. 2001-O-10; N.D.A.G. 2008-O-26; N.D.A.G. 98-O-23.

¹⁸ N.D.C.C. § 44-04-17.1(13)(c). *See also*, N.D.A.G. 2003-O-02; N.D.A.G. 2008-O-26.

¹⁹ N.D.C.C. § 44-04-17.1(14).

²⁰ N.D.C.C. § 44-04-17.1(14); N.D.A.G. 93-O-23 public funds “would not include funds provided directly from the federal government to the organization.” *See also* N.D.A.G. 2004-O-04 federal funds are not considered “public funds.”

²¹ “Minimal” has been interpreted in prior opinions as “‘de minimus contributions of property or assets, such as occasional use of a public meeting room’ because . . . the contribution would have little or no economic value.” N.D.A.G. 2006-O-04 *quoting* N.D.A.G. 98-O-23.

²² N.D.A.G. 2006-O-04 *citing* N.D.A.G. 2004-O-04. *See also*, N.D.A.G. 2003-02 where the James River Senior Citizen’s Center was found to be a public entity because it was “supported by public funds as a result of its mill levy money” and subject to open records law.

²³ Letter from Andrew J.Q. Weiss, Wild & Weiss Law Off., PC, to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Apr. 12, 2022). *See also* N.D.A.G. 96-F-18 stating an exception for receiving public funds in exchange for goods or services does not qualify as being supported whole or in part by public funds.

petition the City Health Board for public funds to address certain financial needs.²⁴ The City Health Board then hears the request and determines whether to provide the funding; there is no agreement in place guaranteeing the funds, nor does Southwest have discretion to use the funds as they wish.²⁵ Southwest could receive funds for its ambulance services from the rural ambulance service district through a similar process.²⁶ Additionally, Southwest received \$95,000 from mill levy money in 2021.²⁷

The fact that Southwest relies on and has access to public funds via mill levies and through requests for public funds from Bowman's healthcare sales tax and rural ambulance service district demonstrates how, at least in respect to the use of these funds,²⁸ Southwest is supported by and expends public funds. Therefore, to the extent Southwest is supported by or expends public funds, in excess of any fair market value exchange of services, it is a public entity subject to open records laws.²⁹

Agency of Government Test

Southwest did not explain or dispute Mr. Thompson's position that the Bowman County Rural Ambulance Service District (District) "delegates its public duty or business to Southwest and Southwest performs such services on behalf of and in place of the District."³⁰ Rural Ambulance Service Districts are organized pursuant to N.D.C.C. chapter 11-28.3 and may pass mill levy money on to a local ambulance service.³¹ According to Mr. Thompson, Southwest receives support from the District in public funds.³² Southwest stated the mill levy funds it receives "are only used

²⁴ Letter from Andrew J.Q. Weiss, Wild & Weiss Law Off., PC, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Apr. 12, 2022).

²⁵ *Id.*

²⁶ *Id.*; Letter from Andrew J.Q. Weiss, Wild & Weiss Law Off., PC, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Aug. 29, 2023).

²⁷ Letter from Andrew J.Q. Weiss, Wild & Weiss Law Off., PC, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Apr. 12, 2022).

²⁸ N.D.C.C. § 44-04-17.1(10) Defines an organization that is supported by public funds as "[A]n organization or agency in any form which has received public funds . . . whether through grants, membership dues, fees, or any other payment."

²⁹ N.D.A.G. 2021-O-12, *citing* N.D.C.C. § 44-04-17.1(14) (definition of public funds), N.D.C.C. § 44-04-17.1(13)(c) (definition of public entity), N.D.C.C. § 44-04-17.1(10) (definition of organization or agency supported in whole or in part by public funds), and N.D.A.G. 2006-O-04.

³⁰ Letter from Adam Bothun, Att'y, Ebeltoft Sickler Laws. PLLC, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Mar. 9, 2022).

³¹ N.D.C.C. § 11-28.3-09; *see also*, N.D.A.G. 2006-L-32.

³² Letter from Adam Bothun, Att'y, Ebeltoft Sickler Laws. PLLC, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Mar. 9, 2022).

for Ambulance Services and only the Ambulance Board can request funds and can be denied.”³³ In addition to the records related to those mill levy funds being open, if Southwest is delegated any authority to provide services or perform any functions the District could provide itself, it is my opinion that Southwest is a public entity for those purposes, and the records related to those funds or activities would also be subject to open records laws. This legal rationale likewise applies to Southwest’s operations of assisted and independent living facilities.³⁴

At times, Southwest receives or expends public funds, from sources such as mill levies, city healthcare sales taxes, and rural ambulance districts and is therefore, a public entity subject to open records law. In any instance when Southwest undertakes government agency activities, the records of those activities are also subject to open records laws.

Issue 2

North Dakota Century Code specifically states, “[u]pon request for a copy of specific public records any entity . . . shall furnish the requester one copy of the public records requested.”³⁵ As analyzed above, Southwest is an organization that is, at times, supported by and expends public funds through mill levy money, Bowman’s healthcare sales tax, and potentially through rural ambulance service district funds³⁶ and, therefore, is a public entity for the purposes of open records laws regarding related records.³⁷ However, records of entities that are subject to the open records law merely because they are in part supported by public funds are limited to the records pertaining to the use of public funds.³⁸ This office in a previous opinion stated, “. . . if the public funds were commingled with the other entity funds and not used for any specific purpose, then all of the entity’s records must be open, unless a specific law provides otherwise.”³⁹ Southwest states the “[m]ill [l]evy funds are not comingled.”⁴⁰ Southwest is bound by the open records laws in respect

³³ Letter from Andrew J.Q. Weiss, Wild & Weiss Law Off., PC, to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Aug. 29, 2023).

³⁴ N.D.A.G. 2003-O-08.

³⁵ N.D.C.C. § 44-04-18(2).

³⁶ Letter from Andrew J.Q. Weiss, Wild & Weiss Law Off., PC, to Adam Bothun, Att’y, Ebeltoft Sickler Law., PLLC (Feb. 16, 2022).

³⁷ N.D.C.C. §§ 44-04-17.1(10), 44-04-17.1(13)(c); Letter from Andrew J.Q. Weiss, Wild & Weiss Law Off., PC, to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Apr. 12, 2022).

³⁸ N.D.A.G. 2006-O-04, “For this type of ‘public entity’ generally those records pertaining to or dealing with the use of public funds will be open.”

³⁹ N.D.A.G. 2006-O-04, *citing* N.D.A.G. 2003-O-10, (all recorded information of Tri-County regarding its use of the unrestricted funds received from the state and counties must be open to the public; if those funds have been pooled with other revenue of Tri-County, and cannot be accounted for separately, then all financial records of Tri-County must be open to the public); N.D.A.G. 2003-O-02; N.D.A.G. 99-O-03; N.D.A.G. 98-O-24.

⁴⁰ Letter from Andrew J.Q. Weiss, Wild & Weiss Law Off., PC, to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Aug. 29, 2023).

to how it manages its public funds; however, if those funds are at any time, past or present, comingled with general funds, then all of the entity's applicable records must be open.⁴¹ Mr. Thompson and his representatives requested records pertaining to the use of public funds, specifically from Bowman's healthcare sales tax, which are open records. Therefore, Southwest's denial of those requests violated North Dakota open records laws.

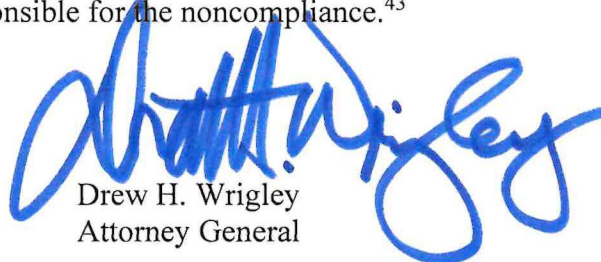
CONCLUSION

1. Southwest is a public entity subject to open records law to the extent the records related to the use of public funds received or expended and any government agency activities.
2. Southwest violated N.D.C.C. § 44-04-18 when it denied records regarding healthcare sales tax expenditures.

STEPS NEEDED TO REMEDY VIOLATION

Southwest must provide the requested records to Mr. Thompson, and anyone else upon request, at no charge.

While I have every reason to expect the Southwest Healthcare Services will remedy this situation, in accordance with this opinion, 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. § 44-04-21.2.⁴² Failure to take these corrective measures may also result in personal liability for the person or persons responsible for the noncompliance.⁴³



Drew H. Wrigley
Attorney General

AML/meo/mjh

cc: Adam Bothun

⁴¹ N.D.A.G. 2003-O-10.

⁴² N.D.C.C. § 44-04-21.1(2).

⁴³ *Id.*