

LETTER OPINION
93-L-187

June 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 May 20, 1993, letter concerning the use of income from the North Dakota Cultural Endowment Fund (Endowment Fund) by the North Dakota Council on the Arts (Council) to purchase certain services from an arts support organization.

The Endowment Fund was established by the 1979 Legislative Assembly to promote the arts. North Dakota Century Code (N.D.C.C.) ? 54-54-08.1; 1979 N.D. Sess. Laws ch. 578, ? 1. The Endowment Fund may be characterized as a state special fund with interest accruing to the Fund itself. See Letter from Attorney General Nicholas J. Spaeth to Robert E. Hanson (May 31, 1990) (copy attached).

The Council is authorized to expend only the interest income as it directs and pursuant to a biennial appropriation. N.D.C.C. ? 54-54-08.2; Letter from Attorney General Nicholas J. Spaeth to S. F. Hoffner (May 23, 1988) (copy attached). The Endowment Fund income was appropriated "for the furthering of the cultural arts in the state" for the current biennium by the 1991 Legislature. 1991 N.D. Sess. Laws ch. 14. A similar direction was made by the 1993 Legislature for the next biennium. S. Bill No. 2012, 53rd ND Leg. (1993).

You advise that the Council wants to contract with an

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organization to, among other things, purchase fundraising for the Endowment Fund. The Council also wants to contract with the organization to purchase advocacy services which amount to lobbying of elected officeholders at the national, state, and local levels regarding public arts policy and funding. You specifically ask whether the Council may use Endowment Fund income to purchase fundraising and advocacy services.

The expenditure of Endowment Fund income is left to the direction of the Council subject only to the Legislature's direction that it be used "for furthering of the cultural arts in the state." N.D.C.C. ? 54-54-08.2; 1991 N.D. Sess. Laws ch. 14; S. Bill No. 2012, 53rd ND Leg. (1993). To further the arts means to promote or advance the arts. Webster's New Collegiate Dictionary (1979).

In my opinion, use of Endowment Fund income for fundraising and advocacy services is a permissible use of the income.

The Council is specifically authorized "to make and sign any agreements; and to do and perform any acts that may be necessary to carry out the purposes of [N.D.C.C. ch. 54-54 which created the Council]." N.D.C.C. ? 54-54-06.

It is a duty of the Council to stimulate and encourage the presentation of the performing and fine arts and the participation and public interest therein. N.D.C.C. ? 54-54-05(1). The Council is required to recommend ways "to encourage participation in and appreciation of the arts." N.D.C.C. ? 54-54-05(2). "To expand the state's cultural resources" is also a duty of the Council. N.D.C.C. ? 54-54-05(3).

A purpose of the Endowment Fund is to make arts programs approved by the Council "more available to the state's citizens." N.D.C.C. ? 54-54-08.1(1), (2).

A program of fundraising and lobbying to enhance the financial status of the Endowment Fund and Council is consistent with the purposes of the Council and the

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Endowment Fund. An increase in funding for the Endowment Fund and Council is bound to facilitate the presentation and participation in arts programs. Additional Endowment Fund income will help further arts programs and make them "more available to the state's citizens." N.D.C.C. ?? 54-54-05(1); 54-54-08.1(2).

Fundraising and lobbying activities on behalf of the Council are also consistent with the expressed policy of the state "to ensure that the role of the arts in the life of our communities will continue to grow and will play an evermore significant part in the welfare and educational experience of [North Dakota's] citizens." N.D.C.C. ? 54-54-01.

You also ask whether it is appropriate in the contemplated service contract to condition release of federal funds for arts projects upon completion of fundraising and lobbying activities. In my opinion, such a provision is not appropriate and I do not recommend it.

The Council is authorized to receive and disburse federal funds. N.D.C.C. ? 54-54-07. Federal assistance to states may be used solely for arts projects and productions which do not involve fundraising or lobbying. 20 U.S.C.S. ? 954(g)(2)(B) (1992). Federal regulations specifically prohibit and penalize the use of federal funds for lobbying at the federal level with respect to the receipt of federal funds. 45 C.F.R. pt. 1158.

Tying release of federal funds for arts projects entitled to federal support to completion of activities not meeting federal standards for assistance may jeopardize federal funding. While not a technical violation of federal law and regulations, such a provision is not in tune with the tenor of the federal law and regulations.

I have otherwise reviewed the proposed contract for services and the related compliance and matching grant agreement. In my opinion, they are in legally sufficient form.

Sincerely,

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Heidi Heitkamp
ATTORNEY GENERAL

tam/krb
Enclosures

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