

**LETTER OPINION
93-L-95**

March 17, 1993

Honorable Jennifer Ring
House of Representatives
First Floor, State Capitol
600 E. Boulevard
Bismarck, ND 585055-0360

Dear Representative Ring:

Thank you for your March 11, 1993 letter requesting my opinion on the applicability of N.D.C.C. ? 44-04-18 and Article XI, Section 6 of the North Dakota Constitution to records of the Greater North Dakota Association.

N.D.C.C. ? 44-04-18 provides in pertinent part:

Except as otherwise specifically provided by law, all records of . . . organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.

(Emphasis supplied.)

This statutory provision was adopted as Article XI, Section 6 of the North Dakota Constitution. (Approved Nov. 7, 1978; 1977 N.D. Sess. Laws ch. 612; 1979 N.D. Sess. Laws ch. 694).

A three pronged test is applied to determine whether a record is subject to the open records law and is available to the public: whether the entity which has the record is subject to the open records law because it is listed in the statute, or if not listed, is at least partially supported by public funds; whether the document is a record; and whether the Legislature has enacted an exception to the rule that all records are open. Letter from Assistant Attorney General Allen C. Hoberg to Nancy Jo Bateman, Executive Director, North Dakota Beef Commission (March 1, 1989). The first and the last prong are relevant to your request regarding GNDA.

The Greater North Dakota Association is supported

in part by public funds. Letter from Dale O. Anderson, President, Greater North Dakota Association to Representative William E. Kretschmar (March 9, 1993). It receives those funds from the North Dakota Department of Parks and Tourism, Job Service North Dakota, NDSU Extension Service, Dickinson State University, and Vocational Education. Thus the Greater North Dakota Association is an entity subject to the open records law.

The issue then becomes whether all of GNDA's records, or just those records that relate to the use of public funds, are subject to public review. The term "record" is expansive, including "all records" in the hands of an entity subject to Article XI, Section 6, of the North Dakota Constitution. City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572 (N.D. 1981). Absent an express exception, access cannot be denied because a record is not required to be kept by law. Nor can access be denied based upon an implied rule which would limit access to records directly relating to how the public funds are spent. Furthermore, the court has made it clear that it will not let the open records law "be circumvented by the delegation of a public duty to a third party, and [the records] are not any less a public record simply because they [are] in the possession of" a private party. Forum Publishing Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986). (Refusing to sanction a scheme of hiring a third party to perform a function to insulate records from public view.)

Because the law provides that records must "be open to the public 'Except as otherwise specifically provided by law,' an exception to the open-records law may not be implied." Hovet v. Hebron Pub. Sch. Dist., 419 N.W.2d 189, 191 (N.D. 1988).

To limit the phrase "all records" to only those records which relate to the expenditure of public funds creates or implies an exception to the open records law which does not exist in statute. Nothing in state law exempts an organization's records because the records are not related to the public funds received by the organization.

The Greater North Dakota Association has brought itself within the scope of the law by accepting public funds to support its activities. Absent an applicable exception it is my opinion that because the Greater North Dakota Association is "supported in whole or in part by public funds" all the

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records of the Greater North Dakota Association are subject to N.D.C.C. § 44-04-18 and Article XI, Section 6 of the North Dakota Constitution, and may be accessed by members of the public during reasonable office hours.

Sincerely,

Heidi Heitkamp
Attorney General