

**LETTER OPINION
2008-L-20**

December 22, 2008

The Honorable Roger Johnson
Agriculture Commissioner
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Commissioner Johnson:

Thank you for your letter asking me to interpret a section of the Pesticide Act (Act). You ask whether a private individual may access pesticide application and sales records by claiming to “enforce” the Act. It is my opinion that only the Commissioner has the authority to enforce the Act and records pertaining to pesticide application and sales are confidential in the hands of the Commissioner. However, if the Commissioner requires a confidential record for the enforcement of N.D.C.C. ch. 4-35, the record loses its confidential status. Further, there is no medical necessity exception that lifts a record’s confidentiality status.

ANALYSIS

The statute at issue within the Act is N.D.C.C. § 4-35-24(5), which provides:

The commissioner shall, at any reasonable time, have access to the records pertaining to pesticide application and sales of any person. The commissioner may copy or make copies of such records for the purpose of carrying out the provisions of this chapter. Unless required for the enforcement of this chapter, such information is confidential.¹

The underlined sentence specifically refers to enforcement of N.D.C.C. ch. 4-35. Although the sentence does not expressly designate the Commissioner as the enforcer, when the subsection, statute, and chapter are read together, it is clear that the Legislature designated the Commissioner, not private persons, to enforce the Act. Subsection five is one of seven subsections in N.D.C.C. § 4-35-24. That statute clearly states “[t]he commissioner is charged with the duty of enforcing the requirements of this chapter and any rules or regulation issued hereunder.”² Because N.D.C.C. § 4-35-24 and other statutes expressly vest the enforcement powers of the Act with the Commissioner, it is my opinion that only the Commissioner can enforce the chapter.

The confidentiality provision in N.D.C.C. § 4-35-24(5) is not absolute. The statute makes pesticide application and sales records confidential “[u]nless required for the

¹ N.D.C.C. § 4-35-24(5) (emphasis added).

² N.D.C.C. § 4-35-24(1) (emphasis added).

enforcement of this chapter.”³ Thus, at the point a record is required to enforce the chapter, the record becomes open.⁴ Since the Commissioner is the only person with authority to enforce the chapter, the Commissioner is responsible for determining which records are required for enforcement and hence thereafter no longer confidential.

Further, although a record’s status can change from confidential to open, there is no express declaration in N.D.C.C. § 4-35-24(5) that causes a record required for enforcing the chapter to revert back to confidential status. Because I cannot add words or phrases which the Legislature did not include, I must presume the Legislature said all that it intended to say.⁵ The language is plain on its face and only provides confidential status until the point where a record is required to enforce the chapter.

Thus, it is my opinion that when a confidential record is required for the enforcement of the chapter, the record is thereafter in the public domain and is no longer confidential.

You ask a second question. If private persons are not entitled to the “enforcement exception,” might they yet be able to obtain the records solely for personal health reasons. Pesticides can drift from the place of their application to unprotected persons on neighboring lands. Persons can also come into contact with pesticides in other ways. Exposure can cause sickness, and proper treatment could depend on knowing the name and chemical make-up of the pesticide.

While there are valid public policy arguments, there is no “medical necessity” exception in N.D.C.C. ch. 4-35, nor in statutes generally governing confidential records. Thus, even if a person has a medical reason for requesting records acquired by the Commissioner under N.D.C.C. § 4-35-24(5), that request must be denied for so long as the information remains confidential. Any potential for harsh results is a matter for the Legislature to consider.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.⁶

³ N.D.C.C. § 4-35-24(5).

⁴ This would generally mean that a record used as an attachment or exhibit to a complaint or brief, and as an exhibit in a deposition or hearing or trial would become an open record.

⁵ Larsen v. North Dakota Dept. of Transp., 693 N.W.2d 39, 43 (N.D. 2005).

⁶ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).