

**OPEN RECORDS AND MEETINGS OPINION
2011-O-09**

DATE ISSUED: June 29, 2011

ISSUED TO: Bank of North Dakota

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Brian Mindt¹ asking whether the Bank of North Dakota violated N.D.C.C. § 44-04-18 by refusing to provide records regarding a loan to the Valley City/Barnes County Economic Development Corporation.

FACTS PRESENTED

In September 2010, Brian Mindt wrote the Bank of North Dakota (BND) seeking information about a loan he believed the Valley City/Barnes County Development Corporation planned to seek from BND. He requested the names of the BND employees who would make the final decision and approve the potential loan. BND denied Mr. Mindt's request on the basis that if the information were disclosed about the employees who would be involved in the loan approval process, BND would indirectly be confirming whether or not there is a pending loan request, contrary to N.D.C.C. § 6-09-35(1). This law requires BND to keep the commercial or financial information of a customer confidential. BND explained, however, that N.D.C.C. § 6-08.1-02(7) allows certain information related to a borrower to be disclosed after a loan has closed.

Mr. Mindt next asked for the names of the employees, and their titles, at BND who would approve a loan for any economic development corporation that sought a loan for the purpose of construction of a structure. BND repeated its previous response and denial.²

¹ The request was submitted by Mr. Mindt's attorney, John Gosbee.

² This office may review the denial of a record only if the request for review is received within thirty days of the alleged violation. N.D.C.C. § 44-04-21.1(1). Mr. Mindt's request for review of the January 3, 2011, Industrial Commission response was within the thirty day period, but his prior requests for information from BND are outside of the thirty day period and may not be reviewed by this office.

After BND approved a loan to the Valley City/Barnes County Development Corporation, Ms. Karlene Fine, executive director of the Industrial Commission, provided Mr. Mindt with the amount of the approved loan and confirmed the name of the loan recipient as allowed under N.D.C.C. § 6-08.1-02.³ Mr. Mindt responded by again asking BND for the name and titles of the BND employees who approved the loan, the names of the people from the economic corporation who applied for the loan, the date the loan application was submitted and the original loan amount requested.⁴

Ms. Fine, on behalf of the Industrial Commission, again denied Mr. Mindt's request because of the statutory prohibition against releasing customer information.

ISSUE

Whether the Industrial Commission violated N.D.C.C. § 44-04-18 by refusing to provide the requester with records regarding a loan to the Valley City/Barnes County Economic Development Corporation.

ANALYSIS

The open records law requires BND, as a state agency, to allow public access to its records and meetings unless there is a specific exception.⁵ The Industrial Commission is BND's governing body and is also a "public entity" subject to N.D.C.C. § 44-04-18, the open records law.⁶

In addition to being a public entity, BND is also a financial institution regulated by the laws of the State of North Dakota. BND is subject to N.D.C.C. § 6-09-35 which requires it to keep the "[c]ommercial or financial information of a customer" confidential in addition to federal confidentiality laws that require protection of customer information.⁷ "Customer information" is defined in N.D.C.C. § 6-08.1-01 as:

³ The Industrial Commission is the entity that operates, manages, and controls BND. N.D.C.C. § 6-09-02. Pursuant to N.D.C.C. § 6-08.1-02(7), the Industrial Commission, not BND, is authorized to release certain loan information once the loan closes.

⁴ Mr. Mindt's attorney, Mr. Gosbee, describes the December 3, 2010, letter as a renewal of his original request for the identity of BND employees.

⁵ See N.D.C.C. § 44-04-18(1) ("Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours").

⁶ See N.D.C.C. § 6-09-02. See also N.D.C.C. § 44-04-17.1(13)(a) (definition of "public entity").

⁷ See Gramm-Leach-Bliley Act (Financial Modernization Act of 1999), Pub. L. 106-102, 113 Stat. 1338-1481.

OPEN RECORDS AND MEETINGS OPINION 2011-O-09

June 29, 2011

Page 3

- a. Any original or any copy of any records held by a financial institution pertaining to a customer's relationship with the financial institution.
- b. Any information derived from a record described in this subsection.⁸

As I explained in 2001, BND customer information is confidential pursuant to N.D.C.C. § 6-09-35.⁹ The Industrial Commission, as BND's governing body, is required to comply with the confidentiality requirements in N.D.C.C. § 6-09-35(1) with the exception of certain loan information that is specifically authorized to be released by the Industrial Commission under N.D.C.C. § 6-08.1-02(7).

Pursuant to N.D.C.C. § 6-08.1-02(7), only the Industrial Commission may release the name of the person who has obtained financing through the Bank of North Dakota and the amount of any financing obtained either directly or indirectly through the Bank of North Dakota. The purpose of this exception is to ensure that information on "newsworthy" loans made by BND would still be available to the public.¹⁰ Thus, after the loan in question closed, the executive director of the Industrial Commission, as opposed to BND, informed Mr. Mindt that BND had approved a \$950,000 loan to the Valley City/Barnes County Development Corporation.¹¹

Mr. Mindt's attorney, John Gosbee, argues that the additional details about the loan should have been provided to his client because the information, like the names of BND employee names, is generally not protected or specifically prohibited from release under N.D.C.C. § 6-08.1-02(7).¹² However, all of the information Mr. Mindt requested would have to be obtained from the loan documents and all information derived from the loan documents is defined as "customer information" under N.D.C.C. § 6-08.1-01 and cannot be released. Therefore, it is my opinion that neither BND nor the Industrial Commission violated the open records law by refusing to provide customer information.

⁸ N.D.C.C. § 6-08.1-01.

⁹ N.D.A.G. 2001-F-10.

¹⁰ N.D.A.G. 2001-F-10 citing Hearing on S. 2386 Before the Senate Industry, Business, and Labor Comm., 1985 N.D. Leg. (Jan. 30) (Testimony of Jack McDonald).

¹¹ Letter from Karlene Fine, Exec. Dir. of the Indus. Comm'n of North Dakota to Brian Mindt (Nov. 21, 2010).

¹² N.D.A.G. 2001-F-10.

CONCLUSION

BND and the Industrial Commission did not violate N.D.C.C. § 44-04-18 by refusing to provide BND customer information.

Wayne Stenehjem
Attorney General

mkk/vkk