

**OPEN RECORDS AND MEETINGS OPINION  
2016-O-03**

DATE ISSUED: January 25, 2016

ISSUED TO: North Dakota State University Alumni Association and  
Development Foundation:

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Matthew Von Pinnon, editor of The Forum, asking whether the North Dakota State University Alumni Association and Development Foundation violated N.D.C.C. § 44-04-18 by refusing to provide records in the possession of their agent.

**FACTS PRESENTED**

The North Dakota State University (NDSU) Alumni Association (Association) and Development Foundation (Foundation) are in the process of hiring a new President/CEO.<sup>1</sup> After the former President/CEO's resignation, the executive committees of the Association and Foundation formed a nine member search committee (search committee) made up of members of the Foundation, Association, and employees of NDSU.<sup>2</sup>

The search committee retained a search firm, Lois L. Lindauer Searches, LLC (LLLS), to assist in the hiring process.<sup>3</sup> Lois L. Lindauer Searches, LLC, was to advertise, generate interest, and obtain applications for employment for the President/CEO position.<sup>4</sup>

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<sup>1</sup> Letter from Christopher McShane, att'y for NDSU Alumni Ass'n/Dev. Found., to Sandra L. DePountis, Asst. Att'y Gen. (Sep. 24, 2015).

<sup>2</sup> Id.

<sup>3</sup> Id. According to the Ass'n/Found., LLLS is a search firm specializing in placements for executive positions in development organizations.

<sup>4</sup> Letter from Christopher McShane, att'y for NDSU Alumni Ass'n/Dev. Found., to Sandra L. DePountis, Asst. Att'y Gen. (Sep. 24, 2015); see also Contract between LLLS and NDSU Dev. Found/Alumni Assoc. (signed Feb. 24, 2015, and Feb. 19, 2015, respectively).

The Development Foundation and Alumni Association utilized the contacts LLLS has in the industry to generate interest in the open position. The position was advertised by e-mail to contacts LLLS has in the industry that may be appropriate for the position, along with postings for the general public. In response to LLLS's effort to generate interest in the open position, individuals were asked to contact LLLS for more information about the position. Several individuals made contact with LLLS to determine if the job would be a proper fit for them, and if they would be a proper fit for the job. During that initial conversation, LLLS informed the individuals that [the Office of Attorney General] has treated the Development Foundation and Alumni Association as public entities, subject to the open records/open meetings laws of the state of North Dakota. This means, once an individual applies for the position, their name and information would become a public record.<sup>5</sup>

After advertising, twelve individuals provided their information and qualifications to LLLS for consideration of the President/CEO position.

At an open meeting on July 30, 2015, the search committee performed a "blind review" of the twelve interested individual's qualifications.<sup>6</sup> Lois L. Lindauer Searches, LLC, provided a written summary of the qualifications of the individuals, took out any identifying information, and presented the materials to the search committee so the search committee could review whether the individuals were qualified for the position.<sup>7</sup> The search committee determined that eight out of the twelve people were qualified for the position.<sup>8</sup> The search committee's determinations were relayed to the interested individuals by LLLS.<sup>9</sup> Four people ultimately decided to submit formal applications.<sup>10</sup>

On August 7, 2015, Grace Lyden of the Fargo Forum sent an email to Nonda Mack, the Foundation and Association's Chief of Staff, asking for "the names of the applicants who were reviewed blindly last week? We believe that because the search consultant knows their names, and because she is working as an agent of a public body, those would also be a public record."<sup>11</sup> Ms. Mack replied on August 10, 2015, that "[n]either the

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<sup>5</sup> Letter from Christopher McShane, att'y for NDSU Alumni Ass'n/Dev. Found., to Sandra L. DePountis, Asst. Att'y Gen. (Sep. 24, 2015).

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Email from Grace Lyden, Higher Ed. Reporter, The Forum, to Nonda Mack, Chief of Staff, NDSU Dev. Found./Alumni Ass'n (Aug. 7, 2015, 2:26 PM).

Development Foundation nor [LLLS] is in possession of a document that is responsive to your request.”<sup>12</sup> Ms. Lyden, in follow up, asked “maybe I asked for the wrong thing...I’d like to request all documents that have the names of the interested individuals who were blindly reviewed by the search committee.”<sup>13</sup> Christopher McShane, attorney for the Association and Foundation, responded to Ms. Lyden by providing copies of the formal applications provided to the Association and Foundation, but did not provide the names of all twelve individuals blindly reviewed by the search committee, stating the information was considered LLLS’s “trade secret” information deemed confidential under N.D.C.C. § 44-04-18.4(1).<sup>14</sup>

### ISSUE

Whether the Foundation and Association properly denied records that would reveal the names of individuals who submitted their information and qualifications to be considered for the President/CEO position with the entities.

### ANALYSIS

The Foundation and Association recognize that they, along with the search committee, are public entities subject to open records and meetings law.<sup>15</sup> The search committee delegated part of its public duty of advertising, generating interest in, and obtaining applications for hiring a new President/CEO of the Foundation and Association to LLLS.<sup>16</sup> When a private corporation enters into a contract with a public entity and performs governmental functions and public services on behalf or in place of the public

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<sup>12</sup> Email from Nonda Mack, Chief of Staff, NDSU Dev. Found./Alumni Ass’n, to Grace Lyden, Higher Ed. Reporter, The Forum (Aug. 10, 2015, 4:31 PM).

<sup>13</sup> Email to Grace Lyden, Higher Ed. Reporter, The Forum, to Nonda Mack, Chief of Staff, NDSU Dev. Found./Alumni Ass’n (Aug. 10, 2015, 5:08 PM).

<sup>14</sup> Email from Christopher McShane, att’y for NDSU Alumni Ass’n/Dev. Found., to Grace Lyden, Higher Ed. Reporter, The Forum (Aug. 17, 2015, 8:38 AM).

<sup>15</sup> Letter from Christopher McShane, att’y for NDSU Alumni Ass’n/Dev. Found, to Sandra L. DePountis, Asst. Att’y Gen. (Sep. 24, 2015); see also N.D.A.G. 2015-O-10 (recognizing the Association and Foundation as “public entities”); N.D.A.G. 2014-O-07 (Association and Foundation are “public entities” subject to open records and meetings laws); N.D.A.G. 2014-O-05 (a committee delegated any part of a governing body’s public duty is subject to the same open records and meetings law of the full governing body).

<sup>16</sup> Letter from Christopher McShane, att’y for NDSU Alumni Ass’n/Dev. Found, to Sandra L. DePountis, Asst. Att’y Gen. (Sep. 24, 2015); see also Contract between LLLS and NDSU Dev. Found./Alumni Ass’n (signed Feb. 24, 2015, and Feb. 19, 2015, respectively).

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entity, it is an agent of the public entity subject to open records law.<sup>17</sup> Lois L. Lindauer Searches, LLC, is therefore considered an agent of the Foundation and Association, subject to open records law.

As an agent, any records in the possession of LLLS related to the performance of its duties of advertising, generating interest, and obtaining applications on behalf of the public entities, are public records, unless otherwise provided by law.<sup>18</sup> In addition, for most public entities, personnel records, which include resumes, applications, and other “records used to determine qualifications for employment” are open records,<sup>19</sup> even if

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<sup>17</sup> N.D.A.G. 2014-O-24.

<sup>18</sup> N.D.C.C. § 44-04-17.1(16) (definition of “record” includes “recorded information of any kind...which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business.”); N.D.A.G. 2015-O-14 (“The application of the open records law is not limited to the public entity itself; it also applies to recorded information regarding public business which is in the possession of an ‘agent’ of the public entity. Under open records law, the terms ‘agent’ or ‘agency’ refers to an arrangement in which a public entity delegates the transaction of some lawful business to another.”); N.D.A.G. 2014-O-24 (“Where a government entity delegates a public duty to a third party, documents in possession of the third party connected with public business are public records within the meaning of N.D.C.C. § 44-04-18.”).

<sup>19</sup> See N.D.A.G. 2015-O-01 (For most public entities, personnel records are open records. There is a limited exception for those entities that are subject to open records law only because they are supported by public funds pursuant to N.D.C.C. § 44-04-18.1(3)); N.D.A.G. 2013-O-16 (“For most public entities, personnel records are generally not exempt or confidential. . . . ‘Personnel records’ means documents that directly pertain to employment and an employee’s ability to perform a job, including . . . records used to determine qualifications for employment . . . .”); N.D.A.G. 2013-O-09 (governing body could not hold an executive session to discuss personnel issues such as the basis in which it felt comfortable hiring an applicant); N.D.A.G. 2011-O-10 (governing body could not hold an executive session for personnel issues such as discussing potential director candidates); N.D.A.G. 2006-O-14 (definition of “personnel record” includes “records used to determine qualifications for employment”); N.D.A.G. 2006-O-04 (courts interpret “personnel records” to include applications for employment and records used to determine qualifications for employment); N.D.A.G. 2006-O-03 (applications for fair manager position were open records); N.D.A.G. 98-F-11 (recognizing resumes, job applications, and other records pertaining to information submitted by a person applying for a position are open records).

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the records are in the hands of an independent consulting firm hired by the public entity to assist in searching for candidates.<sup>20</sup>

The Association and Foundation argue the names of the individuals who contacted LLLS with an interest in the President/CEO position are trade secrets pursuant to N.D.C.C. § 44-04-18.4, which provides, in part:

1. Trade secret, proprietary, commercial, and financial information is confidential if it is of a privileged nature and it has not been previously publicly disclosed.
2. Under this section, unless the context otherwise requires: ...
  - d. "Trade secret" means information including a formula, pattern, compilation, program, device, method, technique, technical know-how, or process, that:
    - (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons that can obtain economic value from its disclosure or use; and
    - (2) Is the subject of efforts that are reasonable under the circumstances to maintain the secrecy of the information.<sup>21</sup>

The Association and Foundation explain that a "major advantage of using LLLS is its contacts in the educational fund raising industry" and its database of contacts utilized to advertise for positions and the list of "names of persons in the higher education development industry who have a desire to change jobs is extremely valuable to LLLS."<sup>22</sup> They point out that LLLS has spent years cultivating the contacts and it would

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<sup>20</sup> N.D.A.G. 2001-O-02 (violation of open records law when public entity refused to disclose information regarding the applications for the superintendent position until a report listing the finalists for the position was presented by the outside personnel firm to the school board at the next meeting); Forum Publishing Co. v. City of Fargo, 391 N.W.2d 169 (N.D. 1986) (job applications in the possession of a consulting firm hired by the city to assist in candidate search are open records).

<sup>21</sup> N.D.C.C. § 44-04-18.4.

<sup>22</sup> Letter from Christopher McShane, att'y for NDSU Alumni Ass'n/Dev. Found., to Sandra L. DePountis, Asst. Att'y Gen. (Sep. 24, 2015).

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not be able to sell its services if this entire database of contacts was generally known to the public.

Conceivably, this database of contacts may be considered a “trade secret” in which LLLS derives “independent economic value” for “not being generally known or readily ascertainable by proper means by, other persons that can obtain economic value from its disclosure or use.”<sup>23</sup> However, The Forum did not request to receive the database cultivated by LLLS. It only requested the names of the twelve individuals who expressed interest and provided qualifications to LLLS for consideration of the President/CEO position with the public entities. The LLLS does not derive “independent economic value” from the information of the twelve individuals; rather, this information was bought and paid for by the Association and Foundation as part of LLLS duties under contract and, since there is a contract in place, the LLLS is not in competition with any other company to advertise and obtain applications for this CEO/president position.<sup>24</sup>

If the Association and Foundation conducted their own advertising for the position, the records of individuals would be considered open records in the hands of the Foundation and Association as public entities. The North Dakota Supreme Court has stated that public entities cannot circumvent open records law by delegating the public duty of searching and obtaining applications for public employment to a third party and the

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<sup>23</sup> The Foundation and Association cite to a 1983 New York Civil Court Case, Fisher Org., Inc. v. Ryan, 122 Misc. 2d 305, (Civ. Ct. 1983) as a basis for finding a list of potential employment candidates to be a “trade secret.” The Ryan case involved private companies in which the plaintiff was an employment agency engaged in executive placement and the defendants were former placement counselors who formed their own agency while still employed by plaintiff and solicited the plaintiff’s customers. The Court found the defendants owed a fiduciary relationship to their employer and the customer lists were “trade secrets.” Unlike Ryan, at issue in this opinion are public entities whose test of confidentiality for a “trade secret” is different under open records law than it is under a general Uniform Trade Secret Act. See N. States Power Co. v. N.D. Public Serv. Comm’n, 502 N.W.2d 240 (N.D. 1993) (finding price and volume data was “trade secret” under the Uniform Trade Secret Act,” N.D.C.C. ch. 47-25.1, but not exempt from open records law). Furthermore, the request was not for a customer database list obtained through former private employment, but was for the list of twelve individuals who expressed interest and provided qualifications for consideration of employment with a public entity.

<sup>24</sup> To adopt the Foundation and Association’s conclusion that the names of individuals who provide records and information to LLLS for employment are “trade secrets,” would then protect not only those interested in the position, but the final applicants as well, a conclusion consistently unsupported by this office and the Supreme Court.

records revealing qualifications and applications are not any less a public record simply because they are in the possession of the independent search firm.<sup>25</sup>

Therefore, it was a violation of open records law when the Association and Foundation failed to provide all twelve records of the individuals who contacted LLLS for the President/CEO position.

### CONCLUSION

The North Dakota State University Alumni Association and Development Foundation violated open records law when it refused to provide records relating to individuals whose information and qualifications were included in a blind review for consideration of employment for the new President/CEO position of the public entities.

### STEPS NEEDED TO REMEDY VIOLATION

The Association and Foundation must immediately turn over any records relating to the individuals whose information was included in the blind review which are either in their or LLLS's possession. Such records may only be redacted pursuant to open records law, such as "personal information" under N.D.C.C. § 44-04-18.1. The Association and Foundation, as the public entities subject to these laws, have the ultimate obligation to obtain such records from its agent. The records should be provided free of charge.

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<sup>25</sup> Forum Publ'g Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986). The Forum case is remarkably similar to the issues presented in this opinion. In Forum, the City Fargo hired a consulting firm specializing in evaluating applications for executive positions to help in the search and selection of a new chief of police. The Supreme Court found the applications to be public records subject to open records law, even in the possession of the consulting firm. The Association and Foundation attempt to distort this conclusion by pointing out that the district court allowed applicants who did not wish for their names to become public to withdraw their applications. The Foundation and Association's attempt to conclude that the "Supreme Court did not question this process, which indicates only records related to actual applicants are determined open in North Dakota." Letter from Christopher McShane, att'y for NDSU Alumni Ass'n/Dev. Found., to Sandra L. DePountis, Asst. Att'y Gen. (Sep. 24, 2015). This conclusion is unsupported by the actual decision by the Supreme Court in Forum finding that all of the applications were considered open records. This conclusion also disregards the very premise of the open records law that any record in the possession of a public entity regarding public business is a public record subject to open records law, regardless of whether the record was obtained as an application or for any other purpose. See N.D.C.C. §§ 44-04-17.1(16) and 44-04-18.

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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.<sup>26</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>27</sup>

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cc: Matthew Von Pinnon (via email only)

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<sup>26</sup> N.D.C.C. § 44-04-21.1(2).

<sup>27</sup> Id.