

**OPEN RECORDS AND MEETINGS OPINION  
2017-O-01**

DATE ISSUED: March 10, 2017

ISSUED TO: University 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 Steve Wagner, editor of the Grand Forks Herald, asking whether the University of North Dakota violated N.D.C.C. § 44-04-18 by refusing to provide copies of requested records.

**FACTS PRESENTED**

On February 19, 2016, the University of North Dakota (UND) contracted with SME, Inc. (SME), to design "an original graphic identity to compliment UND's Fighting Hawks nickname."<sup>1</sup> The new Fighting Hawks logo was unveiled to the public on June 22, 2016. The Grand Forks Herald made an open records request to UND for any preliminary designs that were not selected and any related documentation in UND and SME's possession.<sup>2</sup> UND denied the request, stating that the designs were in the possession of SME and that SME considered the graphics proprietary and trade secret information, protected under N.D.C.C. § 44-04-18.4.<sup>3</sup>

**ISSUE**

Whether UND violated open records law when it withheld preliminary designs not selected for the new Fighting Hawks logo.

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<sup>1</sup> Letter from Peter B. Johnson, Interim V.P. for Univ. and Pub. Affairs, to Sandra DePountis, Asst. Att'y Gen. (July 20, 2016); *see also* UND "Fighting Hawks" Graphic Identity Services Contract.

<sup>2</sup> Email from Wade Rupard, reporter, Grand Forks Herald, to Peter B. Johnson, Interim V.P. for Univ. and Pub. Affairs (June 23, 2016, 9:35 AM); Email from Steve Wagner, Editor, Grand Forks Herald, to Peter B. Johnson, Interim V.P. for Univ. and Pub. Affairs (June 27, 2016, 9:53 AM).

<sup>3</sup> Email from Peter B. Johnson, Interim V.P. for Univ. and Pub. Affairs, to Wade Rupard, reporter, Grand Forks Herald (June 23, 2016, 2:57 PM); Email from Peter B. Johnson, Interim V.P. for Univ. and Pub. Affairs, to Steve Wagner, Editor, Grand Forks Herald (June 28, 2016, 12:57 PM); *see also* Letter from Peter B. Johnson, Interim V.P. for Univ. and Pub. Affairs, to Sandra DePountis, Asst. Att'y Gen. (July 20, 2016).

## ANALYSIS

“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.”<sup>4</sup> UND puts forth two reasons for denying the records request.

### **Possession of Records**

Initially, UND did not produce the records because it did not have possession of the preliminary designs, as many were reviewed only via WebEx and the files were no longer downloaded.<sup>5</sup> In addition, UND explained that under the contract, the designs are the property of SME and it is only “delivered content” that UND has ownership of and only the final logo is considered “delivered content.”<sup>6</sup>

SME still has possession and copies of the preliminary designs. 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.<sup>7</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 entity, it is an agent of the public entity subject to open records law.<sup>8</sup> UND delegated part of its public duty of generating and designing a logo for the new Fighting Hawks nickname to SME. SME is therefore considered an agent of UND and records relating to the public business SME performs on behalf of UND pursuant to their contractual

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<sup>4</sup> N.D.C.C. § 44-04-18(1).

<sup>5</sup> Email from Peter B. Johnson, Interim V.P. for Univ. and Pub. Affairs, to Wade Rupard, reporter, Grand Forks Herald (June 23, 2016, 2:57 PM); Email from Peter B. Johnson, Interim V.P. for Univ. and Pub. Affairs, to Steve Wagner, Editor, Grand Forks Herald (June 28, 2016, 12:57 PM).

<sup>6</sup> Letter from Peter B. Johnson, Interim V.P. for Univ. and Pub. Affairs, to Sandra DePountis, Asst. Att’y Gen. (July 20, 2016); Email from Jason R. Jenkins, Asst. Att’y Gen., to Sandra DePountis, Asst. Att’y Gen. (Aug. 1, 2016 3:50 PM); *see also* UND “Fighting Hawks” Graphic Identity Services Contract. The Contract does not define “delivered content.” UND received and reviewed the preliminary designs and thus, arguably, the preliminary designs are considered “delivered content.” Such a determination is not necessary because open records law would apply to all records relating to the public business performed by an “agent” on behalf of a public entity and a public entity cannot create exceptions to the open records law by contract or policy.

<sup>7</sup> N.D.C.C. § 44-04-17.1(16) (definition of “record” includes records in the possession or custody of a public entity or its agent); *see also* N.D.A.G. 2015-O-14.

<sup>8</sup> N.D.A.G. 2016-O-03; N.D.A.G. 2014-O-24.

agreement are subject to open records law.<sup>9</sup> Open records law cannot be limited by policy or contract; rather, limitations and exemptions must be expressly provided by “law.”<sup>10</sup> Open records law extends to the preliminary designs presented to UND by SME pursuant to its contractual agreement even if the records are physically in the hands of SME.

**Records are protected “proprietary information” and “trade secret”**

Regardless of the issue of possession, UND argues that the records cannot be released because they are considered by SME to be “proprietary information” and “trade secrets” protected under N.D.C.C. § 44-04-18.4, which provides, in relevant 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:  
...  
c. “Proprietary information” includes:  
...  
(5) Technical, financial, or marketing records that are received by a public entity, which are owned or

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<sup>9</sup> N.D.A.G. 2016-O-03; N.D.A.G. 2015-O-14; N.D.A.G. 2014-O-24. The contract between SME and UND recognizes “[a]ll work product, equipment or materials created for UND or purchased by UND under this Contract belong to UND and must be immediately delivered to UND at UNDS request” and also recognizes the applicability of open records law to the information obtained under the contract. See UND “Fighting Hawks” Graphic Identity Services Contract, sections 11 (Work for Hire), 12 (Work Product), 14 (Confidentiality), and 15 (Compliance with Public Records Law). (On file with UND.)

<sup>10</sup> 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.”); N.D.C.C. 44-04-17.1(8) (definition of “law” includes federal statutes or regulations and state statutes). See *also* N.D.A.G. 2004-L-25 (“Neither a public entity nor its agent may by contract, rule, or policy make a record confidential unless the record comes within a specific exemption from the open records law.”); N.D.A.G. 2003-O-09 (public entity’s policy to withhold records without legal exemption is not a valid legal reason to deny a request for copies of records); N.D.A.G. 2000-F-09 (public entities may not create an exception to the open records law by contract).

controlled by the submitting person, are intended to be and are treated by the submitting person as private, and the disclosure of which would cause harm to the submitting person's business.

...

- 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.

Trade secret and proprietary information is confidential only if it is "of a privileged nature" and has not been previously publicly disclosed.<sup>11</sup> Because the preliminary designs have not been previously publicly disclosed, the question becomes whether the designs are "of a privileged nature."

Information is "of a privileged nature" only if disclosing the records is likely to impair the public entity's ability to obtain necessary information in the future, or if it is likely to cause substantial harm to the competitive position of the entity supplying the information.<sup>12</sup>

In order to show a likelihood of substantial competitive harm, the public entity must first show that the contractor is in actual competition with other business, or else there can be no competitive injury from disclosure.<sup>13</sup> The public entity must then support its argument that substantial competitive injury will result from the disclosure.<sup>14</sup> This requires more than conclusory and generalized statements of substantial harm. A

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<sup>11</sup> N.D.C.C. § 44-04-18.4(1).

<sup>12</sup> N.D.A.G. 2016-O-03; N.D.A.G. 2014-O-02; N.D.A.G. 2005-O-06; N.D.A.G. 2004-L-25; N.D.A.G. 2002-O-08; N.D.A.G. 98-O-22; N.D.A.G. 98-L-77; N.D.A.G. 98-L-17.

<sup>13</sup> N.D.A.G. 98-O-22; N.D.A.G. 94-L-194.

<sup>14</sup> N.D.A.G. 98-O-22; N.D.A.G. 94-L-194. Although consultation with the contractor regarding the potential harm to its competitive position is appropriate, UND must make the final decision whether the information is protected. N.D.A.G. 98-L-17.

public entity must provide articulated reasoning or a specific factual basis that could support a decision that the records are confidential pursuant to N.D.C.C. § 44-04-18.4.

In support of its argument that the unchosen preliminary designs are proprietary and would cause substantial harm to SME's competitive position, SME explains:

The drafts presented to UND show a general creative direction and approach that could be used with another current or potential client of SME's. Disclosing these UND drafts would significantly reduce the economic value they would otherwise have on the open market since one client may not be willing to accept a product that was developed from draft work presented to UND.<sup>15</sup>

UND explained the process of choosing a new logo was done in phases. At each phase, SME would present "creative directions" to be refined for the next phase.<sup>16</sup> Ultimately, SME presented UND with close to fifty draft designs for the new Fighting Hawks logo. UND chose one of the designs and worked with SME to fine-tune the design into the final logo unveiled by UND. SME objects to the non-selected options from being released because it is part of SME's creative body of work that may be used in other projects.

The determination of whether a record contains trade secret or proprietary information of a privileged nature as defined by N.D.C.C. § 44-04-18.4 is generally a factual decision to be made by the public entity, in this case UND, because it is in the best position to determine the effect of disclosure.<sup>17</sup> While this office usually defers to an agency's finding of fact, this office has intervened when it was determined that the finding is unsupportable.<sup>18</sup>

In a former opinion, this office considered whether a booklist compiled by Barnes & Noble, the company that operates the UND bookstore on campus, was considered a "trade secret" under N.D.C.C. § 44-04-18.4.<sup>19</sup> Barnes & Noble argued that to allow competitors to obtain the booklist at the "mere costs allowable under the open records law" would place it at a competitive disadvantage because it expended considerable

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<sup>15</sup> Email from Peter B. Johnson, Interim V.P. for Univ. and Pub. Affairs, to Sandra DePountis, Ass't. Att'y Gen. (Aug. 25, 2016, 3:12 PM).

<sup>16</sup> Letter from Peter B. Johnson, Interim V.P. for Univ. and Pub. Affairs, to Sandra DePountis, Ass't Att'y Gen. (July 20, 2016).

<sup>17</sup> N.D.A.G. 2014-O-02; N.D.A.G. 2002-O-08; N.D.A.G. 98-L-77; N.D.A.G. 98-O-22; N.D.A.G. 98-L-17.

<sup>18</sup> N.D.A.G. 2014-O-02; N.D.A.G. 2005-O-06; N.D.A.G. 2004-O-01; N.D.A.G. 2002-O-08; N.D.A.G. 2000-L-107; N.D.A.G. 98-O-22; N.D.A.G. 98-L-17.

<sup>19</sup> N.D.A.G. 2004-L-25.

time and resources to compile the list.<sup>20</sup> This office recognized the analysis done by a New York Court of Appeals in a similar case to determine that the booklist was a trade secret and not subject to disclosure.<sup>21</sup> In that case, the court concluded that the material was exempt from disclosure because it would enable a competitor to obtain the information without expending its resources, thereby providing a competitor with an economic windfall were it to receive the booklist at the minor cost allowed under the open records laws.<sup>22</sup> This office agreed with UND's factual determination that the compilation was a trade secret.

Similarly, here, SME expended considerable time and resources developing the close to fifty preliminary designs at issue in this opinion. It is SME's position that the preliminary designs not chosen by UND still have economic value because they will be used by SME in future projects and it would damage its competitive position to allow its competitors to have access to and be able to utilize those images. In addition, it would further harm SME's competitive position if its competitors could utilize the designs without incurring the same costs and time spent creating the designs.

As with the book list compiled by Barnes & Noble, allowing a competitor to obtain the unused designs for the mere costs allowable under the open records laws would put SME at a competitive disadvantage. It is my opinion that UND's determination that the preliminary designs were protected as a trade secret is supported by law and past opinions. Therefore, UND did not violate the open records law by denying the release of the preliminary designs pursuant to N.D.C.C. § 44-04-18.4.

#### CONCLUSION

UND lawfully withheld preliminary designs created by SME as protected proprietary and trade secret information pursuant to N.D.C.C. § 44-04-18.4.

Wayne Stenehjem  
Attorney General

sld  
cc: Steve Wagner (via email only)

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* See also, *Encore Coll. Bookstores, Inc. v. Auxiliary Serv. Corp.*, 663 N.E.2d 302 (N.Y. 1995).

<sup>22</sup> *Encore*, at 308.