

Office of the Attorney General
State of North Dakota

Opinion No. 85-3

Date Issued: January 22, 1985

Requested by: John A. Richardson
Commissioner
North Dakota State Board of Higher Education

--QUESTION PRESENTED--

Whether a private investigator's report, prepared at the request and in the possession of a state college, concerning a member of that college's faculty, is exempt from North Dakota's Open Records Law.

--ATTORNEY GENERAL'S OPINION--

It is my opinion that a private investigator's report, prepared at the request and in the possession of a state college, concerning a member of that college's faculty, is not exempt from North Dakota's Open Records Law.

--ANALYSIS--

North Dakota's Open Records Law is found in our State Constitution and in state law. Article XI, § 6 of the North Dakota Constitution provides as follows:

Section 6. Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or 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.

N.D.C.C. § 44-04-18, constitutes the statutory provision for the maintenance and disclosure of open records and that statute states as follows:

44-04-18. ACCESS TO PUBLIC RECORDS--PENALTY.

1. Except as otherwise specifically provided by law, all records of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state, or 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.

2. Violations of this section shall be punishable as an infraction.

In applying North Dakota's Open Records Law, one must first inquire as to the scope of the definition of 'records.' The North Dakota Supreme Court, in *City of Grand Forks v. Grand Forks Herald, Inc.*, 307 N.W.2d 572 (N.D. 1981), had the occasion to determine the scope of the definition of 'records' for purposes of the Open Records Law. In that case, the Court stated as follows:

We believe that the term 'records' as used in § 44-04-18, N.D.C.C., and Article XI, § 6 of the North Dakota Constitution is unambiguous. The legislative history surrounding the enactment of § 44-04-18 reveals that the Legislature intended to give the term an expansive meaning. *Id.* at 577.

In *Grand Forks Herald*, *supra*, the Supreme Court noted that with respect to a governmental entity, in that case a city, all of its records are public records open for inspection equally to members of the public which includes the news media. *Id.* at 578. The Court further noted that there were no exceptions to the open records requirement for, among other items, documents which are not required by law to be kept or maintained. Instead, the Court concluded that a public record was any document retained by public officers or employees in the course of their public duties. *Id.*

In summary, North Dakota's Open Records Law provides that unless a specific exemption is provided by law or by necessary implication, all records of public and governmental bodies are open to the public and accessible for inspection during reasonable office hours. Public records are those documents retained by public officers or employees in the course of their public duties.

The facts as to the record in question involving Minot State College indicates that the record is an investigative report prepared at the request of Minot State College officials. This report was gathered not by a law enforcement officer, but by a private investigator at the request of college officials. The investigation report concerns activities allegedly occurring in Billings, Montana and also includes interviews with students and summaries of interviews with faculty members. This particular investigation report is in the possession of officials at Minot State College at this time.

Applying the decision of the North Dakota Supreme Court in *Grand Forks Herald*, *supra*, to the facts, it is apparent that the investigation report in question is indeed a record of a public body. The document was prepared at the request, and is in the possession, of a state college. The document concerns activities of a state employee and raises questions surrounding his activities while

performing his employment responsibilities. As such, it is subject to the Open Records Law and, unless a specific statutory or implied exemption exists, must be made accessible for inspection to the public, including the news media.

In this particular case, no specific or implied legal exemption for this record has been located. There are several statutes which could possibly be relied upon in reaching the conclusion that the record in question is confidential and not subject to the open records law. However, upon close review of these statutes, this conclusion is simply unsupported.

The North Dakota Board of Higher Education, in N.D.C.C. § 15-10-17(2) is authorized to provide for the maintenance by institutions of higher learning of confidential records containing personal information regarding their prospective, current, or former students. In addition, 20 U.S.C. § 1232(g) provides limitations upon the release of 'educational' records and 'directory information' by a school which receives federal funding unless such disclosure is made in compliance with federal laws.

However, the record in question does not constitute a student record and is not a record containing personal information concerning the prospective, current, or former students. Furthermore, the record does not satisfy the federal law definition of 'educational' record or 'directory information.' The record in question is nothing more than an investigative report which happens to contain interviews taken from students of the institution in question. The state and federal statutes previously mentioned cannot be interpreted to prohibit or restrict the release of any information which happens to reference or include information concerning a student of a school. To reach this overbroad conclusion would be to interpret these statutes in a manner so as to achieve absurd, ridiculous, or unjust results. Such a statutory construction has long been condemned by the North Dakota Supreme Court. See *In Interest of B. L.*, 301 N.W.2d 387 (N.D. 1981); *State ex rel., Hjelle v. A Motor Vehicle*, etc., 299 N.W.2d 557 (N.D. 1980).

Finally, it should be mentioned that N.D.C.C. § 15-10-17(1), provides for the Board of Higher Education to consider the appointment or removal of personnel of the institutions under its control to be held in executive session. However, the possibility that any record may be considered by such an executive session which may be held pursuant to this statute is legally insufficient to constitute the exemption required by North Dakota Open Records Law. The statute applies only to the deliberative processes of the Board of Higher Education concerning appointments or removal of personnel. It was not intended by the Legislature to encompass written records that may be considered by the Board in executive session. Such an exemption could completely swallow the Open Records Law.

The argument may be made that where the document in question contains personal or private materials, the disclosure of such a document pursuant to the Open Records Law would constitute an impermissible invasion of one's constitutional right to privacy. This very argument was indeed raised in Grand Forks Herald, supra. The Court, however, noted that North Dakota has not enacted statutory or constitutional legislation recognizing a right to privacy. This is an important fact as a result of the U.S. Supreme Court decision in Whalen v. Roe, 429 U.S. 589 (1977) which held that a New York statutory requirement as to the disclosure of a patient's personal medical information did not violate any federally-protected constitutional right of privacy of that patient. The North Dakota Supreme Court has therefore stated, as follows:

Thus, the protection of a person's general right to privacy--his right to be left alone by other people--is, like the protection of his property and his life, left largely to the law of the individual States. Grand Forks Herald, supra, at 579.

As North Dakota has not enacted such privacy legislation, such personal information contained in public records is subject to public inspection. For those who argue that such personal records should not be subject to public inspection, the following suggestion of the North Dakota Supreme Court in Grand Forks Herald, supra, is appropriate:

If the City and Knutson believe that municipal personnel records are not open to public inspection, a remedy must be sought before the Legislature. Id. at 578.

In summary, the record in question constitutes a public record under the North Dakota Open Records Law as found in both the Constitution and in state statute. As there is no specific exemption or implied exemption provided by law as to the confidentiality of such a record, that record is an open record and is accessible for inspection during normal office hours.

--EFFECT--

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.

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