

Office of the Attorney General  
State of North Dakota

Opinion No. 85-24

Date Issued: June 12, 1985  
Requested by: Janet A. Elkin  
Secretary  
Public Service Commission

--QUESTIONS PRESENTED--

I.

Whether records of a public or governmental agency containing trade secrets materials are open for public inspection pursuant to North Dakota's open records law.

II.

Whether an administrative agency, in a formal proceeding, may issue those protective orders provided to the district courts by the North Dakota Rules of Civil Procedure or may recognize those privileges provided by the North Dakota Rules of Evidence.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that records of a public or governmental agency containing trade secrets material are open for public inspection pursuant to North Dakota's open records law.

II.

It is my further opinion that an administrative agency, in a formal proceeding, may issue those protective orders provided to the district courts by the North Dakota Rules of Civil Procedure or may recognize those privileges provided by the North Dakota Rules of Evidence.

--ANALYSES--

I.

North Dakota's open records law, as found in N.D.C.C. § 44-04-18(1), states, in part, 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.

\*\*\*

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 'records' for the 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, Section 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 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.

As the Public Service Commission is a public or governmental body or agency of the state, its records are subject to the open records law.

Once records are found to be within the possession of an agency which is subject to the open records law, they are presumptively disclosable to the public during normal business hours. However, the records may still be withheld by the agency in question if they fall within an exception to the disclosure provisions of the open records law.

The exemption from public disclosure under the open records law is covered by its introductory phrase which states as follows:

Except as otherwise specifically provided by law . . .

This requirement for specific exemptions is in line with the statutory interpretations which construe narrowly the exceptions to the open records law and, instead, construe liberally in favor of the coverage of such laws. *Grand Forks Herald, supra*; Letter from Chief

Deputy Attorney General Gerald Vande Walle to Ted Frederickson, Jr.  
(August 2, 1977).

A review of the applicable federal and state laws pertaining to trade secrets fails to discover a specific exemption for the non-disclosure of such records as found in the records of a public or governmental body. North Dakota law, as found at N.D.C.C. Ch. 47-25.1, does provide for a civil action upon the misappropriation of trade secrets. Furthermore, where such an action is instituted, a court is granted the authority to preserve the secrecy of alleged trade secrets by reasonable means including the granting of protective orders. However, nothing in this chapter prohibits the disclosure of such records when they are found within the possession of a public or governmental body. Thus, it is my opinion that N.D.C.C. Ch. 47-25.1 does not constitute a specific exemption from the open records law.

In summary, records in the possession of the Public Service Commission which allegedly contain trade secrets material are subject to the North Dakota open records law and are available for public inspection during normal business hours. The North Dakota statute on trade secrets establishes a civil action for the misappropriation of trade secrets, but does not constitute a specific exemption from the disclosure required by the open records law. As will be discussed *infra*, however, there is a means available to protect the confidentiality of trade secrets notwithstanding the absence of any exemption from the requirements of North Dakota's open records law.

## II.

The Public Service Commission is authorized to hold hearings on proposed changes of utility rates. N.D.C.C. § 49-05-06. Although there is no specific statute requiring such hearings to be held in compliance with the Administrative Agencies Practice Act (N.D.C.C. Ch. 28-32), the Public Service Commission is an administrative agency and the Administrative Agencies Practice Act has been applied to its proceedings. *O'Connor v. Northern States Power Co.*, 308 N.W.2d 365 (N.D. 1981); *City of Casselton v. North Dakota Public Service Commission*, 307 N.W.2d 849 (N.D. 1981). Anything filed in connection with its proceedings becomes part of the proceeding itself and is subject to the same rules and regulations of the Administrative Agencies Practice Act applicable to the oral portions of the hearing.

The North Dakota Rules of Civil Procedure, although specifically designed to govern proceedings in courts of law, are applicable to administrative agencies with respect to their administrative proceedings. In *Reliance Ins. Co. v. Public Serv. Com'n*, 250 N.W.2d 918 (N.D. 1977), the North Dakota Supreme Court stated as follows:

Rule 81(a), North Dakota Rules of Civil Procedure, provides:

The statutory proceedings listed in Table A are excepted from these rules insofar as they are inconsistent or in conflict with the procedure and practice provided by these rules.

An examination of Table A discloses that Chapter 28-32, N.D.C.C., the Administrative Agencies Practice Act, is not listed among the statutes, which implies that Chapter 28-32 is not exempt from the Rules of Civil Procedure.

Id. at 920; see also *Evanson v. Wigen*, 221 N.W.2d 648 (N.D. 1974).

In his treatise on administrative law, Charles Koch, Jr., states that protective orders as to access to information are available to administrative agencies in a similar manner as they are available to the courts.

The variety of protection available to an agency is the same as that used in federal trials. The Administrative Conference recommended that authority to make such judgments be vested in the presiding officer. The Administrative Conference recommendations favor a protective order when necessary to 'protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.' C. Koch, *Administrative Law and Practice* § 5.61 at 409-10 (1985).

Moreover, while the North Dakota Rules of Evidence are generally inapplicable to N.D.C.C. Ch. 28-32 (the Administrative Agencies Practice Act), those portions of the Rules of Evidence defining privileges specifically apply to administrative proceedings. N.D.R.Evid. 1101(d). Under our Rules of Evidence, trade secrets are privileged. N.D.R.Evid. 507. N.D.C.C. § 28-32-06 indicates that the admissibility of evidence and the application of the rules regarding privileges in any proceeding before an administrative agency shall be determined in accordance with the practice in district court.

Based upon N.D.C.C. § 28-32-06, the North Dakota Supreme Court has extended to formal hearings of an administrative agency a rule of evidentiary practice (raising of all legal issues at initial hearing) which was applicable to proceedings in the district court. *Gramling v. North Dakota Workmen's Comp Bur.*, 303 N.W.2d 323 (N.D. 1981).

In the absence of obvious error, a prerequisite to review of a trial court decision is that the matter has been appropriately raised in the trial court so that the trial court may intelligently rule on it. . . . While this rule has been stated in conjunction with

hearings before a trial court, we believe the rationale of the rule is equally applicable to formal hearings before the Bureau as Section 28-32-06, N.D.C.C., provides that the admissibility of evidence shall be determined in accordance with the practice in the district court. Id. at 326.

In his treatise on administrative law, Kenneth Davis concludes there is no question but that administrative agency proceedings respect and adhere to the various evidentiary rules of privilege thus resulting in little litigation on the subject.

A trade secret privilege applies in the same way before the Federal Trade Commission as before a court. *Wearly v. FTC*, 462 F. Supp. 589 (D.N.J. 1978).

3 Davis, *Administrative Law Treatise* § 16:10 at 264 (2nd ed. 1980).

Based upon these statutes and authorities, it is my opinion that an administrative agency, engaged in a formal hearing or proceeding as part of its statutory obligations, has available to it those rules of procedure and evidentiary privileges available to district courts by the North Dakota Rules of Civil Procedure and Evidence. Among such rules are those providing protection from the disclosure of information for specified reasons as well as the handling of privileged information. Applying the availability of such rules and procedures to an administrative agency, it is my opinion that such agencies may issue those protective orders provided to district courts by the North Dakota Rules of Civil Procedure and may recognize those privileges provided by the North Dakota Rules of Evidence.

This conclusion is in line with similar conclusions reached by other jurisdictions on similar issues. In *NY Telephone v. Public Service Com'n, Etc.*, 436 N.E.2d 1281 (N.Y. 1982), the New York Court of Appeals concluded that the New York Public Service Commission had access to the same evidentiary privileges and protective orders with respect to trade secrets that would be available to a court in a judicial proceeding. A similar conclusion was reached by the Kansas Court of Appeals with respect to alleged trade secrets information before the state's Regulatory Commissioner. *Southwestern Bell Tel. Co. v. State Corp.*, 629 P.2d 1174 (Kan. App. 1981).

In concluding that the Public Service Commission has available to it rules of procedure and evidence available to a court as part of its formal proceedings, the agency is fully able to respond to those instances where the issuance of protective orders is required as provided for by the applicable rules. The agency's decision to grant or not grant such orders is fully reviewable by a court of law. N.D.C.C. §§ 49-05-12, 28-32-15.

It must be emphasized that the scope of my opinion holding that an administrative agency has available to it those rules of procedure and evidence available to district courts by the North Dakota Rules of Civil Procedure and Evidence is limited only in those cases where the administrative agency is engaged in a formal hearing or proceeding as part of its statutory responsibilities. These rules of evidence and civil procedure do not apply to the normal and routine manner in which state or local government business is conducted. Instead, it is only where an administrative agency is conducting a formal administrative proceeding that it may take advantage of the Rules of Evidence and Civil Procedure in responding to the request for protective orders as a result of alleged privileged material.

--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 questions presented are decided by the courts.

Nicholas J. Spaeth  
Attorney General

Assisted by: Terry L. Adkins and Daniel S. Kuntz  
Assistant Attorneys General