

LETTER OPINION
95-L-253

November 8, 1995

Mr. Bryan R. Dvirnak, CEO
North Dakota Development Fund
1833 East Bismarck Expressway
Bismarck, ND 58504

Dear Mr. Dvirnak:

Thank you for your letter requesting clarification of what client information is available for disclosure and what information is to be held confidential.

Article XI, Section 5 of the North Dakota Constitution provides that all meetings of public or governmental bodies, or state agencies, or any organization supported in whole or in part by public funds must be open to the public. This constitutional provision is codified at N.D.C.C. § 44-04-19 which provides that all such meetings shall be open to the public "[e]xcept as otherwise specifically provided by law."

Similar constitutional and statutory provisions apply to records of public bodies. Article XI, Section 6 of the North Dakota Constitution provides that "[u]nless otherwise provided by law", all records of public bodies supported in whole or in part by public funds must be open and accessible for inspection during reasonable office hours. The statutory provision for open public records is found at N.D.C.C. § 44-04-18 which provides that "[e]xcept as otherwise provided by law" all records of public bodies must be open and accessible to the public. The exceptions to these provisions must be specific. Hovet v. Hebron Public School Dist., 419 N.W.2d 189 (N.D. 1988).

The following statutes create exceptions to the open meeting and open record requirements for the North Dakota Development Fund (NDDF) by providing for the confidentiality of certain information:

10-30.5-07. Confidentiality of corporation records. The following records of the corporation are confidential:

1. Commercial or financial information, whether obtained by the corporation directly or indirectly, of any entity in which an equity interest is purchased or

considered for purchase, to which a loan has been made, or capital otherwise provided, under this chapter.

2. Internal or interagency memorandums or letters which would not be available by law to a party other than in litigation with the corporation.

44-04-18.4. Confidentiality of trade secret, proprietary, commercial, and financial information.

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.

N.D.C.C. § 12.1-13-01 provides that any person who "in knowing violation of a statutory duty imposed on him as a public servant" discloses any confidential information "which he has acquired as a public servant" is guilty of a class C felony. A violation of the open records law, N.D.C.C. § 44-04-18, is punishable as an infraction.

However, certain economic development records are exempt from disclosure under N.D.C.C. § 44-04-18.2. That section provides:

1. The following economic development records and information are not public records subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota:
 - a. Records and information pertaining to a prospective location of a business or industry, including the identity, nature, and location of the business or industry, when no previous public disclosure has been made by the business or industry of the interest or intent of the business or industry to locate in, relocate within, or expand within this state. This exemption does not include records pertaining to the application for permits or licenses necessary to do business or to expand business operations within this state, except as otherwise provided by law.
 - b. Trade secrets and commercial or financial information received from a person, business, or

industry that is interested in or is applying for or receiving financing or technical assistance, or other forms of business assistance.

2. Section 44-04-19 and section 5 of article XI of the Constitution of North Dakota do not apply to that part of a meeting of a public economic development agency held to consider or discuss records and information exempt from public inspection under subsection 1 if:
 - a. The partial closure of the meeting is authorized under this subsection by a motion made and carried in a meeting open to the public;
 - b. Only the records and information exempt from public inspection under subsection 1 are considered or discussed at the closed portion of the meeting; and
 - c. Final action concerning the records and information is taken at a meeting open to the public.

N.D.C.C. § 44-04-18.2(1) outlines a separate category of information that is exempt from the disclosure requirements of N.D.C.C. § 44-04-18 and Section 6 of Article XI of the North Dakota Constitution. While this information is not considered an open record under N.D.C.C. § 44-04-18.2, it is not included within the definition of confidential information under N.D.C.C. § 10-30.5-07. As I previously opined, absent a statute's requiring the records to be open or a statute prohibiting disclosure, the administrator of the agency having custody of the records may exercise discretion in determining whether to disclose an exempt record. See 1994 N.D. Op. Att'y Gen. L-194.

In your letter you inquire about the confidentiality and disclosure parameters for the Bank of North Dakota. Confidentiality and disclosure provisions for the Bank of North Dakota are specifically provided by statute in N.D.C.C. ch. 6-08.1 and N.D.C.C. § 6-09-35.

N.D.C.C. ch. 6-08.1 governs the disclosure of customer information for all financial institutions in the state, including the Bank of North Dakota. N.D.C.C. § 6-08.1-03 provides that a financial institution may not disclose "customer information" unless the disclosure is made: (1) pursuant to consent granted by the customer; (2) to a person or a governmental agency or law enforcement agency

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pursuant to valid legal process; (3) for the purpose of reporting a suspected violation of the law. N.D.C.C. § 6-08.1-01 defines "customer information" to mean either: (1) any original or any copy of any records held by a financial institution pertaining to a customer's relationship with the financial institution; or, (2) any information derived from a record described in the statute. N.D.C.C. § 6-08.1-02 provides for certain exemptions from the requirements of Chapter 6-08.1, including disclosures required or permitted under the Internal Revenue Code or the Uniform Commercial Code.

N.D.C.C. § 6-09-35 also provides for the confidentiality of bank records in the Bank of North Dakota. This section provides that the following records of the Bank of North Dakota are confidential: (1) commercial or financial information of a customer; (2) internal or interagency memorandums; (3) information contained in examination, operating, or condition reports; (4) information obtained from the state department of banking and financial institutions which is not available under N.D.C.C. § 6-01-07.1; and, (5) the reports by a Bank of North Dakota officer or member of the advisory board of directors concerning personal financial statements.

While the statutory confidentiality and disclosure requirements for the Bank of North Dakota are somewhat similar to the requirements applicable to the NDDF, only those matters specifically provided for by the statutes applicable to the NDDF will be exempt from the open record and meeting requirements of the law. As indicated above, "all commercial or financial information" provided by an entity is confidential. N.D.C.C. § 10-30.5-07. Exceptions to the open public meeting and record requirements must be specific and will be narrowly construed. Hovet, supra. Nevertheless, the term "commercial and financial information" encompasses a broad range of information. See 1994 N.D. Op. Att'y Gen. L-1 and 1994 N.D. Op. Att'y Gen. L-194.

The basic public policy in favor of disclosure of government-held information and the statutory penalty attendant thereto, must be balanced against the broad definition of confidential information applicable to the NDDF, and the greater statutory penalty for the unauthorized disclosure of such information. While the determination of which information is confidential and which information may be disclosed will need to be made on a case-by-case basis, it is my opinion that the present practice of the NDDF, as outlined in your letter, to only release the following information: (1) the name of the borrower; (2) the location of the project; and (3) the original transaction amount acted upon by the board, is not appropriate. This practice assumes that every other record on file is either confidential or exempt, and it cannot be said without an examination of the file that this would be correct. Any other public (non-

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confidential or nonexempt) information must also be disclosed upon request.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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