

November 23, 1976

The Honorable Arthur A. Link
Governor of North Dakota
State Capitol
Bismarck, North Dakota

Dear Governor Link:

This is in reply to your letter of October 19, 1976, relative to a document for receipt of confidential information. You state that before any information is requested and received by your office you request our opinion as to legality under North Dakota law of the documents.

Briefly summarized, the request for confidential information was made by a member of your staff to the Bureau of Land Management of the federal government.

The information concerns nominations and areas of public concern for federal coal lands. The Bureau of Land Management in its call for industry nominations and areas of public concern, as published on June 1, 1976, in Federal Register 22133-22134 provided:

“Source of Industry Nominations and Areas of Public Concern will be held as confidential by the Department. Geological and geophysical information and data, including maps, that may be used to calculate coal resources in place, and trade secrets and commercial and financial information obtained through the Call for Industry Nominations and Areas of Public Concern and identified as privileged or confidential shall not be available for public inspection without the consent of the person submitting the nomination. Individual nominators will not be identified with the nominated areas. Only aggregate portrayals of all nominations received will become part of the public record. Since confidentiality will be maintained, nominators should feel free to identify specific areas of interest or concerns with detailed accompanying rationale (such as geological and geophysical data concerning Industry Nominations or periodicity of stream flow in the case of Areas of Public Concern) in support of or contesting the leasing of Federal coal.”

The information was requested for the use of the Natural Resources Council of the State and, because of the above quoted provision, the Bureau of Land Management requires the State to execute the “Receipt of Confidential Information” containing the following language:

“All such information I receive will be held as confidential and shall not be available for public inspection, copying or release.:

The Bureau of Land Management has taken the position that such information is exempt from the Freedom of Information Act, 5 U.S.C.A. 552 et seq, as amended. Your question is presented because of the provision of section 44-04-18 of the NCCC which provides:

“ACCESS TO PUBLIC RECORDS.--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 organization 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.”

The issue thus becomes whether the State, in requesting this information from the federal government, can agree to keep such information confidential in view of the provisions of section 44-04-18 of the NDCC.

Before considering the specific issue as we have defined it, we should note that this office is not authorized to give an opinion on the validity of the above quoted regulation of the Bureau of Land Management, i.e., the federal government is not bound by the opinions of this office concerning the validity of federal regulations or statutes. Therefore, whether such regulation is valid must be determined independently of the opinion of this office.

We note first that the Natural Resources Council is a governmental board or agency of the State and as such would be governed by the provisions of section 44-04-18. See Chapter 54-49.1 of the NDCC, as enacted by the 1975 Legislature, establishing the North Dakota Natural Resources Council. The question may appear to be whether the information requested by the Council is the type of record referred to in section 44-04-18.

In the first instance we must note the information requested is not necessarily a “record” of the Natural Resources Council. Section 44-04-18 does not define what constitutes a “record”. Initially, however, the information is a record of the federal government and not a record of the Council as such although the council has requested permission to receive and presumably examine such information.

However we do not believe it is necessary to determine what is a “record” in this instance. Section 44-04-18 specifies that “except as otherwise provided by law” all records of governmental bodies are open to the public. The law does not necessarily refer to a “law” of the State of North Dakota although that may usually be the situation. A regulation of the federal government may also be a “law” within the meaning of this provision. As an example, there is no State law specifying that the records of students in elementary and secondary schools in North Dakota are private records. However the so-called “Buckley Amendment” (20 U.S.C. 1232(g)) and the regulations adopted thereunder require schools receiving federal aid to keep certain student information confidential. Such law is obviously applicable to the public school districts of this State

although they are also governed by section 44-04-18 as a political subdivision of the State of North Dakota. Such information is confidential because a specific "law", federal in nature, requires it be kept confidential. Therefore, assuming the validity of the federal regulation above quoted, we believe such information as might be received by the Council can be kept confidential because the provisions of section 44-04-18 of the NDCC so indicate.

Another reason which is perhaps more practical than legal also presents itself. The Council has not absolute right to such information (short of the Freedom of Information Act which the federal government states does not apply and which we cannot determine herein). The Council has the choice of receiving the information and agreeing to keep it confidential, or, if it refuses to agree to keep such information confidential, no receiving it at all. Thus, if we were to conclude that section 44-04-18 prohibited the Council from agreeing to keep the information confidential the Council would not receive the information. We conclude that the purpose of section 44-04-18 of the NDCC was to require that records which a State agency maintained as part of its function and duties be open to the public. We do not believe it was intended to prohibit a State agency from receiving from the federal government information to which the State agency would not otherwise be entitled unless the agency agreed to keep the information confidential.

We conclude that the Chairman of the North Dakota Natural Resources Council is not prohibited by Section 44-04-18 of the NDCC from executing the Receipt for Confidential Information and agreeing to keep the information from the Bureau of Land Management of the federal government confidential.

Sincerely,

Gerald W. VandeWalle
Chief Deputy Attorney General