

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 98-O-22**

DATE ISSUED: October 16, 1998

ISSUED TO: Fargo Park District Board Superintendent Roger Gress and
 Attorney Timothy Davies

CITIZEN'S REQUEST FOR OPINION

On July 22, 1998, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Steve Clute asking whether the Fargo Park District (District) violated N.D.C.C. § 44-04-18 by failing to provide access to certain District records upon request and by charging a fee for copies of other District records that exceeded the District's actual copying cost.

FACTS PRESENTED

On June 22, 1998, Steve Clute wrote a letter to Fargo Park District Board Superintendent Roger Gress making eleven separate requests for District records pertaining to Courts Plus. According to the District, Courts Plus is a business owned by the District which is intended to generate income for the District in addition to general park revenues or at least be a break-even venture.

Mr. Clute has challenged the Board's July 7, 1998, response to the following six of his eleven requests:

- 4) The membership list as of April 1, 1998, and July 1, 1998, to include type and cost per member for Courts Plus.
- 5) The bank draft list for all members as of April 1, 1998, and July 1, 1998, for Courts Plus.
- 6) The most recent membership mailing list for Courts Plus members.
- 7) The most recent list of all contracts provided in exchange/barter for other goods, services and consideration.
- 8) The most recent list of all advertising agreements providing for exclusive distribution of products/services in the Courts Plus facility.
- 10) A current list of all corporate memberships and individual memberships provided per those agreements.

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The District denied Requests 4, 7, and 8 because the requested lists did not exist and the District was unwilling to compile them for Mr. Clute. The District denied Requests 4, 6, and 10 on the grounds that its membership list is trade secret, proprietary, and commercial information of a privileged nature which has not been previously disclosed and is therefore confidential. The same basis would apply to Request 5, which the District denied for the additional reason that any list of members' bank drafts would also include credit, debit, or electronic fund transfer card or account numbers which are confidential financial information and not an open record.

With regard to the records the District agreed to copy in response to Mr. Clute's other requests, Mr. Clute alleges the \$0.25 per-page fee charged by the District for those records, and \$30.00 required deposit, exceeds the District's actual cost for making those copies.

Finally, Mr. Clute asks whether the District is required under N.D.C.C. § 44-04-18 to tell him the date the copies he requested will be made available.

ISSUES

1. Whether N.D.C.C. § 44-04-18 requires the District to compile and provide copies of a requested list which does not exist?
2. Whether information contained in a membership list of a business venture of a city park district is a confidential trade secret or commercial information under N.D.C.C. § 44-04-18.4.
3. Whether information contained in a bank draft list of a business venture of a city park district is exempt from the open records law.
4. Whether the \$0.25 per page fee charged by the District for copies of its records exceeds its actual cost for making the copies.
5. Whether N.D.C.C. § 44-04-18 requires a public entity to give a requester a specific date by which access to or copies of records will be provided.

ANALYSES

Issue One:

"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. . . ."

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N.D.C.C. § 44-04-18(1). The Fargo Park District is a political subdivision as defined in N.D.C.C. § 44-04-17.1(10), and is therefore a "public entity" subject to N.D.C.C. § 44-04-18, the open records law. See N.D.C.C. § 44-04-17.1(12) (definition of "public entity").

"Upon request for a copy of specific public records, any entity subject to subsection 1 shall furnish the requester one copy of the public records requested." N.D.C.C. § 44-04-18(2). "Record" means:

[R]ecorded information of any kind, regardless of the physical form or characteristic by which the information is stored . . . which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business.

N.D.C.C. § 44-04-17.1(15). Except for electronically stored information, the open records law does not require a public entity to create or compile a record that does not exist. N.D.C.C. § 44-04-18(3); N.D.A.G. 98-O-20.

Requests 7 and 8 by Mr. Clute ask for lists of particular contracts and agreements. The District responded to Mr. Clute that such lists do not exist, and it is my opinion that N.D.C.C. § 44-04-18 does not require the District to compile the lists at Mr. Clute's request.

Request 4 requests membership lists as of April 1, 1998, and July 1, 1998. The District responded to Mr. Clute that it did not have membership lists as of a given date, and it is my opinion that N.D.C.C. § 44-04-18 does not require the District to compile lists of members on a given date at Mr. Clute's request.

I note, however, that Mr. Clute's request for a member list as of July 1, 1998, was submitted on June 22, more than a week in advance. The District responded by a letter dated July 7, 1998, in which it indicated that it maintains a current member list. Thus, a list as of July 1, 1998, did exist at some time while the request was pending. A public entity may not discard records that are subject to a pending open records request, N.D.A.G. 98-O-07. For the same reason, a public entity cannot deny a request on the grounds that the requested record does not exist if the record came into existence while the request was still pending but was not retained. Because Mr. Clute's request for a member list as of July 1 was still pending on that date, his request should have been treated on July 1 as a request for the District's current member list. How the District was required to respond to the request for its current member list is discussed in Issue Two of this opinion.

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Issue Two:

Trade secrets and commercial information are confidential if the records are "of a privileged nature" and have not been previously publicly disclosed. N.D.C.C. § 44-04-18.4(1). The definition of "trade secret" includes any compilation prepared by a public entity which the public entity attempts to keep secret and from which the public entity may derive economic value if the information is not publicly disclosed. N.D.C.C. § 44-04-18.4(2)(b). "Commercial information" is not defined in N.D.C.C. § 44-04-18.4 but has been defined by this office as any information pertaining to the buying or selling of goods or services. N.D.A.G. 98-L-17. The records requested by Mr. Clute in numbers 6 and 10 and denied by the District are the membership mailing list and a current list of all corporate and individual memberships of Courts Plus, a business venture owned by the District. Customer names and addresses fall within the definitions described in this paragraph and could potentially be confidential under N.D.C.C. § 44-04-18.4.

The broad definitions of "trade secret" and "commercial information" are offset by the requirement that the records be "of a privileged nature" to be confidential under N.D.C.C. § 44-04-18.4. Trade secrets and commercial information of the District are confidential only if disclosure of the records is likely to 1) impair the District's ability to obtain necessary information in the future or 2) cause substantial harm to the competitive position of the District. N.D.A.G. 99-L-77; N.D.A.G. 98-L-17. See also National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). Whether either of these tests is met in a particular situation is usually a question of fact, but sometimes may be answered as a matter of law if there are no facts under which the test may be met. Id.

The District has denied Requests 4, 6, and 10 on the basis that the information is confidential trade secret, proprietary or commercial information. The District has argued that its membership list is the product of significant effort and expense to market Courts Plus as a revenue producing or break-even venture for the District, and that disclosure of the list would cause it substantial competitive injury. The District believes that public disclosure of its membership list would allow a competitor to entice members away from Courts Plus, which would erode the District's customer base and cause economic injury to the District.

This office must assume, from the District's argument, that the District is in competition with other businesses, or else there could be no competitive injury from disclosure. Disclosure of the membership list could not, as a matter of law, cause competitive injury

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to the District in a situation where no other entity in the geographical area offered accommodations or services similar to those provided by Courts Plus.

When determining whether records are confidential under N.D.C.C. § 44-04-18.4, this office looks to judicial interpretations of exemption 4 of the federal Freedom of Information Act, 5 U.S.C. § 552(b)(4). N.D.A.G. 98-L-17. The federal cases interpreting exemption 4 as applied to customer lists are not completely consistent in their results. In two cases, federal district courts have held disclosure of customer names by the federal agency would not cause substantial harm to the competitive position of the supplying entity because the requester could obtain that information from other sources with little difficulty. Ivanhoe Citrus Ass'n v. Handley, 612 F.Supp. 1560, 1566 (D.D.C. 1985); Braintree Elec. Light Dept. v. Department of Energy, 494 F.Supp. 287, 290 (D.D.C. 1980). In another case, a district court ruled as a matter of law that customer names could not be disclosed, but the court of appeals reversed that decision on a 2-1 vote, concluding that the requester had presented enough facts to show that the list could be compiled from other public information and was therefore not protected. Greenberg v. Food and Drug Administration, 803 F.2d 1213, 1217 18 (D.C. Cir. 1986).

The common theme in the federal cases cited above is that whether customer names must be disclosed will almost always be a question of fact. In the situation presented in this opinion, the District has determined that disclosure of its membership list would likely cause substantial harm to its competitive position. This determination is a factual decision by the District which this office will not contradict in an opinion issued under N.D.C.C. § 44-04-21.1.¹ Therefore, it is my opinion that identifying information of members of Courts Plus, including names, addresses and phone numbers, is confidential under N.D.C.C. § 44-04-18.4.²

I am informed that the membership list maintained by the District also contains the following information in addition to the customers' names, addresses, and phone numbers; customer number, membership type (employee, fitness, or court), suffix count (number of individuals covered), date joined, membership status, and member representative (the sales representative who sold and maintains the account). Because disclosure of this information would not identify the members of Courts Plus or

¹ In light of the District's determination that disclosure would be likely to cause substantial competitive harm to the District, it is not necessary to consider whether there would be any likelihood that public disclosure of the membership list would impair the District's ability to obtain membership information in the future.

² Information regarding members who are children would also fall under the open records exception in N.D.C.C. § 44-04-18.13 for children's names, addresses, and phone numbers.

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otherwise cause competitive injury to Court's Plus, none of this information is confidential or covered by any exception to the open records law.

The District has argued that separating exempt or confidential information in its computerized membership records from any information that must be open to the public would require the creation of a new record. This argument contradicts several sections in N.D.C.C. ch. 44-04. A public entity may not deny a request for an open record because the record also contains confidential or closed information; the entity is required to withhold the confidential or closed information and disclose the rest of the record. N.D.C.C. § 44-04-18.10. This obligation is the same whether the record is a paper document or information stored in a computer database. See N.D.C.C. § 44-04-17.1(15) (record means recorded information regardless of physical form). The apparent reason for the electronic records exception to the statement in N.D.C.C. § 44-04-18(3) that creation of a new record is not required is that it may be necessary for a public entity to create a new record (a printed document) in order to provide access to open records that are stored in a computer along with confidential or closed information and cannot be segregated except by printing out the information and removing the confidential or closed material.

Issue Three:

Request 5 was for the bank draft list for all members. I am informed that the bank draft list referred to in Request 5 contains the following information in addition to the customers' names: EFT code (whether payment is made electronically or by credit card), an indication whether payment is made from a checking or savings account, collection total (amount owed), transaction code, collection date, routing transit number (regarding bank routing), bank account numbers, credit card number, expiration date, change date, and change amount. The bank account number and credit card number are exempt from the open records law under N.D.C.C. § 44-04-18.9. The rest of the information contained in the bank draft list, other than the customers name, which is confidential as indicated under Issue Two, is open.

Issue Four:

When providing copies of records under N.D.C.C. § 44-04-18, the public entity is allowed to charge a "reasonable fee" and obtain payment of the fee in advance. N.D.C.C. § 44-04-18(2). The definition of "reasonable fee" in N.D.C.C. § 44-04-18(2) limits a public entity to charging no more than its actual cost of making the copies, including labor, materials, and equipment.

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The District responded to Mr. Clute's requests by indicating that the charge for copies would be \$0.25 per page. In response to an inquiry from this office, the District determined that its actual cost of making the copies was \$0.0783 per page. The District's attorney conceded, in a telephone conversation with a staff attorney in this office, that the fee originally charged by the District was too high. It is my opinion that the fee originally charged by the District exceeded its actual cost of making the copies and therefore violated N.D.C.C. § 44-04-18.

Issue Five:

A public entity must respond to an open records request within a reasonable time. N.D.C.C. § 44-04-18(7). Although N.D.C.C. § 44-04-18 does not necessarily require an immediate response, the delay that is permitted will usually be measured in a few hours or days rather than several days or weeks. N.D.A.G. 98-O-04. Whenever possible, a public entity should inform a requester when, or approximately when, access to or copies of records will be provided. Id. However, as long as the requested access or copies are provided within a reasonable time, N.D.C.C. § 44-04-18 does not require a public entity to give a specific date by which the request will be fulfilled.

CONCLUSIONS

1. It is my opinion that the District was not required under N.D.C.C. § 44-04-18 to compile a list of information at Mr. Clute's request.
2. It is my opinion that the customer names, addresses, and telephone numbers on the membership list of Courts Plus is confidential under N.D.C.C. § 44-04-18.4. It is my further opinion that the remainder of the information on the membership list is an open record.
3. It is my opinion that the routing transfer numbers, bank account numbers and credit account numbers on the bank draft list are exempt from the open records law under N.D.C.C. § 44-04-18.9. The customer name is confidential under N.D.C.C. § 44-04-18.4. The remainder of the information in the bank draft list is an open record.
4. It is my opinion that the \$0.25 per-page fee charged by the District for copies of its records exceeded its actual cost of making the copies and violated N.D.C.C. § 44-04-18.
5. It is my opinion that N.D.C.C. § 44-04-18 does not require a public entity to give a specific date by which access to or copies of records will be provided.

STEPS NEEDED TO REMEDY VIOLATION

The District must provide Mr. Clute with a copy of the current membership list and the bank draft list with the confidential and exempt information redacted. The District must also refund the portion of any copying charge already paid by Mr. Clute which exceeds the actual cost to the District of making the copies.

Failure to disclose a record or take other corrective measures as described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. § 44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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