

**FORMAL OPINION
2001-F-10**

DATE ISSUED: December 11, 2001

REQUESTED BY: Eric Hardmeyer, President, Bank of North Dakota

QUESTION PRESENTED

To what extent is the Bank of North Dakota required to maintain the confidentiality of information regarding customers of the Bank of North Dakota.

ATTORNEY GENERAL'S OPINION

It is my opinion the Industrial Commission, as managing body of the Bank of North Dakota, is required to disclose upon request the name of any person who has obtained financing from the Bank of North Dakota and the amount of financing provided to that person, except for consumer borrowers who have directed the Bank of North Dakota to refrain from sharing that information. It is my further opinion the Bank of North Dakota and the Industrial Commission are otherwise prohibited under N.D.C.C. § 6-09-35 from disclosing bank customer information except for disclosures inherent in the business of financial institutions, such as those listed in several subsections of N.D.C.C. § 6-08.1-02, and as authorized by law, including N.D.C.C. §§ 6-08.1-03, 6-08.1-05, 6-08.1-06, and 6-09-35.

ANALYSIS

As noted in the request for this opinion, several different state and federal statutes affect the requirements of the Industrial Commission and the Bank of North Dakota (BND) regarding the confidentiality of customer information. Chapter 6-08.1, N.D.C.C., contains general confidentiality provisions for all financial institutions within the state of North Dakota, including BND. Section 6-09-35(1), N.D.C.C., which is specific to BND, requires BND to keep the “[c]ommercial or financial information of a customer” confidential. Finally, the Gramm-Leach-Bliley Financial Modernization Act of 1999 (GLB Act), Pub. L. No. 106-102, 113 Stat. 1338-1481 (1999) (codified as amended in

scattered sections of the U.S.C.), instituted the first nationwide financial institution customer information confidentiality requirements.

In contrast to these confidentiality provisions, N.D.C.C. §§ 44-04-18 and 44-04-19 require the Industrial Commission and BND, as state agencies, to allow public access to their records and meetings unless there is a specific exception. The interaction between the various statutes has caused concern regarding how the Industrial Commission and BND should treat customer information.

Section 6-09-35(1) is an example of a specific exception to the open records law and requires BND to keep the “[c]ommercial or financial information of a customer” confidential.¹ Essentially, this statute reverses the application of N.D.C.C. § 44-04-18 and provides that customer information is generally confidential.² As BND’s governing body, the Industrial Commission is generally required to comply with the confidentiality requirements in N.D.C.C. § 6-09-35(1).

If N.D.C.C. § 6-09-35(1) were the only provision affecting the confidentiality of BND’s records, the records would be confidential. However, N.D.C.C. ch. 6-08.1 contains several exceptions to the general bank confidentiality requirements. If one or more of these exceptions to bank customer confidentiality applies to the Industrial Commission or BND, the information related to the exception would be subject to the open records and meetings requirements unless protected from public disclosure under another state or federal law.

The beginning phrase of N.D.C.C. § 6-08.1-02 is as follows: “This chapter does not apply to any of the following:” The statute goes on to list several areas in which the general bank confidentiality requirement of N.D.C.C. § 6-08.1-03 does not apply. Since by its terms N.D.C.C. § 6-08.1-02 only provides exemptions or exceptions to the confidentiality provisions of N.D.C.C. ch. 6-08.1, the exemptions would not usually apply to BND because of BND’s additional specific confidentiality requirement in N.D.C.C. § 6-09-35(1). Thus, the section’s applicability to the Industrial Commission and BND is unclear and subject to different but equally acceptable constructions, and is therefore ambiguous. Because the section is ambiguous, reference to its legislative history is appropriate. See N.D.C.C. § 1-02-39(3).

¹ "Customer" means "any person who has transacted or is transacting business with, or has used or is using the services of, the Bank of North Dakota, or for whom the Bank of North Dakota has acted as a fiduciary with respect to trust property." 2001 N.D. Sess. Laws ch. 393, § 1, amending N.D.C.C. § 6-09-35(1).

² Discussion of information that is confidential or otherwise not subject to N.D.C.C. § 44-04-18 may be held in a closed meeting under N.D.C.C. § 44-04-19.2(1).

One of the exemptions to general bank confidentiality in N.D.C.C. § 6-08.1-02 specifically addresses the Industrial Commission:

[This chapter does not apply to any of the following: t]he release by the industrial commission, in its capacity as the managing body of the Bank of North Dakota, of either of the following:

- a. The name of any person who, either directly or indirectly, has obtained financing through the Bank of North Dakota.
- b. The amount of any financing obtained either directly or indirectly through the Bank of North Dakota.

N.D.C.C. § 6-08.1-02(7). The legislative history on N.D.C.C. § 6-08.1-02 indicates that this subsection was added to ensure that information on “newsworthy” loans made by BND would still be available to the public. Hearing on S. 2386 Before the Senate Industrial, Business and Labor Comm., 1985 N.D. Leg. (Jan. 30) (Testimony of Jack McDonald). The legislative history further indicates that this provision was not intended to apply to personal loans or individual financial information. Id. In fact, the committee chairman was very specific that the intent was not to open up a private individual’s financial records. Hearing on S. 2386 Before the Senate Industrial, Business and Labor Comm., 1985 N.D. Leg. (Jan. 30) (Testimony of Sen. Reiten). Thus, the legislative history indicates the provision was intended to apply to the Industrial Commission and BND notwithstanding N.D.C.C. § 6-09-35, but only to open the records relating to commercial or agricultural borrowers and not other individual or private customers. Given the broad confidentiality requirements of N.D.C.C. § 6-09-35, this narrow construction of the exception provided in N.D.C.C. § 6-08.1-02(7) is warranted.

Another indication that this provision was intended to apply in spite of N.D.C.C. § 6-09-35(1) is the fact that if this provision did not apply to BND and the Industrial Commission because of its specific application to chapter 6-08.1, the language would have no purpose. We must presume the Legislature did not perform an idle act when it passed this provision. See Bickel v. Jackson, 530 N.W.2d 318, 320 (N.D. 1995) (“There is a presumption the legislature acts with purpose and does not perform idle acts.”). In order to give N.D.C.C. § 6-08.1-02(7) purpose, it must also apply to BND’s confidentiality requirements under N.D.C.C. § 6-09-35. Accordingly, it is my opinion N.D.C.C. § 6-08.1-02(7) is an exception to the confidentiality requirements of N.D.C.C. § 6-09-35(1) for commercial and agricultural borrowers, but not private individuals seeking financing for non-commercial or non-agricultural purposes.³ Since the

³ The timing of the release of the information the Industrial Commission is permitted to disclose under N.D.C.C. § 6-08.1-02(7) is important. The Industrial Commission only

information addressed by N.D.C.C. § 6-08.1-02(7) is not confidential for commercial and agricultural borrowers, that information would be an open record under N.D.C.C. § 44-04-18 unless disclosure is prohibited under another exception to the open records law.⁴

Several of the other exemptions in N.D.C.C. § 6-08.1-02, such as a bank's sharing of information with an agent and disclosures required by the Internal Revenue Code or permitted by the Uniform Commercial Code, are so inherent in the business of financial institutions that we might question the necessity of including such actions in the list of exemptions.⁵ However, this does not mean the inclusion was an idle act by the Legislature. When passing a law, the Legislature does not always intend to create or alter law, but instead may intend to "merely clarify the law." Douville v. Pembina County Water Resource Dist., 612 N.W.2d 270, 274-75 (N.D. 2000). Subsections 1, 2, 3, 4, 5, 6, 8, 9 and 11 of N.D.C.C. § 6-08.1-02 appear to be clarifications of the law, rather than the creation or alteration of law. As such, while these exemptions would not otherwise explicitly apply to BND, the exemptions would also be inherently applicable to BND because they are clarifications of the law.

has the authority to disclose the "name of [a borrower] who . . . has obtained financing" and "the amount of any financing obtained." Id. Because the language of the statute is written in the past tense, if the loan has not yet closed, the Industrial Commission does not have the authority to disclose customer-specific information, including the name of the potential borrower, even if the loan has been approved. Until the loan is closed, there is no authority to release the name and proposed loan amount.

⁴ Section 44-04-18.4, N.D.C.C., makes "financial information . . . confidential if it is of a privileged nature and it has not been previously publicly disclosed." While the provision seems expansive, this office has previously stated that personal financial information is confidential under the provision only if the disclosure of the information would be likely to "impair the public entity's future ability to obtain necessary information." 2000 N.D. Op. Att'y Gen. L-107 at L-109. Although this would be a factual determination on which this office may not opine, the limited amount of information disclosed would seem to indicate this standard would not be met for BND's borrowers. Further, since N.D.C.C. § 6-08.1-02(7) is more specific and was enacted later than N.D.C.C. § 44-04-18.4, any conflict between the two statutes would be resolved in favor of the disclosure allowed by N.D.C.C. § 6-08.1-02(7). See N.D.C.C. § 1-02-07.

⁵ For example, N.D.C.C. § 6-03-02(7) gives banks the power "[t]o exercise . . . all the incidental powers as are necessary to carry on the business of banking." Similarly, N.D.C.C. § 6-06-06(12) gives credit unions the power "[t]o exercise any incidental power necessary or requisite to enable the credit union to carry out effectively the business for which it is incorporated."

Section 6-08.1-02(10), N.D.C.C., does not provide an exemption that is inherent in the business of financial institutions. However, the identical exemption is provided in N.D.C.C. § 6-08.1-03(5). Unlike N.D.C.C. § 6-08.1-02, the impact of N.D.C.C. § 6-08.1-03 is not limited by its terms to chapter 6-08.1, and refers to all disclosures of customer information by all financial institutions. Since BND is specifically included in the definition of “financial institution” pursuant to N.D.C.C. § 6-08.1-01(3), the exceptions provided by N.D.C.C. § 6-08.1-03 apply to BND. Thus, the exemption provided in N.D.C.C. § 6-08.1-02(10) is unnecessary and inapplicable for BND’s purposes, but is instead covered by N.D.C.C. § 6-08.1-03(5).

Section 6-08.1-02(12), N.D.C.C., enacted as 2001 Senate Bill 2191, also does not provide an exemption that is inherent in the business of financial institutions. In fact, the Legislature amended N.D.C.C. § 6-09-35(1) to ensure BND would not be affected by the changes proposed by Senate Bill 2191, including the addition of subsection 12 to N.D.C.C. § 6-08.1-02. Hearing on S. 2117 Before the House Political Subdivisions Comm., 2001 N.D. Leg. (Mar. 22) (Testimony of Assistant Attorney General James Fleming). Accordingly, subsection 12 is not applicable to BND. Section 6-08.1-03.1, N.D.C.C., which was also added to chapter 6-08.1 by Senate Bill 2191, is inapplicable to BND for the same reason.

Several other sections also specifically apply to all financial institutions and are not limited by their terms to chapter 6-08.1. See N.D.C.C. §§ 6-08.1-04, 6-08.1-05, 6-08.1-06, 6-08.1-07, 6-08.1-08. Because BND is specifically included in the definition of “financial institution” in N.D.C.C. § 6-08.1-01(3), these statutes also apply to BND.

The confidentiality exemptions and exceptions provided in N.D.C.C. ch. 6-08.1, except for N.D.C.C. § 6-08.1-02(7), only allow disclosure of customer information to specific entities in particular ways or in certain circumstances. As such, those exemptions do not affect the confidentiality of customer information retained by BND and, therefore, the remainder of that customer information is not subject to the open records and meetings requirements.⁶

The GLB Act has an additional impact on the question presented. Section 502(a) of the GLB Act, 15 U.S.C. § 6802(a), states that a financial institution may not disclose a

⁶ Other laws currently effective or enacted in the future may also require or allow BND to disclose otherwise confidential customer information, but do not subject that information to the open records and meetings requirements. For example, N.D.C.C. §§ 44-04-18.10(4) and 50-09-08.2(1)(h) would allow BND to disclose customer information to other state agencies in specific circumstances. Disclosure under these or other similar laws would not violate BND’s confidentiality requirements, nor would that disclosure subject that information to the open meetings and records requirements.

“consumer’s” nonpublic personal information unless the financial institution provides the consumer with a notice of the financial institution’s privacy policy and, if the financial institution shares nonpublic personal information with nonaffiliated third parties, an opportunity to direct the financial institution to refrain from sharing that information, otherwise known as “opting-out” of that sharing. A “consumer” is “an individual who obtains, from a financial institution, financial products or services which are to be used primarily for personal, family, or household purposes.” 15 U.S.C. § 6809(9) (emphasis added).

The GLB Act’s definition of “consumer” shows that the Act does not apply to commercial or agricultural customers. As such, the Industrial Commission and BND have no responsibilities to their commercial or agricultural customers under the GLB Act. Because the definition of “consumer” under the GLB Act does not include commercial or agricultural borrowers, the name and amount of financing provided to those borrowers are open to the public under N.D.C.C. §§ 6-08.1-02(7) and 44-04-18.

In contrast, customers who use BND’s services for personal, family, or household purposes are protected by the GLB Act. 15 U.S.C. § 6809(9). N.D.C.C. § 6-09-35 further protects those customers, and prohibits the Industrial Commission and BND from sharing their financial information. Accordingly, it is my opinion that the GLB Act only requires BND to furnish its personal, family or household customers with the privacy notice required by the GLB Act. BND is not required to give those customers the opportunity to opt-out of any information sharing because their information is confidential under state law.

My above opinion is somewhat at odds with a November 25, 1985, memorandum from former Attorney General Nicholas Spaeth to the Industrial Commission (the “Spaeth Memo”) stating that the Industrial Commission is required to “make a decision with respect to [a] loan [from the Bank of North Dakota] (e.g., extending credit, denying credit, crippling the loan, etc.)” in the public portion of the commission’s meeting. The Spaeth Memo was affirmed in an April 23, 1986, letter opinion from former Attorney General Spaeth to Joseph Lamb, then the chief operating officer of the Bank.

As stated above, N.D.C.C. § 6-09-35(1) makes confidential the “[c]ommercial or financial information of a customer” in BND’s possession. Section 6-08.1-02(7), N.D.C.C., is the only exception to the bank customer confidentiality requirements that allows BND or the Industrial Commission to release customer information to the general public and, as discussed in footnote 3 of this opinion, authorizes release of that information only after a loan has been closed. The Spaeth Memo’s statement that the Industrial Commission “should list any loans that will be considered in closed session as part of [its] agenda” is not valid.

The Spaeth Memo attempted to reconcile BND's confidentiality requirements with the open records and meetings laws. The memo's conclusion was that the open records and meetings laws must prevail at least in regard to actions the Industrial Commission takes on the loans it reviews. However, there is no basis for that conclusion given the current open records and meetings provisions.

Section 44-04-19.2(2)(e), N.D.C.C., requires that "[f]inal action concerning the topics discussed or considered during the executive session is [to be] taken at a meeting open to the public." While final action is to be taken in an open session, the requirement does not relieve the governing body of its obligation to refrain from disclosing confidential information to the public. 2000 N.D. Op. Att'y Gen. O-04 at pp. O-16 to O-17. In order to prevent the disclosure of confidential information, a member of a governing body may make a detailed motion in the executive session. The presiding officer of a governing body may then reconvene in an open session, summarize the motion without disclosing confidential information, and call for a vote. Id.

Applying N.D.C.C. § 44-04-19.2 to bank customer information, a member of the Industrial Commission may make a detailed motion in executive session regarding a loan. Once the meeting reconvenes in open session, the motion may be summarized without disclosing confidential information, and a roll call vote taken. 2000 N.D. Op. Att'y Gen. O-04 at pp. O-16 to O-17. Only after a loan is closed is the Industrial Commission allowed to disclose the name of the borrower and the amount of the loan. N.D.C.C. § 6-08.1-02(7). If the Industrial Commission takes action to write off a loan, rather than make a loan, there is no authority for the public disclosure of that information.

The conclusion in the Spaeth Memo was reached at a time when state law did not specify a procedure for a public entity to follow in making a decision regarding public business at an open public meeting while at the same time maintaining the confidentiality of information on which the entity's decision is based. The process in N.D.C.C. § 44-04-19.2 for approving "anonymous" loans was enacted by the Legislature to address the very situation presented in the Spaeth Memo, when a governing body of a public entity is considering confidential or closed material but must make a public decision.

It is my opinion the procedural requirements in N.D.C.C. § 44-04-19.2 supersede the process described in the Spaeth Memo. Accordingly, the Spaeth Memo's conclusion, as well as that conclusion's later affirmation in a letter opinion, that the Industrial Commission is required to disclose in open session confidential information relating to the actions it takes on loans is no longer valid, and is hereby overruled. The Industrial Commission is only authorized to release the names of borrowers and the amounts

loaned, and then only once the loans have closed. Other actions affecting the loan, including the act of writing off a loan, may not be disclosed publicly.

In conclusion, the confidentiality requirements of the Industrial Commission and BND regarding bank customer information are as follows:

- The name of an agricultural or commercial borrower and the amount of financing provided to the borrower is open upon request to the Industrial Commission under N.D.C.C. §§ 6-08.1-02(7) and 44-04-18, but only after the loan has closed.
- The name of a consumer borrower as defined in the GLB Act and the amount of financing provided to the borrower is confidential pursuant to N.D.C.C. § 6-09-35.
- All other bank customer information is confidential and may only be released as allowed or required by law or in the narrow circumstances described in this opinion, including the following:
 - The confidentiality exemptions and exceptions provided in N.D.C.C. § 6-09-35 and N.D.C.C. ch. 6-08.1, except for N.D.C.C. § 6-08.1-02.
 - The inherent exceptions to bank confidentiality represented in subsections 1, 2, 3, 4, 5, 6, 8, 9 and 11 of N.D.C.C. § 6-08.1-02.

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.

Wayne Stenehjem
Attorney General

Assisted by: Scott A. Miller
Assistant Attorney General

James C. Fleming
Assistant Attorney General