

**LETTER OPINION  
2004-L-25**

April 1, 2004

Honorable Ray Holmberg  
State Senator  
621 High Plains Court  
Grand Forks, ND 58201-7717

Dear Senator Holmberg:

Thank you for your letter regarding textbook lists at the Barnes & Noble Bookstore at the University of North Dakota. Specifically, you asked (1) whether a compilation or booklist created and maintained by the Barnes & Noble Bookstore for the purpose of purchasing an inventory of required textbooks and materials used in University courses is a "record" of a public entity subject to disclosure under the open records laws and (2) whether a list of textbooks and materials required or recommended for a course at the University compiled by a professor or instructor is an open record.

For the reasons discussed below, it is my opinion that (1) the booklist created and maintained by the Barnes & Noble Bookstore is confidential and not subject to disclosure under the state's open records laws, and (2) a list of textbooks and materials compiled by a professor or instructor is an open record that must be disclosed under the open records laws.

**FACTS**

For business reasons, the University of North Dakota has chosen to "contract out" the operation of the University Bookstore, including the acquisition and sale of required textbooks and educational materials. In 1999, the University of North Dakota ("University") entered into a contract with Barnes & Noble College Bookstores, Inc. ("Barnes & Noble") to operate and provide services for the bookstore of the University of North Dakota ("Bookstore"). Agreement for Bookstore Services between University of North Dakota and Barnes & Noble College Bookstores, Inc., (effective January 1, 1999) ("Contract").

Barnes & Noble operates the Bookstore in a building owned by the University and located on the University Campus. Under the terms of the contract, the University

provides to Barnes & Noble at the University's expense, among other things: heat, light, utilities, and air conditioning; office equipment (including computer equipment, cash registers, and safes), furniture and fixtures, file cabinets, telephones and telephone services, and office machines; and all repairs and maintenance for the building and the physical structure in which the Bookstore is located. Contract, §§ 3 and 21. All operating expenses of the Bookstore other than those described in section 3, including employee expenses, bill paying and accounting, office equipment repair, and custodial services, are provided to the University at Barnes & Noble's expense. Id. at § 4.

Barnes & Noble operates the Bookstore as an independent contractor. Id. at § 11. The Bookstore is the University of North Dakota's exclusive retail outlet of all required, recommended or suggested course materials and tools, including books, course packs, computer software, and materials published or distributed electronically. Id. at § 11(a). Barnes & Noble is the University's exclusive online service provider for books, through Barnes & Noble's web site. Id.

Barnes & Noble pays the University annually \$707,017 or 12 percent of gross sales up to \$10 million, whichever is greater.<sup>1</sup> Id. at § 18. These payments totaled \$929,309.50; \$1,054,204.75; \$1,086,606.13; and \$1,102,067.56 for the years 2000, 2001, 2002, and 2003, respectively. The University has full access at all times to the Bookstore records, including all cash registers being used by Barnes & Noble, with or without notice. Id. at § 24. Under the contract, the University has control over various aspects of the Bookstore's operation such as employment of certain Bookstore personnel, the Bookstore's operating hours, book pricing, and used book purchases and resale. Id. at §§ 7, 9, 12, and 17.

Professors and instructors of the University receive from the Bookstore a form entitled "Course Book Information Request", with instructions for listing the author, title, edition, publisher, and the required number of copies, as well as the instructor's name, department, course, and estimated enrollment. The form comes with a carbon copy so an instructor may retain a record of the textbooks he or she has requested. From this information, Barnes & Noble compiles a "booklist" listing books required for each course. It is my understanding that the University does not collect or maintain a compilation of textbooks and other teaching materials submitted to the Bookstore.

#### ANALYSIS

State open records law requires that all "records" of a "public entity" be open to the public unless otherwise specifically provided by law. N.D.C.C. § 44-04-18; N.D.A.G. 2002-L-41. "Record" is defined as "recorded information . . . which is in the possession or custody of a public entity or its agent and which has been received or prepared for

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<sup>1</sup> The percentage is higher if gross sales exceed \$10 million.

use in connection with public business or contains information relating to public business." N.D.C.C. § 44-04-17.1(15); N.D.A.G. 2002-O-09; N.D.A.G. 2001-O-10; and N.D.A.G. 98-O-22.

## ISSUE I

Whether the booklist created and maintained by the Bookstore is subject to disclosure under the open records law.

Whether the booklist is open to the public is answered in part by determining whether the Bookstore is a "public entity." N.D.C.C. § 44-04-17.1(12). A "public entity" includes a governmental body or agency of the state, and includes any entity created or recognized by the Constitution of North Dakota or state statute to exercise public authority or perform a governmental function. N.D.C.C. § 44-04-17.1(12)(a). The definition of "public entity" includes "[o]rganizations or agencies supported in whole or in part by public funds." N.D.C.C. § 44-04-17.1(12)(c). An organization is not supported by public funds if the public funds it receives are provided in exchange for goods or services having an equivalent fair market value. N.D.C.C. § 44-04-17.1(9); N.D.A.G. 2001-O-10. Regardless of funding, an entity may also be subject to the open records laws if it is an agent of a public entity. "[I]n determining whether a nongovernmental organization is a public entity, this office looks not only at the issue of whether public money is received by an organization but whether it functions as an agent of the public entity." N.D.A.G. 2002-O-09 (citing N.D.A.G. 2001-O-11 and N.D.A.G. 2001-O-10).

In this case, the University has provided the use of a new bookstore building, including heating, light, utilities, air conditioning, and fixtures. See Contract, §§ 3 and 21. But, in return, the University receives payments from the Bookstore based on a percentage of annualized gross sales. I am unable to determine conclusively on the basis of information available to this office that the Bookstore is receiving support beyond that provided in exchange for goods or services having an equivalent fair market value.

As noted above, even if an entity receives fair market value for the goods and services it provides, it may still be a "public entity" for open records purposes if it is an agent of a public entity. This office has concluded that an organization providing economic development services under a contract with a government entity is performing a governmental function and is therefore an "agency of government" under the North Dakota Supreme Court holding in Forum Publishing Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986) ("[w]e do not believe the open-record law can be circumvented by the delegation of a public duty to a third party. . ."). N.D.A.G. 2001-O-10. This office has also held that a nonprofit corporation managing a pool of government funds on behalf of numerous political subdivisions is acting as an "agency of government" under the Forum Publishing decision. N.D.A.G. 99-O-02.

The delegation of government functions to private contractors raises significant questions on the application of the state open records and meetings laws to the contractor. To date, the Forum Publishing case is the only North Dakota Supreme Court precedent addressing whether the open records and meetings laws apply to a private entity that has been delegated governmental functions. The Florida open records and meetings laws, however, are very similar to those in North Dakota. Appellate courts in Florida have considered on several occasions whether the Florida open records and meetings laws apply to a contractor and have identified several non-exclusive factors to aid in determining whether a private organization is performing a governmental function:

- 1) the level of public funding; 2) commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether services contracted for are an integral part of the public agency's chosen decision-making process; 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; 6) the extent of the public agency's involvement with, regulation of, or control over the private entity; 7) whether the private entity was created by the public agency; 8) whether the public agency has a substantial financial interest in the private entity; and 9) for whose benefit the private entity is functioning.

News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So.2d 1029, 1031 (Fla. 1992) (hereafter, "Schwab"); Memorial Hospital–West Volusia, Inc. v. News-Journal Corp., 729 So.2d 373 (Fla. 1999). "Rather than relying on any one of these factors, the courts generally have made the determination based on the 'totality of factors.'" Schwab, 596 So.2d at 1031. Applying these factors ensures that contractors do not become subject to the open records and meetings laws "merely by entering into a contract to provide professional services to the agency," but also ensures "that a public agency cannot avoid disclosure . . . by contractually delegating to a private entity that which otherwise would be an agency responsibility." Id. These goals match very closely the North Dakota Supreme Court holdings in this area. See Forum Publishing, 391 N.W.2d at 172; Adams County Record v. Greater North Dakota Association, 529 N.W.2d 830 (N.D. 1995). Therefore, the Schwab factors are helpful in interpreting the North Dakota open records and meetings laws. N.D.A.G. 2002-O-09.

As indicated earlier, it is unclear whether the Bookstore is receiving public support beyond that provided in exchange for goods or services having an equivalent fair market value. (Factor 1). It does not appear that University funds are co-mingled with the Bookstore's funds. (Factor 2). The Bookstore is located on University property and the University owns the building. (Factor 3). The services contracted for are not an integral part of the University's chosen decision-making process. (Factor 4). The University used to run its own bookstore before it contracted out this service, thus, the

Bookstore operated by Barnes & Noble is performing a function which the University otherwise would perform. See Encore College Bookstores, Inc. v. Auxiliary Service Corp., 663 N.E.2d 302 (N.Y.2d 1995) (campus bookstore is an essential service required to fulfill a university's educational mission). (Factor 5). While the Bookstore operates as an independent contractor, Contract at § 11, the University has a right to examine the records of the Bookstore at any time. Id. at § 24. Barnes & Noble is required to "stock in sufficient quantity, display, and sell all required, recommended and suggested course books, whether new or used . . . used by the students of University of North Dakota in pursuing their courses." Id. at § 11(f). In addition, under the contract, the University has control over various aspects of the Bookstore's operation such as hours, personnel, book pricing, and used book purchasing and resale. Id. at §§ 7, 9, 12, 17. (Factor 6). The University did not create Barnes & Noble College Bookstores, Inc., but the University has a substantial financial interest in the Bookstore's success because the University currently receives 12 percent of the gross revenue of the Bookstore, which in recent years has exceeded \$1 million. (Factors 7 and 8). The Bookstore serves the interest of both the University and Barnes & Noble. It solicits, receives, and compiles a booklist of required and recommended textbooks and materials not only for its own benefit, but also for the benefit of the students and faculty of the University. Id. at § 11. (Factor 9).

Considering the totality of the Schwab factors as they relate to this matter, it is my opinion that the Bookstore is acting as an agent of the University for the purpose of acquiring and offering for sale to University students required and recommended textbooks and related educational materials. Compare N.D.A.G. 2001-O-10 (finding a contractor was a "public entity" under the "agency of government" test). See also Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores, Inc., 718 So.2d 227, 229 (Fla. Dist. Ct. App. 1998) (Barnes & Noble as the custodian of textbook order records is an agent of several Florida universities and is therefore a public entity). Therefore, since the Bookstore is acting as an agent of the University, a public entity, the booklist is a record subject to disclosure under the open records law unless a specific provision of the open records law exempts the booklist from disclosure.

Section 44-04-18.4(1), N.D.C.C., makes trade secret, proprietary, and commercial information confidential, "if it is of a privileged nature and it has not been previously publicly disclosed." 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). See also N.D.A.G. 2002-O-09; N.D.A.G. 98-O-22.

In previous decisions this office has concluded that trade secret and commercial information is confidential if it is of a privileged nature and it has not been publicly disclosed. See e.g., N.D.A.G. 98-O-22 (citing N.D.C.C. § 44-04-18.4). Because the Bookstore's booklist, which is a compilation of some 2,000 required and recommended

textbooks, is not disclosed to the public the only question is whether it is of "a privileged nature."

Information is "of a privileged nature" if "disclosure is likely to impair [the Bookstore's] ability to obtain necessary information in the future or [if the] disclosure would cause substantial harm to the competitive position of the contractor [the Bookstore]." N.D.A.G. 98-L-17 applying National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). See also N.D.A.G. 98-L-77, N.D.A.G. 98-O-22. Barnes & Noble asserts that the booklist has not been previously publicly disclosed and that its disclosure would cause substantial harm to its competitive position. The following discussion focuses on whether disclosure would cause substantial harm to the competitive position of the Bookstore.

There are no North Dakota cases addressing whether a booklist compiled by a college bookstore is confidential. The New York Court of Appeals, however, reviewed a claim substantially similar to the issue presented here, i.e., whether a college booklist created by Barnes & Noble was a trade secret. Encore College Bookstores, Inc. v. Auxiliary Service Corp., 663 N.E.2d 302 (N.Y. 1995). In that case, the court, in determining whether disclosing the information would cause substantial harm to the bookstore, said:

whether "substantial competitive harm" exists . . . turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise.

. . .

Where . . . the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand . . .

'Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under [the open records law]. If those competitors are charged only minimal . . . retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not

contemplated as part of [the open records law's] principal aim of promoting openness in government.'

Id. at 307 quoting Worthington Compressors v. Costle, 662 F.2d 45, 51 (D.C. Cir. 1981).

In applying that test to Encore's request for the Barnes & Noble booklist, the court concluded that the material was exempt from disclosure because it would enable a competitor to obtain the information without expending its resources, thereby providing a competitor with an economic windfall were it to receive the booklist at the minor cost allowed under the open records laws. Id. at 308. Thus, the competitor's costs would be reduced, reducing its costs of business and putting Barnes & Noble at a competitive disadvantage. Id.

According to Barnes & Noble, the creation of comprehensive booklist information is a time consuming, labor intensive process. Gathering material occupies the time of three employees about 40 weeks a year. The court in Encore found that allowing a competitor to obtain this information for the mere costs allowable under the open records laws would put Barnes & Noble at a competitive disadvantage.

While a determination that a compilation is a trade secret is generally a factual question,<sup>2</sup> the New York Court of Appeals determined a booklist similar to the booklist in this case was a trade secret and not subject to disclosure. I find the New York court's analysis sound. It is therefore my opinion the booklist, a compilation of all the required textbooks and materials for courses at the University of North Dakota, is a trade secret and not subject to disclosure by Barnes & Noble.

## ISSUE 2

Whether a list of textbooks and materials compiled by a professor for a course at the University is an open record.

The University of North Dakota is established under the Constitution and laws of North Dakota to exercise public authority and perform a governmental function. N.D. Const. art. VIII, §6(1)(a), N.D.C.C. §15-11-01. Therefore, it is a "public entity." The course book information requests completed by the professors are "records" as defined in the open records laws. Such lists are not subject to any specific exemption from disclosure, and therefore must be disclosed upon request. Booklists kept by individual faculty

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<sup>2</sup> In previous opinions, this office has analyzed particular factual situations and determined, as a matter of law, that certain information was "of a privileged nature" and, therefore, confidential under N.D.C.C. § 44-04-18.4. See, e.g., N.D.A.G. 98-L-77 (disclosure of the parentage of agricultural seeds would appear to cause substantial competitive harm to a company and would therefore be confidential).

members are "records" in the possession of a public entity, and the University must make them available for inspection or copying. N.D.C.C. § 44-04-18; Mohawk Book Co. Ltd. v. State University of New York, 732 N.Y.S.2d 272, 274 (N.Y. App. Div.3d 2001) (booklists "held by individual faculty members . . . are 'held . . . for an agency'").

There is a statement at the bottom of the Bookstore textbook order form entitled "Course Book Information Request" that says "[t]his information is confidential and is for the use of the sender and recipient only." Neither a public entity nor its agent may by contract, rule, or policy make a record confidential unless the record comes within a specific exemption of the open records law. N.D.C.C. § 44-04-18; North Dakota Const. art. XI, § 6; N.D.A.G. 2003-O-06 ("All records of a public entity are public records, open and accessible to the public, except as otherwise specifically provided by law"); see also N.D.A.G. 2000-F-09 (public entities may not create an exception to the open records law by contract). There is no exemption in the open records laws for the order form or information on it. Therefore, this statement is invalid and does not make the records confidential. Neither the University or a professor may rely on this statement to withhold the textbook order form or any other record containing the information on the form.

Although I conclude that Barnes & Noble is not required to release the booklist because it is a trade secret, students or anyone else may request information about required textbooks from the University, any department of the University, or any professor or instructor. And, while a public entity is not required to disclose a list it does not have (N.D.A.G. 2004-O-01; N.D.A.G. 2003-O-01) or create a new record by compiling information from existing records, i.e. the individual instructors' lists (N.D.A.G. 2003-O-09; N.D.A.G. 2000-O-11; N.D.A.G. 98-O-20) it must collect and copy the open records it does possess if a request for them is received. N.D.C.C. § 44-04-18.

Sincerely,

Wayne Stenehjem  
Attorney General

mjm/vkk

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. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).