

**OPEN RECORDS AND MEETINGS OPINION
2004-O-01**

DATE ISSUED: January 2, 2004

ISSUED TO: Karlene Fine, Executive Director, Industrial Commission
Lee Peterson, Executive Director, Department of Commerce

CITIZEN'S REQUEST FOR OPINION

On November 11, 2003, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Steve Huenneke asking whether the Industrial Commission or the Department of Commerce violated N.D.C.C. § 44-04-18 by failing to disclose records relating to the loan status of loans under the Partnership in Assisting Community Expansion (PACE) and the North Dakota Development Fund (NDDF) programs.

FACTS PRESENTED

In an undated letter to Governor John Hoeven, Attorney General Wayne Stenehjem, Agriculture Commissioner Roger Johnson, Industrial Commission Executive Director Karlene Fine, Bank of North Dakota (BND) President Eric Hardmeyer, Department of Commerce Commissioner Lee Peterson, and Division of Economic Development and Finance Director Linda Butts, Mr. Huenneke requested "a list of all PACE loans and all Development Fund loans that are currently delinquent, or have ever been delinquent for any period of time." Mr. Huenneke further requested "all open records that contain payment status information on any of these loans."

Karlene Fine responded to Mr. Huenneke's request by letter dated November 5, 2003. In that letter, Ms. Fine advised Mr. Huenneke of the confidentiality restrictions placed on information in the Bank's possession. Based on those confidentiality restrictions, Ms. Fine advised Mr. Huenneke that she could not provide him with a list of PACE and Development Fund loans that were then delinquent or had ever been delinquent. Ms. Fine did advise Mr. Huenneke that she could provide him with information on all loans through the Bank that had a net writeoff or loan forgiveness, but did not provide that information with her

response. Ms. Fine went on to advise Mr. Huenneke that neither the Bank nor the Industrial Commission had any information on loans through the Development Fund.

Lee Peterson and Linda Butts wrote a joint reply to Mr. Huenneke's request by letter dated November 5, 2003. In that letter, Mr. Peterson and Ms. Butts advised Mr. Huenneke that the Department of Commerce, which includes the Division of Economic Development and Finance, does not have any information regarding PACE loans. They indicated that the NDDF had made a loan to WebSmart Interactive, Inc., on February 20, 2001, in the amount of \$300,000. They further indicated that all other financial information that Mr. Huenneke requested was confidential pursuant to N.D.C.C. § 10-30.5-07, and that they could not release any further information.

ISSUES

1. Whether the Industrial Commission violated N.D.C.C. § 44-04-18 by refusing to provide to the requester information on the payment status of PACE loans and Development Fund loans.
2. Whether the Department of Commerce violated N.D.C.C. § 44-04-18 by refusing to provide to the requester information on the payment status of PACE loans and Development Fund loans.

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." N.D.C.C. § 44-04-18(1). The Industrial Commission is a "public entity" subject to N.D.C.C. § 44-04-18, the open records law. N.D.C.C. § 44-04-17.1(12)(a) (definition of "public entity"). The open records law does not require a public entity to provide copies of a requested record that it does not have. N.D.A.G. 2003-O-01. N.D.C.C. § 44-04-18(3).

The Industrial Commission and BND do not have any records about loans made through the North Dakota Development Fund (NDDF) and therefore could not provide those records to Mr. Huenneke. As such, their refusal to furnish those records was proper.

The Industrial Commission is BND's governing body. See N.D.C.C. § 6-09-02. Therefore, it is subject to a variety of confidentiality laws including those that apply specifically to BND.

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See N.D.A.G. 2001-F-10. All financial institutions within the state of North Dakota, including BND, are prohibited from disclosing any customer information. N.D.C.C. § 6-08.1-03. The Bank of North Dakota is specifically prohibited by N.D.C.C. § 6-09-35 from releasing any “[c]ommercial or financial information of a customer.” “Essentially, [N.D.C.C. § 6-09-35] reverses the application of N.D.C.C. § 44-04-18 and provides that customer information is generally confidential. 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).” N.D.A.G. 2001-O-10 (footnote omitted).

The Industrial Commission determined that it could not provide a list of delinquent PACE loans based on N.D.C.C. §§ 6-08.1-03 and 6-09-35. To provide a list of delinquent PACE loans, the Industrial Commission would have to distinguish PACE loans from loans under other programs. Since the qualification requirements for a PACE loan are different than the qualification requirements for other loans, distinguishing entities that have obtained PACE loans would result in a release of commercial and financial information of a customer in violation of the confidentiality requirements of N.D.C.C. § 6-09-35(1). Since the requester specifically requested only information on PACE loans, the Industrial Commission’s response was accurate, and the Industrial Commission did not violate the open records laws with its response.

Issue Two

The North Dakota Development Fund, Inc., is housed in the Department of Commerce (Commerce) under the Division of Economic Development and Finance. It is 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)(a) (definition of “public entity”). However, similar to the Industrial Commission and BND, the Department of Commerce does not have any records regarding PACE loans and, therefore, could not provide those records to Mr. Huenneke. As such, the Department’s refusal to provide those records is not a violation of the open records laws. See N.D.C.C. § 44-04-18(3); N.D.A.G. 2003-O-03 (the open records law does not require a public entity to provide copies of records that it does not have).

The NDDF has a specific statute making certain records confidential. N.D.C.C. § 10-30.5-07. That statute states:

The following records of the NDDF are confidential:

1. Commercial or financial information, whether obtained by the NDDF 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.

N.D.C.C. § 10-30.5-07.

The Department of Commerce determined that information regarding delinquent NDDF loans was commercial or financial information and was therefore confidential under N.D.C.C. § 10-30.5-07 and could not be released. “[T]he term ‘commercial and financial information’ encompasses a broad range of information.” N.D.A.G. 95-L-253. “[C]ommercial’ and ‘financial’ information refer broadly to information pertaining to commerce (buying or selling of goods or services) or finances (monetary resources).” N.D.A.G. 98-L-17. The determination of whether a particular piece of information may be disclosed is to be made by the agency on a case-by-case basis. N.D.A.G. 95-L-253.

While this office will usually defer to an agency’s finding of fact, this office has intervened when it has determined that the finding is unsupported. However, in this case the information requested is clearly commercial or financial information and is, therefore, confidential. The Department of Commerce did not violate the open records law when it refused to disclose the information to the requester.¹

CONCLUSIONS

1. It is my opinion that the Industrial Commission did not violate N.D.C.C. § 44-04-18 by refusing to provide to the requester information on PACE loans or Development

¹ In contrast, had N.D.C.C. § 44-04-18.4(1) applied rather than N.D.C.C. § 10-30.5-07, the result may have varied. Section 44-04-18.4(1), N.D.C.C., also makes commercial and financial information confidential, but only “if it is of a privileged nature and it has not been previously publicly disclosed.” Information is “of a privileged nature” if “disclosure is likely to impair [Commerce’s] ability to obtain necessary information in the future or whether disclosure would cause substantial harm to the competitive position of the contractor.” N.D.A.G. 98-L-17. However, since N.D.C.C. § 10-30.5-07 does not contain the requirement that the information be “of a privileged nature” before recognizing it as confidential, the Department of Commerce must keep all commercial and financial information confidential regardless of its privileged nature. The Department of Commerce applied the correct statute to the request.

Fund loans that are delinquent or have ever been delinquent, and information relating to the payment status of any of those loans.²

2. It is my opinion that the Department of Commerce did not violate N.D.C.C. § 44-04-18 by refusing to provide to the requester information on PACE loans or Development Fund loans that are delinquent or have ever been delinquent, and information relating to the payment status of any of those loans.

Wayne Stenehjem
Attorney General

Assisted by: Scott A. Miller
Assistant Attorney General

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² The requester had asked the further question of whether, if it was my conclusion that neither the Industrial Commission nor the Department of Commerce had violated the open records laws, Governor John Hoeven “violated the law when he disclosed the status of WebSmart Interactive loans to the media and the public.” This office is not authorized to provide legal advice or opinions to the general public other than on open records issues.