

**OPEN RECORDS AND MEETINGS OPINION
2014-O-02**

DATE ISSUED: February 3, 2014

ISSUED TO: North Dakota Mill and Elevator Association

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Lynn Herndon asking whether the North Dakota Mill and Elevator Association violated N.D.C.C. § 44-04-18 by denying a request for records.

FACTS PRESENTED

On September 10, 2013, Ms. Lynn Herndon, an attorney of the law firm Shook, Hardy, & Bacon, LLP, sent a letter to representatives of the North Dakota Mill and Elevator Association (the "State Mill"), requesting records, from the time period September 1, 2011, to present, for each customer purchasing either Dakota Maid White Whole Wheat flour or Stone Ground Whole White Wheat flour, showing "the customer name, business address, ship-to address, purchase volume in hundred wts, and gross sales in dollars."¹ General counsel for the State Mill denied the records request on September 12, 2013, because "[t]he information that you have requested is confidential commercial information under N.D.C.C. § 44-04-18.4(2)(a)."² Ms. Herndon challenges the denial and requests an administrative review on whether the records are confidential commercial information.³

ISSUE

Whether the State Mill violated N.D.C.C. § 44-04-18 by denying a request for records.

¹ Letter from Lynn C. Herndon, Att'y at Law, to Vance Taylor, President and Gen. Manager, NDME and Lori S. Mickelson Asst. Att'y Gen. (Sept. 10, 2013) (on file with author).

² Letter from Lori S. Mickelson Asst. Att'y Gen., to Lynn C. Herndon, Att'y at Law (Sept. 12, 2013) (on file with author).

³ Letter from Lynn C. Herndon, Att'y at Law, to Att'y Gen.'s office (Nov, 4, 2013) (on file with author).

ANALYSIS

The open records law requires the State Mill, as a state agency,⁴ to allow public access to its records unless there is a specific exception.⁵ The State Mill alleges the records requested contain confidential commercial information and are therefore not subject to open records law.

Pursuant to N.D.C.C. § 44-04-18.4(1), “commercial . . . information is confidential if it is of a privileged nature and it has not been previously publically disclosed.” The definition of “commercial information” includes “information pertaining to buying or selling of goods and services.”⁶

The broad definition of “commercial information” is offset by the requirement that the records be “of a privileged nature” to be confidential under N.D.C.C. § 44-04-18.4.⁷ Information is “of a privileged nature” if “disclosure is likely to impair [the State Mill’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 State Mill].”⁸ The State Mill argues that disclosure of the customer information, including the customer list and transaction information, would cause substantial harm to its competitive position.⁹

The determination of whether a record contains commercial information of a privileged nature as defined under N.D.C.C. § 44-04-18.4 is generally a factual decision to be made by the public entity because it is in the best position to determine the effect of

⁴ N.D.C.C. § 44-04-17.1(13)(a) defines “[p]ublic entity” to include “public or governmental bodies, boards, bureaus, commissioners, or agencies of the state, including any entity created or recognized by . . . state statute . . . to exercise public authority to or perform a governmental function.” The State Mill was created by statute under N.D.C.C. ch. 54-18 to perform the governmental function of “encouraging and promoting agriculture, commerce, and industry.” N.D.C.C. § 54-18-02. Previous Attorney General opinions also recognize the State Mill as a state agency; N.D.A.G. 2011-L-08 (“the North Dakota Supreme Court determined that the North Dakota Mill and Elevator Association was an agency of the state because it was created by the state Legislature ‘to accomplish purposes that have been defined as public by the Legislature.’”) (citing State v. Bonzer, 279 N.W. 769 (N.D. 1938)).

⁵ N.D.C.C. § 44-04-18.

⁶ N.D.C.C. § 44-04-18.4(2)(a).

⁷ Because the records requested have not been disclosed, the only question is whether the information is “of a privileged nature.”

⁸ N.D.A.G. 2004-L-25; see also N.D.C.C. § 44-04-18.4(2)(a).

⁹ See Email from Ed Barchenger, Controller and Fin. Manager, NDME, to Sandra Voller, Asst. Att’y Gen. (Dec. 10, 2013, 3:23 p.m.) (on file with author).

disclosure.¹⁰ While this office usually defers to an agency's finding of fact, this office has intervened when it has determined that the finding is unsupported.¹¹ The State Mill supports its factual determination that disclosure of the information would cause substantial competitive harm with the following reasoning.

The State Mill contends that disclosure of its customer list, including customer names and addresses, would cause substantial competitive harm because it would give its competitors a list of potential customers and would likely result in the State Mill losing the business of its current customers.¹² The State Mill also explains how disclosing volume of flour sold and gross sales dollars would cause substantial competitive harm:

[A]ll the flour mills generally compete for the same customers. The gross sales dollars and purchased hundredweights would give competitors the price that the NDME's customers are paying for flour. All a competitor would need to do is divide the gross sales dollars by the purchased hundredweights to get a price per hundredweight.¹³ ... If a competitor knows the price their competition is charging, they would only need to reduce the price a few cents a hundredweight to win the business.¹⁴ ... This would have a huge negative impact on the NDME as we would not know going in on our proposal to a customer that a competitor was undercutting us by that amount (since they would know the price we charge a customer) and that the NDME's competitor would probably win the entire business from that customer. Every business keeps customer information confidential for these same reasons.¹⁵

¹⁰ See N.D.A.G. 2005-O-06; N.D.A.G. 2004-O-01; N.D.A.G. 2002-O-08; N.D.A.G. 2000-L-107; N.D.A.G. 98-O-22; N.D.A.G. 98-L-17.

¹¹ See N.D.A.G. 2005-O-06; N.D.A.G. 2004-O-01; N.D.A.G. 2002-O-08; N.D.A.G. 2000-L-107; N.D.A.G. 98-O-22; N.D.A.G. 98-L-17.

¹² Email from Ed Barchenger, Controller and Fin. Manager, NDME, to Sandra Voller, Asst. Att'y Gen. (Dec. 10, 2013, 3:23 p.m.) (on file with author). See also N.D.A.G. 98-O-22 in which this office previously supported a public entity's factual finding that disclosure of a customer list would cause competitive harm because the information would "allow a competitor to entice members away from [the entity], which would erode [its] customer base and cause economic injury."

¹³ Flour is sold by the hundredweight.

¹⁴ As an example, the State Mill explains that a reduction of only \$.25 in hundredweight for a customer who buys 100,000 hundredweights a year will increase the customer's bottom line profit by \$25,000.

¹⁵ Email from Ed Barchenger, Controller and Fin. Manager, NDME, to Sandra Voller, Asst. Att'y Gen. (Dec. 10, 2013, 3:23 p.m.) (on file with author).

The State Mill is the only state-owned milling facility in the United States¹⁶ and although it is a public entity, I recognize it is a business competing against several other non-public mill and elevator facilities that keep their customer information confidential for the above reasoning. The North Dakota Legislative Assembly has contemplated and permitted that the State Mill act just as any other private business would act in North Dakota.¹⁷ Because of the nature of the business and the competition the State Mill faces against other private companies, I find the above reasoning supports the State Mill's factual finding that disclosure of the requested information would cause substantial competitive injury to the State Mill. This office will not contradict an entity's determination of a supported factual decision in an opinion issued under N.D.C.C. § 44-04-21.1.¹⁸

Based on the foregoing, I find the information requested to be commercial information. It was therefore proper for the State Mill to deny the request for records containing confidential commercial information under N.D.C.C. § 44-04-18.4(2)(a).

CONCLUSION

The State Mill properly denied a request for records containing confidential commercial information pursuant to N.D.C.C. § 44-04-18.4.

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Attorney General

slv/vkk

¹⁶ North Dakota Mill, History, <https://www.ndmill.com/history.cfm> (last visited Jan. 31, 2014).

¹⁷ N.D.C.C. § 54-18-02; see also N.D.A.G. Memorandum to N.D. Ind. Comm'n. (Apr. 7, 1987).

¹⁸ See N.D.A.G. 2004-O-01; N.D.A.G. 2002-O-09; N.D.A.G. 2000-L-107; N.D.A.G. 98-O-22