

**OPEN RECORDS AND MEETINGS OPINION  
2019-O-09**

DATE ISSUED: May 24, 2019

ISSUED TO: North Dakota Industrial Commission

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Senator Merrill Piepkorn asking whether the North Dakota Industrial Commission violated N.D.C.C. § 44-04-18 by failing to provide copies of public records and by failing to respond to a request within a reasonable time.

**FACTS PRESENTED**

Senator Merrill Piepkorn, personally and through Legislative Council, made several requests for information and records to Karlene Fine, Executive Director and Secretary of the Industrial Commission (Commission), regarding contracted services with the Lignite Energy Council (LEC).<sup>1</sup> Some information and records were provided, however, some were withheld as the Commission previously designated reports of the LEC as confidential pursuant to N.D.C.C. § 54-17.5-06, during a meeting in 2015.<sup>2</sup>

At issue in this opinion is the following request made by Legislative Council, on behalf of Senator Piepkorn, on April 25, 2018, to Ms. Fine:

Will you please provide the names of any subcontractors under this contract and the dollar amounts each received? Also, will you please provide any records that show the expenditures of the Lignite Energy

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<sup>1</sup> Letter from Karlene Fine, Exec. Dir and Sec'y, N.D. Indus. Comm'n, with attached emails between Karlene Fine, Merrill Piepkorn, N.D. State Sen., and Claire Ness, Att'y at Law, Legislative Council, to Att'y Gen.'s Office (July 9, 2018).

<sup>2</sup> Letter from Karlene Fine, Exec. Dir and Sec'y, N.D. Indus. Comm'n, to Att'y Gen.'s Office (July 9, 2018); see *also* Minutes, N.D. Indus. Comm'n (Dec. 16, 2015). For example, a list of media where previous ads were placed and a copy of LEC's contract were provided to Legislative Council. Emails from Karlene Fine to Claire Ness, Att'y at Law, Legislative Council (April 12, 2018, 3:59 PM, April 20, 2018, 8:15 AM).

Council under this contract or any budget the council used for the money they received under the contract?<sup>3</sup>

The Commission received a new application from the LEC to continue funding and a request to designate materials as confidential, including the information requested by Legislative Council and Senator Piepkorn on proposed budget and expenditures with subcontractors.<sup>4</sup> The Commission met in an executive session on June 5, 2018, to consider the LEC contract and request for confidentiality.<sup>5</sup> The Commission granted the confidentiality request contingent upon the LEC providing a non-confidential report with sufficient information to determine that the work outlined in the application was being completed.<sup>6</sup>

On June 11, Ms. Fine emailed Legislative Council explaining the decision of the Commission made during the June 5, 2018, executive session that the information was confidential, but that the LEC must generate a report of non-confidential information.<sup>7</sup> Ms. Fine sent the non-confidential report to Legislative Council on June 29, 2018, after receiving it from the LEC.<sup>8</sup>

#### ISSUES

1. Whether the Industrial Commission violated open records law when it withheld records regarding Lignite Energy Council's budget, expenditure, and subcontractor information.
2. Whether the Industrial Commission provided a response to a records request within a reasonable time.

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<sup>3</sup> Email from Claire Ness, Att'y at Law, Legislative Council, to Karlene Fine, Exec. Dir. and Sec'y, N.D. Indus. Comm'n (April 25, 2018, 4:30 PM). This requested information was contained in the previously withheld attachment to the contract determined to be confidential by the Commission in 2015.

<sup>4</sup> Letter from Karlene Fine, Exec. Dir and Sec'y, N.D. Indus. Comm'n (July 9, 2018); see *also* Email from Karlene Fine, Exec. Dir and Sec'y, N.D. Indus. Comm'n, to Att'y Gen.'s Office (July 15, 2018, 10:24 PM).

<sup>5</sup> Letter from Karlene Fine, Exec. Dir and Sec'y, N.D. Indus. Comm'n, to Att'y Gen.'s Office (July 9, 2018); see *also* Minutes, N.D. Indus. Comm'n (Dec. 16, 2015).

<sup>6</sup> Letter from Karlene Fine, Exec. Dir and Sec'y, N.D. Indus. Comm'n, to Att'y Gen.'s Office (July 9, 2018); see *also* Minutes, N.D. Indus. Comm'n (Dec. 16, 2015).

<sup>7</sup> Email from Karlene Fine, Exec. Dir and Sec'y, N.D. Indus. Comm'n, to Claire Ness, Att'y at Law, Legislative Council (June 11, 2018, 3:49 PM).

<sup>8</sup> Email from Karlene Fine, Exec. Dir and Sec'y, N.D. Indus. Comm'n, to Claire Ness, Att'y at Law, Legislative Council (June 29, 2018, 11:10 AM).

## ANALYSIS

### 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.”<sup>9</sup> The Commission is authorized, under N.D.C.C. § 54-17.5-06, to designate certain materials and data submitted regarding lignite research, development, and marketing as confidential.

#### **54-17.5-06. Access to commission records.**

1. Materials and data submitted to, or made or received by, the commission, to the extent that the commission determines the materials or data consist of trade secrets or commercial, financial, or proprietary information of individuals or entities applying to or contracting with the commission or receiving commission services under this chapter are subject to section 44-04-18.4.
2. A person or entity must file a request with the commission to have material designated as confidential under subsection 1. A request to have material designated as confidential is exempt as defined in section 44-04-17.1. The request must contain any information required by the commission, and must include at least the following:
  - a. A general description of the nature of the information sought to be protected.
  - b. An explanation of why the information derives independent economic value, actual or potential, from not being generally known to other persons.
  - c. An explanation of why the information is not readily ascertainable by proper means by other persons.
  - d. A general description of any person or entity that may obtain economic value from disclosure or use of the

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<sup>9</sup> N.D.C.C. § 44-04-18(1).

information, and how the person or entity may obtain this value.

- e. A description of the efforts used to maintain the secrecy of the information.
3. Any information submitted under subsection 2 is confidential. The commission shall examine the request and determine whether the information is relevant to the matter at hand and is a trade secret under the definition in section 47-25.1-01 or 44-04-18.4. If the commission determines the information is either not relevant or not a trade secret, the commission shall notify the requester and the requester may ask for the return of the information and request within ten days of the notice. If no return is sought, the information and request are a public record.
  4. The names or identities of independent technical reviewers on any project or program and the names of individual lignite council members making recommendations are confidential and may not be disclosed by the commission.<sup>10</sup>

During its June 5, 2018, meeting, the Industrial Commission made the determination that the materials and data received from the LEC that is trade secret and proprietary information would be protected.<sup>11</sup> In executive session, the Commission considered a letter from the LEC, dated April 12, 2018, requesting confidentiality, as required under N.D.C.C. § 54-17.5-06(2).<sup>12</sup> During the executive session, the Chairman of the LEC reiterated that it wanted to keep things in its application confidential, such as its strategies, polling data, budget, and contractor identities, as disclosure could harm the industry and the economy in North Dakota and lead to opponents making their campaigns more effective.<sup>13</sup> The Commission voted in open session to grant confidentiality to LEC “contingent upon the applicant providing non-confidential reports

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<sup>10</sup> N.D.C.C. § 54-17.5-06.

<sup>11</sup> Minutes, N.D. Indus. Comm’n (June 5, 2018).

<sup>12</sup> The executive session was recorded in compliance with N.D.C.C. § 44-04-19.2(5) and reviewed by a member of my staff.

<sup>13</sup> The Commission did discuss, however, that certain information is already public such as some televised advertisements that clearly were commissioned by the LEC. The Commission determined that it needed to be more transparent moving forward on the Project and the need to release information in a report that would show the work being done by the grant money.

with sufficient information to determine that the work outlined in the application is being completed.”<sup>14</sup>

Section 54-17.5-06, N.D.C.C., gives exclusive authority to the Industrial Commission to designate materials or data as confidential. The statute also sets out the procedure to be followed by the Commission before the records can be designated as confidential. Here, the statutory requirements were met. Therefore, it is my opinion that it was not a violation of the open records law for the Commission to deny records made confidential under N.D.C.C. § 54-17.5-06.

#### Issue Two

“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.”<sup>15</sup> When a public entity receives a request for records, it must, within a reasonable time, either provide the records or explain why the records are not being provided.<sup>16</sup> Whether records have been produced within a reasonable time will depend on the facts of a given situation.<sup>17</sup> A delay may be appropriate for a number of reasons, including reviewing large volumes of documents to respond to a request, excising closed or confidential information, availability and workload of staff who can respond to the request, balancing other responsibilities of the public entity that demand immediate attention, accessing the records requested, consulting with an attorney when there is reasonable doubt whether the records are open to the public, sorting out what has previously been provided to a requester, and seeking clarification on vague requests.<sup>18</sup>

Ms. Fine continually worked with Senator Piepkorn and Legislative Council to determine what information could be obtained without violating any confidentiality provisions. For the records at issue in this opinion, Ms. Fine contacted legal counsel and the LEC to determine the status of the records. The timing of the request also played a part in the delay as the LEC was again asking for additional funding and requesting confidentiality of the records.

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<sup>14</sup> See June 5, 2018, Meeting Minutes.

<sup>15</sup> N.D.C.C. § 44-04-18(1).

<sup>16</sup> N.D.C.C. § 44-04-18.

<sup>17</sup> N.D.A.G. 2017-O-06; N.D.A.G. 2014-O-25; N.D.A.G. 2014-O-21; N.D.A.G. 2014-O-20; N.D.A.G. 2013-O-17.

<sup>18</sup> N.D.A.G. 2017-O-10; N.D.A.G. 2017-O-06; N.D.A.G. 2014-O-25; N.D.A.G. 2014-O-21; N.D.A.G. 2014-O-20; N.D.A.G. 2014-O-06; N.D.A.G. 2013-O-17; N.D.A.G. 2013-O-15; N.D.A.G. 2012-O-07; N.D.A.G. 2010-O-04; N.D.A.G. 2008-O-08; N.D.A.G. 2004-O-05; N.D.A.G. 2003-O-21; N.D.A.G. 98-O-20; N.D.A.G. 98-O-04.

Past opinions explain that a “public entity’s response to an open records request cannot be automatically extended until the next scheduled meeting of the governing body simply to enable the governing body to give its permission to release the records.”<sup>19</sup> “Providing access to records which are open to the public is a ministerial act which will not require action of a governing body in most cases.”<sup>20</sup> However, the records at issue in this opinion, and the circumstances surrounding their release, are exceptions to these general rules. Ms. Fine needed to contact legal counsel and the Commission to determine which records were considered confidential and the records were not indisputably open records that could be automatically produced as a ministerial act. The Commission has the legal authority to deem the information confidential, which, in this case, required a meeting of the Commission to review the information and request for confidentiality. Given these unique circumstances requiring the Commission to meet pursuant to N.D.C.C. § 54-17.5-06 to review the records, and the fact that Ms. Fine continually corresponded and worked with the requestor to provide as much information as possible, I do not find an unreasonable delay in responding to the open records request.

#### CONCLUSIONS

1. The Industrial Commission did not violate open records law when it withheld records regarding Lignite Energy Council’s budget, expenditure, and subcontractor information as such information was deemed confidential by the Commission pursuant to N.D.C.C. § 54-17.5-06.
2. The Industrial Commission provided a response to a records request within a reasonable time.

Wayne Stenehjem  
Attorney General

cc: Senator Merrill Piepkorn (via email only)

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<sup>19</sup> N.D.A.G. 2017-O-06; N.D.A.G. 2001-O-02.

<sup>20</sup> N.D.A.G. 2001-O-02.