

LETTER OPINION
98-L-77

June 17, 1998

Mr. Douglas G. Johansen
ND State Seed Commissioner
North Dakota State Seed Department
State University Station
PO Box 5257
Fargo, ND 58105-5257

Dear Mr. Johansen:

Thank you for your letter asking about seed field inspection records of the State Seed Department (Department).

You first ask whether records indicating the kind, variety, and parentage of inspected seeds are subject to N.D.C.C. § 44-04-18, the open records law. "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). See also N.D. Const. Art. XI, § 6.

A three-prong analysis should be used to determine whether a record . . . is subject to the open records . . . law[] and is open to the public. 1996 N.D. Op. Att'y Gen. 38, 39; 1993 N.D. Op. Att'y Gen. L-95. First, is the entity that is maintaining the document . . . subject to the open records . . . laws? Second, is the document a record . . . of that entity? Third, if the answer to both of these questions is yes, is there a specific law providing that the record . . . is confidential or exempt from the open records . . . laws?

1996 N.D. Op. Att'y Gen. 99, 100.

In performing this analysis, the open records law must be interpreted broadly in favor of the public's access to information. 1985 N.D. Op. Att'y Gen. 77, 79. See also N.D.C.C. § 1-02-01; City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572 (N.D. 1981). In contrast to the broad interpretation of the open records law, exceptions must be specific and will not be implied. Hovet v. Hebron Public School District, 419 N.W.2d 189, 191 (N.D. 1988).

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1998 N.D. Op. Att'y Gen. 63, 64.

The question presented refers to kind, variety, and parentage information contained in field inspection applications and reports (hereafter seed field records) maintained by the Department in the course of performing its statutory functions under N.D.C.C. ch. 4-09. Thus, the documents are "records" of a "public entity" regarding "public business" as those terms are used in the open records law. See N.D.C.C. § 44-04-17.1(11) (performance of governmental function) (12)(a) (state agency), (15) (recorded information regarding public business). As a result, the first two prongs of the analysis are satisfied, and the answer to your first question depends on the third-prong of the analysis: is there a specific exception to the open records law that applies to kind, variety, and parentage information in seed field records?

Currently, there is no statute in N.D.C.C. ch. 4-09 specifically exempting seed field records from the open records law or prohibiting disclosure of those records. The only records specifically made confidential in that chapter are the name and address of the consignee on a phytosanitary certificate on seed offered for export. See N.D.C.C. § 4-09-06.1. To the contrary, the state seed commissioner is expressly authorized to publish the results of seed inspections, along with any other information the commissioner deems advisable. N.D.C.C. §§ 4-09-06; 4-09-07. These sections strongly suggest that seed field records are not confidential and are open to the public under N.D.C.C. § 44-04-18.

Certain information in seed field records may be confidential under N.D.C.C. § 44-04-18.4(1), which provides:

Trade secret, proprietary, commercial, and financial information is confidential if it is of a privileged nature and it has not been previously publicly disclosed.

"Commercial information" as used in N.D.C.C. § 44-04-18.4 means information pertaining to buying or selling of goods or services. 1998 N.D. Op. Att'y Gen. L-__ (March 2 letter to Carol Olson).

Seed field records describe the kind of seed (i.e. soybeans) being offered for sale, the variety name given to the seed by the company developing it, and the parentage or genetic makeup of the seed. Thus, kind, variety, and parentage information in seed field records can be considered "commercial information" under N.D.C.C. § 44-04-18.4. As a result, it is unnecessary to determine if that

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information would also be trade secret or proprietary information under that section.

For trade secret or commercial or proprietary information to be confidential under N.D.C.C. § 44-04-18.4, it must be "of a privileged nature."

This office looks to judicial interpretations of exemption 4 of the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4), in determining whether trade secret or commercial or financial information is "of a privileged nature" and therefore confidential. 1994 N.D. Op. Att'y Gen. L-194 (August 1 letter to Dykshoorn).

1998 N.D. Op. Att'y Gen. at L-__ (March 2 letter to Carol Olson at p.2). As explained in that letter, whether trade secret or commercial or proprietary information is "of a privileged nature" should be determined by applying the two-part test of National Parks and Conservation Ass'n v. Morton:

[C]ommercial or financial matter is "confidential" for purposes of [exemption 4] if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

498 F.2d 765, 770 (D.C. Cir. 1974).

Whether the Department's future ability to obtain necessary information would be impaired by disclosing kind, variety, and parentage information is a question of fact. The agency in possession of the trade secret, commercial or proprietary information "is in the best position to determine the effect of disclosure on its ability to obtain necessary technical information." AT&T Info. Systems v. G.S.A., 627 F. Supp. 1396, 1401 (D.D.C. 1986) (quotation omitted), rev'd on other grounds and remanded, 810 F.2d 1233 (D.C. Cir. 1987).

In North Dakota, the name of the variety must be made available by anyone requesting eligibility for seed certification. See N.D. Admin. Code § 74-03-01-03. Seed grown in North Dakota, or elsewhere and brought into the state, may not be sold or distributed using the term "breeders", "foundation", "registered", "certified", "pedigreed", "elite", or "inspected" seed without the approval and

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authorization of the commissioner. N.D.C.C. § 4-09-17. Such "approval and authorization" requires seed certification, including disclosure of variety, as required by law. See N.D.C.C. §§ 4-09-16, 4-09-17, 4-09-17.1, 4-09-18; N.D. Admin. Code ch. 74-03-01. In my opinion, it appears unlikely in this situation that applicants for seed certification will be less inclined to submit applications if the seed variety is disclosed as there currently exists no alternative. All applicants are subject to the same requirements.

Part two of the National Parks test requires a determination by the Department whether disclosure of seed kind, variety, and parentage would "cause substantial harm to the competitive position of the person from whom the information was obtained." While this decision appears to be in the discretion of the Department, there are several reasons why I conclude, as a matter of law, that disclosure of seed kind and variety information would not place the applicant for seed inspection at a competitive disadvantage.

First, kind and variety information for soybean seed must be disclosed by applicants for seed certification on two occasions: when the seed is inspected by the Department, and when the seed is later offered or held for sale. N.D.C.C. § 4-09-10(1)(a). Thus, any "disadvantage" of public disclosure is spread evenly among all competitors. Second, as discussed above, the state seed commissioner is expressly authorized to publish the results of seed inspections. N.D.C.C. §§ 4-09-06; 4-09-07. This authority would be rendered meaningless, and lead to an absurd result, if the commissioner could publish test results but was prohibited from identifying the kind and variety of seed that was tested. Finally, the kind and variety of seed protected under the Plant Variety Protection Act, Pub. L. No. 91-577 (codified as amended at 7 U.S.C. §§ 2321-2582) may nevertheless be published. 7 U.S.C. § 2426. See also H.R. Rep. 103-699, 103rd Cong., 2d Sess. (1994), reprinted in 1996 U.S.C.C.A.N. 2424, 2425.

My conclusion that disclosure of kind and variety information would not lead to a substantial competitive disadvantage does not, however, extend to parentage information. I understand that the Department requires parentage information when performing a seed inspection. Disclosure of parentage information, in addition to variety name, would permit a competitor to duplicate and sell the same seed in competition with the original applicant for a seed inspection. Such disclosure would also create a disincentive for the applicant to invest funds in research and development of new varieties of seed when that seed could be duplicated by a competitor at little cost once the seed reaches the market. While the Plant Variety Protection

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Act authorizes a civil action for infringement of plant variety protection, I do not believe an award of damages in a court action would completely remedy the initial infringement or the resulting competitive disadvantage of disclosing parentage information to a competitor.

It is my opinion that disclosure of kind and variety information in seed field records is not likely to impair the Department's ability to obtain necessary information in the future and, as a matter of law, does not cause substantial harm to the competitive position of the applicant. Therefore, it does not appear that kind and variety information in seed field records could be considered confidential under N.D.C.C. § 44-04-18.4. However, disclosure of information regarding the parentage of seeds inspected by the Department would appear to cause substantial competitive harm to the applicant and would therefore be confidential under N.D.C.C. § 44-04-18.4.

This office has not located any other law that would make kind and variety information in seed field records confidential or otherwise exempt from the open records law.

Your second question is whether seed dealers may sell soybean seed without disclosing the kind and variety. N.D.C.C. § 4-09-10, states in part:

Each container of agricultural seed which is sold, offered for sale, exposed for sale, transported for sale, or held in storage with the intent to sell for planting purposes within this state must bear thereon or have attached thereto in a conspicuous place, or there must be properly delivered with bulk sales or movements of said seed, a plainly written or printed label or tag in the English language giving the following information, which statement may not be modified or denied in the labeling or on another label attached to the container:

1. a. In seeds of wheat, durum, barley, oats, rye, soybeans, dry beans, and flax the commonly accepted name of the kind and variety of each agricultural seed component in excess of five percent of the whole and the percentage by weight of each. (emphasis added).

Further, N.D.C.C. § 4-09-10.1 requires the same disclosures of "kind" and "variety" with respect to labelers of bagged agricultural seed sold exclusively within the state. Finally, "kind" and "variety" are

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both defined by N.D.C.C. § 4-09-01, thereby eliminating ambiguity regarding their intended meaning.

Unambiguous statutes are construed according to their plain, ordinary and commonly understood meaning. N.D.C.C. §1-02-02. See City of Fargo v. Ness, 551 N.W.2d 790 (N.D. 1996); Wingerter v. North Dakota Dep't of Transp., 530 N.W.2d 362 (N.D. 1995). When a statute is unambiguous, the letter of it is not disregarded in pursuit of its spirit. N.D.C.C. § 1-02-05. The controlling statute here is unambiguous. Consequently, there is no room for interpretation; seed dealers selling soybean seed must disclose the kind and variety of seed.

Sincerely,

Heidi Heitkamp
Attorney General

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