

N.D.A.G. Letter to Patrie (Dec. 10, 1986)

December 10, 1986

Mr. William S. Patrie
Director
North Dakota Economic Development Commission
Liberty Memorial Building
Bismarck, ND 58505

Dear Mr. Patrie:

Thank you for your letter of October 21, 1986, inquiring as to the impact of the North Dakota open records law upon university research projects performed for private companies. Specifically, your inquiry is whether research information gathered pursuant to a contract between a university research center and a private company may be subject to public disclosure pursuant to North Dakota's open records law.

The North Dakota open records law provides that all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state shall be open and accessible for inspection during reasonable office hours except as otherwise specifically provided by law.

The North Dakota Supreme Court has reviewed the open records law with respect to its intent and impact. In so doing, the court has concluded that the open records law is intended to disclose the manner in which public monies are spent and public business is handled.

The Legislature no doubt intended to make information available to the public relative to the spending of public monies and the handling of public business. And that is all that it intended. . . . What the Legislature was attempting to accomplish was to provide the public with the right and the means of informing itself of the conduct of the business in which the public has an interest, in order that the citizen and taxpayer might examine public records to determine whether public money is being properly spent, or for the purpose of bringing to the attention of the public irregularities in the handling of public matters.

Grand Forks Herald v. Lyons, 101 N.W.2d 543, 546 (N.D. 1960) (Emphasis supplied).

In attempting to apply the open records law to the question of research information gathered pursuant to a private contract, the specific facts and circumstances surrounding these contracts are critical in this determination. In visiting with officials at North Dakota State University and the University of North Dakota, I have learned that there is a rather

unique set of facts surrounding these contractual relationships between the universities and private companies.

According to our information, the contracts entered into between private industry and the universities are calculated, in terms of consideration, to include the costs incurred by the universities in providing the research personnel and the research overhead costs in performing the desired research. Where there are state-salaried employees performing the research, those salaries are reduced during the time these individuals perform the research on behalf of the private companies. When these salaries are reduced, a portion of those monies received from the private entity are forwarded to the employee. Indeed, in some cases the employees performing university research do not receive any state moneys as part of their salaries. Instead, these employees are paid only when federal monies or private monies are available by which contractual research is performed.

Furthermore, all costs incurred by the universities in performing such research (e.g., equipment, building, and maintenance costs) are passed along to the private entity as part of the agreed upon contract price. Our information is that these costs are calculated with preciseness as opposed to being an estimate or guess. Thus, although university facilities are being used in performing the research, the pro rata costs of such facilities are being paid by the private entity rather than the taxpayers.

In reviewing these unique facts, it is obvious that a university and its personnel/facilities are actually being contracted by a private entity for a specific research project. In such cases, state moneys are not involved either in terms of the personnel or in the facilities used in performing the research. In essence, the private entity is leasing university personnel and facilities to perform the desired research.

In light of the intention of the open records law (with respect to public knowledge as to the spending of public monies and the handling of public business) and given the specific facts surrounding the contracts between private entities and universities involving private research, it is my conclusion that the intent and objective of the open records law, as expressed by our state supreme court, would not be furthered by its application in these circumstances. According to the available facts, we are addressing a situation where private monies are being used to gather private research information. Although university facilities and personnel may appear on the surface to be involved, a close scrutiny of the facts indicate that the private entity is actually paying for the use of the university personnel and its facilities. Thus, state funds are not involved in performing the private research.

Therefore, in this unique situation, the open records law would not be applicable and information gathered pursuant to such contractual relationships may not be required to be publicly disclosed pursuant to this law.

I must stress the limited scope of my conclusion. As indicated earlier, the facts and circumstances surrounding these contracts are critical in analyzing the applicability of the open records law. Of special importance are those facts as to who pays for the use of the

university's personnel and facilities. Where facts and circumstances exist other than those described within this letter, the conclusion as to the applicability of the open records law may change accordingly.

Furthermore, this conclusion does not apply to a research contract the terms of which are intentionally designed to avoid the impact of North Dakota's open records law. The terms and conditions of such research contracts must be bona fide and reasonable with respect to those actual costs incurred by the universities in performing the desired research. Contractual terms which are nothing more than artifices or stratagems evading the open records law will not be allowed to prevent public disclosure of the research results.

Sincerely,

Nicholas J. Spaeth

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