

LETTER OPINION
94-L-103

April 14, 1994

Mr. Wayne Hokenson
Audit Director
Office of State Auditor
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Hokenson:

Thank you for your letter concerning the confidentiality of certain records maintained by the city of Riverdale in association with its home improvement loan program. Specifically, you ask whether it is permissible for the city to refuse to permit the public to view the city's checkbook containing home improvement loan payments made to city residents and whether other records associated with the city's home improvement loan program would be exempt from public disclosure.

Open governmental records in North Dakota are required by both the North Dakota Constitution and North Dakota Century Code (N.D.C.C.) ? 44-04-18. Article XI, Section 6 of the North Dakota Constitution provides:

Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, . . . shall be public records, open and accessible for inspection during reasonable office hours.

N.D.C.C. ? 44-04-18 echoes the provisions of Section 6 of Article XI and provides that the custodian may charge a reasonable fee for making a copy of a requested open record.

"[F]or an exception to the open-records law to exist under our constitutional and statutory provisions, it must be specific, i.e., the Legislature must directly address the status of the record in question, for a specific exception, by the plain terms of those

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provisions, may not be implied." Hovet v. Hebron Public School District, 419 N.W.2d 189, 191 (N.D. 1988). See also City of Grand Forks v. Grand Forks Herald, Inc., 307 N.W.2d 572, 578 (N.D. 1981) ("The City is a political subdivision of the State and, as such, all of its records [except those specifically exempt from being open] are public records open for inspection equally to members of the public, which includes the news media.").

The purpose of the open records law is "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, Inc. v. Lyons, 101 N.W.2d 543, 546 (N.D. 1960).

No state statute provides a specific exemption under the open records law for a city checkbook. If the checkbook contains any information which is specifically exempted from the open records law by statute, access to that information may be denied. The remainder of the checkbook remains an open record.

Regarding the specific question relating to exemptions for the home loan program records, arguments might be made that the following state and federal laws apply.

N.D.C.C. ? 6-08.1-03 prohibits a financial institution from disclosing customer information to any person unless the disclosure is made consistent with provisions of N.D.C.C. ch. 6-08.1. A financial institution is defined as "any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, a bank, including the Bank of North Dakota, a savings bank, a trust company, a savings and loan association, or a credit union." N.D.C.C. ? 6-08.1-01(3). Because a political subdivision is not an organization authorized to do business under state law relating to

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financial institutions, N.D.C.C. ? 6-08.1-03 does not provide an exception to the open records law for the checkbook or other loan documents relating to the city's home improvement loan program.

The Federal Right to Financial Privacy Act of 1978, 12 U.S.C. ?? 3401-3422, limits federal agency access to the financial records of customers of financial institutions. Specifically, 12 U.S.C. ? 3403 provides that "[n]o financial institution, or officer, employees, or agent of a financial institution, may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this chapter." 12 U.S.C. ? 3401(1) defines financial institution as "any office of a bank, savings bank, card issuer as defined in section 1602(n) of Title 15, industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution, located in any State or territory of the United States. . . ." A political subdivision is not a financial institution as defined under 12 U.S.C. ? 3401(1) and, therefore, the provisions of the Federal Right to Financial Privacy Act are not applicable.

The Federal Fair Credit Reporting Act, 15 U.S.C. ?? 1681-1681t, restricts consumer reporting agencies from releasing consumer reports except under certain circumstances. See 15 U.S.C. ? 1681b. A consumer reporting agency is defined as "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." 15 U.S.C. ? 1681a(f). A political subdivision is not a consumer reporting agency and, therefore, the Federal Fair Credit Reporting Act does not apply to a political subdivision.

There being no express federal or state statutory provision which would exempt the records in question

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from public disclosure, the question remains whether a city loan applicant or borrower could assert a constitutional right of privacy so as to restrict the release of the checkbook and other loan documents from public disclosure.

The North Dakota Supreme Court in Hovet v. Hebron Public School District, 419 N.W.2d at 192-193, considered the issue of whether a political subdivision's employee's personnel file was protected under a constitutional right to privacy. Relying upon City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572 (N.D. 1981), the court in Hovet noted "that there is no explicit right to privacy under our [North Dakota] Constitution, and . . . [the court] declined to consider whether such a right to privacy could be inferred under our [North Dakota] Constitution." The court also dismissed a federal constitutional claim to the right of privacy reasoning that "the Federal right to privacy is limited to 'cases involving governmental intrusions into matters relating to marriage, procreation, contraception, family relationships, child rearing, and education.'" 419 N.W.2d at 192. See also United States v. Miller, 425 U.S. 435 (1976) (holding that the Fourth Amendment did not give a bank customer a constitutional right of privacy in records held by his bank). Because the documents in question do not relate to marriage, procreation, conception, family relationships, child rearing, or education, the federal constitutional right to privacy is not implicated.

Because no specific statutory or constitutional exemption to the open records law exists regarding home improvement loan program records maintained by a political subdivision, it is my opinion that all such records are public records, open and accessible for inspection by the public during reasonable office hours.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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