

LETTER OPINION
95-L-243

October 23, 1995

Honorable Robert W. Peterson
State Auditor
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Peterson:

Thank you for your letter asking whether North Dakota Century Code (N.D.C.C.) § 6-09.10-10 renders legal and tax assistance program records of the Credit Review Board and the Agriculture Commissioner confidential in a manner that would prevent the use of a collection agency to collect unpaid debts incurred under the legal and tax assistance program.

There are three separate programs created and administered under N.D.C.C. ch. 6-09.10. The Agricultural Mediation Service and home quarter purchase program provide for mediation by the Agricultural Mediation Service between farmers and farm lenders and for an interest subsidy to a lender for the purchase of the farmer's home quarter if mediation is not successful. N.D.C.C. §§ 6-09.10-03 and 6-09.10-05. The legal and tax assistance program, administered by the Credit Review Board and the Agriculture Commissioner, provides for legal and tax assistance to not only eligible farmers but also to small business persons. N.D.C.C. §§ 6-09.10-08.1 through 6-09.10-08.6. This program provides for legal and tax assistance to those eligible by contract made by the Credit Review Board and the Agriculture Commissioner with lawyers or accountants. It does not involve mediation by the Agricultural Mediation Service other than to require those persons providing the legal or tax assistance to cooperate with, among others, the Agricultural Mediation Service. N.D.C.C. § 6-09.10-08.5(3).

Government agency records are open records unless otherwise specifically provided by law. N.D.C.C. § 44-04-18 provides, in part:

Except as otherwise specifically 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, or organizations or agencies supported in whole or in part by public funds, or expending public funds, are public records, open and accessible for inspection during reasonable office hours.

Honorable Robert W. Peterson
October 23, 1995
Page 2

N.D.C.C. § 44-04-18(1). The North Dakota Supreme Court has held that "records" under N.D.C.C. § 44-04-18 is a term to be interpreted expansively and that a specific exception to it is required to render records confidential or exempt. City of Grand Forks v. Grand Forks Herald, Inc., 307 N.W.2d 572 (N.D. 1981); Hovet v. Hebron Public School District, 419 N.W.2d 189 (N.D. 1988).

N.D.C.C. § 6-09.10-10, enacted in 1989, provides, in part:

Information created, collected, and maintained by the agricultural mediation service in the course of any mediation is confidential and is not subject to the open records requirements of section 44-04-18. Such information may be released only upon written consent of all parties to the mediation or pursuant to an order issued by the court upon a showing of good cause.

This provision states a specific limited exception to N.D.C.C. § 44-04-18 for records "created, collected, and maintained by the agricultural mediation service in the course of any mediation" and renders those records confidential. The exception is limited to information created, collected, and maintained "in the course of any mediation." Other records maintained by the Agricultural Mediation Service are still subject to the open records law and not confidential, unless otherwise specifically exempted (i.e., attorney work product as defined in N.D.C.C. § 44-04-19.1).

Records assembled by the Credit Review Board and the Agriculture Commissioner under the legal and tax assistance program are not created, collected, or maintained in the course of mediation; they are created and maintained in an effort to provide assistance to farmers and small business persons to deal with their legal and tax status separately from the mediation program, although possibly in cooperation with it as noted above. Such records are therefore not confidential or exempt from the open records law under N.D.C.C. § 6-09.10-10.

Because no specific statute renders the legal and tax assistance program records of the Credit Review Board and the Agriculture Commissioner confidential or exempt from N.D.C.C. § 44-04-18, it is my opinion that those records are open records and not subject to the confidentiality requirements for mediation records under N.D.C.C. § 6-09.10-10.

However, determining that the legal and tax assistance program records are open records does not resolve the secondary element of

Honorable Robert W. Peterson
October 23, 1995
Page 3

your letter over the use of a private collection agency to collect unpaid debts incurred under the legal and tax assistance program.

"Basically, administrative agencies are creatures of legislative action. As such, legal logic compels the conclusion that agencies have only such authority or power as is granted to them or necessarily implied from the grant." First Bank of Buffalo v. Conrad, 350 N.W.2d 580, 584-85 (N.D. 1984). In defining an agency's authority, the rule of strict construction applies, and any doubts as to the existence of a given power must be resolved against the agency. Cf. Meyer v. City of Dickinson, 451 N.W.2d 113, 115 (N.D. 1990). However, once an agency's powers have been determined, "the rule of strict construction no longer applies, and the manner and means of exercising those powers where not prescribed by the Legislature are left to the discretion of the [agency]." Id. at 116 (quoting Lang v. City of Cavalier, 228 N.W.2d 819, 822 (N.D. 1930)).

The legal and tax assistance program permits farmers and small business persons, who could not otherwise afford to pay for tax and legal services, to receive services and then pay for the value of the services plus interest over a period of time. See N.D.C.C. § 6-09.10-08.4. The recipients therefore incur a debt to the program to repay the assistance. (In essence, the program loans the recipients the money to pay for the tax and legal services.) Under N.D.C.C. § 6-09.10-08.4, the Credit Review Board can defer the required repayment of legal and tax assistance obtained under the program, and, after the deferral, may waive repayment of all or part of the assistance. Although there is no express power of the Credit Review Board to collect unpaid debts, such is implied by the fact farmers and small business persons can become indebted to the program. It would be unreasonable for the Legislature to authorize farmers and small business persons to become indebted to the legal and tax assistance program but not to permit the administrators of the program to collect the debt. Thus, it is my opinion that the Credit Review Board, as administrator of the legal and tax assistance program, has the power to collect the debts incurred under the program.

Having concluded the Credit Review Board has the power to collect unpaid debts, the rule of strict construction no longer applies, and the manner and means of exercising that power is left to the discretion of the program's administrator, the Legislature not having prescribed the manner and means of making collections. It is therefore my opinion that the Credit Review Board may exercise its collection power by entering contracts with private collection agencies. However, whether it does so is within its sound

Honorable Robert W. Peterson
October 23, 1995
Page 4

discretion. In exercising this discretion, the Credit Review Board should consider whether contracts with collection agencies will interfere with the exercise of discretion by the Credit Review Board to defer or waive repayment of legal or tax assistance and whether the costs of the contracts with the collection agencies could exceed the amount recoverable from the persons who received legal and tax assistance under the program.

In conclusion, it is my opinion that the legal and tax assistance program records of the Credit Review Board and the Agriculture Commissioner are open records and not subject to the confidentiality requirements for mediation records under N.D.C.C. § 6-09.10-10. It is my further opinion that the Credit Review Board has the power to collect unpaid debts and, in its discretion, can use private collection agency services to collect the unpaid debts.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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