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**OPEN RECORDS AND MEETINGS OPINION**  
**2025-O-22**

DATE ISSUED: December 5, 2025

ISSUED TO: Retirement and Investment Office

**CITIZEN'S REQUEST FOR OPINION**

Tory Jackson requested an opinion from this office under N.D.C.C. § 44-04-21.1 asking whether the Retirement and Investment Office (RIO) violated N.D.C.C. § 44-04-18 by improperly responding to a request for records.

**FACTS PRESENTED**

On January 15, 2024, Mr. Jackson requested records regarding Legacy Fund investment holdings from RIO.<sup>1</sup> He specifically requested:

The current list of all foreign holdings in the Legacy Fund listed in alphabetical order by country:

The current list of all domestic holdings in the Legacy Fund listed in alphabetical order by company.

The current list of all foreign investments in the Legacy Fund sorted by each asset/money manager.

The current list of all domestic investments in the Legacy Fund sorted by each asset/money manager.

The current amount of Legacy Fund monies that has been distributed to date to 50 South Capitol.

The amount of money that 50 South Capitol has then invested in each of the following five companies/managers:

Lewis & Clark Agrifood

Homegrown Capital

Longwater Opportunities

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<sup>1</sup> Letter from Tory Jackson, Jackson Law Firm, to Off. of Att'y Gen. (Feb. 9, 2024).

Gener8tor

Badlands Captial [sic]

The investments that have been made by the five firms listed above with money from the Legacy Fund provided to 50 South Capital.<sup>2</sup>

That same day, Ms. Murtha responded to Mr. Jackson, confirmed receipt of his request, and informed him that due to the state holiday that day, RIO's Communications Director, Sarah Mudder, would contact with him within the next few days to provide a time and cost estimate related to his request.<sup>3</sup> On January 17, 2024, Ms. Mudder replied to Mr. Jackson's request.<sup>4</sup> In response to his requests for "[t]he current list of all foreign holdings in the Legacy Fund listed in alphabetical order by country" and "[t]he current list of all domestic holdings in the Legacy Fund listed in alphabetical order by company" Ms. Mudder sent Mr. Jackson "a link to the Legacy Fund's webpage where monthly performance reports are posted that list the fund's foreign holdings . . . and domestic holdings. . . ." <sup>5</sup> In response to Mr. Jackson's requests for "[t]he current list of all foreign investments in the Legacy Fund sorted by each asset/money manager" and "[t]he current list of all domestic investments in the Legacy Fund sorted by each asset/money manager" Ms. Mudder "informed Mr. Jackson where to find information on RIO's asset/money managers . . . and informed him that manager-specific position information . . . is confidential commercial and financial information under NDCC 44-04-18.4."<sup>6</sup> Ms. Mudder did provide Mr. Jackson with the "current commitment, i.e., the current amount of [Legacy Fund] mon[ies] distributed to the ND Growth Fund, as managed by 50 South Capitol."<sup>7</sup> Ms. Mudder denied Mr. Jackson's last two requests for "the specific dollar amounts . . . invested in the five companies/manager because, while holding level data for some funds is publicly available, these private market investments . . . are confidential commercial and financial information under NDCC 44-04-18.4."<sup>8</sup>

Ms. Mudder also informed Mr. Jackson that RIO could run a "position query" for Legacy Fund holdings by name and country, however, it would require RIO to perform a search for which they

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<sup>2</sup> Email from Tory Jackson, Jackson Law Firm, to Janilyn Murtha, Exec. Dir., RIO (Jan. 15, 2024, 10:33 AM) (emphasis in original).

<sup>3</sup> Email from Janilyn Murtha, Exec. Dir., RIO, to Tory Jackson, Jackson Law Firm (Jan. 15, 2024, 4:58 PM).

<sup>4</sup> Email from Sarah Mudder, Commc'ns & Outreach Dir., RIO, to Tory Jackson, Jackson Law Firm (Jan. 17, 2024, 11:44 AM); Letter from Janilyn Murtha, Exec. Dir., RIO, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Apr. 4, 2024).

<sup>5</sup> Letter from Janilyn Murtha, Exec. Dir., RIO, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Apr. 4, 2024).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

would need to charge a fee.<sup>9</sup> On January 29, 2025, Emmalee Riegler, Procurement/Records Coordinator for RIO, acknowledged the receipt of payment of Mr. Jackson's fee, and provided an additional response to Mr. Jackson.<sup>10</sup>

According to Mr. Jackson, RIO did provide lists of the Legacy Fund's foreign and domestic holdings.<sup>11</sup> However, RIO denied Mr. Jackson's request for foreign and domestic holdings records by asset/money manager, "claiming that 'manager specific position information is confidential commercial and financial information under NDCC 44-04-18.4.'"<sup>12</sup> Mr. Jackson also questions the responsiveness of the records provided on January 29, 2024.<sup>13</sup> He had requested "a breakdown of investments by country,"<sup>14</sup> however, the provided records include investments in the "Emerging Market Region," "Global Region," and "International Region"<sup>15</sup> but with no additional breakdowns provided.

## ISSUES

1. Whether RIO violated the open records laws by denying a request for records containing certain investment manager specific information provided to RIO as confidential under N.D.C.C. § 44-04-18.4.
2. Whether RIO violated the open records law by failing to provide a breakdown of its investments by country.

## ANALYSIS

### Issue 1

RIO is a public entity and is subject to the open record law.<sup>16</sup> "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>17</sup> Confidential records are "prohibited from being open to the public."<sup>18</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> Email from Emmalee Riegler, Procurement/Recs. Coordinator, RIO, to Tory Jackson, Jackson Law Firm (Jan. 29, 2024, 1:56 PM).

<sup>11</sup> Letter from Tory Jackson, Jackson Law Firm, to Off. of Att'y Gen. (Feb. 9, 2024).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> N.D.C.C. § 44-04-17.1(13)(a). *See* N.D.C.C. ch. 54-52.5 (establishing RIO).

<sup>17</sup> N.D.C.C. § 44-04-18(1). *See also* N.D.A.G. 2013-O-18; N.D.A.G. 2011-O-10.

<sup>18</sup> N.D.C.C. § 44-04-17.1(3).



Financial information and commercial information are “confidential if it is of a privileged nature and it has not been previously publicly disclosed.”<sup>19</sup> Financial information means (1) information pertaining to monetary resources of a person (2) that has not been previously publicly disclosed and (3)(a) that if the information were to be disclosed would impair the public entity’s future ability to obtain necessary information or (3)(b) would cause substantial competitive injury to the person from which the information was obtained.<sup>20</sup> Financial information “is defined broadly to include all information pertaining to finances or monetary resources.”<sup>21</sup> Commercial information means (1) information pertaining to buying or selling of goods and services that (2) has not been previously publicly disclosed and (3)(a) that if the information were to be disclosed would impair the public entity’s future ability to obtain necessary information or (3)(b) would cause substantial competitive injury to the person from which the information was obtained.<sup>22</sup>

“Information is of a privileged nature only if disclosing the records is likely to impair the public entity’s ability to obtain necessary information in the future, or if it is likely to cause substantial harm to the competitive position of the entity supplying the information.”<sup>23</sup> Whether a record contains commercial or financial information of a privileged nature is “generally a factual decision to be made by the public entity,”<sup>24</sup> because the public entity “is in the best position to determine the effect of disclosure.”<sup>25</sup> This office is required to base an open records opinion on “the facts given by the public entity” and generally defers to those “findings of fact unless the finding is unsupported.”<sup>26</sup>

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<sup>19</sup> N.D.C.C. § 44-04-18.4(1). This office has occasionally looked to federal case law to interpret the meaning of this statute because the definition in statute followed the language set out by the D.C. Circuit when interpreting the federal Freedom of Information Act, which did not have a statutory definition of “commercial or financial information.” See *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), *abrogated by Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427 (2019). The change of the federal approach has not changed the statutory definitions in N.D.C.C. § 44-04-18.4 and so does not impact the meaning of “commercial or financial information” under state law.

<sup>20</sup> N.D.C.C. § 44-04-18.4(2)(b).

<sup>21</sup> N.D.A.G. 2000-L-107, *citing* N.D.A.G. 1998-L-17.

<sup>22</sup> N.D.C.C. § 44-04-18.4(2)(a).

<sup>23</sup> N.D.A.G. 2019-O-12, *citing* N.D.C.C. § 44-04-18.4(2).

<sup>24</sup> N.D.A.G. 2019-O-12.

<sup>25</sup> N.D.A.G. 2019-O-12, *citing* N.D.A.G. 2014-O-02; N.D.A.G. 2005-O-06; N.D.A.G. 2004-O-01; N.D.A.G. 2002-O-08; N.D.A.G. 2000-L-107; N.D.A.G. 98-O-22; N.D.A.G. 98-L-17.

<sup>26</sup> N.D.C.C. § 44-04-21.1(1); N.D.A.G. 2019-O-12, *citing* N.D.A.G. 2014-O-02; N.D.A.G. 2005-O-06; N.D.A.G. 2004-O-01; N.D.A.G. 2002-O-08; N.D.A.G. 2000-L-107; N.D.A.G. 98-O-22; N.D.A.G. 98-L-17.

Here, RIO has asserted that the requested information was privileged and that the information has not previously publicly disclosed,<sup>27</sup> the latter of which Mr. Jackson does not dispute.<sup>28</sup> The privileged nature of the information is a factual determination made by the agency.<sup>29</sup> Therefore, this opinion will focus on whether the requested records contained financial or commercial information as defined in N.D.C.C. § 44-04-18.4.

First, to be considered financial information, the information must be “information pertaining to monetary resources of a person.”<sup>30</sup> The requests by Mr. Jackson were for the investments and moneys invested by each asset/money manager.<sup>31</sup> The requested records clearly fall within the broad definition of “financial information.”<sup>32</sup> Because the requested information is obviously “financial information,” and “financial information” and “commercial information” have identical additional elements, this office need not address whether the information may also constitute “commercial information.”<sup>33</sup>

Second, we must determine whether disclosure of the information would either (a) “impair the public entity’s future ability to obtain necessary information” or (b) “cause substantial competitive injury to the person from which the information was obtained.”<sup>34</sup> As RIO assessed:

Manager-specific positions constitute confidential . . . financial information because it is financial information relating to the buying and selling of securities that illustrate the manager’s investment strategies and have not been previously publicly disclosed. This information has commercial value that RIO on behalf of

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<sup>27</sup> Letter from Janilyn Murtha, Exec. Dir., RIO, to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Apr. 4, 2024).

<sup>28</sup> See Letter from Tory Jackson, Jackson Law Firm, to Off. of Att’y Gen. (Feb. 9, 2024) (focusing on the substantial competitive injury question).

<sup>29</sup> N.D.A.G. 2019-O-12.

<sup>30</sup> N.D.C.C. § 44-04-18.4(2)(b).

<sup>31</sup> Letter from Tory Jackson, Jackson Law Firm to Off. of Att’y Gen. (Feb. 9, 2024).

<sup>32</sup> See N.D.A.G. 2000-L-107, *citing* N.D.A.G. 1998-L-17.

<sup>33</sup> Compare N.D.C.C. § 44-04-18.4(2)(a) (defining commercial information) with N.D.C.C. § 44-04-18.4(2)(b) (defining financial information). RIO assumes in its response to this office that the information is also commercial information. Letter from Janilyn Murtha, Exec. Dir., RIO, to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Apr. 4, 2024). N.D.C.C. § 44-04-18.4 does not define “goods” and “services,” and this office’s prior opinions have not specifically addressed the definitions of these terms. See, e.g., N.D.A.G. 2014-O-02 (customer list of North Dakota Mill and Elevator Association is commercial information); N.D.A.G. 2004-L-25 (textbook list at UND Barnes & Noble Bookstore is a commercial information); N.D.A.G. 2002-O-09 (consultant’s strategies or plans are trade secrets or commercial information). Because this opinion can be resolved without addressing the definitions of “goods” and “services” under N.D.C.C. § 44-04-18.4, these issues are not addressed at this time.

<sup>34</sup> N.D.C.C. § 44-04-18.4(2)(b).



the state pays up to \$100 million in manager fees every year to receive. Releasing such information has the potential to cause substantial competitive injury to both the investment manager from the public disclosure of its investment strategy as well as the potential to negatively impact the performance of the public funds invested by those managers. . . . Disclosure would also greatly impair RIO's ability to obtain such information in the future because investment managers can terminate a client relationship if the client is unable to maintain the confidentiality of its investment strategy.<sup>35</sup>

In other words, RIO states that the investment managers would suffer substantial competitive injury by disclosure of that information, and RIO's ability to obtain the information in the future would be impaired by disclosing the information. Additionally, RIO found that the funds it invests would be negatively impacted by disclosing how much it has invested in any given fund manager because:

The ability for the Fund to make investments in underlying funds without (i) other fund managers or (ii) other investors knowing the fact that the Fund has invested in any given fund manager and/or the size of the Fund's investment in any such manager directly impacts the Fund's negotiating power in connection with such investments, which the Fund is able to utilize to negotiate favorable terms. If the investment information is made publicly available, the Fund and any other co-investors would suffer substantial competitive injury, as the Fund may lose negotiating leverage with underlying managers or potentially lose investment opportunities altogether.<sup>36</sup>

In essence, RIO itself would be suffering both an impairment of its future ability to obtain the necessary information, but also substantial competitive injury as a result of the information's disclosure. Even the disclosure of aggregate information regarding a fund manager's position can result in the need for confidentiality.<sup>37</sup> RIO's assessment of the privileged nature of the requested records is reasonable, and I therefore conclude that RIO substantially complied with N.D.C.C. § 44-04-18 by denying a request for financial information which is confidential under N.D.C.C. § 44-04-18.4.

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<sup>35</sup> Letter from Janilyn Murtha, Exec. Dir., RIO, to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Apr. 4, 2024).

<sup>36</sup> *Id.*

<sup>37</sup> *See, e.g.*, 15 U.S.C. § 78m(f)(3) (authorizing Securities and Exchange Commission to exempt institutional investment managers or security from the reporting of aggregate information).

Issue 2

“Upon a request for a copy of specific public records,” a public entity “shall furnish the requester one copy of the public records requested.”<sup>38</sup> The public entity must either provide or deny the record in a reasonable time.<sup>39</sup> A public entity does not have to “create or compile a record that does not exist” and only has to search the records in its possession.<sup>40</sup> In addressing such matters, an attorney general opinion issued under N.D.C.C. § 44-04-21.1 shall be based on “the facts given by the public entity.”<sup>41</sup>

Mr. Jackson requested “a breakdown of investments by country.”<sup>42</sup> The records RIO provided included investments organized by “Emerging Market Region,” “Global Region,” and “International Region.”<sup>43</sup> According to RIO, the records including investments in the Emerging Market, Global, and International Regions provided to Mr. Jackson were “comingled or mutual funds and therefore not limited to a single country.”<sup>44</sup> RIO’s position is that they do not “have a view into these holdings, meaning the Country(ies) of Risk are not a part of the holdings’ records” and they simply provided Mr. Jackson with “the unaltered record from [their] custodian bank.”<sup>45</sup>

Based on the information provided to this office, requested breakdown by country for the Emerging Market, Global, and International Regions does not exist.<sup>46</sup> While there may have been clearer ways for RIO to explain the regional breakdown to Mr. Jackson, RIO was under no legal obligation to create records that did not exist. I conclude that RIO complied with N.D.C.C. § 44-04-18 because the requested records do not exist.

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<sup>38</sup> N.D.C.C. § 44-04-18(2). *See also* N.D.A.G. 2023-O-09, *citing* N.D.C.C. § 44-04-18(2); N.D.A.G. 2023-O-08, *citing* N.D.C.C. § 44-04-18(2); N.D.A.G. 2013-O-18, *citing* N.D.C.C. § 44-04-18(2); N.D.A.G. 2007-O-06, *citing* N.D.C.C. § 44-04-18(2).

<sup>39</sup> N.D.C.C. § 44-04-18. *See also* N.D.A.G. 2023-O-09, *citing* N.D.C.C. § 44-04-18; N.D.A.G. 2023-O-08, *citing* N.D.C.C. 44-04-18.

<sup>40</sup> N.D.C.C. § 44-04-18(4). *See also* N.D.A.G. 2023-O-09, *citing* N.D.C.C. § 44-04-18(4); N.D.A.G. 2023-O-08, *citing* N.D.C.C. § 44-04-18(4); N.D.A.G. 2023-O-07, *citing* N.D.C.C. § 44-04-18(4).

<sup>41</sup> N.D.C.C. § 44-04-21.1(1). *See also* N.D.A.G. 2024-O-02; N.D.A.G. 2015-O-14; N.D.A.G. 2007-O-06, *citing* 44-04-21.1(1).

<sup>42</sup> Letter from Tory Jackson, Jackson Law Firm, to Off. of Att’y Gen. (Feb. 9, 2024).

<sup>43</sup> *Id.*

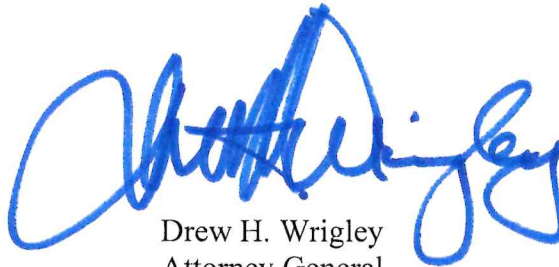
<sup>44</sup> Letter from Janilyn Murtha, Exec. Dir., RIO, to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Apr. 4, 2024).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

### CONCLUSIONS

1. RIO did not violate the open records law by denying a request for records containing certain investment manager specific information provided to RIO as confidential financial information under N.D.C.C. §44-04-18.4.
2. RIO did not violate the open records law when it did not provide a breakdown of investments by country as RIO is not obligated under N.D.C.C. § 44-04-18 to create records that do not exist.



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cc: Tory Jackson