

N.D.A.G. Letter to Govig (Dec. 19, 1991)

December 19, 1991

Mr. Paul Govig
Business Expansion Specialist
Department of Economic Development
& Finance
1833 E Bismarck Expressway
Bismarck, ND 58504

Dear Mr. Govig:

Thank you for your November 18, 1991, letter on behalf of the Board of Directors of North Dakota Future Fund, Inc. (the North Dakota economic development finance corporation established by N.D.C.C. ch. 10-30.1) requesting clarification of the open meeting requirements for the North Dakota Future Fund (the primary sector development fund established by N.D.C.C. § 10-30.1-10). Please excuse the delay in responding.

Art. XI, § 5 of the North Dakota Constitution provides that "[a]ll meetings 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, shall be open to the public." N.D. Const. Art. XI, § 5. A similar provision applies to records of public bodies. "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, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours." N.D. Const. Art. XI, § 6. Exceptions to these provisions must be specific. Hovet v. Hebron Pub. School Dist., 419 N.W.2d 189 (1988). There is a strong presumption in North Dakota that any ambiguities in the open meetings/records laws be resolved in favor of opening the meeting.

Meetings and records of the North Dakota Future Fund, Inc. are governed by section 10-30.3-07.

10-30.3-07. Confidentiality of corporation records. The following records of the corporation are confidential:

1. Commercial or financial information, whether obtained by the corporation directly or indirectly, of any entity in which an equity interest is purchased or considered for purchase, to which a loan has been made, or capital otherwise provided, under this chapter.
2. Internal or interagency memorandums or letters which would

not be available by law to a party other than in litigation with the corporation.

N.D.C.C. § 10-30.1-07. This statute on its face applies only to the records of the Future Fund; however, this office has previously determined that portions of meetings of a public body, when discussing records exempt from the open records law, may be closed to the public. Letter to Allen Person from Nicholas J. Spaeth, Attorney General, January 21, 1988. This exception applies only to discussions of those records determined to be confidential pursuant to North Dakota's open meetings, open records law.

The terms "commercial or financial information" contained in section 10-30.3-07 encompass a broad range of information. Arguably, any information from a business may be considered commercial. However, section 44-04-18.4 provides that for commercial and financial information to be considered confidential, that information must be of "a privileged or confidential nature." N.D.C.C. § 44-04-18.4. Information of a privileged or confidential nature is that which is "intended to be held in confidence or kept secret," or would otherwise give a competitor an unfair advantage if disclosed. BLACK'S LAW DICTIONARY 297 (6th Ed. 1990). Commercial and financial information, such as marketing plans, pricing strategy, nonpublic financial statements, contract negotiations and the like would therefore not be subject to disclosure. Trade secrets, such as formulas, customer lists, procedures, and the like are also not subject to public disclosure. Each applicant to the Future Fund is different, and has different confidentiality requirements.

Further protection for economic development records is contained in section 44-04-18.2 of the North Dakota century Code.

44-04-18.2. Certain economic development records exempt from disclosure.

1. The following economic development records and information are not public records subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota.
 - a. Records and information pertaining to a prospective location of a business or industry, including the identity, nature, and location of the business or industry, when no previous public disclosure has been made by the business or industry of the interest or intent of the business or industry to locate in, relocate within, or expand within this state. This exemption does not include records pertaining to the application for permits or licenses necessary to do business or to expand business operations within this state, except as otherwise provided by law.
 - b. Trade secrets and commercial or financial information

received from a person, business, or industry that is interested in or is applying for or receiving financing or technical assistance, or other forms of business assistance.

N.D.C.C. § 44-04-18.2(1). In addition to trade secrets, commercial, and financial information, the above section provides that the interest of a business in a new location in North Dakota is confidential, as well as the prospective location and nature of that business, unless previous disclosure of that information has been made by the business.

The above sections obligate the Future Fund to treat certain information submitted by applicants in a confidential manner. The confidentiality requirement is for the benefit of the applicants. As such, confidential information may be disclosed only by the applicants, or with the applicants' approval. An applicant may choose to disclose confidential information so long as such disclosure does not disclose confidential information belonging to another entity. For example, if there were two businesses applying for assistance, directly or indirectly, which were engaged in negotiations with each other, disclosure by one entity may not include the disclosure of its relationship with the other entity, without the prior consent of the other entity. Further, an applicant's refusal to allow the disclosure of confidential information may not be used against the applicant in order to deny assistance which would otherwise have been provided, nor may a waiver of confidentiality be used to favor an applicant which so discloses.

To assist in satisfying the public's right to know with the Future Fund's obligation to treat certain information submitted by applicants as confidential, I recommend that a representative of the Future Fund, or the Department of Economic Development and Finance, meet with each applicant to the Future Fund at the time their application is submitted. At this time, the application should be reviewed, and an agreement could be reached with the applicant regarding which information is confidential and which information is subject to public disclosure. If the applicant requests that more information be kept confidential than is allowed by statute, the applicant would be allowed to withdraw its application prior to that application becoming a record of the Future Fund. While the Future Fund is obligated to treat certain information as confidential, it is only obligated to the extent allowed by statute. Once the application is accepted by the Future Fund, a summary of nonconfidential information should be drafted and made available to the public.

I would further recommend that the Future Fund establish a review process, so that if the Fund's determination of which information is confidential is challenged, either by the applicant or by a member of the public seeking disclosure, there will be a procedure in place to ensure that the public's right to know is protected.

It is therefore my opinion that the name of the applicant, its officers and directors, its address, the nature of its business and that information included in the application determined by the Future Fund that, if disclosed, would not give a competitor an unfair advantage are subject to disclosure. If the application is directed toward obtaining a

particular piece of property within the state of North Dakota, no information concerning the interest of the applicant in the prospective location may be disclosed by the Future Fund until disclosure is made by the applicant, or the location becomes no longer prospective, that is, the property is obtained, or is no longer being considered. Discussion concerning confidential information obtained from an applicant must be held during the executive session portion of a Future Fund meeting. Discussion concerning whether investment in an applicant conforms to the Future Fund's statutory distribution, fund diversification, and public policy requirements must be held during that portion of the meeting open to the public.

Final action on every application accepted by the Future Fund, including approval, rejection, or a decision not to review the application, must be made by motion at a meeting open to the public. N.D.C.C. § 44-04-18.2(3). If an application receives approval from the Future Fund, the amount and key provisions of the investment are subject to disclosure. If an application is rejected or a decision has been made not to review an application, the reason for the decision to reject, or not review, may be made in general terms. A rejection which could reveal confidential information, such as commenting on the applicant's creditworthiness, would violate the letter and spirit of the law protecting confidential information. I recommend that a general statement reflecting that the rejection was based on one or more factors, including the applicant's creditworthiness, statutory guidelines, public policy reasons, or the Fund's diversification requirements be used. This will show that the applicant was not arbitrarily rejected, but will not disclose confidential information.

I trust this discussion is helpful to you.

Sincerely,

Nicholas J. Spaeth

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