

N.D.A.G. Letter to Sand (Dec. 18, 1992)

December 18, 1992

Rosellen M. Sand
Deputy Secretary of State
Capitol Building
600 East Boulevard Avenue
Bismarck, ND 58505-0500

Dear Ms. Sand:

Thank you for your June 16, 1992, letter questioning whether the privacy provisions of N.D.C.C. § 44-04-18.4 apply to information reported under N.D.C.C. ch. 10-23. I apologize for the delay in responding.

I understand your request stems from an out-of-state corporation's request that the financial information submitted on its annual report, required by N.D.C.C. § 10-23-01, be held confidential. The corporation bases its request on the fact that it was required by N.D.C.C. § 10-22-01 to file as a foreign corporation with the state of North Dakota in order to receive a manufacturer's license under N.D.C.C. § 53-06.1-14.

N.D.C.C. § 10-23-01 requires all domestic corporations and all foreign corporations authorized to transact business in the state to file an annual report. The annual report must include, among other things, a statement of the amount of "stated capital of the corporation", a statement of the value of all property owned by the corporation, the value of the property of the corporation located within the state, and a statement of "the gross amount of business transacted by the corporation" for the past 12 months, both in total and "at or from places of business in this state." N.D.C.C. § 10-23-01(7) and (8). Annual reports containing such financial information have been required since 1957.

N.D.C.C. § 53-06.1-14 requires every manufacturer of charitable gaming tickets or paper bingo cards and every distributor to apply annually for a license from the Attorney General. None of the financial information required by the annual report is required under the provisions of N.D.C.C. § 53-06.1-14.

N.D.C.C. § 44-04-18.4 provides as follows:

Confidentiality of trade secrets and commercial and financial information. Trade secrets and commercial and financial information are confidential if of a privileged or confidential nature and obtained by any state agency, institution, department, or board from any person or organization under a contract or license agreement entered into by any state agency, institution, department, or board. The term "trade secrets" includes a computer software program and components of a computer software

program which are subject to a copyright or a patent, and any formula, pattern, compilation, program, device, method, technique, or process supplied to any state agency, institution, department, or board which is the subject of efforts by the supplying person or organization to maintain its secrecy and that may derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons or organizations that might obtain economic value from its disclosure or use.

(Emphasis supplied.)

N.D.C.C. § 44-04-18.4 was enacted by the 1989 Legislature. 1989 N.D. Sess. Laws ch. 542, § 1. N.D.C.C. § 44-04-18.4 only applies to commercial and financial information obtained by any state agency from a corporation under a contract or license agreement entered into by the state agency. A license agreement contemplates an arrangement whereby the individual holding a license grants some rights or privileges to another party, and thus is similar to a contract. N.D.C.C. § 44-04-18.4 does not cover specific information required by a state agency or board in order to grant a business or professional license to an individual or corporation. In this particular case, the financial information in question is required on the annual report which must be filed by all domestic corporations and foreign corporations authorized to transact business in North Dakota. It is not being received by the state agency under a license granted by the out-of-state corporation to the state agency, and, therefore, may not be kept confidential pursuant to N.D.C.C. § 44-04-18.4.

In conclusion, it is my opinion that N.D.C.C. § 44-04-18.4 does not provide an exception to the Open Records Act for financial information provided in annual reports filed pursuant to N.D.C.C. § 10-23-01.

Sincerely,

Nicholas J. Spaeth

jfl