

STATE OF NORTH DAKOTA
ATTORNEY GENERAL'S OPINION 94-F-19

Date issued: July 1, 1994
Requested by: Senator Jerome Kelsh

- QUESTION PRESENTED -

Whether records relating to the State Labor Commissioner's payroll, accounting, telephone usage, and employee travel claims are public records, open and available for inspection under North Dakota's open records law.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that records relating to the State Labor Commissioner's payroll, accounting, telephone usage, and employee travel claims are public records open and available for inspection under North Dakota's open records law.

- ANALYSIS -

North Dakota's open records law provides, in part:

1. 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.

N.D.C.C. ? 44-04-18(1).

The North Dakota Supreme Court has interpreted this section on a number of occasions. The court has held that public records are not limited to those records which are required by law to be kept and maintained. In City of Grand Forks v. Grand Forks Herald, the court stated that the term "record" implies that a document of some official import be retained by the public officer or employee in the course of his public duties. City

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of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572, 578 (N.D. 1981).

N.D.C.C. ? 34-05-03 provides, in part:

All public officers and all employers shall furnish to the commissioner of labor such information as the commissioner may request relating to their respective offices or businesses. The information obtained must be preserved, systemized, and tabulated by the commissioner. Information concerning the business or affairs of any person may not be divulged or made public by the commissioner or anyone in the employ of the commissioner's office; provided, that the commissioner may provide a list of the names and addresses of employers to other agencies or to a private entity for the purpose of jointly publishing or distributing publications or other information as provided in section 54-06-04.3.

This quoted portion of N.D.C.C. ? 34-05-03 does not specifically describe the information concerning the business or affairs which is the subject of the prohibition. In 1985, an Attorney General's opinion discussed N.D.C.C. ? 34-05-03 for the purpose of determining whether it provided an exception to the open meetings law (N.D.C.C. ? 44-04-19) for proceedings to determine wage claims under N.D.C.C. ? 34-14-05. Letter from Attorney General Nicholas J. Spaeth to Labor Commissioner Orville W. Hagen (May 17, 1985). That 1985 opinion determined that the disclosure prohibitions of N.D.C.C. ? 34-05-03 were sufficient to provide an exception to the open meetings law under N.D.C.C. ? 44-04-19 and that those wage collection "hearings" did not have to be open to the public. The 1985 opinion, however, did not deal with exactly what records or information are covered by the disclosure prohibition in N.D.C.C. ? 34-05-03 and, consequently, does not resolve the question presented here.

In Hovet v. Hebron Pub. Sch. Dist., 419 N.W.2d 189 (N.D. 1988), a teacher argued that records in a personnel file should be closed because a teacher nonrenewal hearing under N.D.C.C. ? 15-47-38 authorized a closed school board meeting to consider the issue and the reasons for nonrenewal must be drawn from specific and documented findings arising from

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formal reviews conducted by the board with respect to the teacher's performance. The North Dakota Supreme Court rejected that reasoning and determined that the teacher's personnel file, which would be reviewed at the closed meeting, was still an open record in North Dakota because of the requirement that an exception to the open records statute be specifically provided by law, rather than implied. The court noted the word "specific" usually meant "explicitly set forth; particular, definite," as contrasted with "implied" which meant "suggested, involved, or understood although not clearly or openly expressed." The court held that in order for a record to be excepted from the open records law, the Legislature must specifically address the status of that type of record -- e.g., statements that a certain type of record is confidential or that it is not open to the public.

In a more recent case, the North Dakota Supreme Court determined that even though certain price and volume data of a public utility was a trade secret under North Dakota's Uniform Trade Secrets Act, N.D.C.C. ch. 47-25.1, that fact did not automatically exempt the information from being subject to disclosure under the open records law when filed with the North Dakota Public Service Commission because it was required by law to be kept, maintained, and publicly filed. The court reiterated that the Legislature must directly address the status of the record in question for a specific exception, because by the plain terms of the law exceptions may not be implied. Northern States Power Company v. North Dakota Public Service Commission, 502 N.W.2d 240, 243 (N.D. 1993).

As noted above, N.D.C.C. ? 34-05-03 does not state specifically what "business or affairs" information is to be collected, tabulated, systematized, and kept secret. It would appear, however, that the information to be kept confidential is the information obtained from the officer or employer and the information which is obtained from any investigation by the Commissioner of Labor. See C.L. 1913 ? 164 (predecessor to N.D.C.C. ? 34-05-03). There is no reason to believe that the record of phone calls made by the agency showing only the number called, the number called from, and the length of the call or travel records of state employees showing destinations and the purpose of the travel were meant to be included within the information to be kept confidential. Such basic agency financial and equipment usage records (probably available at both the office of the Labor Commissioner and the Office of Management and Budget) do not reveal "private business or

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affairs" information referred to in N.D.C.C. ? 34-05-03.

The fact that a Labor Department employee called or visited a North Dakota employer does not indicate the purpose of the call or visit. The contact may have been to conduct research, return a call from the employer, or for some other reason. The fact of the contact does not reveal that an investigation was being done, nor whether information was being provided by the employer or by the Labor Department. Merely because an employer contacted the Labor Department or the Labor Department contacted an employer does not indicate that the Labor Commissioner was taking action against the employer. Therefore, it is my opinion that the information which the State Labor Commissioner's general phone records or travel claims contain are not covered by any exemption to the North Dakota open records law.

It is recognized that other states with laws and court decisions different than North Dakota's have dealt with telephone usage records in a way contrary to this opinion. In Rogers v. Superior Court, 23 Cal. Rptr.2d 412 (Cal. App. 1993), a free-lance columnist requested public records from the city of Burbank. The request included records of telephone calls made and received by certain city council members. The California Court of Appeal held that the records were not subject to disclosure under the California Public Records Act, West's Annotated California Government Code ? 6255, known as the "catch all" exemption. That "catch all" section provides:

The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.

West's Annotated California Government Code ? 6255 (emphasis added).

North Dakota has no statute applicable to the issue at hand giving agencies authority to determine in a particular case whether the public interest served by not making these records public outweighs the public interest served by disclosure of the records. In North Dakota there must be a specific

provision of law making records exempt from disclosure.

In North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 601 A.2d 693 (N.J. 1992), the New Jersey Supreme Court considered a case where the newspaper company wanted access to county records concerning telephone toll billing records of the number called, the date, the time, the length of the call, and the charge for the call. The New Jersey Supreme Court held the phone records not available under both the New Jersey Right-to-Know Law, New Jersey Statutes Annotated ? 47:1A-2, and New Jersey common law. The New Jersey Supreme Court stated that the phone records were not available under the New Jersey Right-to-Know Law because they were not "required by law to be made, maintained or kept on file." That court also held that under New Jersey common law the records with respect to the identity of the persons called and the telephone number were not available under a "balancing of interests" test used in common law open record cases in New Jersey without a showing of public need that outweighed privacy interests involved.

As noted above, the North Dakota Supreme Court has determined that records of North Dakota public bodies are open and available for inspection if they are contained in files of government bodies whether or not the records are required by law to be kept. Further, North Dakota has no general balancing of interest test pursuant to statute or judicial ruling to protect identities of those that have contacted government. A specific statute rendering certain records confidential or not subject to the open records law is required in North Dakota to exempt records from disclosure. Although the North Dakota Legislature has exempted its own telephone records showing the identification of persons and their phone numbers from N.D.C.C. ? 44-04-18 and Article XI, Section 6 of the North Dakota Constitution (N.D.C.C. ? 44-04-18.6), it has not created any such specific exemptions for records of the State Labor Commissioner.

Because no statutes specifically exempt the payroll, accounting, telephone usage or employee travel claim records of the State Labor Commissioner from the open records law or make the information they contain confidential, it is my opinion that those records are public records which must be held open and available for inspection pursuant to N.D.C.C. ? 44-04-18. Further, the records must be available for inspection in each state agency which maintains such records.

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- EFFECT -

This opinion is issued pursuant to N.D.C.C. ? 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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