



Wyoming Department of Agriculture

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MEMO

TO: All Conservation Districts
FROM: Lucy Hansen *Lucy*
DATE: June 23, 2003
SUBJECT: Attorney General's Opinion

Recently, we requested an Attorney General's opinion concerning whether or not bid proposals are considered public information and required to be released as such. The Attorney General determined that the proposals are considered public information and should be provided to members of the public who request them. However, according to the opinion, the District can withhold "letters of reference, trade secrets and commercial or financial data submitted as part of a bid package."

Attached, please find a copy of the opinion. If you have any questions, please feel free to call me at (307) 777-7323.

cc: WACD

CC-NR



WYOM. DEPT. OF
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May 12, 2003

John Etchepare, Director
Wyoming Department of Agriculture
2219 Carey Avenue
Cheyenne, Wyoming 82002

RE: Conservation District Release of Information

Dear John:

You have requested our opinion on the following question on behalf of the Powder River Conservation District:

QUESTION: Is the Powder River Conservation District required to make public information pertaining to the bid proposals? If so, specifically what type of information from the proposals are they allowed to release?

The Public Records Act is found at WYO. STAT. § 16-4-101 *et seq.* Generally, the policy of the Act is that all public records shall be open for inspection by any person at reasonable times, except as provided in the Act or as otherwise provided by law. WYO. STAT. § 16-4-202(a).

The term "public records" is defined at WYO. STAT. § 16-4-201(a)(v) as follows:

'Public records' when not otherwise specified includes the **original and copies of any** paper, correspondence, form, book, photograph, photostat, film, microfilm,

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sound recording, map, drawing or other document, regardless of physical form or characteristics **that have been made by the state of Wyoming and any counties, municipalities and political subdivisions thereof** and by any agencies of the state, counties, municipalities and political subdivisions thereof, **or received by them in connection with the transaction of public business, except those privileged or confidential by law;** (emphasis added)

"Political subdivision" means "every county, city and county, city, incorporated and unincorporated town, school district and special district within the state." WYO. STAT. § 16-4-201(a)(iv). "Official custodian" means "any officer or employee of the state or any agency, institution or political subdivision thereof, who is responsible for the maintenance, care and keeping of public records, regardless of whether the records are in his actual personal custody and control." WYO. STAT. § 16-4-201(a)(ii).

The Wyoming Conservation Districts Law is found at WYO. STAT. §§ 11-16-101 through 11-16-134. The act declares it is the policy of the Legislature to provide for the conservation of the soil, and soil and water resources of this State. WYO. STAT. § 11-16-103(b). WYO. STAT. § 11-16-113(a)(ii) indicates that upon creation a conservation district is a governmental subdivision and a public body, corporate and politic. In addition, WYO. STAT. § 11-16-102(a)(v) defines "district" or "conservation district" as "a governmental subdivision of this state, and a public body corporate and politic, organized in accordance with this act." It would seem clear that a conservation district is a governmental subdivision of the state of Wyoming and subject to the Public Records Act.

The applicable portions of the public records act found in WYO. STAT. § 16-4-203 are:

(a) The custodian of any public records shall allow any person the right of inspection of the records or any portion thereof except on one (1) or more of the following grounds or as provided in subsection (b) or (d) of this section:

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(i) The inspection would be contrary to any state statute;

(ii) The inspection would be contrary to any federal statute or regulation issued thereunder having the force and effect of law; or

(iii) The inspection is prohibited by rules promulgated by the supreme court or by the order of any court of record.

* * *

(d) The custodian shall deny the right of inspection of the following records, unless otherwise provided by law:

* * *

(iv) Letters of reference;

(v) Trade secrets, . . . and confidential commercial financial, . . . data furnished by or obtained from any person; (emphasis added)

Generally, the Public Records Act is to receive a liberal construction in favor of disclosure and against withholding, and exemptions are to be construed narrowly. *Sheridan Newspapers, Inc. v. City of Sheridan*, 660 P.2d 785, 793 (Wyo. 1983). The policy and dominant object of Public Records Act is disclosure, not secrecy; exemptions, therefore, are to be construed narrowly. *Laramie River Conservation Council v. Dinger*, 567 P.2d 731-733 (Wyo. 1977). The court explained in *Laramie River Conservation Council v. Dinger, supra*:

The disclosure acts promote within the agencies affected a sensitiveness to the needs of the public and make democratic government function in a modern society. With some necessary exceptions, recognized by Wyoming's records and meetings act, state agencies must act in a fishbowl . . .

Id. 567 P.2d at 734.

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"[I]t is for the government to remember that the written, viewing and broadcasting press are the eyes and ears of the people." *Sheridan Newspapers Inc., supra*, 660 P.2d at 791. In *Houghton v. Franscell*, 870 P.2d 1050, 1056 (Wyo. 1994), the Court held the Wyoming Public Records Act required disclosure of physician recruitment contracts, and were not hospital records under the exception found at WYO. STAT. § 16-4-203(d)(vii).

In *Sublette County Rural Health Care v. Miley*, 942 P.2d 1101 (Wyo. 1997), the Wyoming Supreme Court reviewed the statutory exception found at WYO. STAT. § 16-4-203(d)(v), relating to **confidential** commercial and financial data. In its analysis the Court cites *National Parks and Conservation Ass'n. v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), which addressed the commercial and financial exception found in the federal Freedom of Information Act. The case involved agency records concerning concessions operated in the national parks. A two-fold justification for the exemption of commercial material was noted:

- (1) encouraging cooperation by those who are not obliged to provide information to the government, and
- (2) protecting the rights of those who must.

The *Morton* court concluded:

To summarize, commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Id. 498 F.2d at 770.

The Wyoming Supreme Court in *Sublette County Rural Health Care v. Miley, supra*, adopted the above-cited criteria for discerning confidential, commercial or financial data under the Wyoming Public Records Act. The court held that the disclosure of the doctors' financial reports would likely impair the future ability of the District to obtain necessary information. The court explained "[T]he doctors could not be expected to agree to turn over sensitive financial data

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if the District, in turn, is required by law to disseminate that information to the public." *Id.* 942 P.2d at 1104. Thus, the doctors' financial reports were held to be confidential.

The Wyoming Supreme Court also distinguished between "compelled information" and "voluntary information". The court explained:

Furthermore, if the information had been furnished as a completely voluntary submission, the first test under the two part criteria of *National Parks* would furnish an adequate basis for a determination of confidentiality.

Id. 942 P.2d at 1104.

The test for confidentiality of voluntarily provided information is whether "it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Id.* 942 P.2d at 1103.

The requirements for a custodian relative to the withdrawal of records or portions thereof have been provided by the Wyoming Supreme Court which said:

[I]n Wyoming, public records . . . are to be open to the public unless the custodian—after restricting his decision-making to areas authorized by statute and after weighing the competing interests involving the public's right to know against specific statutory mandate and perceived harm to the public interest through disclosure—decides to withdraw the record or a part thereof. When he does withdraw records, reasons therefore must be given so that these reasons may provide grounds for review should court action result... In that event, the custodian must be able to satisfy the court that, in the balancing process, statutory withdrawal, when viewed in the spotlight of public-interest protections, outweighs the public policy which emphasizes disclosure. If, however, the custodian gives either no reasons or inadequate reasons for withdrawal, appropriate legal action is available to force an automatic disclosure of the records.

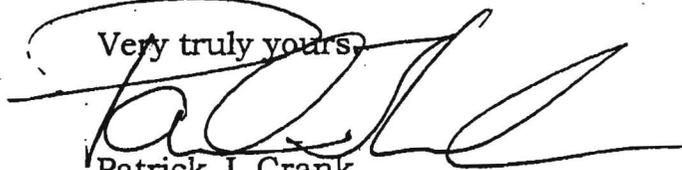
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Sheridan Newspapers, Inc., supra, at 798-799.

It is our understanding that the District recently solicited bid proposals for a water quality consultant. The successful bidder was awarded a contract to provide the services required in exchange for a one time lump-sum payment.

We believe the bid proposals are "public records" as defined in WYO. STAT. § 16-4-201(a)(v). As such, they must be provided to those members of the public who so request. However, the Conservation District may withhold letters of reference, trade secrets and confidential commercial or financial data submitted as part of a bid package. If any such information is withheld, it must be identified and the statutory basis for its being withheld provided to the person who made the request.

Very truly yours,



Patrick J. Crank
Attorney General

Michael L. Hubbard
Michael L. Hubbard
Deputy Attorney General



Kennard F. Nelson
Senior Assistant Attorney General

PJC:MLH:KFN:cc