

**OPEN RECORDS AND MEETINGS OPINION
2008-O-05**

DATE ISSUED: February 29, 2008

ISSUED TO: Workforce Safety and Insurance

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Chad Nodland asking whether Workforce Safety and Insurance ("WSI") violated the open records law when it denied Mr. Nodland's request for records pursuant to N.D.C.C. § 32-12.2-11, and because WSI did not provide Mr. Nodland with an index of the records that were not provided to him.

FACTS PRESENTED

On November 5, 2007, Kay Grinsteinner, Internal Audit Manager of WSI, submitted an e-mail to WSI's Board of Directors and Sandy Blunt, WSI's the CEO, with four documents attached: (1) a November 5, 2007, letter written by Grinsteinner to WSI's board of directors; (2) April 11, 2007, meeting notes of an internal WSI staff meeting involving Injury Services (Claims) employees and other WSI staff; (3) an August 2, 2007, research paper drafted by Kate Peterson, Intern Legal Clerk to Rob Forward, staff counsel for WSI, concerning the legal definition of "Objective Medical Evidence;" and (4) an undated document drafted by Rob Forward discussing Occupational Disability Guidelines.

On November 7, 2007, Mr. Nodland transmitted an e-mail to WSI requesting a copy of any documents, e-mails, memoranda, or other public records Ms. Grinsteinner, or anybody else on her behalf, disclosed to any or all of the members of WSI's Board of Directors and Sandy Blunt on November 5, 2007.¹ Mr. Nodland asked for electronic copies of the same records, if they were available, and further requested that "[i]f anything is withheld or redacted, please provide a listing of what has been withheld or redacted, along with a detailed explanation as to why it was withheld or redacted."

¹ E-mail from Editor [Chad Nodland] to Mark Armstrong, WSI (Nov. 7, 2007, 5:07 p.m. CST).

The next day, WSI provided Mr. Nodland with a copy of the staff meeting minutes and the two memoranda that were attached to Ms. Grinsteinner's letter.² WSI, however, withheld Ms. Grinsteinner's e-mail and the November 5 letter attached to the e-mail explaining: "[o]ther documents are not being produced in response to your request as these documents are not subject to disclosure pursuant to NDCC 32-12.2-11."

ISSUES

1. Whether WSI's written denial of Mr. Nodland's request was sufficient under N.D.C.C. § 44-04-18(7).
2. Whether WSI violated N.D.C.C. § 44-04-18 by failing to provide a list describing the records withheld and by failing to adequately describe the legal authority for withholding the records.

ANALYSIS

Issue One

Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection.³ The word "[l]aw" as defined in N.D.C.C. § 44-04-17.1(7), includes "federal statutes, applicable federal regulations, and state statutes."⁴ A denial of an open records request must indicate the public entity's specific authority for denying access to the requested records and must be made in writing, if requested.⁵

Here, WSI provided Mr. Nodland with a written denial and cited N.D.C.C. § 32-12.2-11 as statutory authority for denying the record that Mr. Nodland's requested. WSI gave the following explanation to this office:

The content of an initial document [a memorandum and discussion notes prepared by Ms. Grinsteinner] led internal counsel to conclude that an incident report should be filed with Risk Management on October 29th, 2007. . . . WSI's position is that based on their content [Ms. Grinsteinner's letter and attachments and the e-mail transmitting them] and that they have been filed with the Division of Risk Management, they are privileged pursuant to N.D.C.C. §32-12.2-11.⁶

² E-mail from Mark Armstrong to Editor [Chad Nodland] (Nov. 8, 2007, 11:19 a.m.).

³ N.D.C.C. § 44-04-18.

⁴ N.D.C.C. § 44-04-17.1(7)

⁵ N.D.C.C. § 44-04-18(7).

⁶ Memorandum from Anne Jorgenson Green, Staff Counsel WSI, to Mary Kae Kelsch, Assistant Attorney General (Nov. 26, 2007).

North Dakota Century Code § 32-12.2-11 exempts the following records:

- a. Records containing information relating to that portion of the funds or liability reserves of the risk management fund established for the purpose of satisfying a specific pending or reasonably predictable claim against the state or a state employee; and
- b. Incident reports, investigation reports, or other risk management fund records of a pending or reasonably predictable claim against the state or a state employee.

In order to be exempt under this section, the records must be one of those listed in subsections a and b. Here, the documents claimed by WSI to be exempt are not incident reports, investigation reports, risk management fund records, nor records containing information relating to that portion of the risk management fund or liability of the risk management fund.

Although Ms. Grinsteinner created the record for the purpose of alerting the WSI board of directors of her perceived problems and speculation about liability, the record did not report a specific incident or claim of injury that is within the scope of N.D.C.C. ch. 32-12.2. The mere fact that a record uses words such as “liability” or “damages” does not amount to an incident or potential claim of injury.

In addition, the fact that the subject matter of a record may relate to a previously filed incident report is an insufficient basis to make the record privileged under N.D.C.C. § 32-12.2-11.⁷ Therefore, WSI would need independent legal authority to make the records exempt or confidential.⁸ As I have explained in past opinions, providing a requester with inaccurate legal reasoning for denying a record violates the open records law.⁹

It is my opinion that WSI violated N.D.C.C. § 44-04-18(7) when it incorrectly relied upon N.D.C.C. § 32-12.2-11 to withhold records in its possession.

Issue Two

Once a request for records is made to a public entity under N.D.C.C. § 44-04-18, the entity must either provide the records or explain why the records are not being

⁷ N.D.A.G. 2008-O-04

⁸ See N.D.C.C. § 44-04-17.1(5) (definition of exempt record); N.D.C.C. § 44-04-17.1(3) (definition of confidential record).

⁹ N.D.A.G. 2006-O-12, see also N.D.A.G. 2004-O-11.

provided.¹⁰ If the public entity denies the request, it is required to “describe the legal authority for the denial. . . .”¹¹

The focus of the requirement in N.D.C.C. § 44-04-18(7) is to provide the requester with the legal authority used by an agency to deny a record. In past opinions, this office has explained that a public entity is not required to identify the exact statutory citation used to deny a request, but the denial must provide the public with some idea of what “law” was relied upon as a specific exception to the open records law.¹² The requirement that exemptions be specific should provide the requester with sufficient information to explain what kinds of records were withheld.¹³ Although federal courts construing the federal Freedom of Information Act¹⁴ may require a public entity to prepare a list or an index describing any documents that are withheld,¹⁵ there is no similar requirement in the North Dakota open records law.¹⁶

Based on the foregoing it is my opinion that WSI did not violate N.D.C.C. § 44-04-18 by failing to provide Mr. Nodland with a detailed description of records that were not disclosed.

CONCLUSIONS

1. WSI’s written denial of Mr. Nodland’s request was not sufficient under N.D.C.C. § 44-04-18(7) because it failed to describe valid legal authority for denying the request.
2. WSI did not violate N.D.C.C. § 44-04-18 by failing to describe documents it withheld from disclosure because a public entity is not required to provide an index or detailed list describing the documents that are withheld.

¹⁰ N.D.C.C. § 44-04-18(7).

¹¹ Id.

¹² N.D.A.G. 2000-O-13.

¹³ Hovet v. Hebron Public School District, 419 N.W.2d 189, 191 (N.D. 1988) (“specific” and “implied” have opposite meanings), cited with approval in Adams County Record v. Greater North Dakota Association, 529 N.W.2d 830 (N.D. 1995).

¹⁴ 5 U.S.C. § 552.

¹⁵ See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), see also Farley v. Worley, 599 S.E.2d 835 (W.Va. 2004) (“when a public body asserts that certain documents in its possession are exempt . . . the public body must produce a Vaughn index”).

¹⁶ See 2002-L-41 (citing St. Michael Convalescent Hospital v. State of California, 643 F.2d 1369, 1373-1374 (9th Cir. 1981) (the Freedom of Information Act does not apply to state governments)).

STEPS NEEDED TO REMEDY SITUATION

WSI must disclose Ms. Grinsteiner's November 5, 2007, letter and e-mail to the WSI Board of Directors and former CEO Sandy Blunt to Mr. Nodland free of charge.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2.¹⁷ It may also result in personal liability for the person or persons responsible for the noncompliance.¹⁸

Wayne Stenehjem
Attorney General

Assisted by: Michael J. Mullen
Assistant Attorney General

vkk

¹⁷ N.D.C.C. §44-04-21.1(2).

¹⁸ Id.