

**OPEN RECORDS AND MEETINGS OPINION  
2012-O-09**

DATE ISSUED: December 4, 2012  
ISSUED TO: North Dakota State University

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Rob Port asking whether North Dakota State University violated N.D.C.C. § 44-04-18 by denying a request for records.

**FACTS PRESENTED**

On April 4, 2012, Rob Port requested a copy of the reprimand “concerning the Women’s Athletics Director.” Mr. Port also requested “details as to what activities ‘show significant inappropriate professional behavior’ on her behalf as has been reported by the media.” North Dakota State University (NDSU) had previously investigated an incident involving the NDSU Woman’s Athletic Director and filed an incident report with Risk Management Division (Risk Management) of the North Dakota Office of Management and Budget (OMB). NDSU attached various investigation notes to the incident report.

The office of legal counsel for NDSU provided the letter of reprimand to Mr. Port, but denied Mr. Port’s request for “the details of the activities” stating that they were privileged and exempt under North Dakota Open Records law. NDSU later clarified that the details of the activities were privileged and exempt under N.D.C.C. § 32-12.2-11.

**ISSUE**

Whether NDSU’s written denial of Mr. Port’s request was sufficient under N.D.C.C. § 44-04-18.

## ANALYSIS

All recorded information regarding public business in the possession of a public entity is open to the public “[e]xcept as otherwise specifically provided by law.”<sup>1</sup> Upon request for a copy of specific public records, a public entity shall furnish the requester one copy of the requested public records.<sup>2</sup> If a public entity denies a records request, the denial must indicate the public entity’s specific authority for denying access to the requested record and be made in writing, if requested.<sup>3</sup> An “exempt record” means all or part of a record that is neither required by law to be open to the public, nor is confidential, but may be open in the discretion of the public entity. Generally, personnel records are open to the public as are most investigations conducted by a public entity.<sup>4</sup>

In this situation, NDSU treated Mr. Port’s request for “details” as a request for a specific record, and denied the request citing N.D.C.C. § 32-12.2-11. NDSU had filed an incident report with the Risk Management division of OMB and attached its handwritten notes created during its investigation. NDSU, however, kept a copy of the handwritten notes. Section 32-12.2-11 provides:

1. The following records in the possession of the office of management and budget or a public entity are privileged and exempt and are not subject to section 44-04-18 or section 6 of article XI of the Constitution of North Dakota:
  - 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.
2. The office of management and budget shall make available for public disclosure records identified in subsection 1 when disclosure of the record will not prejudice any outstanding claim or reasonably predictable claim against the state or a state employee, all civil litigation or adversarial administrative proceedings, including the

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<sup>1</sup> N.D.C.C. § 44-04-18.

<sup>2</sup> N.D.C.C. § 44-04-18(2).

<sup>3</sup> N.D.C.C. § 44-04-18(7).

<sup>4</sup> N.D.C.C. § 44-04-17.1(5).

exhaustion of all appellate remedies, have been completed, and, in the case of reasonably predictable claims, the applicable statute of limitations has expired.<sup>5</sup>

NDSU argues that because the notes in its possession were part of the investigative report it filed with OMB, the records met the criteria of N.D.C.C. § 32-12.2-11.

In order to invoke N.D.C.C. § 32-12.2-11, the records must be one of those listed in subsections (a) and (b); the records must be related to a specific incident that potentially may result in a risk management claim.<sup>6</sup> In 2008, WSI also withheld a copy of handwritten notes pursuant to N.D.C.C. § 32-12.2-11. The notes were not attached to the filed incident report, but rather, were sent to Risk Management subsequent to the filing of the incident report.<sup>7</sup> I determined that because the notes did not describe a specific reportable incident, the notes were not records listed under N.D.C.C. § 32-12.2-11(a) and (b).<sup>8</sup> In a subsequent opinion to WSI, I again rejected the use of N.D.C.C. § 32-12.2-11 to protect records that were not filed with the original incident report and did not describe a specific incident or claim of injury.<sup>9</sup>

Here, the notes describe the specific reportable incident that prompted NDSU to file an incident report with Risk Management and were submitted with the report. Risk Management's instructions for filing incident reports allows an agency to "attach any files/diagrams" to an electronically filed report.<sup>10</sup> Thus, it was reasonable for NDSU to conclude that the notes became exempt risk management fund records under N.D.C.C. § 32-12.2-11 once they were attached to the incident report.

In addition, N.D.C.C. § 32-12.2-11(2), provides that "[t]he office of management and budget shall make available for public disclosure [the exempt] records identified in subsection 1 when disclosure of the record will not prejudice any outstanding claim."<sup>11</sup> Usually, when a public entity is in possession of a record that is exempt from the open records law by statute, the entity that possesses them has the discretion to retain or

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<sup>5</sup> Emphasis added.

<sup>6</sup> N.D.A.G. 2008-O-05.

<sup>7</sup> N.D.A.G. 2008-O-04.

<sup>8</sup> N.D.A.G. 2008-O-04.

<sup>9</sup> N.D.A.G. 2008-O-05.

<sup>10</sup> [http://www.nd.gov/risk/files/Manuals/RiskVision\\_Instructions-Sept.2011.pdf](http://www.nd.gov/risk/files/Manuals/RiskVision_Instructions-Sept.2011.pdf) (last visited on November 15, 2012).

<sup>11</sup> Once a Risk Management case is closed, the records are no longer subject to N.D.C.C. § 32-12.2-11 and the records may be released by any public entity that possesses them.

release the record.<sup>12</sup> Section 32-12.2-11 is unique in that it not only sets forth an exemption, but specifies the public entity that is authorized to claim the exemption. As a result, NDSU did not have the authority to provide the records without the consent of Risk Management.<sup>13</sup>

Based upon the forgoing, it is my opinion that it was reasonable for NDSU to believe the copy of records it attached to the incident report filed with the Risk Management were exempt pursuant to N.D.C.C. § 32-12.2-1.

#### CONCLUSION

NDSU's written denial of Mr. Port's request was sufficient under N.D.C.C. § 44-04-18(7).

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<sup>12</sup> See N.D.C.C. § 44-04-17.1(5). "Exempt record" means all or part of a record that is neither required by law to be open to the public, nor is confidential, but may be open in the discretion of the public entity.

<sup>13</sup> The statute does not prevent a person from requesting the records directly from Risk Management.