

**OPEN RECORDS AND MEETINGS OPINION  
2008-O-03**

DATE ISSUED: February 29, 2008

ISSUED TO: Workforce Safety and Insurance

**CITIZEN'S REQUEST FOR OPINION**

Chad Nodland alleges that Workforce Safety and Insurance ("WSI") violated the open records law by improperly claiming that two video clips recorded by WSI's video surveillance security system are exempt records under N.D.C.C. § 44-04-24 and by refusing to provide a copy of the video surveillance recordings in violation of N.D.C.C. § 44-04-18.

**FACTS PRESENTED**

WSI has a video surveillance security system that monitors the areas outside and inside the building it occupies. The system includes both visible and hidden cameras. Mr. Nodland requested that WSI provide him with an electronic copy of two specific video clips recorded on WSI's video surveillance security system on November 1, 2007. Alternatively, if an electronic copy could not be sent via e-mail or downloaded from an FTP server,<sup>1</sup> Mr. Nodland indicated he would personally retrieve a copy.

WSI informed Mr. Nodland that it had the video clips, but averred that they were exempt pursuant to N.D.C.C. § 44-04-24 because they are a part of WSI's security system plan. WSI believed that if it provided a copy of the video clips to the general public as opposed to allowing for someone to review the video, a person could evaluate the capabilities of WSI's security cameras thereby potentially jeopardizing the safety of employees and the building. WSI offered Mr. Nodland an opportunity to review the video footage in WSI's offices without making or obtaining a copy, but Mr. Nodland declined the offer.

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<sup>1</sup> An "FTP" server is a computer or web server that allows a user to log on and upload or download files.

Mr. Nodland alleges that WSI violated the open records law by improperly claiming the videos recorded by WSI's video surveillance security system are exempt security system plan records and by refusing to provide a physical copy of the video recordings.<sup>2</sup>

### ISSUE

Whether WSI violated N.D.C.C. § 44-04-18 by refusing to provide copies of video surveillance tapes recorded by WSI's surveillance security system to a requester pursuant to N.D.C.C. § 44-04-24.

### ANALYSIS

Records possessed by a public entity are presumptively open to the public during normal business hours.<sup>3</sup> However, a public record need not be disclosed if a state or federal statute makes the record "confidential" or "exempt."<sup>4</sup> A record that is "confidential" by law cannot be released.<sup>5</sup> A record declared "exempt," 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>6</sup>

In this instance, WSI refused to provide Mr. Nodland with a digital or electronic copy of its surveillance video pursuant to N.D.C.C. § 44-04-24(2)(b). The statute makes the security system plans of public entities exempt and broadly defines a "security system plan" as:

[Including] all records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, communications, or consultations or portions of any such plan relating directly to the physical or electronic security of a public facility. . . whether owned by or leased to the state or any of its political subdivisions. . . if the plan or a portion of the plan is in the possession of a public entity; threat assessments; vulnerability and capability assessments conducted by a

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<sup>2</sup> Mr. Nodland also alleges that WSI is violating the open records law by systematically denying requests for open records. I am only able to review the one denial described in the request for an opinion.

<sup>3</sup> Open Records Manual, 2007 Edition, pg. 18, North Dakota. See also N.D.C.C. § 44-04-18.

<sup>4</sup> N.D.C.C. § 44-04-17.1(7), see also Dickinson Newspapers, Inc. v. Jorgensen, 338 N.W.2d 72, 75 (N.D. 1983).

<sup>5</sup> N.D.C.C. § 44-04-17.1(3).

<sup>6</sup> N.D.C.C. § 44-04-17.1(5). See N.D.A.G. 2005-O-13.

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public entity, or any private entity; threat response plans; and emergency evacuation plans.<sup>7</sup>

A surveillance video is a public record under N.D.C.C. § 44-04-17.1(15), but it directly relates to the physical or electronic security of a public facility and is part of WSI's security plan. Additionally, N.D.C.C. § 44-04-24(b) uses the word "includes," which ordinarily is not a word of limitation, but a word of enlargement.<sup>8</sup> As explained in a prior opinion:

By the use of the word "includes," [in a definition] the Legislature did not intend the listed items to be exclusive. The items set forth in the definition are illustrative, not exhaustive.<sup>9</sup>

The inclusion of surveillance video in the definition of security system plan is consistent with the purpose of the law, which was described to the Legislature as "to exempt information regarding plans and details about infrastructure from getting into the hands of people who would intentionally want to use that information to do harm."<sup>10</sup> Uncontrolled access to surveillance video from all of our public facilities would work contrary to the purpose of the law. It is therefore my opinion that surveillance video taken from security cameras meets the definition of "security system plan" as defined in N.D.C.C. § 44-04-24.

Accordingly, because surveillance video from public facilities is exempt, the decision to disclose and the means by which the record is disseminated is left to the discretion of the public entity.<sup>11</sup> The decision to release an exempt record should be "based upon the particular situation, the type of record, the interests served by release or nondisclosure of the document and any other relevant factors."<sup>12</sup> Ultimately, it is up to the public entity to decide whether to release an exempt record. After considering the circumstances, WSI chose to allow Mr. Nodland access to the videos at the WSI building, an offer he refused, preferring instead to seek an opinion from this office.

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<sup>7</sup> N.D.C.C. § 44-04-24(2)(b) (emphasis added).

<sup>8</sup> See Lucke v. Lucke, 300 N.W.2d 231, 234 (N.D. 1980).

<sup>9</sup> N.D.A.G. 96-F-15 (citations omitted).

<sup>10</sup> Hearing on H.B. 1143 Before the House Comm. on the Judiciary, 2003 N.D. Leg. (Jan. 21) (Statement of Douglas C. Friez, Director of N.D. Div. of Emergency Management).

<sup>11</sup> N.D.C.C. § 44-04-17.1(5). See also N.D.A.G. 94-L-194; N.D.A.G. 98-F-09; N.D.A.G. 2000-O-02; N.D.A.G. 2005-O-06; N.D.A.G. 2006-O-04.

<sup>12</sup> N.D.A.G. 94-L-194.

Based on the foregoing, it is my opinion that WSI did not violate the open records law by refusing to provide copies of the surveillance videos to a requester.

#### CONCLUSION

Surveillance videos taken from security cameras of a public entity are exempt records pursuant to N.D.C.C. § 44-04-24. Therefore, WSI did not violate N.D.C.C. § 44-04-18 when it refused to provide a copy of the video.

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