

**OPEN RECORDS AND MEETINGS OPINION
2010-O-08**

DATE ISSUED: June 24, 2010

ISSUED TO: Risk Management Division of the Office of Management and Budget

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 the Risk Management division of the Office of Management and Budget violated N.D.C.C. § 44-04-18 by denying records as attorney work product.

FACTS PRESENTED

In March 2010, Chad Nodland requested that the Risk Management division ("Risk Management") of the Office of Management and Budget ("OMB") provide a copy of the most recent month's billing records in the matter of Long v. State of North Dakota. At the time of the request, the trial in the matter was set for April 12, 2010, but was later postponed until November 2010. Risk Management provided the billing records and explained that certain entries had been redacted under N.D.C.C. § 44-04-19.1(1) and (6), because the billing entries constitute attorney work product that is exempt from disclosure until such time as the above-referenced litigation is concluded.

A member of my staff has reviewed the records provided to Mr. Nodland and a version of the billing records without the redactions. The billing statement provided to Mr. Nodland included the dates from January 26, 2010, to February 22, 2010, containing 99 entries of which 25 were redacted in whole or in part.

ISSUE

Whether Risk Management properly redacted information contained in attorney billing records as attorney work product.

ANALYSIS

Except as otherwise specifically provided by law, all records of a public entity are public records.¹ A record means recorded information of any kind . . . which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business.²

Risk Management is a division of OMB, a state agency that handles claims and lawsuits brought against the state. The following statute applies to its records:

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 exhaustion of all appellate remedies, have been completed, and, in the case of reasonably predictable claims, the applicable statute of limitations has expired.³

¹ N.D.C.C. § 44-04-18.

² N.D.C.C. § 44-04-17.1(15).

³ N.D.C.C. § 32-12.2-11(emphasis added).

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Thus, because requested billing records are records of a pending claim against the state, the requested records are exempt from the open records law.⁴ Although an exempt record is not required by law to be open to the public it may be released at the discretion of the public entity.⁵

Although N.D.C.C. § 32-12.2-11 grants OMB broad discretion to decline to disclose its litigation files, Risk Management typically releases requested billing records after determining whether they contain attorney work product as defined in N.D.C.C. § 44-04-19.1 and whether public disclosure would prejudice any claim or reasonably predictable claim against the state or a state employee.⁶ Risk Management reviews records for prejudice under N.D.C.C. § 32-12.2-11(2) which allows protection for prejudicial records.

According to the director of Risk Management, previous billing records had been released to Mr. Nodland upon request after following the above analysis. However, in this instance, the billing records responsive to the request covered the period of time when the attorneys were preparing for trial. Thus, Risk Management determined the redacted parts of the records contained attorney work product which, if released, could prejudice the State's interest in defending the outstanding claim brought by Mr. Long.⁷

Relying on N.D.C.C. § 44-04-19.1(6), Risk Management decided to redact information it believed to be "attorney work product" from the billing records. In order to be considered "attorney work product," all three of the following elements must exist.⁸ "Attorney work product:"

- a. Was prepared by an attorney representing a public entity or prepared at such an attorney's express direction;
- b. Reflects a mental impression, conclusion, litigation strategy, or legal theory of that attorney or the entity; and

⁴ The exemption is not unlimited because under subsection 2 of N.D.C.C. § 32-12.2-11 the records that are not prejudicial to outstanding claims against the state must be released upon completion of the litigation and after the statute of limitations has run.

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

⁶ Letter from Tag Anderson, Director of Risk Management, to Mary Kae Kelsch, Assistant Attorney General (Mar. 30, 2010). See also N.D.C.C. § 32-12.2-11(2).

⁷ Letter from Tag Anderson, Director of Risk Management, to Mary Kae Kelsch, Assistant Attorney General (Mar. 30, 2010).

⁸ N.D.A.G. 2008-O-09; N.D.A.G. 2003-O-17; N.D.A.G. 2002-O-05; N.D.A.G. 92-F-04.

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- c. Was prepared exclusively for civil or criminal litigation, for adversarial administrative proceedings, or in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings.⁹

Clearly the requirements of subdivisions a and c of N.D.C.C. § 44-04-19.1(6) are met because the records are billing statements created by attorneys retained to represent the state in a pending action. This office has reviewed the billing statement without the redactions to determine whether the requirement in subdivision b is also met. According to Risk Management, the billing statements reflected final trial preparation including witness preparation that would directly disclose who the state is likely to call as witnesses and potential legal issues that have not been fully addressed by opposing counsel.

In a 2002 opinion, this office concluded that transcripts of an interview of a witness by an attorney qualified as work product because one could easily see from the questions asked by an attorney what legal strategies or theories the attorney was considering.¹⁰ Similarly here, it was reasonable for Risk Management to redact the portions of the billing statement that revealed the attorney's thought process for trial strategy and legal theories.¹¹

Based on the foregoing, it is my opinion that N.D.C.C. § 32-12.2-11 provides OMB with broad discretion over its litigation files and thus it was not a violation of the open records law to redact attorney work product, as defined in N.D.C.C. § 44-04-19.1(6), from the requested billing records.

⁹ N.D.C.C. § 44-04-19.1(6).

¹⁰ N.D.A.G. 2002-O-05.

¹¹ Letter from Tag Anderson, Director, Risk Management, to Mary Kae Kelsch, Assistant Attorney General (Mar. 30, 2010) ("billing entries were redacted only upon an assessment that the entry constituted attorney work product under N.D.C.C. § 44-04-19.1 AND . . . contained substantive matters that would actually prejudice the State's interest in defending the lawsuit") (emphasis in original); see also 8 Wright, Miller, & Marcus, Federal Practice and Procedure, § 2028, at 584 (3rd ed. 2010) ("an interrogatory asking a party to identify all persons interviewed [in preparation for trial] would contravene work product").

CONCLUSION

It is my opinion that OMB did not violate the open records law when it redacted attorney work product from the requested billing records.

Wayne Stenehjem
Attorney General

mkk/vkk