

## **N.D.A.G. Letter to Rayl (April 21, 1988)**

April 21, 1988

Mr. R. L. Rayl  
Director of Institutions  
State Capitol  
Bismarck, ND 58505

Dear Mr. Rayl:

Thank you for your letter of April 19, 1988, inquiring as to the open records law and a pretermination letter you have sent to an employee of the Director of Institutions' office.

North Dakota's open record laws, as found at Art. VI, § 6 of the North Dakota Constitution and N.D.C.C. § 44-04-18, essentially state that all records of public bodies are open to public disclosure "except as otherwise specifically provided by law." In determining whether a certain record is subject to the disclosure provisions of North Dakota's open record laws, one must employ a three-pronged analysis.

First, it must be determined whether the record sought is in the hands of a public agency subject to the statute. The open records laws specifically mention records of governmental bodies and agencies of the state. There appears to be no dispute but that the Director of Institutions is an agency of the state. Thus, the record sought in this matter is in the hands of a public agency subject to the open records law.

Second, it must be determined whether the document is of the type which comes within the purview of the open records laws. The North Dakota Supreme Court, in City of Grand Forks v. Grand Forks Herald, Inc., 307 N.W.2d 572 (N.D. 1981), had the occasion to determine the scope of the definition of "records" for purposes of the open records law. In that case, the court stated as follows:

We believe that the term "records" as used in § 44-04-18, N.D.C.C., and Article VI, § 6 of the North Dakota Constitution is unambiguous. The legislative history surrounding the enactment of § 44-04-18 reveals that the Legislature intended to give the term an expansive meaning.

Id. at 577. In Grand Forks Herald, the supreme court noted that the definition of the term "records" was not restricted to those documents which were required by law to be kept or maintained. Instead, the court concluded that a public record was any document retained by public officers or employees in the course of their public duties. Id.

The document in question is in your possession as part of your official duties and responsibilities as a state official. The document clearly comes within the purview of the open records laws.

Finally, it must be determined whether there are any exceptions to the open records laws applicable to the record in question. Our review of applicable statutes and rules has failed to reveal any exception to the public disclosure requirements of the open records laws with respect to a pretermination letter sent to a state employee. One may argue that the employee's right of privacy will have been violated should the letter be released for public disclosure. However, in a recent North Dakota Supreme Court decision, the argument that a public employee's implied right to privacy will prevent the disclosure of an otherwise public record pursuant to North Dakota's open records laws was specifically rejected. The court noted the absence of any specific legislative exception to the North Dakota open records laws discussing public employee's rights to privacy. Hovet v. Hebron Public School Dist., 419 N.W.2d 189 (N.D. 1988).

I sympathize with your belief that an injustice may occur if the pretermination letter in question is disclosed to the public prior to the employee's ability to respond to that letter. However, by the exact words of the open records laws and the various interpretations placed upon these laws by the North Dakota Supreme Court, the document in question must be considered a public record subject to public disclosure. The Legislature may wish to address any inequities presented in such a situation by specifically excluding such documents from public disclosure until at least the employee concerned has had a chance to respond to the allegations so that both sides have had their story presented for public review.

Sincerely,

Nicholas J. Spaeth

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