

N.D.A.G. Letter to Tomac (July 17, 1991)

July 17, 1991

Honorable Steven W. Tomac
State Senator
Route 1, Box 36
St. Anthony, ND 58566

Dear Senator Tomac:

Thank you for your July 3, 1991 letter asking several questions concerning restrictions the City of Flasher adopted on access to certain city records. You have also asked whether the mayor must sign city commission minutes if he believes those minutes to be in error.

North Dakota's open records law states that unless otherwise provided by law, all records of public or governmental bodies are public records, which must be "open and accessible for inspection during reasonable office hours." N.D. Const. art. XI, § 6; N.D.C.C. § 44-04-18. The purpose of the open records law is:

... to provide the public with the right and the means of informing itself of the conduct of business in which the public has an interest, in order that the citizen and taxpayer might examine public records to determine whether public money is being properly spent, or for the purpose of bringing to the attention of the public irregularities in the handling of public matters ...

Grand Forks Herald v. Lyons, 101 N.W.2d 543, 546 (N.D. 1960). The North Dakota Supreme Court has said that the Legislature intended to give the term "records" used in section 44-04-18 an expansive meaning. City of Grand Forks v. Grand Forks Herald 307 N.W.2d 572 (N.D. 1981). The term refers to a document of some official import retained by a public officer or employee in the course of his official duties. Id., at 578. Municipal personnel records are public records subject to the open records law. Id.

In a prior opinion concluding that a private investigator's report in the possession of a state college is a public record, I said "that record is an open record and is accessible for inspection during normal office hours." 1985 N.D. Op. Att'y Gen. 03. Whether inspection of public records may be limited to certain times during regular office hours was not raised in connection with that opinion. However, I believe the language of the open records law requires that public records be available for inspection during regular or normal office hours. The word "reasonable" in section 44-04-18 is used in conjunction with "office hours", indicating not that access may be limited during regular office hours but that office hours must be reasonable. Therefore, it is my opinion that access to public records may not be denied during regular or normal office hours.

It is my understanding, based on a telephone conversation between the city auditor and a member of my staff, that the city auditor is the only regular office worker employed by the city of Flasher. The city auditor is currently authorized to work 40 hours per week,

although the actual time worked varies depending upon the amount of work available. Actual hours worked range from 28 to 40 hours weekly. The auditor generally is in her office daily between 9:00 a.m. and 3:00 p.m., although office hours are not posted and occasionally she is out of the office during these hours.

It is my opinion, given these circumstances, that the city of Flasher may not limit access to its records to one hour each day. Access must be allowed during those hours the city office is open for business. The object of the open records law is to allow the public an opportunity to see how its business is being conducted. That goal is hindered by a policy limiting access to only one hour each day.

In accordance with the foregoing discussion, the city may not adopt other policies that unduly restrict access to public records. However, the city may require that an employee or city official be present when access is permitted. The city may justifiably impose this requirement as a security measure to protect important city records. Nevertheless, this justification may not be used as an excuse to unreasonably deny access to those records. If the city chooses to require the presence of a city official or city employee as a security measure or for other legitimate reasons, the city may not deny access merely because it is inconvenient to meet that requirement.

It is my opinion that a person requesting access to city records may not be required to give advance notice of the request. Although common sense suggests certain delays may be unavoidable if it is necessary to search voluminous files for a requested record or if the record is in storage, the law expressly requires that public records be "open and accessible for inspection during reasonable office hours." Therefore, anyone who walks into city offices without advance notice is entitled to inspect city records. Likewise, because a policy providing that the city employee whose records are inspected must be present during inspection would hinder or delay access to those records, it is my opinion that the city may not enforce such a policy. However, the city is free to adopt a policy providing for notice to the employee if access to the records is not delayed pending that notice.

The open records law does not permit the kinds of restrictions you have outlined in your letter for any type of public record. All city records are equally open and accessible for inspection, except those for which a specific exemption is provided by law.

You ask if the city must provide copies of its records and whether the city may charge for the copies. The open records law requires that public records be open and available for inspection. The law does not expressly require public bodies to furnish copies of public records. However, this office has consistently urged public officials in complying with the open records law to make copies available to further the spirit and intent of the open records law. Also, in a prior opinion I concluded that an agency that is subject to the open records law may assess a copying charge based on the actual cost incurred in reproducing records, but may not assess other charges for access to those records. 1989 N.D. Op. Att'y Gen. 07. Accordingly, it is my opinion that although the city is not expressly required by law to provide copies of public records, the city should do so to further the purpose of the open records law, and the city may assess a reasonable copying charge for these copies.

All records in possession of the city or kept by city officials as part of their official duties are public records. Grand Forks Herald, 307 N.W.2d at 578. If the city has two sets of records concerning city employee work hours, both sets are public records.

Your final question concerns the duty of the mayor to sign the official minutes of the city commission. You ask whether the mayor must sign commission minutes if he believes those minutes to be in error or to contain information not discussed at the meeting covered by the minutes in question.

Pursuant to N.D.C.C. § 40-16-03(l), the city auditor is to "keep a complete record" of the proceedings of the city commission and sign that record when the minutes are prepared. Furthermore, the record of the proceedings is to be signed by the executive officer "upon board approval at a subsequent meeting." Therefore, once the minutes have been approved by the board, the mayor has a duty to sign the minutes. If the mayor or any other commissioner believes the minutes prepared and signed by the auditor contain an error, the mayor or other commissioner should move to correct the error prior to final approval.

Your question concerning the mayor's duty to sign the minutes suggests the mayor may be reluctant to sign because he believes the minutes are not accurate even though a majority of the board has approved those minutes. Arguably, if the mayor knows the minutes contain a false entry, his signature may be in violation of N.D.C.C. § 12.1-11-02. That section makes it unlawful for any person, in a governmental matter, to submit or invite reliance "on any material writing which he knows to be forged, altered, or otherwise lacking in authenticity." The duty to sign the minutes does not override the mayor's responsibility to comply with the laws of this state. If the mayor believes the minutes approved by the board are inaccurate, he may have his statement voicing his disagreement recorded in the minutes at the subsequent meeting and then sign the minutes. Or, if the mayor is convinced the minutes contain a false entry even though approved by the board, he may qualify his signature to the extent necessary to avoid violating the provisions of section 12.1-11-02.

I hope this information is helpful to you.

Sincerely,

Nicholas J. Spaeth

krb

cc: Flasher City Commission
Mayor Jerry Rhone
Flasher City Auditor
Allen Kopyy