

**OPEN RECORDS AND MEETINGS OPINION
2007-O-03**

DATE ISSUED: March 1, 2007

ISSUED TO: North Dakota Department of Transportation

CITIZEN'S REQUEST FOR OPINION

On November 21, 2006, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Terry Narum asking whether the Department of Transportation violated N.D.C.C. § 44-04-18 by requiring Mr. Narum to complete a form in order to request records.

FACTS PRESENTED

On November 13, 2006, Terry Narum called the Department of Transportation (Department) and asked for a copy and date of a letter the Department sent to the Ward County Commission informing it of the 2007-2009 federal aid funding level. He spoke with the local government engineer who had written the letter Mr. Narum was requesting. The engineer retrieved the letter and told Mr. Narum it was dated May 1, 2006. Mr. Narum asked for a copy of the letter. The engineer thought Mr. Narum wanted the letter mailed to him so he began to ask for his name and address. The engineer says Mr. Narum became angry because he did not believe he had to provide his name. This response led the engineer to ask Mr. Narum if he was an attorney and whether the information was for use in a lawsuit against the Department or Ward County. Mr. Narum stated his belief that he did not have to give such information, but further said no to both questions. The engineer told Mr. Narum he would send him a "Records/Electronic Information Request" form to fill out to formally request a copy of the letter. Mr. Narum asserted that completing the form was not required to get a copy of the letter. The engineer explained that filling out the form was Department policy. The form was faxed to Mr. Narum, who completed it and faxed it back. The following day the engineer faxed Mr. Narum a copy of the letter.

It is the Department's practice to ask every person who requests a record to fill out the "Records/Electronic Information Request" form. If the requester refuses, the Department requires its employees to attempt to fill out the form based on information obtained from the requester. The top part of the form contains spaces asking the requester to provide the following information: requester's name, company name, address, and telephone number; the date of the request; and the records sought. The

middle section, entitled “How information will be used,” asks whether the information will be used in a court proceeding or if it relates to any criminal, civil, or adversarial administrative proceedings involving the requester or the Department. In the middle section the form states in bold letters, “Failure to answer this question may cause delays or the denial of some information sought.”¹ The form contains two lines for the requester’s signature.

ISSUE

Whether the Department violated the open records law by asking the requester for his name and whether the information was for use in a lawsuit, and by requiring the requester to fill out the Department’s Records/Electronic Information Request form.

ANALYSIS

“Except as otherwise specifically provided by law, all records of a public entity are public records, open, and accessible for inspection during reasonable office hours.”² The right to access public records belongs to all persons equally, therefore the identity of the requester and the purpose of the request are generally irrelevant.³ A request for a public record “need not be made in person or in writing.”⁴ A verbal request in person or by telephone has the same effect as a “formal” written request.⁵

Recently this office found that a form used by the Bismarck Park District violated the open records law because it appeared to be mandatory and gave the impression that it must be signed in order to obtain copies of records.⁶ Similarly, the Department routinely uses a form when a request for records is made. The Department’s form, like the one used by the Bismarck Park District, requires signatures and other identifying information. In addition, it requires information about how the records will be used, and warns that the failure to provide this information could cause delays or a denial of information requested.

According to the Department, it receives a large number of record requests and has used the form for eight years. The form is used to keep track of records requested and disclosed, and to whom they are disclosed, should the matter escalate into litigation at

¹ Records/Electronic Information Request Form, SFN 16595 (Rev. 03-2005).

² N.D.C.C. § 44-04-18(1). See also N.D. Const. Art. XI, § 6.

³ N.D.A.G. 2006-O-15; N.D.A.G. 98-F-13.

⁴ N.D.C.C. § 44-04-18(2); N.D.A.G. 2006-O-15.

⁵ N.D.A.G. 98-O-03.

⁶ N.D.A.G. 2006-O-15.

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some future point.⁷ The express language of N.D.C.C. § 44-04-18(2) provides that a request need not be made in writing. Therefore, a person is not required to fill out a form as a prerequisite to receiving a copy of a public record. If a requester refuses to fill out a form, there is no basis to deny a copy of a record.

The Department's form does more than keep track of who gets what records. It specifically asks how the information is to be used. Although generally the identity of the requester and the purpose of an open record request are irrelevant, past opinions have described two instances where such information is relevant.

The first instance was discussed in a 1998 opinion. In that opinion, this office interpreted 23 U.S.C. § 409, a federal law that prohibits certain highway safety records from being discovered or used in federal or state court proceedings or in any court action for damages, to be an exception to the open records law.⁸ This office said:

[I]n those limited circumstances [where protected highway safety records are requested] it is appropriate to ask whether the person requesting the information is, or is acting on behalf of a person who is, 1) a party in a pending court proceeding or court action for damages arising from any court proceeding or court action for damages arising from any occurrence at a location mentioned or addressed in the requested records or 2) engaged in discovery related to a court proceeding or court action for damages arising from any occurrence at a location mentioned or addressed in the requested records.⁹

Therefore, if the Department receives a request for highway safety records protected by 23 U.S.C. § 409, it cannot require that the request be made in writing, but it may ask the requester how the information will be used. It may also require the requester to sign an

⁷ There is nothing that prohibits a public entity from accounting for records it provides through open records requests. Such an accounting, however, is the responsibility of the public entity and should not be a burden to members of the public requesting records. The Department could track record requests without imposing a burden on the requester by completing an internal form stating what records were provided on what date and to whom, if known, or by providing a cover letter with every record provided and keeping a copy.

⁸ N.D.A.G. 98-F-13.

⁹ Id. It was after the 1998 opinion that the Department began using their current form saying that use of the form was justified due to the large number of 23 U.S.C. § 409 records in its possession.

acknowledgment that the records will not be used in a court action for damages against any party.¹⁰

A 2002 opinion discussed a second situation in which a public entity may ask how a record will be used. The opinion interpreted N.D.C.C. § 44-04-18(5) (now 44-04-18(6)) which requires a party to a criminal or civil action or adversarial administrative proceeding to comply with discovery rules rather than requesting records via the open records law. In order to determine whether records are being requested by a party to an action, this office said that “it is appropriate for a public entity to verify that . . . records are not being requested by a party or an agent of a party to the action or the proceeding.”¹¹ As in the case of protected highway safety records, if a request is made for records related to a legal action or administrative proceeding, the request does not have to be made in writing, but it may be appropriate to obtain the person’s name and require the person to sign an acknowledgement that the records are not being requested by a party or agent of a party to a pending action.¹²

The exceptions set forth above must be narrowly construed and should not be read as authorization for the use of a form, such as the Department’s, as a response to every request for an open record. The Department may only ask the purpose for which the records will be used if a request is made for protected highway safety records or if there is a reasonable basis to believe that the requested records are related to a pending criminal or civil action or adversarial administrative proceeding.¹³

The record Mr. Narum requested was not a record protected by 23 U.S.C. § 409 or a record relating to a pending legal action or administrative proceeding. Nothing about Mr. Narum’s request would permit the Department to ask why he was requesting a copy of the May 1, 2006, letter or require him to fill out a request form. Therefore, I find that the Department violated the open records law by doing so.

CONCLUSION

The Department may only ask for the name of a requester and why the requester wants the records if the records requested are highway safety records protected by 23 U.S.C. § 409, or if, because of the nature of the records or name of the requester it reasonably

¹⁰ Id.

¹¹ N.D.A.G. 2002-O-05 n.3.

¹² In the context of an open records request, a person’s signed acknowledgment may be a reasonable method of verifying that certain records are not being sought for use in a proceeding.

¹³ The fact that a requester becomes angry is not a legitimate reason to believe the requester is involved in litigation against the Department.

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believes the requester is a party, or the agent of a party, to a criminal, civil, or administrative proceeding in which the Department is a named party. The Department violated the open records law when it asked the requester for his name, why he wanted a copy of a letter, and required him to fill out the Department's "Records/Electronic Information Request" as a prerequisite to receiving the record.

STEPS NEEDED TO REMEDY VIOLATION

The Department may not require a person who requests a record to fill out a "Records/Electronic Information Request" form or answer questions from the form as a prerequisite to receiving records. The Department has assured this office that it will change its procedure for responding to requests for records to be consistent with this opinion.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2.¹⁴ It may also result in personal liability for the person or persons responsible for the noncompliance.¹⁵

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¹⁴ N.D.C.C. §44-04-21.1(2).

¹⁵ Id.