

**OPEN RECORDS AND MEETINGS OPINION  
2008-O-04**

DATE ISSUED: February 29, 2008

ISSUED TO: Workforce Safety and Insurance

**CITIZEN'S REQUEST FOR OPINION**

Chad Nodland requests that the Attorney General review whether Workforce Safety and Insurance ("WSI") improperly denied Mr. Nodland's October 31, 2007, open records request to WSI under N.D.C.C. § 44-04-18.

**FACTS PRESENTED**

On October 31, 2007, Chad Nodland requested the following records from WSI:

[A] copy/copies of any records that have been or will be provided to KFYR Radio Morning Co-host Jason Hulm and KFYR Operations Manager Todd Mitchell in response to their open records request to you date-stamped received October 29, '07.<sup>1</sup>

His request referred to a request that had been made to WSI by Jason Hulm on October 26 and 29, 2007, asking for investigative reports and personnel records of two WSI employees who had sought whistleblower status pursuant to N.D.C.C. § 34-11.1-04. WSI denied both Mr. Nodland and Mr. Hulm's request stating that the requested documents were privileged under N.D.C.C. § 32-12.1-11.<sup>2</sup>

**ISSUE**

Whether WSI's written denial of Mr. Nodland's request was sufficient under N.D.C.C. § 44-04-18(7).

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<sup>1</sup> E-mail from Editor to Mark Armstrong, WSI Communications Director (Oct. 31, 2007, 8:31 p.m.).

<sup>2</sup> E-mail from Mark Armstrong, WSI Communications Executive, to Chad Nodland (Nov. 2, 2007, 8:35 a.m.).

## ANALYSIS

Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection.<sup>3</sup> The word “[l]aw,” as defined in N.D.C.C. § 44-04-17.1(7), includes “federal statutes, applicable federal regulations, and state statutes.”<sup>4</sup> A denial of an open records request must indicate the public entity’s specific authority for denying access to the requested record and be made in writing, if requested.<sup>5</sup>

Here, WSI provided Mr. Nodland with a denial in writing and cited N.D.C.C. § 32-12.2-11 as the statutory authority for denying the record that was the subject of Mr. Nodland’s request. The record withheld was a copy of handwritten notes dated (March-April 07) that were sent to the Risk Management Division (“Risk Management”) of the North Dakota Office of Management and Budget (“OMB”) to be attached to a previously filed incident report; WSI believed the notes “contemplated” the same subject matter as the incident report. Section 32-12.2-11, N.D.C.C., however, only exempts the following records:

- 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.

Although WSI had previously filed an incident report under section 32-12.2-11 with Risk Management, the record did not contain information relating to that portion of risk management funds or liability reserves established for a specific claim and the record was not an incident report, investigation report, or risk management fund record created after the incident report was filed by WSI. In addition, although the record documents a potential personnel issue or combination of issues, the record does not appear to have been created for the purpose of alerting properly charged agency officials of an incident that might give rise to a claim against the state or a state employee so it could be evaluated and, if warranted, reported under N.D.C.C. § 32-12.2-11. Rather, it appears that the notes in the record were of a meeting or an ongoing personnel issue<sup>6</sup> that did not, at that time, amount to or justify the filing of an incident report under N.D.C.C.

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<sup>3</sup> N.D.C.C. § 44-04-18.

<sup>4</sup> N.D.C.C. § 44-04-17.1(7).

<sup>5</sup> N.D.C.C. § 44-04-18(7).

<sup>6</sup> Personnel records, including information regarding the salary and job performance of an employee, are generally open to the public.

§ 32-12.2-11.<sup>7</sup> The fact that the record may relate to the same subject matter as an incident report is an insufficient basis to make the record privileged under N.D.C.C. § 32-12.2-11. Therefore, WSI would need independent legal authority to make the records exempt or confidential.<sup>8</sup> In past opinions, I have explained that giving inaccurate legal reasoning for denying a record violates the open records law.<sup>9</sup> Here, WSI incorrectly used N.D.C.C. § 32-12.2-11 to shield an open record.

It is my opinion that WSI violated N.D.C.C. § 44-04-18(7) when it incorrectly used N.D.C.C. § 32-12.2-11 to withhold records in its possession.

### CONCLUSION

WSI's written denial of Mr. Nodland's request was not sufficient under N.D.C.C. § 44-04-18(7) because it failed to describe valid legal authority for denying the request.

### STEPS NEEDED TO REMEDY VIOLATION

WSI must provide Mr. Nodland with a copy of the record it denied free of charge.

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.<sup>10</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>11</sup>

Wayne Stenehjem  
Attorney General

Assisted by: Michael J. Mullen  
Assistant Attorney General

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<sup>7</sup> The document provided to this office, however, was not a copy of the original record withheld from Mr. Nodland and it is unknown whether the original record exists. The document appears to be a recreated version of the original document. WSI did not provide an explanation as to why the record was recreated.

<sup>8</sup> See N.D.C.C. § 44-04-17.1(5) (definition of exempt record); N.D.C.C. § 44-04-17.1(3) (definition of confidential record).

<sup>9</sup> N.D.A.G. 2006-O-12, see also N.D.A.G. 2004-O-11.

<sup>10</sup> N.D.C.C. § 44-04-21.1(2).

<sup>11</sup> Id.