

**OPEN RECORDS AND MEETINGS OPINION
2008-O-09**

DATE ISSUED: April 4, 2008

ISSUED TO: Workforce Safety and Insurance

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, on behalf of NorthDecoder.com, asking whether Workforce Safety and Insurance violated the open records law by claiming a record was protected attorney work product.¹

FACTS PRESENTED

On December 20, 2007, Chad Nodland requested the following information from Workforce Safety and Insurance ("WSI"):

A copy of any legal memoranda prepared by WSI legal staff in or after October of 2003 relating to the availability or unavailability of severance pay to then-departing Executive Director Brent Edison.²

On December 28, 2007, WSI responded to Mr. Nodland stating: "[t]o the extent there exists any written records on this issue, these records are protected communications pursuant to N.D.C.C. § 44-04-19.1(4), attorney work product, and will not be disclosed."³

WSI does have a legal memorandum written by a WSI attorney in its possession.

¹ Mr. Nodland also asked our office whether WSI violated the law by failing to provide a meaningful description and explanation of the records WSI withheld. Our office recently addressed this issue in N.D.A.G. 2008-O-05, which determined that such a detailed explanation is not required.

² E-mail from Chad Nodland to Mark Armstrong, WSI (December 20, 2007, 3:16 p.m. CST).

³ E-mail from Anne Jorgenson Green, WSI Staff Counsel, to Chad Nodland (December 28, 2007, 12:12 p.m. CST).

ISSUE

Whether WSI violated the open records law when it denied a record as “attorney work product” under N.D.C.C. § 44-04-19.1.

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.⁴ “Attorney work product” is exempt from mandatory public disclosure under N.D.C.C. § 44-04-18, the state open records law.⁵ Attorney work product means any document or record that

- a. Was prepared by an attorney representing a public entity or prepared at such attorney’s express direction;
- b. Reflects a mental impression, conclusion, litigation strategy, or legal theory of that attorney or the entity; and
- 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.⁶

“All three elements of this definition must exist for a record to be exempt under N.D.C.C. § 44-04-19.1 as ‘attorney work product.’”⁷ Once any litigation and adversarial administrative proceedings are completed, the attorney work product must be available for public disclosure unless other exceptions apply.⁸

In this instance, the legal memorandum was prepared by a WSI attorney and reflects a mental impression, conclusion, or legal theory of the attorney. The memo was prepared exclusively in anticipation of reasonably predictable civil litigation.⁹ I agree with WSI that the memo reflects the attorney’s legal theories and qualifies as attorney work product. It is therefore my opinion that the denial WSI provided did not violate the open records law.

⁴ N.D.C.C. § 44-04-18(1).

⁵ N.D.C.C. § 44-04-19.1(1).

⁶ N.D.C.C. § 44-04-19.1(6).

⁷ N.D.A.G. 2003-O-17; N.D.A.G. 2002-O-05; N.D.A.G. 92-F-04.

⁸ N.D.C.C. § 44-04-19.1(8); N.D.A.G. 2002-O-05.

⁹ The memo pertains to an action for which the statute of limitations has not run.

CONCLUSION

WSI did not violate the open records law when it denied a record as “attorney work product” under N.D.C.C. § 44-04-19.1.

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Attorney General

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