

**OPEN RECORDS AND MEETINGS OPINION  
2008-O-20**

DATE ISSUED: August 1, 2008

ISSUED TO: Workforce Safety and Insurance

**CITIZEN'S REQUEST FOR OPINION**

Chad Nodland requests that the Attorney General review Workforce Safety and Insurance's ("WSI") denial of Mr. Nodland's open records request to WSI under N.D.C.C. § 44-04-18.<sup>1</sup>

**FACTS PRESENTED**

On February 12, 2008, Chad Nodland requested specific records from WSI:

A printout of the names of all persons or entities who have received WSI safety grants, the amounts of each grant payment and the date of each payment, during the period from January 2002 through January 2008. I am not asking for the grant application forms or for any other confidential information; just the names of the recipients of these public moneys, the amounts paid to each and the dates on which each such grant payment was paid. . . .<sup>2</sup>

WSI responded the same day and advised Mr. Nodland that the records he requested are protected information pursuant to N.D.C.C. § 65-04-15, WSI's employer confidentiality statute.

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<sup>1</sup> Mr. Nodland also asked our office whether WSI violated the law by failing to provide an "index-type listing" of the records WSI withheld. Our office recently addressed this issue in N.D.A.G. 2008-O-05, which determined that such a listing is not required. Mr. Nodland also alleges that WSI is violating the open records law by systematically denying requests for open records. I am only able to review the one denial described in the request for an opinion.

<sup>2</sup> E-mail from Editor, [northdecoder@gmail.com](mailto:northdecoder@gmail.com), to Mark A. Armstrong, WSI Communications Executive (Feb. 12, 2008, 10:23 a.m.).

ISSUE

Whether WSI properly withheld records sought by Mr. Nodland under N.D.C.C. § 65-04-15.

ANALYSIS

WSI is a special fund<sup>3</sup> public entity subject to the state's open records law.<sup>4</sup> Under the authority of N.D.C.C. § 65-03-04, WSI has developed three safety grant programs: Safety Training & Education Program Level 1 (STEP 1); Safety Training & Education Program Level 2 (STEP 2); and Hazard Elimination Learning Program (HELP). Here, the requester seeks certain records pertaining to these programs.

All records of a public entity are open to the public unless "otherwise specifically provided by law."<sup>5</sup> "[F]or an exception to the open-records law to exist under our constitutional and statutory provisions, it must be specific, i.e., the Legislature must directly address the status of the record in question, for a specific exception, by the plain terms of those provisions, may not be implied."<sup>6</sup> The word "[r]ecord" means recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business . . . .<sup>7</sup>

WSI relied upon N.D.C.C. § 65-04-15 to deny the request. That section provides:

The information contained in an employer's file is not subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota; is for the exclusive use and information of the organization or its agents in the discharge of the organization's official duties; and is not open to the public nor usable in any court in any court action or proceeding unless the organization is a party to that court action or proceeding. The information contained in the file, however, may be tabulated and published by the organization in statistical form for the use and information of the state

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<sup>3</sup> Special funds are monies that have been acquired by the state for certain or specific purposes. Langer v. State, 284 N.W. 238, 248 (N.D. 1939) ("There is as much reason for safeguarding the expenditure of moneys held by the State in trust for expenditure for certain [special] designated purposes as there is to place safeguards around the expenditure of moneys collected for general purposes.").

<sup>4</sup> N.D.C.C. § 44-04-17.1(12).

<sup>5</sup> N.D.C.C. § 44-04-18(1).

<sup>6</sup> Hovet v. Hebron Pub. Sch. Dist., 419 N.W.2d 189, 191 (N.D. 1988).

<sup>7</sup> N.D.C.C. § 44-04-17.1(15).

departments and of the public. Upon request, the organization shall disclose the rate classification of an employer to the requester; however, the organization may not disclose any information that would reveal the amount of payroll upon which that employer's premium is being paid or the amount of premium the employer is paying. The organization may disclose whether an employer's file is active, canceled, closed, pending, delinquent, or uninsured. The information in the employer's file may not be released in aggregate form, except to those persons contracting with the organization for exchange of information pertaining to the administration of this title, except upon written authorization by the employer for a specified purpose, or at the discretion of the organization with regard to delinquent and uninsured employers. Disclosure by a public servant of information contained in an employer's report, except as otherwise allowed by law, is a violation of section 12.1-13-01. Anyone who is convicted under section 12.1-13-01 is disqualified from holding any office or employment with the organization.

. . . .<sup>8</sup>

WSI argues that an employer's file includes all aspects of an employer's relationship and submissions to WSI. WSI also explains that an employer file is not limited to an actual manila-type folder, but rather includes information sent and submitted from the policyholder services department, loss prevention, loss control (all departments within Employer Services) and its PICS computer system (used by all departments within Employer Services). WSI is also wary of releasing information due to the potential criminal penalties that may be imposed for releasing confidential information to the public.

WSI further explains that its position regarding safety grant information as part of an employer's confidential file, has "evolved" through factual experience and Attorney General opinions that address N.D.C.C. § 65-04-15 before it was amended in 2003.

In 2003, the Legislature amended N.D.C.C. § 65-04-15 by changing the word "report" to "file."<sup>9</sup> Brent Edison, then Executive Director of WSI, testified in part:

The proposed changes amend §65-04-15, the employer confidentiality statute, in two ways. First, the amendment permits the disclosure of the status of an employer file. Currently, NDWC may tell a requesting party whether or not an employer has an account with NDWC. The amendment permits Workers Compensation to disclose whether the account is active, cancelled, closed, pending or delinquent. This tool may

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<sup>8</sup> N.D.C.C. § 65-04-15.

<sup>9</sup> 2003 N.D. Sess. Laws ch. 564, § 4.

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prove invaluable to a homeowner researching a contractor, or to a contractor confirming the statements of subcontractors.

Secondly, the amendment simplifies and broadens with whom Workers Compensation may exchange information. The current language lists a number of agencies individually. The amendment provides Workers Compensation with the discretion to disclose employer information to any state or federal agency, but only for the purpose of administering the duties of the state or federal agency.<sup>10</sup>

There was no discussion or testimony explaining why WSI wanted to replace the word “report” with “file.” House Bill 1334 also amended N.D.C.C. § 65-04-15 in 2003. On February 3, 2003, counsel for WSI testified:

The current language of 65-04-15 protects North Dakota employers from disclosure of their premium information. Indeed, the statute does not permit the disclosure of “any information that would reveal the amount of payroll upon which that employer’s premium is being paid . . . .” HB 1334 would require NDWC to provide data on employer location, employee location and any other information requested by the department of commerce . . . .<sup>11</sup>

The primary goal in construing a statute is to ascertain the intent of the Legislature.<sup>12</sup> In ascertaining the Legislature’s intent, the plain language of a statute is examined first and each word of the statute is given its ordinary meaning.<sup>13</sup> If the language of the statute is clear and unambiguous, the language cannot be ignored under the pretext of pursuing its spirit because the legislative intent is presumed clear from the face of the statute.<sup>14</sup> If a statute’s language is ambiguous, however, extrinsic aids may be used to interpret the statute.<sup>15</sup> A statute is ambiguous if it is susceptible to differing but rational meanings.<sup>16</sup> The word “file” is not defined in N.D.C.C. title 65, but The American

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<sup>10</sup> Hearing on Engrossed H.B. 1149 Before the Senate Comm. on Industry, Business, and Labor, 2003 N.D. Leg. (Mar. 3) (Testimony of Brent Edison, Executive Director, North Dakota Workers Compensation).

<sup>11</sup> Hearing on H.B. 1334 Before the House Comm. on Industry, Business, and Labor, 2003 N.D. Leg. (Feb. 3) (Testimony of Anne Jorgenson Green, North Dakota Workers Compensation).

<sup>12</sup> Olson v. Workforce Safety and Ins., 747 N.W.2d 71, 75 (N.D. 2008).

<sup>13</sup> Id.; N.D.C.C. § 1-02-02.

<sup>14</sup> In re Guardianship and Conservatorship of V.J.V.N., 750 N.W.2d 462, 465 (N.D. 2008) (quoting Guardianship/Conservatorship of Van Sickle, 694 N.W.2d 212, 219 (N.D. 2005)); N.D.C.C. § 1-02-05.

<sup>15</sup> Olson, 747 N.W.2d at 76.

<sup>16</sup> Reopelle v. Workforce Safety and Ins., 748 N.W.2d 722, 728 (N.D. 2008).

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Heritage Dictionary defines the word to mean “[a] receptacle that keeps loose objects, esp. papers, in useful order. . . . [a] collection of objects kept or arranged in or as if in a file . . . .”<sup>17</sup> Although the word “file” is unambiguous, WSI’s broad interpretation of N.D.C.C. § 65-04-15 is, in my opinion, ambiguous and makes the section susceptible to differing meanings.

In determining the intention of legislation, the following matters may be considered:

1. The object sought to be attained.
2. The circumstances under which the statute was enacted.
3. The legislative history.
4. The common law or former statutory provisions, including laws upon the same or similar subjects.
5. The consequences of a particular construction.
6. The administrative construction of the statute.
7. The preamble.<sup>18</sup>

The legislative history indicates the object sought to be attained by making an employer’s file confidential was the protection of North Dakota employers from disclosure of their premium information and amount of payroll. In addition, the circumstances of the legislation indicate that N.D.C.C. § 65-04-15 was amended to broaden or liberalize the amount of information available to the public by making certain account information available to the public. WSI explains that the change was intended to be a more accurate reflection of the information that WSI sought to protect. Nothing in the legislative history, however, mentions the confidentiality of safety grant records, and nothing indicates that the Legislature intended to protect records beyond what is set forth in N.D.C.C. § 65-04-15, which is the employer premium and payroll amount.

I agree with WSI that its employer confidentiality statute authorizes WSI to protect an employer’s premium amount or payroll information, including information that may reveal an employer’s premium amount or payroll information. It is my opinion, however, that N.D.C.C. § 65-04-15 does not apply to all records that may relate to an employer and the statute is too general to make all safety grant records confidential. Only safety grant records that would reveal premium or payroll information can be protected under N.D.C.C. § 65-04-15.

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<sup>17</sup> The American Heritage Dictionary 503 (2d coll. ed. 1991).

<sup>18</sup> N.D.C.C. § 1-02-39.

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To support its denial of safety grant records, WSI relies in part upon previous opinions from this office which address N.D.C.C. § 65-04-15.<sup>19</sup> Those opinions generally conclude that all information submitted by an employer to WSI constitutes an “employer report.” WSI’s reliance on prior opinions addressing N.D.C.C. § 65-04-15 may be misplaced because those opinions addressed a former version of the statute. And in N.D.A.G. 96-L-16, this office concluded certain employer information, including notices from WSI to employers concerning premium adjustments, was open to the public. I also disagree with WSI’s interpretation of N.D.A.G. 96-L-16 and N.D.A.G. 95-L-146 that any record regarding an employer is confidential. That interpretation goes beyond the plain language of the statute. As previously explained, exceptions to the open records law must be specific and directly address the status of the record in question.

Prior to the issuance of this opinion, WSI has agreed that STEP grant information does not reveal premiums or payroll information, and WSI has released a list of STEP grant recipients and amounts to Mr. Nodland. Although WSI’s decision to release the records preceded this opinion, WSI’s decision to release the records was a violation of the open records law because it was not made within a reasonable time, and only followed intercession from this office.<sup>20</sup>

Section 44-04-18 does not usually require an immediate response to an open records request, but the delay permitted will usually be measured in a few hours or a few days rather than several days or weeks.<sup>21</sup> “Depending on the circumstances, a delay may be appropriate for a number of reasons, including excising closed or confidential information, consulting with an attorney when there is a reasonable doubt whether the records are open to the public, or balancing other responsibilities of the public entity that demand immediate attention.”<sup>22</sup> “Whether a response has been provided within a reasonable time will depend on the facts of a given situation.”<sup>23</sup> In this case, WSI waited over 160 days before deciding to provide the records. The delay is unreasonable.

The remaining safety grant records are related to the HELP grant. According to WSI, the amount of a grant is related to the premium amount paid by an employer and therefore, if the award amount is released, it potentially could provide a person with the building blocks to calculate a range of an employer’s premium. Members of my staff have reviewed the records and agree that if released, some of the information would reveal the premium amounts. Generally, the amount of money provided by an agency through a grant would be considered an open record. In this case, the grant amount

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<sup>19</sup> N.D.A.G. 96-L-16; N.D.A.G. 95-L-146; N.D.A.G. 85-23.

<sup>20</sup> N.D.C.C. § 44-04-18(8).

<sup>21</sup> N.D.A.G. 2004-O-07; N.D.A.G. 2002-O-06.

<sup>22</sup> N.D.A.G. 2004-O-05; N.D.A.G. 2002-O-06; N.D.A.G. 98-O-20; N.D.A.G. 98-O-04.

<sup>23</sup> N.D.A.G. 2006-O-15; N.D.A.G. 2005-O-05; N.D.A.G. 2003-O-09.

does have a reasonable potential to reveal an employer's premium amount and that is prohibited by N.D.C.C. § 65-04-15. If this is not the intent of the Legislature, it should consider amending the law in the next legislative session.

Nothing in N.D.C.C. § 65-04-15, however, protects the names of the employers who received grant money. Thus, it is my opinion that the names of HELP grant recipients are open records and WSI violated N.D.C.C. § 44-04-18 by not releasing the names to Mr. Nodland.

Finally, WSI has previously argued that the information requested is not available because it was requested in the aggregate.<sup>24</sup> WSI has since provided STEP grant records to Mr. Nodland in the format he requested. I agree with the format used to release the information. And, it should also be followed for the release of the HELP grant records.

#### CONCLUSION

WSI violated N.D.C.C. § 44-04-18 by not releasing STEP grant information within a reasonable time and the names of HELP grant recipients.

#### STEPS NEEDED TO REMEDY VIOLATIONS

WSI must provide Mr. Nodland with the HELP grant records 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>25</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>26</sup>

Wayne Stenehjem  
Attorney General

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<sup>24</sup> N.D.C.C. § 65-04-15 prevents WSI from releasing employer information in the aggregate.

<sup>25</sup> N.D.C.C. §44-04-21.1(2).

<sup>26</sup> Id.