

**OPEN RECORDS AND MEETINGS OPINION
2014-O-16**

DATE ISSUED: October 6, 2014

ISSUED TO: West Fargo Police Department

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Dave Roepke asking whether the West Fargo Police Department violated N.D.C.C. § 44-04-18 when it withheld the identity of a victim whose death was being investigated.

FACTS PRESENTED

On July 11, 2014, the West Fargo Police Department (Department) issued a Press Release providing certain information about an incident involving the death of an infant that occurred on June 13, 2014.¹ The press release stated, in part:

At this time the case remains under investigation. The investigation has been completed and the case will be forwarded to the Cass County States Attorney for consideration of charges.²

On July 14, 2014, Dave Roepke, news director for The Forum, requested that the Department release the identity of an infant victim whose death was being investigated by the Department and State's Attorney's office.³ The Department, upon

¹ See Press Release, West Fargo Police Dep't. (July 11, 2014); see also letter from Mike Reitan, West Fargo Police Chief, to Sandra Voller, Asst. Att'y Gen. (July 29, 2014) (Chief Reitan explains the press release inaccurately states the investigation of the incident was closed).

² Press Release, West Fargo Police Dep't. (July 11, 2014).

³ See Emails from Dave Roepke, The Forum News Director, to Michael Reitan, West Fargo Police Chief, Greg Warren, Sergeant, West Fargo Police Dept. and Ryan Younggren, Asst. Cass Cty. State's Att'y (July 14, 2014; 10:40 AM, 11:13 AM, and 6:10 PM).

recommendation of the Cass County State's Attorney's office,⁴ declined to release the identity of the victim at the time of Mr. Roepke's request as exempt "active criminal investigative information" under N.D.C.C. § 44-04-18.7(1) and (4).⁵ Mr. Roepke was under the impression that the investigation was concluded based upon the press release so he questions whether the identity of a victim can be withheld as criminal investigative information.⁶

ISSUE

Whether the Department violated N.D.C.C. § 44-04-18 by withholding the identity of a victim as "active criminal investigative information" as defined by N.D.C.C. § 44-04-18.7.

ANALYSIS

All records of a public entity⁷ are open to the public unless otherwise specifically provided by law.⁸ A public entity must disclose all requested public records, except for confidential or exempt information.⁹ "Active criminal investigative information" is exempt from the open records law.¹⁰

"Criminal investigative information" means information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including information derived from laboratory tests, reports of investigators or informants, or any type of surveillance. Criminal investigative information must be considered "active" as long as it is related to an ongoing investigation that is continuing with a reasonable

⁴ The Department forwarded the case file to the Cass County State's Att'y's office for consideration of charges on July 10, 2014. See Letter from Michael Reitan, West Fargo Police Chief, to Sandra Voller, Asst. Att'y Gen. (July 29, 2014).

⁵ See Letter from Michael Reitan, West Fargo Police Chief, to Sandra Voller, Asst. Att'y Gen. (July 29, 2014); see also Emails to Dave Roepke, The Forum News Director, from Michael Reitan, West Fargo Police Chief (July 14, 2014, 12:45 PM; July 15, 2014, 6:48 PM).

⁶ See Letter from Dave Roepke, The Forum News Director, to Wayne Stenehjem, N.D. Att'y Gen. (July 17, 2014).

⁷ See N.D.C.C. § 44-04-17.1(13)(b) (definition of "public entity"). The Department, as an agency of the political subdivision of West Fargo, is a "public entity" subject to open records law.

⁸ N.D.C.C. § 44-04-18(1).

⁹ Id.

¹⁰ N.D.C.C. § 44-04-18.7(1).

good-faith anticipation of securing an arrest or prosecution in the foreseeable future.¹¹

Because “active criminal intelligence information” is exempt,¹² the decision to disclose it lies within the discretion of the criminal justice agency,¹³ subject to restrictions in other statutes or federal law.¹⁴

The Department explains that the statement in the press release that the investigation was complete was inaccurate.¹⁵ In fact, at the time of Mr. Roepke’s request, the state’s attorney’s office and Department were actively investigating the incident. The identity of the victim was still considered to be “active criminal intelligence information”¹⁶ due to the concern that the release of the victim’s identity prior to the filing of charges would impede the “cooperation of the child’s parents in disclosing information and releasing records relating to the investigation.”¹⁷ Based on the above definition and the reasoning provided by the Department, it is my opinion that the Department had the discretion to exempt the identity of the victim as “active criminal investigative information” pursuant to N.D.C.C. § 44-04-18.7.

The Department, as a criminal justice agency, has the authority to withhold active criminal investigative information. Accordingly, it is my opinion that the Department did not violate N.D.C.C. § 44-04-18 when it declined to disclose the identity of a victim relating to an active criminal investigation.

¹¹ N.D.C.C. § 44-04-18.7(4). Subsection 2 of N.D.C.C. § 44-04-18.7, lists certain information that is not considered “criminal investigative information” and therefore should be disclosed upon request unless otherwise provided by law; however, the identity of a victim is not included in this list.

¹² See N.D.C.C. § 44-04-17.1(5) (definition of “exempt record” means “all or part of a record...that is neither required by law to be open to the public, nor is confidential, but may be open in the discretion of the public entity.”).

¹³ The term “criminal justice agency” includes any law enforcement agency or prosecutor. N.D.C.C. § 44-04-18.7(5).

¹⁴ See N.D.A.G. 2005-O-13; N.D.A.G. 98-F-09.

¹⁵ Letter from Mike Reitan, West Fargo Police Chief, to Sandra Voller, Asst. Att’y Gen. (July 29, 2014).

¹⁶ The identity of the victim fits the definition of “information with respect to an identifiable person...compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including information derived from laboratory tests, reports of investigators or informants, or any type of surveillance.” N.D.C.C. § 44-04-18.7(4) (definition of “criminal investigative information”).

¹⁷ See Letter from Mike Reitan, West Fargo Police Chief, to Sandra Voller, Asst. Att’y Gen. (July 29, 2014).

CONCLUSION

It was not a violation of open records law for the West Fargo Police Department to deny a request for the name of a victim because, at the time of the request, the information was exempt active criminal intelligence and investigative information under N.D.C.C. § 44-04-18.7.

Wayne Stenehjem
Attorney General

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