

**LETTER OPINION  
2016-L-04**

December 30, 2016

The Honorable George J Keiser  
State Representative, District 47  
422 Toronto Dr  
Bismarck, ND 58503-0276

Dear Representative Keiser:

Thank you for your letter requesting my opinion on the effect the recently passed constitutional provision in Article I, section 25, known as “Marsy’s Law” has on the open records law and whether the amendment prevents the disclosure of certain records by public entities. Specifically you ask:

1. Can state and local public entities release motor vehicle crash reports to the public without violating Article I, Section 25?
2. Can state and local public entities include street addresses where crimes have occurred and the names of victims in crime report logs or law enforcement radio traffic without violating Article I, Section 25?

**ANALYSIS**

North Dakota has extensive statutory provisions, opinions, and court decisions on open records law. The North Dakota Constitution provides:

Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies or the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.<sup>1</sup>

---

<sup>1</sup> N.D. Const. art. XI, § 6.

The open records law is further developed in North Dakota Century Code ch. 44-04, beginning with section 44-04-17.1.

In 2016, Article I, Section 25 was passed by initiated measure in North Dakota, referred to as Marsy's Law. Marsy's Law enumerates 19 rights afforded to victims.<sup>2</sup> A "victim" is defined as "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed."<sup>3</sup> One of the enumerated rights in Marsy's Law is the victim's "right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information about the victim, and to be notified of any request for such information or records."<sup>4</sup> This amendment to the constitution is unclear on how rights must be asserted, what is meant by records that could be used to "harass" or "locate" a victim or victim's family, and what is considered "confidential or privileged information" about a victim. The ambiguous language requires constitutional interpretation.

The constitutional and statutory provisions of the open records law must be read in conjunction with the constitutional provision of Marsy's Law, and statutory provisions on victim's rights, to harmonize and give meaning to the related provisions.<sup>5</sup> The North Dakota Supreme Court outlined the following principles for construing constitutional provisions:

When interpreting the state constitution, our overriding objective is to give effect to the intent and purpose of the people adopting the constitutional statement. The intent and purpose of a constitutional provision is to be determined, if possible, from the language itself. We give words in a constitutional provision their plain, ordinary, and commonly understood meaning. When interpreting constitutional provisions, we apply general principles of statutory construction. We must give effect and meaning to every provision and reconcile, if possible, apparently inconsistent provisions. We presume the people do not intend absurd or ludicrous results in adopting

---

<sup>2</sup> N.D. Const. art. I, § 25. Statutory provisions found in N.D.C.C. chs. 12.1-34 and 12.1-35 also detail certain victim rights and treatment.

<sup>3</sup> N.D. Const. art. I, § 25(4). If a victim is deceased, incompetent, incapacitated, or a minor, the victim's spouse, parent, grandparent, child, sibling, grandchild, or guardian, and any other person with a relationship to the victim that is substantially similar to a listed relationship, may also exercise these rights. The term "victim" does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor or incapacitated victim.

<sup>4</sup> N.D. Const. art. I, § 25(1)(e).

<sup>5</sup> N.D.C.C. § 1-02-07.

constitutional provisions, and we therefore construe such provisions to avoid those results.<sup>6</sup>

A court, when interpreting constitutional provisions, “may consider contemporary legal practices and laws in effect when the people adopted the constitutional provision.”<sup>7</sup> “When ambiguity exists in the constitution, [the Supreme Court] may properly consider the consequences of a particular construction.”<sup>8</sup>

The North Dakota Supreme Court recognizes that rights afforded by the constitution are not always absolute and can be subject to reasonable limitations.<sup>9</sup> One such limitation is requiring a person to affirmatively invoke his or her right in order to seek its protections.<sup>10</sup> Marsy’s Law specifically provides that the “victim...may assert and seek enforcement of the rights enumerated...in any trial or appellate court, or before any other authority with jurisdiction over the case, as a matter of right.”<sup>11</sup> The right at issue in this opinion allows the victim “to prevent the disclosure of information or records.”<sup>12</sup> By the plain language of the amendment, it is reasonable to conclude that a victim would need to affirmatively assert his or her right to prevent the disclosure of the records or information. It is therefore my opinion that a victim under Marsy’s Law must specifically invoke his or her right to prevent disclosure of information or records.

---

<sup>6</sup> Kelsh v. Jaeger, 2002 ND 53, ¶7, 641 N.W.2d 100, 104 (N.D. 2002) (citations omitted).

<sup>7</sup> MKB Mgmt. Corp. v. Burdick, 2014 ND 197, ¶25, 855 N.W.2d 31, 41 (N.D. 2014) (citing State v. Orr, 375 N.W.2d 171, 177-78 (N.D. 1985) (interpreting right to counsel provision in state constitution in view of statutes in effect when constitution adopted) and City of Bismarck v. Altevogt, 353 N.W.2d 760, 764-65 (N.D. 1984) (interpreting right to jury trial under state constitution in view of territorial statutes defining right to jury trial)).

<sup>8</sup> Fed. Land Bank of Saint Paul v. Gefroh, 418 N.W.2d 602, 604 (N.D. 1988).

<sup>9</sup> See State v. N.D. Educ. Ass’n., 262 N.W.2d 731 (N.D. 1978) (freedom of speech and the press are not absolute or unqualified rights, but are subject to implied limitations and restrictions), State v. Ricehill, 415 N.W.2d 481 (N.D. 1987) (constitutional right to bear arms does not grant an absolute right in all situations but instead has limiting language and must be read in conjunction with the State’s exercise of police power).

<sup>10</sup> See State, ex rel. v. Gruchalla, 467 N.W.2d 451 (N.D. 1991) (recognizing that a witness must assert his or her Fifth Amendment right against self-incrimination with each question); State v. Lefthand, 523 N.W.2d 63 (N.D. 1994) (an accused must invoke his or her right to have counsel present in custodial interrogations under the Fifth Amendment and must separately assert his or her Sixth Amendment right to counsel for criminal prosecutions).

<sup>11</sup> N.D. Const. art. I, § 25(2).

<sup>12</sup> N.D. Const. art. I, § 25(1)(e).

If a victim does make an affirmative invocation of his or her right to prevent disclosure of the information contained in section 25, subsection (1)(e), the question then becomes what information is protected under Marsy's Law.

Marsy's Law protects "information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or private information about the victim." Marsy's Law does not define or provide guidance on what information is considered to "locate" or "harass" or what is "confidential" or "privileged."

As stated above, when ambiguity exists in the constitution, it is proper to consider the consequences of a particular construction, presuming the people do not intend absurd or ludicrous results in adopting constitutional provisions.<sup>13</sup> I therefore turn to guidance from the other constitutional provisions and the open records law.

Under the open records law, all records in possession of a public entity are open unless a law specifically states otherwise.<sup>14</sup> The open records law requires that a public entity describe the legal authority for a denial by pointing to a specific law that makes a record or information "exempt" or "confidential."<sup>15</sup>

Under Marsy's Law, a victim can affirmatively assert protection for information or records that would reveal "confidential or privileged" information about the victim. "Confidential" information is already defined and protected under the open records law and includes "all or part of a record ... that is either expressly declared confidential or is prohibited from being open to the public."<sup>16</sup> The term "privileged" is not defined under the open records law or in Marsy's Law. However, there are statutes in the North Dakota Century Code that use the term "privileged" either alone or in conjunction with

---

<sup>13</sup> Kelsh v. Jaeger, 2002 ND 53, ¶ 7, 641 N.W.2d 100, 104 (N.D. 2002); Fed. Land Bank of St. Paul v. Gefroh, 418 N.W.2d 602, 604 (N.D. 1988).

<sup>14</sup> N.D.C.C. § 44-04-18. A "law" that could prevent disclosure must be found in federal law or regulations or the North Dakota Constitution or state statutes. See N.D.C.C. § 44-04-17.1(8) (definition of "law") and N.D. Const. art. XI, § 6.

<sup>15</sup> N.D.C.C. § 44-04-18(7).

<sup>16</sup> N.D.C.C. § 44-04-17.1(3) (definition of "confidential meeting" and "confidential record)."

the terms “exempt” or “confidential.”<sup>17</sup> Under Marsy’s law, a public entity must cite to a specific law that makes a record or information “confidential” or “privileged” to prevent disclosure.

Marsy’s Law also protects information or records “that could be used to locate ... the victim or the victim’s family.” A public entity must review a record and reasonably interpret what information could be used to locate a victim or victim’s family. This would include addresses, or even reference to a specific building or place of employment, that could lead to the location of a victim.

Finally, Marsy’s Law protects information or records “that could be used to ... harass the victim or victim’s family.” This provision is ambiguous with no clear definition on what records or information this might encompass. The North Dakota Supreme Court has held that exceptions to the open records law must be specifically stated by constitutional or statutory provisions and narrowly construed.<sup>18</sup> An expansive definition of what information or record could be used to harass a victim or victim’s family would, in effect, prevent the release of all records regarding a crime. This is inconsistent with the constitutional provision that requires public records to be open and accessible unless otherwise provided by law.<sup>19</sup> In order to reconcile this seemingly inconsistent provision of Marsy’s law and the open records law, it is my opinion that because a victim’s contact information is an obvious means to harass a victim or victim’s family, this is the information to be protected under

---

<sup>17</sup> N.D.C.C. § 13-08-11.2 (“Information received by the commissioner from any third party which is confidential or privileged in the third party’s possession remains confidential or privileged in the commissioner’s possession.”); N.D.C.C. § 31-01-06.1 (school counselors “shall be legally immune from disclosing any privileged or confidential communications made to such counselor in a counseling interview.”); N.D.C.C. § 26.1-03.1-08 (“risk-based capital reports...that are in the possession or control of the insurance department are confidential and privileged...”); N.D.C.C. § 32-12.2-11 (certain records “in the possession of the office of management and budget or a public entity are privileged and exempt”).

<sup>18</sup> Hovet v. Hebron Pub. Sch. Dist., 419 N.W.2d 189 (N.D. 1988) (“for an exception to the open records law to exist under our constitutional and statutory provisions, it must be specific” and cannot be implied); City of Grand Forks v. Grand Forks Herald, Inc., 307 N.W.2d 572 (N.D. 1981) (there is no explicit right to privacy in North Dakota’s Constitution and the court declined to consider whether such a right can be inferred, therefore finding the personnel file of a former police chief to be a public record).

<sup>19</sup> N.D. Const. Art. 11, § 6.

this provision.<sup>20</sup> Contact information includes cell phone numbers, home addresses, work addresses, personal telephone numbers, or email addresses.<sup>21</sup>

Keeping the above guidance in mind, I now turn to the specific questions asked in this opinion.

1. Can state and local public entities release motor vehicle crash reports to the public without violating Article I, Section 25?

Motor vehicle accident reports are generated pursuant to statute, which require a law enforcement officer to complete a report of an accident in a form provided by the director of the Department of Transportation.<sup>22</sup> The first page of the report contains identifying information of operators and owners of the vehicles in the accident and the second page includes an area for law enforcement officers to draw a diagram of the accident and provide a narrative.<sup>23</sup> The narrative may include the law enforcement officer's opinion as to fault or responsibility for the accident. Under N.D.C.C. § 39-08-13:

4. The reports required to be forwarded by law enforcement officers and the information contained in the reports is not privileged or confidential. If, however, the investigating officer expresses an opinion as to fault or responsibility for the accident, the opinion is confidential and not open to public inspection, except as provided in subsection 5. In addition, the following information contained in the report is an exempt record as defined in section 44-04-17.1 unless the requester is a party to the accident, a party's legal representative, the insurer of any party to the accident, the agent of that insurer, or the legal representative or insurer of an individual involved in defending or investigating a prior or subsequent claim or accident involving a party to the accident:
  - a. Driver identification number of a party in the report;
  - b. Telephone number of a party in the report;
  - c. Insurance company name and policy number of a party in the report; and

---

<sup>20</sup>This is consistent with the protections afforded under N.D.C.C. ch. 12.1-34, Fair Treatment of Victims and Witnesses, specifically N.D.C.C. § 12.1-34-03(4).

<sup>21</sup>No doubt, many additional questions will arise regarding the protections of Marsy's Law. It is impossible to resolve every potential issue in this opinion. Such instances will need to be addressed by the Legislature, the courts, and this office on a case by case basis.

<sup>22</sup>N.D.C.C. §§ 39-08-10 and 39-08-13.

<sup>23</sup>N.D.A.G. 2013-L-01.

- d. Day and month of birth of a party in the report.
5. Upon affirmation by a party to the accident, a party's legal representative, or the insurer of any party to the accident that the investigating officer's opinion is material to a determination of liability and upon payment of a fee of five dollars, the director or investigating agency shall release a completed copy of the investigating officer's opinion to the entity requesting the information. ...

There are already statutory limitations on the release of accident reports as outlined in N.D.C.C. § 39-08-13(4). For example, the officer's opinion is confidential<sup>24</sup> and certain information is exempt<sup>25</sup> except for a party to the accident or the party's legal representative or insurer.<sup>26</sup> Accident reports are released to the parties listed in N.D.C.C. § 39-08-13(4) and (5) for the purpose of having liability claims resolved in a timely manner. In addition, N.D.C.C. § 39-08-06 requires drivers who are involved in an accident to exchange names, addresses, and insurance information.

Under Marsy's Law, if the accident report involves a victim to a crime and the victim has asserted his or her rights, there would also be protections before releasing contact and location information to the general public, as previously discussed in this opinion. However, Marsy's Law does not prevent the release and exchange of contact information specifically required by the above statutes. The release of the accident report and the exchange of information at the scene of an accident are for the benefit of the victim and aid in resolving liability claims, and cannot reasonably be construed as a means to harass a victim. This interpretation is consistent with the provision in Marsy's Law that states "[t]he granting of these rights to victims shall not be construed to deny or disparage other rights possessed by victims."<sup>27</sup>

Therefore, it is my opinion that accident reports may still be released pursuant to N.D.C.C. § 39-08-13 and information may still be exchanged as required by N.D.C.C.

---

<sup>24</sup> N.D.C.C. § 39-08-13(5) provides which individuals or entities can receive a copy of the officer's opinion in the accident report. If the government agency receives affirmation that a requesting party is one of the enumerated individuals or entities in this subsection, they would still be able to obtain the officer's opinion because it would not be considered "confidential or privileged" to these individuals.

<sup>25</sup> N.D.C.C. § 44-04-17.1(5) (defining "exempt record" to mean "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").

<sup>26</sup> N.D.C.C. § 39-08-13(4).

<sup>27</sup> N.D. Const. art. I, § 25(3).

§ 39-08-06, but for records released to the general public, location and contact information may be protected if the victim invokes Marsy's Law.

2. Can state and local public entities include street addresses where crimes have occurred and the names of victims in crime report logs or law enforcement radio traffic without violating Article I, Section 25?

An address stated in real time over the radio frequency used by law enforcement is given in order to direct the law enforcement officer to a potential incident. The real time communication between law enforcement officers is essential to carry out the mission and duties of law enforcement. At the time of the statement over the radio, no crime has been established, no victim has been identified, and the rights under Marsy's Law have not been asserted. Marsy's Law would therefore not prohibit such radio traffic by law enforcement.<sup>28</sup>

If, however, afterwards, the victim has affirmatively invoked his or her rights under Marsy's Law, the public entities must take into account the protections afforded under Marsy's Law before responding to a records request or disclosing the information. If the street address where a crime occurred is the address of a victim or victim's family, and victim has asserted his or her rights under Marsy's Law, the public entity should not reveal the address.<sup>29</sup>

In addition to addresses, you also ask whether the names of a victim can be released without violating Marsy's Law. Currently, there are limited exceptions that would protect the names of crime victims under the open records law. For example, the identity of victims of domestic violence, sexual offenses, sexual performance of a child, or human trafficking are protected under N.D.C.C. § 44-04-18.20. Child victim's names and identifying information are protected pursuant to N.D.C.C. § 12.1-35-03.<sup>30</sup> If one of these statutes apply, the public entity can protect the names of crime victims. Otherwise, Marsy's Law does not specifically prevent the disclosure of an adult victim's name. As previously explained in this opinion, Marsy's Law must be reconciled with the constitutional provision that requires open records. Marsy's Law cannot be read so broadly that it unreasonably restricts North Dakota's Constitutional provision that requires open

---

<sup>28</sup> To interpret otherwise would compromise public safety. Marsy's Law also recognizes that the rights granted "to victims shall not be construed to deny or disparage other rights possessed by the victims." Law enforcement and first responders must be able to communicate freely in order to protect victims and the public.

<sup>29</sup> Although a specific address of a victim is protected, this does not prevent law enforcement from releasing general location information about criminal activity for purposes of public safety.

<sup>30</sup> This exception does not apply to child victims of traffic accidents or child victims of a fire.



LETTER OPINION 2016-L-04  
December 30, 2016  
Page 9

records.<sup>31</sup> Therefore, it is my opinion that, unless specifically protected by law, Marsy's Law does not protect the names of adult victims.

Sincerely,

Wayne Stenehjem  
Attorney General

sld

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.<sup>32</sup>

---

<sup>31</sup> See N.D. Const. Art. XI, § 6.

<sup>32</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).