

**OPEN RECORDS AND MEETINGS OPINION
2017-O-05**

DATE ISSUED: August 23, 2017

ISSUED TO: Morton County State's Attorney's Office and Morton County Sheriff's Department

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Benjamin M. Stoll asking whether the Morton County State's Attorney's Office and the Morton County Sheriff's Department violated N.D.C.C. § 44-04-18 by refusing to release records related to criminal investigations.

FACTS PRESENTED

On February 21, 2017, Mr. Stoll sent a request for records to the Morton County State's Attorney's Office and the Morton County Sheriff's Department. Mr. Stoll requested all video and photographs taken by law enforcement on or near Backwater Bridge (on North Dakota Highway 1806) on November 21, 2016, between 1:30 a.m. and 5 a.m. central standard time.

Both the Morton County State's Attorney's Office and the Morton County Sheriff's Department responded that the records would not be released based on N.D.C.C. § 44-04-18.7, which authorizes entities to not release records relating to active criminal intelligence information or active criminal investigative information.¹ Particularly they rely on the exception for active criminal investigative information.²

The Morton County State's Attorney's Office and the Morton County Sheriff's Department are in the process of investigating and prosecuting cases related to the protests of the Dakota Access Pipeline that occurred on or near Backwater Bridge in 2016.

¹ The Morton Cnty. Sheriff's Dep't also based its denial of records release on N.D.C.C. § 44-04-25, relating to security system plans. Because we find there was sufficient basis under N.D.C.C. § 44-04-18.7 to not release the records, we do not address whether the records could also be withheld based on N.D.C.C. § 44-04-25.

² See letter from Allen Koppy, Morton Cnty. State's Att'y, to Lea Ann Schneider, Asst. Att'y Gen. (May 26, 2017).

ISSUE

Whether the Morton County State's Attorney's Office and the Morton County Sheriff's Department violated the open records law by refusing to release the requested records on the basis that they constituted active criminal investigative information.

ANALYSIS

All records of a public entity are open for inspection unless they are specifically exempted by law.³ Section 44-04-18.7, N.D.C.C., provides an exemption for active criminal intelligence information and active criminal investigative information:

1. Active criminal intelligence information and active criminal investigative information are not subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota. . . .

4. "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 good-faith anticipation of securing an arrest or prosecution in the foreseeable future.
5. "Criminal justice agency" means any law enforcement agency or prosecutor. The term also includes any other unit of government charged by law with criminal law enforcement duties or having custody of criminal intelligence or investigative information for the purpose of assisting law enforcement agencies in the conduct of active criminal investigations or prosecutions.

9. An image taken by a law enforcement officer or a firefighter with a body camera or similar device and which is taken in a private place is an exempt record.⁴

This office requested the Morton County State's Attorney's Office and the Morton County Sheriff's Department to explain their position that the requested records fall

³ N.D. Const. art. XI, § 6; N.D.C.C. §44-04-18.

⁴ N.D.C.C. § 44-04-18.7.

under active criminal investigative information. The Morton County State's Attorney's Office responded on behalf of both entities, stating, in part:

1.

The Morton County Sheriff's Department and Morton County State's Attorney has resisted disclosing such video or photographs from November 21, 2016 along with all video/photos containing evidentiary purposes due to their active involvement in investigations and potential use in further cases. As of today's date [May 26, 2017], the Morton County State's Attorney, the Morton County Sheriff's Office and potentially other agencies are still actively investigating, potentially charging, and prosecuting instances stemming from early October and possibly September. The week of November 21, 2016 as well as other protest dates before and after is still subject to follow up investigation. For one example in specific, identification of suspects is ongoing.

2. Matters involving protests in the month of November are currently under investigation, active, and cannot be disclosed until these matters have been fully investigated and adjudicated.

3. The State is actively considering the strengths and weakness of its cases. As it is publicly known, the State has dismissed several protester cases in consideration of re-charging. These are examples of actions consistent with an active investigation. The State is only able to make these considerations due to the Morton County Sheriff's Department and their investigated materials including body cameras and photographs. This material that is requested is essential to the prosecution and the adjudication of further cases. The State and the Court system have not adjudicated matters involving the dates in November due to an ample caseload involving the months of September and October.⁵

As quoted above in N.D.C.C. § 44-04-18.7, "[c]riminal investigative information must be considered 'active' as long as it is related to an ongoing investigation that is continuing with a reasonable good-faith anticipation of securing an arrest or prosecution in the foreseeable future."⁶ The Morton County State's Attorney has explained that Morton

⁵ Letter from Allen Koppy, Morton Cnty. State's Att'y to Lea Ann Schneider, Asst. Att'y Gen. (May 26, 2017).

⁶ N.D.C.C. § 44-04-18.7(4). See *also* N.D.A.G. 2005-O-13 (criminal investigative information is active until the prosecution is complete).

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County has been focusing on the ample caseload involving the months of September and October, and that the matters involving protests in the month of November are currently under investigation. In an open records opinion, this office must base the opinion on the facts given by the public entity.⁷ The public entities have provided a reasonable explanation as to why, at the time of the open records request, the requested records were exempt as active criminal investigative information. Therefore, the Morton County State's Attorney's Office and the Morton County Sheriff's Department did not violate the open records law when they refused to release the requested records, because the records constituted active criminal investigative information.⁸

The requester argues that, because subsection 9 of N.D.C.C. § 44-04-18.7, quoted above, authorizes video images to be withheld if they are taken in a private place, this means that they cannot be withheld if they are taken in a public place, such as at Backwater Bridge. This is not a correct interpretation of this law. Under N.D.C.C. § 44-04-18.7, criminal investigative information, including any type of surveillance, may be withheld, as long as the investigation is active. After the investigation is no longer active, the criminal investigative information becomes open to the public unless some other state law authorizes certain information to remain closed.⁹ Subsection 9 would authorize video images taken in a private place to remain closed even after a criminal investigation is no longer active.

CONCLUSION

It is my opinion that the Morton County State's Attorney's Office and the Morton County Sheriff's Department did not violate the open records law by refusing to release the requested records, because the records constituted active criminal investigative information.

Wayne Stenehjem
Attorney General

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cc: Benjamin M. Stoll (via email only)

⁷ N.D.C.C. § 44-04-21.1(1).

⁸ See N.D.A.G. 2014-O-15 (Grand Forks Police Department properly denied a request for 911 transcripts because the information contained therein was active criminal intelligence and investigative information under N.D.C.C. § 44-04-18.7).

⁹ N.D.A.G. 98-F-09.