

**OPEN RECORDS AND MEETINGS OPINION
2019-O-01**

DATE ISSUED: April 4, 2019

ISSUED TO: North Dakota Forensic Examiner's Office and the University of
North Dakota School of Medicine and Health Sciences

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from The Bismarck Tribune asking whether the North Dakota Forensic Examiner's Office and the University of North Dakota School of Medicine and Health Sciences and violated N.D.C.C. § 44-04-18 by failing to provide requested records.

FACTS PRESENTED

The Bismarck Tribune made two open record requests, one to the North Dakota Forensic Examiner's Office (Forensic Examiner) and one to the University of North Dakota School of Medicine and Health Sciences Forensic Department (UND), asking for copies of two different Reports of Death based on autopsies performed by the respective departments. Each department, after contacting the appropriate investigating agencies, denied the request for records citing N.D.C.C. § 44-04-18.7, active criminal intelligence and investigative information.¹

ISSUE

Whether the North Dakota Forensic Examiner's Office and the University of North Dakota School of Medicine and Health Science properly withheld records as active criminal intelligence and investigative information.

¹ Letter from Dr. William Massello III, N.D. State Forensic Exam'r, to Att'y Gen. Office (rec'd Oct. 26, 2018); Letter from Jason Jenkins, Asst. Att'y Gen. for UND, to Att'y Gen. Office (Oct. 23, 2018).

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.”² An “exempt” record may be released at the discretion of the public entity.³

Section 23-01-05.5, N.D.C.C., protects the “autopsy report,”⁴ and working papers and notes relating to the autopsy report as confidential, subject to disclosure as authorized by law.⁵ The “report of death” however, is subject to disclosure pursuant to N.D.C.C. § 23-01-05.5(2) and “becomes a public record eight days after the report of death is finalized.”⁶ The “report of death” is “issued by the state forensic examiner, the examiner’s designee ... which is the face page of the autopsy report identifying the decedent and stating the cause of death and manner of death.”⁷

The Bismarck Tribune contends that the plain language of N.D.C.C. § 23-01-05.5 provides that the report of death becomes a public record, without limitation, after eight days. However, that conclusion ignores provisions of the open records law that allow public records to be closed if “specifically provided by law.”⁸ Section 44-04-18.7, N.D.C.C., is a specific exception to the open records law and allows protections for active criminal intelligence and investigative information.⁹

A 2014 opinion explained that, although 911 transcripts are considered public records under N.D.C.C. § 57-40.6-07(4), the transcripts could nonetheless be withheld or redacted pursuant to exceptions under the open records law, specifically “active criminal intelligence and investigative information” pursuant to N.D.C.C. § 44-04-18.7.¹⁰ Similarly, in 2017, an opinion found that, although body camera images taken by law enforcement in a public place are not protected under N.D.C.C. § 44-04-18.7(9), which only protects images taken in a “private place,” the images are still subject to the other

² N.D.C.C. § 44-04-18.

³ N.D.C.C. § 44-04-17.1(5) (definition of exempt record).

⁴ N.D.C.C. § 23-01-05.5(1)(a) (definition of autopsy report).

⁵ N.D.C.C. § 23-01-05.5; *see also* N.D.C.C. § 44-04-18.18 (protecting autopsy photograph and images and authorizing disclosure for limited purposes), N.D.C.C. § 11-19.1-11 (coroners use and disclosure of autopsy reports).

⁶ N.D.C.C. § 23-01-05.5(2)(c). The eight day timeframe is for the individual who performed the autopsy to provide notification to the next of kin before the report of death becomes public record.

⁷ N.D.C.C. § 23-01-05.5(1)(b) (definition of report of death).

⁸ N.D.C.C. § 44-04-18.

⁹ *See* N.D.A.G. 2018-O-03; N.D.A.G. 2014-O-16; N.D.A.G. 2006-O-08.

¹⁰ N.D.A.G. 2014-O-15.

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provisions of N.D.C.C. § 44-04-18.7, and can be withheld as active criminal investigative information.¹¹ Likewise, the report of death, considered open after eight days, is still subject to the provisions of other open record laws.

Here, both the Forensic Examiner and UND contacted the appropriate law enforcement agency to determine the status of the records. The Forensic Examiner reached out to the law enforcement agencies investigating the subject's death and the McKenzie County Sheriff's Department who stated it was still actively investigating the case with the "distinct possibility" that criminal charges may be forthcoming.¹² The Sheriff's Department therefore "specifically requested that no information be released publicly at this time."¹³ According to the Forensic Examiner's office, it is cognizant of criminal investigative procedure and that the release can compromise the ability of law enforcement officials to do their jobs, and therefore, it relies on the investigating agencies' authority and determination that protecting the records is necessary as active criminal intelligence and investigative information.¹⁴

Likewise, UND reached out to the relevant law enforcement agencies and was informed by the Federal Bureau of Investigation and the Mountrail County Sheriff's Department that the requested record related to an active investigation.¹⁵ UND believes that the investigating agencies are in the best position to determine whether the case is active and whether the release of information would compromise the active investigations, and defers to the law enforcement agencies.¹⁶ Both the McKenzie County Sheriff's Department and the Mountrail County Sheriff's Department realize that once the cases are no longer deemed active by the appropriate law enforcement authorities, they would release the reports of death.¹⁷

Active criminal intelligence and investigative information, as defined by N.D.C.C. § 44-04-18.7, is a specific exception to the open records law and applies to records otherwise considered to be open, such as a report of death. The law enforcement agencies investigating the case are in the best position to determine whether the

¹¹ N.D.A.G. 2017-O-05.

¹² Letter from Dr. William Massello III, N.D. State Forensic Exam'r, to Att'y Gen. Office (rec'd Oct. 26, 2018).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Letter from Jason Jenkins, Asst. Att'y Gen. for UND, to Att'y Gen.'s Office (Oct. 23, 2018).

¹⁶ *Id.*

¹⁷ Letter from Dr. William Massello III, N.D. State Forensic Exam'r, to Att'y Gen. Office (rec'd Oct. 26, 2018); Letter from Jason Jenkins, Asst. Att'y Gen. for UND, to Att'y Gen. Office (Oct. 23, 2018).

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records fall into this exception. It was reasonable for UND and the Forensic Examiner to contact the law enforcement agencies and rely on their determinations that the requested records were considered active criminal intelligence and that investigative information would compromise the active investigations if released. It is therefore my opinion that the Forensic Examiner and UND did not violate the open records law by refusing to disclose the reports of death while the cases are active.

CONCLUSION

The North Dakota Forensic Examiner's Office and the University of North Dakota School of Medicine and Health Science properly withheld reports of death after contacting the law enforcement agencies investigating the case and were told that the case was still active and the record should not be released.

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Attorney General

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cc: Steve Wallick, Editor, Bismarck Tribune (via email only)