

**OPEN RECORDS AND MEETINGS OPINION  
2020-O-07**

DATE ISSUED: July 15, 2020

ISSUED TO: City of Fargo

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Rob Port asking whether the City of Fargo violated N.D.C.C. § 44-04-18 by failing to provide requested records.

**FACTS PRESENTED**

On June 4, 2020, Rob Port made an open records request to the Fargo Police Chief for “the email you sent out to the department concerning ‘Ozzie.’”<sup>1</sup> The City of Fargo provided a redacted email to Mr. Port later that day with an explanation that “[r]edactions by the City Attorney’s Office were necessary to protect communications which could contain intelligence information, law enforcement techniques or security procedures (44-04-24, 44-04-25).”<sup>2</sup>

**ISSUE**

Whether the City of Fargo violated the open records law when it redacted an email provided in response to an open records request.

**ANALYSIS**

All records of a public entity are open and accessible to the public unless otherwise specifically provided by law.<sup>3</sup> Records that are “confidential” may only be released in accordance with the law but a record that is “exempt” may be disclosed at the discretion

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<sup>1</sup> Email from Rob Port to David Todd, Chief, Fargo Police Dep’t (June 4, 2020, 8:45 AM).

<sup>2</sup> Email from Gregg Schildberger, Dir. of Commc’ns & Gov’tal Affairs, Fargo, to Rob Port (June 4, 2020, 9:03 PM).

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

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of the public entity.<sup>4</sup> A public entity has a duty to review a record, redact exempt or confidential information, and turn over the remaining portions of the record that are not protected.<sup>5</sup>

The City cited three exceptions to the open records law as the basis for withholding information contained in the requested email.

The first exception covers exempt criminal intelligence information, defined by N.D.C.C. § 44-04-18.7(3):

“Criminal intelligence information” means information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity. Criminal intelligence information must be considered “active” as long as it is related to intelligence gathering conducted with a reasonable good-faith belief it will lead to detection of ongoing or reasonably anticipated criminal activities. Criminal intelligence information also includes training materials and information obtained by a criminal justice agency regarding prospective criminal activities which impact officer safety until the information is publicly disclosed.

Subsection 2 of N.D.C.C. § 44-04-18.7 contains a list of nine items that are not considered “criminal intelligence information” including a “crime summary” and “[a] chronological list of incidents, including initial offense report information showing the offense, date, time, general location, officer, and a brief summary of what occurred.”<sup>6</sup>

Next, the City cites N.D.C.C. § 44-04-24 which exempts “security system plans” and “records regarding disaster mitigation, preparation, response, vulnerability, or

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<sup>4</sup> N.D.C.C. § 44-04-17.1(3) (definition of “confidential record”); N.D.C.C. § 44-04-17.1(5) (definition of “exempt record”); N.D.A.G. 2008-O-03.

<sup>5</sup> N.D.C.C. § 44-04-18.10; N.D.A.G. 2020-O-01.

<sup>6</sup> N.D.C.C. § 44-04-18.7(2). A previous opinion analyzed the policy behind this expansive exemption to open records law for law enforcement records as an attempt to balance the public’s general right to know public information with a public policy that the state’s efficient operation of law enforcement agencies is necessary and vital for the protection of the health and welfare of its citizens. N.D.A.G. 2005-O-13.

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recovery.”<sup>7</sup> “Security system plan” includes records, information, and communications, relating to the “physical or electronic security of a public facility, or any critical infrastructure . . . ; [t]hreat assessments; [v]ulnerability and capability assessments conducted by a public entity, or any private entity; [t]hreat response plans; and [e]mergency evacuation plans.”<sup>8</sup> “Critical infrastructure” includes public buildings and systems.<sup>9</sup>

Finally, the city cites N.D.C.C. § 44-04-25, which provides “[a]ny plans and only those portions of the records, information, surveys, communications, and consultations used to produce the plans relating to protection of the public or public officials against threats of violence or other harm are exempt . . . .”.

Pursuant to the authority granted in N.D.C.C. § 44-04-21.1(1), this office obtained a copy of the un-redacted email at issue in this opinion for review. The redacted portions of the email refer to an upcoming event and the importance of the police department pulling together as a team to be prepared to protect the city and its infrastructure. The other redactions refer to an incident in which the deputy chief went undercover during a previous protest and, though, according to the city, such action was not authorized, the deputy chief was able to gather and provide some criminal intelligence information to the department.

This email was sent and requested during a contentious time. In the midst of a pandemic, a peaceful protest had elements that turned destructive, with police cars being damaged, business windows smashed, and businesses looted.<sup>10</sup> The email at issue was sent by the Police Chief after this protest, and in preparation for an upcoming event, scheduled for the weekend.

While the position of the department at the time of this records request is understandable, the contents of the email do not fit within any of the exceptions to the open records law. No actual security plans or threat assessments were included or detailed in the email. Merely stating that the department has criminal intelligence information is not, in and of itself, criminal intelligence information. It is therefore my

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<sup>7</sup> N.D.C.C. § 44-04-24(1). A previous opinion recognized that surveillance videos from a public facility is an exempt “security system plan” as defined in N.D.C.C. § 44-04-24, and the purpose of this law, as described to the Legislature, was “to exempt information regarding plans and details about infrastructure from getting into the hands of people who would intentionally want to use that information to do harm.” N.D.A.G. 2008-O-03.

<sup>8</sup> N.D.C.C. § 44-04-24(2)(b).

<sup>9</sup> N.D.C.C. § 44-04-24(2)(a).

<sup>10</sup> Letter from William Wischer, Asst. City Att’y, to Att’y Gen.’s Office (June 25, 2020).

opinion that the City of Fargo violated the law when it redacted information from a requested record that is not protected under open records law.

#### CONCLUSION

The City of Fargo violated the open records law when it improperly redacted a requested record.

#### STEPS NEEDED TO REMEDY VIOLATION

The City of Fargo must provide an unredacted copy of the email to Rob Port 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>11</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>12</sup>

Wayne Stenehjem  
Attorney General

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cc: Rob Port (via email only)

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<sup>11</sup> N.D.C.C. § 44-04-21.1(2).

<sup>12</sup> *Id.*