OPEN RECORDS AND MEETINGS OPINION
2002-O-05

DATE ISSUED: April 1, 2002

ISSUED TO: Fred Strege, Attorney, Wahpeton Public School District

CITIZEN'S REQUEST FOR OPINION

On November 9, 2001, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Attorney Karen Prout, on behalf of a client, asking whether the Wahpeton Public School District violated N.D.C.C. § 44-04-18 by denying Ms. Prout's request for records compiled by the School District's attorneys in response to a complaint submitted earlier by Ms. Prout's client.

FACTS PRESENTED

On August 23, 2001, Ms. Prout's client, an employee of the Wahpeton Public School District (District), formally submitted to the District's superintendent charges of sexual harassment against certain employees of the District. The District responded immediately to the complaint by hiring a local law firm to investigate the complaint on behalf of the District. A significant amount of information was compiled and generated by the law firm in the course of the investigation.

The employee, represented by Ms. Prout, filed a workers' compensation claim on September 17, 2001. The claim was denied on October 18. The employee also submitted a discrimination complaint to the North Dakota Department of Labor on October 11, 2001. These two claims and the employee's sexual harassment complaint were based on the same alleged misconduct.

On October 31, 2001, Ms. Prout was contacted by an attorney for the District informing her that the District had completed its internal investigation of her client's sexual harassment complaint. The next day, Ms. Prout sent a letter to the District asking it for the following records:

1. Copies of all investigative materials, documents, or other papers, including but not limited to the following:

    a. copies of all recorded witness statements or interviews;

    b. copies of all exhibits utilized, generated, produced, or relied upon during the investigation;

c. copies of all correspondence, memorandums, or papers utilized, generated, produced, or relied upon during the investigation;

d. copies of any video or audio cassette tapes on which witness statements or interviews have been recorded;

e. copies of any other materials, documents, or papers utilized, generated, produced, or relied upon during the investigation, but which is not covered in any of the above requests.

2. Copies of any report, whether preliminary, draft, or final, provided to the Wahpeton Public School Board, any individual member of the school board, or to the Superintendent Mike Connell concerning the investigation.

Letter from Karen Prout to Wahpeton School District (Nov. 1, 2001).

The District, through its attorney, denied the request in writing on November 5, 2001. At the time of the District's response, the period to seek review of the denial of the worker's compensation claim was still open and the complaint with the Department of Labor was pending. The letter noted the two pending administrative proceedings brought by Ms. Prout's client and denied the request (except for the recording of the employee's meeting with the superintendent) under N.D.C.C. § 44-04-18 on the grounds the request was vague, overbroad, and sought records that are "work product and attorney-client privileged documents . . . ."

Ms. Prout responded by seeking an opinion from this office on the denial of her request for records. In its response to the request for this opinion, the District described the records in its file regarding this matter and further explained its legal authority for denying Ms. Prout's request.

For clarity, this opinion divides the records in the District's file into three categories:

1. "Attorney work product" as defined in N.D.C.C. § 44-04-19.1;

2. Records that do not qualify as "attorney work product" under N.D.C.C. § 44-04-19.1 because the records do not include the mental impressions or theories of the District's attorney but have been prepared in anticipation of litigation and would be privileged under N.D.R. Civ. P. 26(b)(3) if requested by a party to the litigation.

3. Records in the file that are not “attorney work product” under N.D.C.C. § 44-04-19.1 or privileged under N.D.R. Civ. P. 26(b)(3). These records were compiled as a part of the investigation but consist of records prepared by employees of the district long before the complaint from Ms. Prout’s client.

ISSUES

1. Whether some of the requested records were properly withheld under N.D.C.C. § 44-04-19.1 as “attorney work product.”

2. Whether some of the requested records were properly withheld under N.D.C.C. § 44-04-18(5) because the records are privileged under N.D.R. Civ. P 26(b)(3) and requested by a party to pending adversarial administrative proceedings against the District.

3. Whether the remainder of the requested records were properly withheld under N.D.C.C. § 44-04-18(5), which requires compliance with discovery rules.

4. Whether records generated by a public school district’s attorney in the course of an administrative investigation of a complaint against a school district employee are open to the public after completion of the investigation under N.D.C.C. § 15.1-07-25.

ANALYSES

Issue One:

The first category of records in the District’s file are those records that fall under the definition of “attorney work product” in N.D.C.C. § 44-04-19.1. “Attorney work product” is exempt from mandatory public disclosure under N.D.C.C. § 44-04-18, the state open records law. N.D.C.C. § 44-04-19.1(1).

> “Attorney work product” means any document or record that:
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> a. Was prepared by an attorney representing a public entity or prepared at such an attorney’s express direction;
>
> b. Reflects a mental impression, conclusion, litigation strategy, or legal theory of that attorney or the entity; and

> c. Was prepared exclusively for civil or criminal litigation, for adversarial administrative proceedings, or in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings.

N.D.C.C. § 44-04-19.1(3). All three elements of this definition must exist for a record to be exempt under N.D.C.C. § 44-04-19.1 as "attorney work product." N.D.A.G. 92-F-04. Here, the District indicates it was evident from the first communication with Ms. Prout and her client that litigation or adversarial administrative proceedings against the District, or both, were reasonably predictable.[1]

There are no prior opinions of the North Dakota Supreme Court or this office interpreting the types of records that may be withheld from the public as "attorney work product" under N.D.C.C. § 44-04-19.1. In N.D.A.G. 92-F-04, the Attorney General noted that the 1989 legislation enacting N.D.C.C. § 44-04-19.1 was based on Florida law. Interpretations of the Florida law shed some light on the meaning of N.D.C.C. § 44-04-19.1.

Shortly after the 1984 enactment of the Florida law for "attorney work product," the Florida Attorney General made the following observations about the statute:

> It is important to emphasize that the Legislature did not create a blanket exception to the Public Records Law for all attorney work product. An examination of the exception provided . . . for attorneys employed or retained by an agency . . . indicates that the exemption afforded by that statute is narrower than the work product privilege recognized by the courts for private litigants. Compare, Hickman v. Taylor, 329 U.S. 495 (1947) . . . . Only those records reflecting mental impressions, conclusions, litigation strategies or legal theories prepared by a government attorney or at [the attorney's] express direction for ongoing or imminent litigation or adversarial administrative proceedings are exempt from disclosure . . . until the conclusion of such litigation or proceedings. . . . Moreover, records prepared for ongoing litigation or adversarial

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[1] It is beyond my authority in issuing opinions under N.D.C.C. § 44-04-21.1 to resolve disputed facts. For purposes of this opinion, I must assume as true the District's claim that many of the records in the file were generated in anticipation of litigation or adversarial administrative proceedings. The validity of the District's claim may be reviewed in the context of a discovery request. See, e.g., Long v. Anderson University, 204 F.R.D. 129 (S.D. Ind. 2001) (documents generated during administrative investigation that would have been created irrespective of litigation are not protected under work product doctrine).

> administrative proceedings must under the terms of the statute have been prepared exclusively for such litigation or proceedings; records prepared for other purposes may not be converted into exempt material simply by their use in such litigation or proceedings.

1985 Fla. Op. Atty. Gen. 85-89.

The "work product privilege recognized by the courts for private litigants" mentioned in the Florida Attorney General's opinion is currently found in Rule 26(b)(3) of the North Dakota Rules of Civil Procedure. This rule, in turn, is derived from Federal Rule of Civil Procedure 26(b). Burlington Northern, Inc. v. North Dakota District Court, 264 N.W.2d 453, 456 (N.D. 1978). Rule 26(b)(3) first establishes a broad discovery protection for records that are otherwise discoverable but were "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . ." These records may be discovered only if the party seeking discovery of the records can show that the party has substantial need of the records in preparing the party's case and that the party cannot obtain the substantial equivalent of the records through other means without undue hardship. N.D.R. Civ. P. 26(b)(3). Even if the required showing has been made, Rule 26(b)(3) further requires the court to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." (Emphasis added). This subclass of records that may not be discovered even if there is a substantial need has been described as "opinion work product." See 8 Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, Federal Practice and Procedure § 2026 (2d. ed 1994); 23 Am. Jur.2d Depositions and Discovery § 64 (1983).

In my opinion, the similarity in language between the description of "opinion work product" under Rule 26(b)(3) and "attorney work product" under N.D.C.C. § 44-04-19.1 is more than a coincidence. It is this narrower class of "opinion work product" under Rule 26(b)(3) that is protected by N.D.C.C. § 44-04-19.1.

The District's local law firm was assisted in its investigation by a law firm in Minneapolis. The District's file on the administrative investigation includes correspondence between the two firms in which the attorneys raise and discuss each other's impressions and legal theories on the complaint. The file also includes an attorney's summary of information, events, and witness interviews that the attorney feels are relevant to the legal issues posed by the complaint. These records contain the product of an attorney's thought process on the legal issues posed by the employee's complaint and qualify as "attorney work product" under N.D.C.C. § 44-04-19.1.

Finally, the file includes transcripts and recordings of witness interviews conducted by the District's attorneys in a question and answer manner. I agree with the District that

the interviews are different from signed, narrative statements by the witnesses. A simple factual narrative does not include any impressions or work product of the attorney or the entity and would not be protected under N.D.C.C. § 44-04-19.1. However, a recording or transcript of an interview of a witness by an attorney "is a result of skilled questioning by an attorney" and qualifies as attorney work product. 23 Am.Jur.2d Depositions and Discovery § 62 (1983). Often, one can easily see from the questions asked by an attorney what legal strategies or theories the attorney is considering.

In conclusion, many of the records requested by Ms. Prout were properly withheld under N.D.C.C. § 44-04-19.1 because the records constitute "attorney work product" regarding a reasonably predictable lawsuit and pending adversarial administrative proceedings.[2]

Issue Two:

The second category of records in the District's file are those records that are not "attorney work product" under N.D.C.C. § 44-04-19.1 because they do not include the mental impressions or theories of the District's attorney but have been prepared in anticipation of litigation and would be privileged under N.D.R. Civ. P. 26(b)(3) if requested by a party to the litigation.

The application of open records laws to records prepared in anticipation of litigation varies from jurisdiction to jurisdiction. Under the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, and similar state laws, any material protected from discovery in litigation is also protected from mandatory public disclosure, regardless of whether the person requesting the information is a party to a pending action against the government entity possessing the requested records. See 5 U.S.C. § 552(b)(5). In a case involving a request for attorney work product under FOIA, a federal appellate court reversed a district court ruling that allowed a federal agency to withhold only "opinion work product" under Rule 26(b)(3), holding that the "work product doctrine protects such deliberative materials but it also protects factual materials prepared in anticipation of litigation." Tax Analysts v. Internal Revenue Service, 117 F.3d 607, 620 (D.C. Cir. 1997). The United States Supreme Court has also addressed the availability of attorney work product:

> Moreover, respondents' contention that they can obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. We have consistently rejected such a construction of the FOIA. . . . We do not think Congress

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[2] Once any litigation and adversarial administrative proceedings are completed, the attorney work product must be available for public disclosure unless other exceptions apply. N.D.C.C. § 44-04-19.1(6).

> could have intended that the weighty policies underlying discovery privileges could be so easily circumvented.

United States v. Weber Aircraft Corp., 465 U.S. 792, 801-02 (1984).

The State of Florida, on the other hand, only prohibits access to records qualifying as opinion work product under Rule 26(b)(3). Other work product that could not be discovered from a private litigant under Rule 26(b)(3) may nevertheless be obtained from a Florida government agency. See 1985 Fla. Op. Atty. Gen. 85-89.

Until 1997, North Dakota law applied the same way as Florida's law. Litigants against a North Dakota agency or political subdivision did not have a right to obtain "opinion work product" under N.D.C.C. § 44-04-19.1, but could obtain other records that would be privileged under Rule 26(b)(3) in the possession of a private litigant.

In 1997, the Legislature enacted N.D.C.C. § 44-04-18(5) to specifically address open records requests from a party to a court action or adversarial administrative proceeding against a state agency or political subdivision. N.D.C.C. § 44-04-18(5) currently provides:

> Any request under this section for records in the possession of a public entity by a party to a criminal or civil action or adversarial administrative proceeding in which the public entity is a party, or by an agent of the party, must comply with applicable discovery rules and be made to the attorney representing that entity in the criminal or civil action or adversarial administrative proceeding. The public entity may deny a request from a party or an agent of a party under this subsection if the request seeks records that are privileged under applicable discovery rules.

(Emphasis added). The open records law does not further describe what is meant by the phrase "comply with applicable discovery rules." The only reference in the legislative history of the 1997 enactment to this section, including the recordings of the committee hearings on the bill, was limited to the question of the person to whom such requests must be made. "[L]itigation involving a public entity will be handled more efficiently because any request from an opposing party for records in the custody of the entity must be made to the attorney representing the entity in that action or proceeding." Hearing on S.B. 2228 Before the Senate Comm. on the Judiciary 1997 N.D. Leg. (Feb. 5) (Written section-by-section analysis by Office of Attorney General at p. 6). The last sentence in subsection 5 was added in 2001 at the request of the Office of Attorney General with the following explanation: "The bill clarifies that a public entity can deny a request for records from a party to litigation involving the public entity if the records are

privileged." Hearing on S.B. 2117 Before the Senate Judiciary Comm. 2001 N.D. Leg. (Jan. 24) (Written testimony of Assistant Attorney General James C. Fleming at p. 3).

As a result of the 2001 amendments to N.D.C.C. § 44-04-18(5), it is clear that a public entity receiving an open records request from or on behalf of an adversary to a pending action or adversarial administrative proceeding is entitled under N.D.C.C. § 44-04-18(5) to the full scope of the discovery privilege for work product under N.D.R. Civ. P. 26(b)(3). This is a broader exception than provided for attorney work product in N.D.C.C. § 44-04-19.1, but is limited to requests from an adversary or an adversary's representative. It does not apply if the records are requested by a member of the public who has no interest in the action or proceeding.[3] In this respect, North Dakota law does not provide as much protection for privileged documents as FOIA.

When Ms. Prout requested records from the District on November 1, 2001, her client's complaint with the Department of Labor was (and still is) pending. In addition, the process to seek further review of her client's claim with the Workers' Compensation Bureau had not yet concluded. Relying on N.D.C.C. § 44-04-18(5), the District argues that these filings resulted in "adversarial administrative proceedings" and that Ms. Prout's request on behalf of the District's adversary in those proceedings is governed by the discovery rules in the North Dakota Rules of Civil Procedure. Specifically, the District objects to the request on the grounds it is vague, overbroad, and seeks materials that are privileged.

Section 44-04-18(5), N.D.C.C., does not define "adversarial administrative proceeding." However, N.D.C.C. § 44-04-17.1 through N.D.C.C. § 44-04-21.3 are closely related statutes. N.D.C.C. § 44-04-19.1(5) defines "adversarial administrative proceeding" as "proceedings where the administrative agency . . . acts as a complainant, respondent, or decisionmaker in an adverse administrative proceeding." The Workers' Compensation Bureau and Department of Labor, respectively, are decisionmakers in the two complaints brought by Ms. Prout on her client's behalf. The client was the complainant and the District was the respondent.[4] I agree with the District that the claims filed by Ms. Prout's client resulted in "adversarial administrative proceedings" for purposes of N.D.C.C. § 44-04-18(5).

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[3] It is appropriate, therefore, for a public entity to verify that privileged records are not being requested by a party or an agent of a party to the action or the proceeding. See N.D.A.G. 98-F-13.

[4] A review of N.D.C.C. §§ 44-04-19(5) and 28-32-01, including amendments to those statutes since 1989, shows that the definition of "adversarial administrative proceeding" in N.D.C.C. § 44-04-19.1(5) has never been limited or linked to the formal process for contested cases or adjudicative proceedings under N.D.C.C. ch. 28-32.

The second category of records in the District's file in this matter are not protected by N.D.C.C. § 44-04-19.1 because the records do not include the mental impressions or legal theories of the District, but the records were nevertheless prepared by the District's attorneys or employees in anticipation of a lawsuit or adversarial administrative proceeding arising out of the conduct alleged in the sexual harassment complaint by Ms. Prout's client. It is my opinion that pursuant to N.D.C.C. § 44-04-18(5), this material is privileged under N.D.R. Civ. P. 26(b)(3) and was properly withheld from Ms. Prout and her client.

Issue Three:

The third category of records in the District's file are those records that are not "attorney work product" under N.D.C.C. § 44-04-19.1 and are not privileged under N.D.R. Civ. P. 26(b)(3) because the records were prepared by employees of the District long before the District received the complaint from Ms. Prout's client. It cannot be claimed that these records were created in anticipation of litigation or proceedings. The question becomes whether these records were properly withheld from Ms. Prout. As in Issue Two of this opinion, the answer to this question is found in N.D.C.C. § 44-04-18(5).

Subsection 5 of N.D.C.C. § 44-04-18 incorporates any discovery privileges that may apply to the records in the District's file that have been requested by Ms. Prout, since she is an agent of a party to the pending adversarial administrative proceedings against the District. I believe there is also a procedural component to N.D.C.C. § 44-04-18(5).

The subject of the first sentence in N.D.C.C. § 44-04-18(5) is a request for records under N.D.C.C. § 44-04-18. Rather than simply state that privileged documents are not subject to mandatory disclosure under N.D.C.C. § 44-04-18, the plain language of subsection 5 instead requires that the request comply with applicable discovery rules. By subjecting open records requests from a party to a pending action or proceeding to the rules of discovery, I conclude the Legislature was doing more than incorporating any applicable discovery privileges.[5] I believe the Legislature was placing public entities on an equal footing with private litigants by establishing the discovery process, rather than the open records law, as the exclusive method of compelling a public entity to provide records to its adversary in a pending criminal or civil action or adversarial administrative proceeding. While informal requests for open records are not prohibited any more than similar requests between private litigants, the full range of discovery objections are available to public entities, including the District's objections that Ms. Prout's request is

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[5] This conclusion is supported by the fact that after amending N.D.C.C. § 44-04-18(5) to specifically incorporate any discovery privileges, the phrase "comply with any applicable discovery rules" was not deleted from the statute. The retention of the phrase suggests it was intended to do more than incorporate discovery privileges.

overbroad, vague, and seeks privileged information. This prevents a party in an action or proceeding against a public entity from burdening the public entity and its litigation attorney with voluminous requests for records that may not be relevant to the issues in the pending action or proceeding.

Discovery in adjudicative administrative proceedings before state agencies is permitted under N.D.C.C. § 28-32-33. A proceeding becomes adjudicative when a hearing is required. N.D.A.G. 93-L-362. For the workers' compensation claim, a number of informal preliminary steps must occur before a hearing on the complaint is held under N.D.C.C. ch. 28-32 and discovery is authorized. N.D.C.C. § 65-01-16. Similarly, for the complaint with the Department of Labor, the Department must first determine whether probable cause exists to believe that a discriminatory practice has occurred before a hearing is held under N.D.C.C. ch. 28-32 and discovery is authorized. At the time Ms. Prout requested records from the District, neither adversarial administrative proceeding had progressed to the stage at which discovery was authorized. Therefore, the District had the right to deny the request for its file under N.D.C.C. § 44-04-18(5) as a premature discovery request.

To summarize, N.D.C.C. § 44-04-18(5) authorizes a public entity to rely on legitimate discovery objections to deny a request for records under N.D.C.C. § 44-04-18 from an adversary or agent of an adversary in a pending criminal or civil action or adversarial administrative proceeding. Here, the District objected to providing the requested records on the same grounds it could use to object to a discovery request for the same records. In the event Ms. Prout makes a formal discovery request for the records, the District can make the same objections and the parties can present arguments to the presiding officer in the administrative proceedings on whether the requested information is properly subject to discovery. Thus, it is my opinion that under N.D.C.C. § 44-04-18(5), the District was not required to grant Ms. Prout's informal request under the open records law for the third category of records, i.e., those records prepared by employees of the District before litigation in this matter was anticipated.

<u>Issue Four</u>:

The records requested by Ms. Prout were compiled or generated by the District through its employees and attorneys during the District's investigation into her client's allegations of sexual harassment. A specific state law applies to records generated by a public school district in the course of investigating a complaint against a school district employee:

> If a complaint is filed concerning a school district employee and an administrative investigation is conducted, any record or document generated as part of the administrative investigation <u>is confidential and not</u>

> subject to the requirements of this section or section 44-04-18, until the investigation is completed. The investigation and any determination of disciplinary action may not exceed sixty days from the date the complaint is filed.

N.D.C.C. § 15.1-07-25(2) (emphasis added). For reasons discussed earlier in this opinion, the records requested by Ms. Prout qualify as "attorney work product" under N.D.C.C. § 44-04-19.1 or may be withheld under subsection 5 of N.D.C.C. § 44-04-18. Nevertheless, Ms. Prout suggests N.D.C.C. § 15.1-07-25(2) requires public disclosure of all records generated during an administrative investigation once the investigation is completed and supersedes any other laws making the records closed or confidential.

A person might infer from the phrase, "confidential . . . until the investigation is completed" in N.D.C.C. § 15.1-07-25(2), that the records generated during an administrative investigation become open to the public after the investigation is completed. However, to the extent this is a reasonable inference, which can be debated, the inference conflicts with the specific authority of the District to refuse to disclose "attorney work product" under N.D.C.C. § 44-04-19.1 and to apply applicable discovery rules to Ms. Prout's request under N.D.C.C. § 44-04-18(5).

The language that is now in subsection 2 of N.D.C.C. § 15.1-07-25 was enacted in 1993. See 1993 N.D. Sess. Laws ch. 187. Prior to that time, there was no open records exception that applied specifically to records generated during an administrative investigation of a complaint against a school district employee. By making the records confidential during the investigation, the effect of the 1993 amendments is to temporarily reduce the amount of records that are available to the public. There is no support in either the plain language of N.D.C.C. § 15.1-07-25 or the legislative history of the 1993 amendments for the suggestion that the confidentiality protections in existing law could be circumvented simply by filing a complaint and, after the investigation is completed, requesting any confidential records under N.D.C.C. § 15.1-07-25(2).

Subsection 2 of N.D.C.C. § 15.1-07-25, by its plain language, applies until an investigation is completed. That subsection does not expressly indicate that the records are open to the public after the investigation is completed. Any inference that the statute makes all records generated during the District's investigation open to the public at the conclusion of the investigation must yield to N.D.C.C. § 44-04-19.1 and 44-04-18(5). It is my opinion that the completion of the District's administrative investigation under N.D.C.C. § 15.1-07-25(2) does not require public disclosure of documents generated during the investigation that are closed or confidential under N.D.C.C. §§ 44-04-19.1 and 44-04-18(5), or other applicable exceptions to the open records law.

In conclusion, it is my opinion that the District did not violate N.D.C.C. § 44-04-18 by denying Ms. Prout's request for records because the District was authorized to withhold the records under N.D.C.C. §§ 44-04-19.1 and 44-04-18(5) and the District's authority to withhold records was not superseded by N.D.C.C. § 15.1-07-25(2) when its administrative investigation was completed.

CONCLUSIONS

1. It is my opinion that some of the requested records were properly withheld under N.D.C.C. § 44-04-19.1 as "attorney work product."

2. It is my opinion that some of the requested records are privileged and were properly withheld under N.D.C.C. § 44-04-18(5).

3. It is my opinion that the remainder of the requested records were properly withheld under N.D.C.C. § 44-04-18(5), which requires compliance with discovery rules.

4. It is my opinion that the completion of an administrative investigation under N.D.C.C. § 15.1-07-25(2) does not require public disclosure of documents generated during the investigation that are closed or confidential under other applicable laws.

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