

**OPEN RECORDS AND MEETINGS OPINION
2007-O-07**

DATE ISSUED: April 24, 2007

ISSUED TO: Coolin Township

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Lowell Bottrell asking whether Coolin Township ("Township") violated N.D.C.C. § 44-04-18 by denying Mr. Bottrell's request for certain records.

FACTS PRESENTED

J. R. and Linda Gibbens have a conditional use permit from Coolin Township for a concentrated animal feeding operation ("CAFO") on property in Coolin Township. The Coolin Township Board of Supervisors is considering proposed revisions to its zoning ordinance that affect concentrated animal feeding operations. Lowell Bottrell, an attorney who represents J. R. and Linda Gibbens, requested certain records from Douglas Goulding, the attorney who drafted the revised zoning ordinance for the Township. In addition to records that are not at issue here, Mr. Bottrell requested from Mr. Goulding:

[A]ny and all communications, whether evidenced by a written document or by electronic means, that you have had with third parties other than your client, the township, concerning the current ordinance in the township or the proposed ordinance. Specifically, I am looking for any communications that you have had with third parties such as the Botz family, Citizens Against Factory Farming, Grace Factory Farm Project and the Dakota Resource Council. However, this request is not limited to just these entities, but any other entities that you have had communications with concerning these ordinances. If you have drafts of the ordinances that you have received from them, whether in hard form or electronic form, I would like to have copies of those drafts.

. . . [A]ny scientific information that you have gathered concerning the ordinances and how you came up with the various setbacks and other criteria for determination of CAFOs. . . .¹

Mr. Goulding responded to this request for records on October 3, 2006, and stated in relevant part:

¹ Letter from Lowell Bottrell to Douglas Goulding (Sept. 21, 2006) (emphasis added).

I have not had communications with the Botz family, Citizens Against Factory Farming, Grace Factory Farm Project, the Dakota Resource Council, or other third parties regarding the current Coolin Township Zoning Regulations or proposed amendments to the Coolin Township Zoning Regulations. I have not received draft amendments from third parties, and have not circulated draft amendments to third parties.

You also asked for any scientific information that I have gathered concerning the ordinances and how I came up with various setbacks and other criteria for determination of CAFOs. . . . [I]f I understand your request correctly, you are in essence asking for all materials I have read in the course of representing clients on CAFO-related matters. This is overreaching. I will not produce the information in my law office files that I have gathered in the course of undertaking my work for Coolin Township in drafting proposed amendments to the Coolin Township Zoning Regulations. This information is protected against public disclosure pursuant to the attorney-client privilege, the attorney work product doctrine, and the common law deliberative process privilege.

ISSUES

1. Whether the private attorney hired by the Township to draft the Township's revised zoning ordinance was an agent of the Township.
2. Whether not providing copies of communications with third parties violated the open records law.
3. Whether the scientific information gathered by the Township's attorney was properly withheld as "attorney work product" or as "privileged" information.
4. Whether not providing the requester information on how the Township's attorney came up with the various setbacks and other criteria violated the open records law.

ANALYSES

Issue One

The state's open records law applies to "records" of "public entities."² A township is a political subdivision, which is a public entity.³ "Record" means "recorded information of

² N.D.C.C. § 44-04-18.

³ N.D.C.C. §§ 44-04-17.1(10) (definition of a political subdivision) and 44-04-17.1(12) (definition of a public entity).

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any kind . . . which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business.”⁴ Therefore, if Mr. Goulding was an agent of the Township when he performed his duties as attorney for the Township, the open records law applies to the records relating to those duties.

Under the general law of agency, an attorney is an agent of the client.⁵ Courts in other jurisdictions have held that an attorney in private practice is an agent of a public entity with respect to legal services provided to the public entity.⁶ In addition, this office has previously opined that “client files held by an attorney belong to the client rather than the attorney” and there is “no reason why this general principle should not apply when the client is a municipality instead of a private entity or person.”⁷ The opinion specifically held that “the legal files of a municipality belong to the municipality as the client rather than the city attorney.”⁸

There is no basis under the open records law to treat records of a private attorney doing work for a public entity differently than records of an attorney employed by the public entity. The law does not make such a distinction, and doing so would invite public entities to circumvent the open records law by retaining private counsel.⁹

It is my opinion Mr. Goulding was acting as an agent of the Township with respect to work he performed while drafting the Township’s revised zoning ordinance. Accordingly, the open records law applies to the records relating to those duties.

Issue Two

All records of a public entity are open to the public unless otherwise specifically provided by law.¹⁰ Upon a request for a copy of specific public records, an entity must

⁴ N.D.C.C. § 44-04-17.1(15) (definition of record) (emphasis added).

⁵ Restatement (Third) of the Law Governing Lawyers, Introductory Note to ch. 2 (2000).

⁶ State ex rel. Findlay Publishing Co. v. Hancock Cty. Bd. of Commrs., 684 N.E. 2d 1222, 1225 (Ohio 1997); Creative Restaurants, Inc. v. City of Memphis, 795 S.W.2d 672, 679 (Tenn. Ct. App. 1990); Womack Newspapers, Inc. v. Town of Kitty Hawk, 639 S.E.2d 96 (N.C. Ct. App. 2007).

⁷ N.D.A.G. 95-L-174; see also City of North Miami v. Miami Herald Publishing Co., 468 So.2d 218, 219 (Fl. 1985) (under Florida law, “communications [between a lawyer and his public-entity client] (public records) belong to the client (government entity), not the lawyer”).

⁸ N.D.A.G. 95-L-174.

⁹ Womack Newspapers, Inc. v. Town of Kitty Hawk, 639 S.E.2d 96, 105 (N.C. Ct. App. 2007); State ex rel. Findlay Publishing Co. v. Hancock Cty. Bd. of Commrs., 684 N.E. 2d at 1225; City of Fayetteville v. Edmark, 801 S.W.2d 275, 279 (Ark. 1990).

¹⁰ N.D.C.C. § 44-04-18(1).

furnish the requester one copy of the records requested¹¹ or explain why the records are not being provided.¹²

Mr. Bottrell asked Mr. Goulding for copies of written communications with third parties. Mr. Goulding stated that he has not had communications with third parties and, thus, no records exist. In an open records opinion, this office is required to base the opinion on the facts given by the public entity.¹³ Accordingly, it is my opinion that the Township did not violate N.D.C.C. § 44-04-18 by not disclosing records of communications with third parties, because no such records exist.

Issue Three

Mr. Bottrell asked Mr. Goulding for “any scientific information that you have gathered concerning the ordinances” Mr. Goulding did not supply such records, stating, “[t]his information is protected against public disclosure pursuant to the attorney-client privilege, the attorney work product doctrine, and the common law deliberative process privilege.”¹⁴

The attorney-client privilege does not apply to a request for records under the open records law.¹⁵ However, requests for records from a party to a criminal or civil action or adversarial administrative proceeding must comply with applicable discovery rules.¹⁶ Since the requester and the Township are not parties to a criminal or civil action or an adversarial administrative proceeding, N.D.C.C. § 44-04-18(6) is not relevant in this case.

“Attorney work product” is exempt from disclosure under the open records law.¹⁷ Attorney work product means:

[A]ny document or record that:

- a. Was prepared by an attorney representing a public entity or prepared at such an attorney’s express direction;

¹¹ N.D.C.C. § 44-04-18(2).

¹² N.D.C.C. § 44-04-18(7).

¹³ N.D.C.C. § 44-04-21.1(1).

¹⁴ Letter from Douglas Goulding to Lowell Bottrell (Oct. 3, 2006).

¹⁵ N.D.A.G. 95-L-1 (the lawyer-client privilege set forth in the North Dakota Rules of Evidence is “applicable only to proceedings in the courts of North Dakota and other related proceedings”).

¹⁶ N.D.C.C. § 44-04-18(6), N.D.A.G. 2002-O-05.

¹⁷ N.D.C.C. § 44-04-19.1(1).

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- 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.¹⁸

Thus, a record is exempt as “attorney work product” if it 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.”¹⁹

Any attorney work product of Mr. Goulding was not “prepared exclusively” for litigation “or in anticipation of reasonably predictable” litigation. Mr. Goulding drafted a revised zoning ordinance for the Township. Thus, the requested records may not be withheld by the Township’s attorney as “attorney work product.”

The common law deliberative process privilege²⁰ does not provide an exception to North Dakota’s open records law. Exceptions to the open records law will not be implied; exceptions must be specific.²¹

A record in the possession of an agent of a public entity that has been “received or prepared for use in connection with public business or [that] contains information relating to public business” is a public record.²² A township has the authority to enact zoning regulations related to concentrated feeding operations.²³ Therefore, the scientific information gathered by Mr. Goulding in the course of drafting the proposed revisions to the Township zoning ordinance are records under the open records law and copies must be provided to Mr. Bottrell.

¹⁸ N.D.C.C. § 44-04-19.1(4) (emphasis added).

¹⁹ N.D.C.C. § 44-04-19.1(4)(c).

²⁰ As explained by one court: “The deliberative process privilege is unique to the government. It is a widely recognized confidentiality privilege asserted by government officials. The privilege rests on the ground that public disclosure of certain communications would deter the open exchange of opinions and recommendations between government officials, and it is intended to protect the government’s decision-making process, its consultative functions, and the quality of its decisions.” City of Colorado Springs v. White, 967 P.2d 1042, 1046-47 (1998).

²¹ Adams County Record v. Greater North Dakota Ass’n, 529 N.W.2d 830, 833 (N.D. 1995); N.D.A.G. 98-O-23.

²² N.D.C.C. § 44-04-17.1(15).

²³ N.D.C.C. § 58-03-11(3) (“[a] board of township supervisors may regulate the nature and scope of concentrated feeding operations permissible in the township . . .”).

Based on the foregoing, it is my opinion that the Township's attorney violated N.D.C.C. § 44-04-18 by not providing copies of the scientific information gathered in the course of drafting the proposed revisions to the Township's zoning ordinance related to concentrated animal feeding operations.

Issue Four

Mr. Bottrell asked Mr. Goulding "how you came up with the various setbacks and other criteria for determination of CAFOs." A "record" does not include unrecorded thought processes or mental impressions.²⁴ This request of Mr. Bottrell is not a request for records. Accordingly, it is my opinion that the Township's attorney did not violate N.D.C.C. § 44-04-18 by not disclosing how he came up with the various setbacks and other criteria for reasonable operation of CAFOs.

CONCLUSIONS

1. It is my opinion that the private attorney the Township retained to draft the Township's revised zoning ordinance was an agent of the Township.
2. It is my opinion that not providing copies of communications with third parties was not a violation of the open records law because no such records exist.
3. It is my opinion that not providing copies of scientific information gathered by the Township's attorney was a violation of the open records law.
4. It is my opinion that not providing the requester with information on how the Township's attorney came up with the various setbacks and other criteria was not a violation of the open records law.

STEPS NEEDED TO REMEDY VIOLATION

Coolin Township's attorney must provide to the requester copies of the scientific information the attorney gathered concerning the drafting of proposed revisions to the Township's ordinance regulating concentrated animal feeding operations.

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

²⁴ N.D.C.C. § 44-04-17.1(15).

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under N.D.C.C. § 44-04-21.2.²⁵ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁶

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²⁵ N.D.C.C. § 44-04-21.1(2).

²⁶ Id.