

**OPEN RECORDS AND MEETINGS OPINION  
2008-O-07**

DATE ISSUED: March 20, 2008

ISSUED TO: Workforce Safety and Insurance

**CITIZEN'S REQUEST FOR OPINION**

Chad Nodland requests that the Attorney General review Workforce Safety and Insurance's ("WSI") denials made on October 31 and November 2, 2007, in response to Mr. Nodland's open records requests to WSI under N.D.C.C. § 44-04-18.<sup>1</sup>

**FACTS PRESENTED**

On October 30, 2007 (11:01 a.m.), Chad Nodland requested "copies of any e-mail correspondence (with attachments) between WSI Board Member/Audit Committee Chairman, Evan Mandigo<sup>2</sup> and WSI's internal audit manager<sup>3</sup> between the dates of October 8, 2007 and October 23, 2007."<sup>4</sup> Later that day Mark Armstrong, WSI Communications Executive, asked Ms. Grinsteinner by e-mail whether she had any e-mails that satisfied Mr. Nodland's request. Ms. Grinsteinner responded: "Mark, I have no emails to Evan between that time period in my office email."<sup>5</sup>

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<sup>1</sup> Mr. Nodland also asked our office whether WSI violated the law by failing to provide an "index-type listing" of the records WSI withheld. Our office recently addressed this issue in N.D.A.G. 2008-O-05, which determined that such a listing is not required.

<sup>2</sup> Mr. Mandigo resigned from WSI's Board of Directors and his position as chairman of the Board's Audit Committee in October 2007.

<sup>3</sup> At the time of Mr. Nodland's request, the WSI internal audit manager was Kay Grinsteinner. Ms. Grinsteinner is no longer employed by WSI.

<sup>4</sup> E-mail from Editor (Chad Nodland) to Mark A. Armstrong (Oct. 30, 2007, 11:01 AM).

<sup>5</sup> E-mail from Kay Grinsteinner to Mark Armstrong (Oct. 30, 2007, 1:24 PM) (emphasis added).

WSI did not ask Mr. Mandigo whether he had any e-mails that were responsive to Mr. Nodland's request. Mr. Armstrong responded to Mr. Nodland's request at 8:41 a.m. on October 31 stating that "[t]here are no Open Records to satisfy your request."<sup>6</sup>

On November 1, Mr. Nodland clarified his request and asked WSI to disclose e-mails containing :

"[I]nformation relating to public business" that was sent to or received by either Mandigo or the internal audit manager -- both of whom were WSI "agents" at the time -- that were sent on *any* WSI or **non-WSI** e-mail accounts, if either WSI agent had or has possession or custody of the e-mails. This should include, but not be limited to, hotmail, gmail, excite, yahoo or any other non-state e-mail accounts. I am hoping such records, if they exist, would be provided to me regardless of whether either or both parties used personal, anonymous or other e-mail accounts to conduct the public's business.<sup>7</sup>

WSI did not ask Ms. Grinsteinner or Mr. Mandigo if they had records that were responsive to the request located on home, business, or other computers and thus neither person turned any e-mails over to Mr. Armstrong for release. However, WSI replied to Mr. Nodland on November 2 stating: "The documents that you have requested under this Open Records request are privileged and may not be released under N.D.C.C. §32-12.2-11."<sup>8</sup>

WSI does not know if Ms. Grinsteinner or Mr. Mandigo had records that satisfied the request.

#### ISSUE

Whether WSI's denials met the requirements of N.D.C.C. § 44-04-18.

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<sup>6</sup> E-mail from Mark Armstrong to Chad Nodland (Oct. 31, 2007, 8:41 AM).

<sup>7</sup> E-mail from Chad Nodland to Mark Armstrong (Nov. 1, 2007, 8:45 AM) (emphasis in original).

<sup>8</sup> E-mail from Mark Armstrong to Chad Nodland (Nov. 2, 2007).

## ANALYSIS

“Upon request for a copy of specific public records, any entity subject to subsection 1 shall furnish the requester one copy of the public records requested.”<sup>9</sup> This section presumes that in order to provide a copy of a record, a reasonable search must take place.<sup>10</sup> “A denial of a request for records made under this section must describe the legal authority for the denial and must be in writing if requested.”<sup>11</sup>

When Mr. Nodland made his first request for Ms. Grinsteinner and Mr. Mandigo’s e-mails, WSI only asked Ms. Grinsteinner, an employee, to turn over any responsive e-mails; WSI did not ask Mr. Mandigo, a board member, for e-mails he had that were responsive. The next day, when Mr. Nodland again asked for Ms. Grinsteinner and Mr. Mandigo’s e-mails and specifically asked for e-mails that were contained in private e-mail accounts, WSI did not ask Ms. Grinsteinner or Mr. Mandigo whether they had such e-mails. Even though WSI did not know if it had records that were responsive to Mr. Nodland’s request because neither Ms. Grinsteinner nor Mr. Mandigo were told of the second request and thus did not provide any records to Mr. Armstrong, WSI responded that the records were exempt pursuant to N.D.C.C. § 32-12.2-11. In response to questions from this office, WSI admits that it incorrectly used N.D.C.C. § 32-12.2-11 for its denial.<sup>12</sup> As I have explained in past opinions, providing a requester with inaccurate legal reasoning for denying a record violates the open records law.<sup>13</sup> Therefore, it is my opinion that it was a violation of N.D.C.C. § 44-04-18(7) when WSI incorrectly relied upon N.D.C.C. § 32-12.2-11 to deny one of Mr. Nodland’s requests.

When asked why it did not ask Mr. Mandigo for e-mails responsive to the request, WSI explained that “WSI Board members do not have state *email* accounts, so any *email* originating from or sent to Mr. Mandigo’s home address is not a record in the possession of WSI. N.D.C.C. § 44-04-17.1(15).”<sup>14</sup> When asked why Ms. Grinsteinner was not asked for e-mails she may have had on her home computer, WSI explained that:

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<sup>9</sup> N.D.C.C. § 44-04-18(2).

<sup>10</sup> See N.D.A.G. 2004-O-07.

<sup>11</sup> N.D.C.C. § 44-04-18(7).

<sup>12</sup> We recently issued an opinion to Mr. Nodland regarding records that WSI denied based inaccurately on N.D.C.C. § 32-12.2-11. That request is addressed in N.D.A.G. 2008-O-05.

<sup>13</sup> N.D.A.G. 2008-O-05, see also 2006-O-12 and 2004-O-11.

<sup>14</sup> Letter from Anne Green, WSI Staff Counsel, to Assistant Attorney General Mike Mullen (Dec. 24, 2007) (emphasis added).

As the employer, we [WSI] are not comfortable making this request [for private e-mails] and based on our previous experience relating to records requests of a similar nature; we seriously question the appropriateness of such a request and the ability to enforce it.<sup>15</sup>

The definition of “public entity” includes in relevant part:

- a. Public or governmental bodies, boards, bureaus, commissions, or agencies of the state, including any entity created or recognized by the Constitution of North Dakota, state statute, or executive order of the governor or any task force or working group created by the individual in charge of a state agency or institution, to exercise public authority or perform a governmental function;<sup>16</sup>

A public entity’s employees and governing body are part of the public entity. If a public record is in the possession of a board member or employee, it is subject to the open records law.<sup>17</sup> If a board member or employee of a public entity refuses to turn over records in response to an open records request, that board member or employee commits a violation the open records law on behalf of the public entity.

In a recent opinion this office found that a county commission violated the open records law when four out of five commissioners failed to respond in a timely manner to a request for records made to each of them individually by a member of the public.<sup>18</sup> The records in question were in the possession of the commissioners at home, on their private computers, but each individual commissioner had a duty to respond to the request for records in a timely manner.<sup>19</sup> The requirements of N.D.C.C. § 44-04-18, the open records law, applied to the individual commissioners because the records were in the possession of the public entity (individual commissioners) and related to public business.

A “record” is defined in the open records law as:

[R]ecorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced,

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<sup>15</sup> Memorandum from Anne Green, WSI Staff Counsel, to Mike Mullen, Assistant Attorney General (Jan. 25, 2008).

<sup>16</sup> N.D.C.C. § 44-04-17.1(12).

<sup>17</sup> See N.D.A.G. 98-O-05 (private e-mails of Board of Higher Education members are records subject to the open records law).

<sup>18</sup> See N.D.A.G. 2007-O-06.

<sup>19</sup> Id.

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.<sup>20</sup>

“Public business,” is broadly defined as “all matters that relate or may foreseeably relate in any way to:

- a. The performance of the public entity's governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power; or
- b. The public entity's use of public funds.<sup>21</sup>

Thus, if either Mr. Mandigo or Ms. Grinsteinner were acting within the scope of their public positions and created a record regarding public business, that record is subject to the open records law regardless of whether it is located at their private homes or businesses. The open records law applies to public records regardless of where a public employee or board member possesses the record.

To allow a person to circumvent the open records law by maintaining public records on a private computer would be inconsistent with past court decisions and Attorney General's opinions. The North Dakota Supreme Court has stated “[W]e do not believe the open-record law can be circumvented by the delegation of a public duty to a third party, and these documents are not any less a public record simply because they were in the possession of [an independent contractor]”.<sup>22</sup> Similarly, this office has consistently applied the open records law to public records in the possession of an “agent” of a public entity, such as a private advertising company<sup>23</sup> and to private non-profit organizations such as domestic violence shelters.<sup>24</sup> The law should not be construed in a way that allows a public employee or board member to avoid disclosure of a public record when that same law mandates disclosure of that record by an independent contractor or private entity.

In comparison, public meetings are required to be open whether they are held in the official meeting room of a governing body or at some other location.<sup>25</sup> For example,

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<sup>20</sup> N.D.C.C. § 44-04-17.1(15) (emphasis added).

<sup>21</sup> N.D.C.C. § 44-04-17.1(11).

<sup>22</sup> Forum Publishing Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986).

<sup>23</sup> See N.D.A.G. 2001-O-04.

<sup>24</sup> See N.D.A.G. 99-O-03; N.D.A.G. 2003-O-10.

<sup>25</sup> See N.D.A.G. 98-O-08 (city commission meeting held in local restaurant); N.D.A.G. 98-O-11 (county water resource district meeting held in local restaurant); N.D.A.G.

this office found that a quorum of the Mandan City Commission held a meeting not properly noticed when the commissioners e-mailed each other regarding public business.<sup>26</sup> In that case, the commissioners used their private computers to hold a meeting for which proper notice was not provided.<sup>27</sup> The fact that private computers were used did not negate the fact that public business was discussed by a quorum of a governing body.<sup>28</sup> Likewise, the fact that a public record is kept on a private computer or at a business does not alter the fact that it is a public record subject to the open records law.

Therefore, e-mails that Ms. Grinsteinner and Mr. Mandigo may have had on their private home or business computers regarding public business are public records in the possession of a public entity.<sup>29</sup> Therefore, it is my opinion that WSI violated N.D.C.C. § 44-04-18(2) when it failed to thoroughly search for the requested records, which in this instance would have involved asking Ms. Grinsteinner and Mr. Mandigo if the requested records existed.

#### CONCLUSION

WSI violated N.D.C.C. § 44-04-18(7) when it incorrectly relied upon N.D.C.C. § 32-12.2-11 to deny one of Mr. Nodland's requests. It also violated N.D.C.C. § 44-04-18(2) when it failed to thoroughly search for the requested records.

#### STEPS NEEDED TO REMEDY VIOLATIONS

WSI must ask Kay Grinsteinner and Evan Mandigo to provide copies of any records that are responsive to Mr. Nodland's October 31 and November 1, 2007, requests. WSI must provide Mr. Nodland with copies of any records it receives from Ms. Grinsteinner and Mr. Mandigo. Mr. Nodland may not be charged for any records provided.

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2001-O-05 (school board meeting at retreat held in hotel in Bismarck); N.D.A.G. 2007-O-08 (county commission meeting with the Department of Transportation in hotel).

<sup>26</sup> N.D.A.G. 2007-O-14.

<sup>27</sup> Id.

<sup>28</sup> See N.D.A.G. 2007-O-14.

<sup>29</sup> See N.D.A.G. 98-O-05. WSI argues that it has no authority to demand records that are not within its direct control. If an employee or board member refuses to turn over public records, it is a violation of the open records law, but also may be a violation of internal office or board policy.

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>30</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>31</sup>

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<sup>30</sup> N.D.C.C. § 44-04-21.1(2).

<sup>31</sup> Id.