

**OPEN RECORDS AND MEETINGS OPINION
2011-O-11**

DATE ISSUED: August 24, 2011

ISSUED TO: Department of Human Services

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Damian J. Huettl asking whether the Department of Human Services (DHS) violated N.D.C.C. § 44-04-18 by refusing to provide copies of public records.

FACTS PRESENTED

During the beginning of April, Damian Huettl requested records regarding all costs and expenses incurred by the State of North Dakota in the lawsuit State of North Dakota, Ex Rel, et al. vs. Center For Special Needs Trust Adm., Inc., et al. Mr. Huettl was personally named as a defendant in the lawsuit as it was originally filed, but the law firm Larson, Latham, Huettl, LLP was later substituted as a defendant. DHS denied Mr. Huettl's request for records pursuant to N.D.C.C. § 44-04-18(6).

ISSUE

Whether DHS violated N.D.C.C. § 44-04-18 by denying a request for records.

ANALYSIS

Except as otherwise specifically provided by law, all records of a public entity are public records.¹ Normally, the identity of the requester and purpose of the request are irrelevant; the right to access public records belongs to all persons equally.² The open records law, however, does not allow a party involved in litigation to circumvent the discovery process when seeking records from a public entity.³ The law provides:

Any request under this section for records in the possession of a public entity by a party to a criminal or civil action, adjudicative proceeding as defined in subsection 1 of section 28-32-01, or arbitration in which the public entity is a party, or by an agent of the party, must comply with

¹ N.D.C.C. § 44-04-18.

² N.D.A.G. 98-F-13.

³ See generally N.D.A.G. 2002-O-05.

applicable discovery rules or orders and be made to the attorney representing that entity in the criminal or civil action, adjudicative proceeding, or arbitration. 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.⁴

The law does not allow a person to disclaim their involvement in litigation or business relationships that may be relevant to litigation. Mr. Huettl incorrectly believes that because the records he requested are open to the public he can disassociate himself from the litigation and his business relationship with his law firm.

As long as the requester is a party, or an agent of a party to the action, N.D.C.C. § 44-04-18(6) applies. At the time of the request, Mr. Huettl was personally named in the lawsuit but was soon replaced by his law firm, Larson, Latham, Huettl, LLP. The law recognizes, at a minimum, that each general partner is an agent of the limited partnership for the purposes of its activities.⁵ Thus, as a partner in the law firm, Mr. Huettl is an agent of his firm which is a party to a lawsuit by DHS. Therefore, he and his firm must follow the rules of discovery in order to obtain records related to the lawsuit.⁶ I have explained previously that the legal discovery process is 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.⁷ It is therefore my opinion that DHS properly denied Mr. Huettl's request under N.D.C.C. § 44-04-18(6).

CONCLUSION

DHS properly denied a request for records from an agent of a party to a lawsuit pursuant to N.D.C.C. § 44-04-18(6).

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Attorney General

mkk/vkk

⁴ N.D.C.C. § 44-04-18(6).

⁵ N.D.C.C. § 45-10.2-38. Mr. Huettl is identified as one of the managing general partners of Larson, Latham, Huettl, LLP. The firm is listed as "active & in good standing." Business Records Search: North Dakota Secretary of State, available at <http://www.nd.gov/sos/businessserv/> (last visited August 4, 2011).

⁶ N.D.C.C. § 44-04-18(6).

⁷ N.D.A.G. 2002-O-05.