

LETTER OPINION
98-L-128

September 2, 1998

Mr. Jeff Rotering
Adams County State's Attorney
PO Box 1379
Hettinger, ND 58639

Dear Mr. Rotering:

Thank you for your letter asking whether telephone records of a public school district containing information regarding personal telephone calls made by teachers are records required to be open to the public under N.D.C.C. § 44-04-18 if the teachers reimburse the district for the cost of the calls.

All "records" of a public entity must be open and accessible to the public during reasonable office hours unless otherwise specifically provided by law. N.D.C.C. § 44-04-18. A public school district is a "political subdivision" and therefore is also a "public entity" subject to N.D.C.C. § 44-04-18. N.D.C.C. § 44-04-17.1(10), (12)(b). "Record" is defined as "recorded information . . . which is in the possession or custody of a public entity and which has been received or prepared for use in connection with public business." N.D.C.C. § 44-04-18(15). This definition applies to each item of information contained in the telephone records rather than the entire document. 1997 N.D. Op. Att'y Gen. 26. As this definition indicates, if an item of recorded information possessed by a public entity has not been received or prepared for use "in connection with public business," it is not a "record" subject to N.D.C.C. § 44-04-18.

The plain meaning of "connection" requires a link or association between the recorded information received by the public entity and the entity's "public business." The American Heritage Dictionary 311 (2nd coll. ed. 1991). "Public business" means "all matters that relate or may foreseeably relate in any way to . . . [t]he performance of the public entity's governmental functions . . . or . . . [t]he public entity's use of public funds. N.D.C.C. § 44-04-18(11). The public business of the school district in this situation is the payment of school expenses and supervision of school personnel. Thus, each item of recorded information in the school district's telephone records that is linked to or is associated with

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the payment of school expenses or supervision of school personnel is a "record."

Certain types of information in the telephone records easily fall within both parts of the definition of "public business." This would include the time, duration, billing rate and total charge to the school district for an employee's personal call. Although phone charges are required to be reimbursed, public funds have still been paid for the phones that have been used, the building in which the phones are located, and the wages or salaries of the teachers making the calls. In addition, access to the phone records allows the public to make sure that the school district is reimbursed for all personal calls. Finally, the time and duration of the calls will indicate whether the calls were made during a teacher's break time or during hours when the teacher was supposed to be in class.

The link between the location and number called, and the school district's public business, however, is less direct. The location and number called is personal to the employee, although less personal than a record containing the substance of those phone calls. Nevertheless, the North Dakota Supreme Court has indicated that the term "record" should be given a broad and expansive meaning. City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572, 577 (N.D. 1981).

A similar question about public access to phone records of a mayor's office and official residence has been addressed by the Michigan Court of Appeals:

This is not to say that mere possession of a record by a public body is sufficient to make it a public record. Here, however, the city used and retained the bills in the performance of an official function. The city paid the bills and retained them, presumably for documentation. Payment and documentation of expenses incurred by public officials and employees is conduct in the performance of an official function. . . . The bills as a whole formed the basis of an official function - the use of public funds to pay telephone expenses.

Detroit News v. City of Detroit, 516 N.W.2d 151, 154 (Mich. Ct. App. 1994).

The fact that an item of recorded information is in the possession of a public entity does not necessarily mean that it is a "record." For example, a personal letter to a public employee received at work rather than at home would not, for that reason alone, be a "record." However, the information in the phone records regarding personal

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calls has not merely been received by the school district, but rather is contained in a document detailing the charges which the school district is responsible to pay, regardless of whether the cost of the calls is later reimbursed. Although I understand the privacy interests implicated by disclosure of the complete telephone records, I agree with the decision in Detroit News and conclude that every item of recorded information in a public school district's telephone records, including information regarding personal calls that are reimbursed by school district personnel, is a "record" required to be open under N.D.C.C. § 44-04-18 unless otherwise specifically provided by law.

This office has issued a related opinion regarding access to phone records of the State Labor Commissioner:

[T]he North Dakota Supreme Court has determined that records of North Dakota public bodies are open and available for inspection if they are contained in files of government bodies whether or not the records are required by law to be kept. . . . A specific statute rendering certain records confidential or not subject to the open records law is required in North Dakota to exempt records from disclosure. Although the North Dakota Legislature has exempted its own telephone records showing the identification of persons and their phone numbers from N.D.C.C. § 44-04-18 and Article XI, Section 6 of the North Dakota Constitution (N.D.C.C. § 44-04-18.6), it has not created any such specific exemptions for records of the State Labor Commissioner.

1994 N.D. Op. Att'y Gen. 81, 85 (copy enclosed).

Similarly, there is currently no exception under North Dakota law for phone records of a public school district, including information regarding personal telephone calls that are reimbursed by school district personnel. Therefore, because the records pertain to public business, and there is no exception specifically provided by law, it is my opinion that the records must be open to the public under N.D.C.C. § 44-04-18. If school district employees wish to avoid personal calls appearing on the district's telephone records, the calls can be made using a calling card instead of charging the school district.

Sincerely,

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