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OFFICE OF ATTORNEY GENERAL

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OPEN RECORDS AND MEETINGS OPINION
2025-O-21

DATE ISSUED: December 5, 2025

ISSUED TO: North Dakota Insurance Reserve Fund

CITIZEN'S REQUEST FOR OPINION

Michelle Kommer requested an opinion from this office under N.D.C.C. § 44-04-21.1 asking whether the North Dakota Insurance Reserve Fund violated N.D.C.C. § 44-04-18 by refusing to provide records pertaining to a water main break.

FACTS PRESENTED

On February 7, 2023, a water main broke in front of the commercial property owned by Michelle and Toby Kommer, located in Fargo, North Dakota.¹ The incident allegedly caused significant flooding and property damage to the basement of the business, including damage to the boilers, elevator equipment, and stored personal property.² According to the Kommers, a City of Fargo crew chief on site assured them that the City's insurance would cover the damage and provided contact information for filing a claim.³ Based on this representation, Michelle Kommer, acting on behalf of the business, submitted a third-party liability claim against the City of Fargo, a member of the North Dakota Insurance Reserve Fund (NDIRF).⁴

On February 14, 2023, NDIRF Claims Adjuster Jordan Wahl informed the Kommers that, based on his preliminary investigation, the water main break was caused by environmental conditions

¹ Email from Michelle Kommer to Melissa J. Hamilton, Paralegal, Off. of Att'y Gen. (Mar. 28, 2023, 9:55 AM).

² Email from Toby Kommer to Jordan Wahl, Claims Adjuster, NDIRF (Feb. 15, 2023, 1:37 PM); Email from Michelle Kommer to Jordan Wahl, Claims Adjuster, NDIRF (Feb. 22, 2023, 3:41 PM).

³ Email from Toby Kommer to Jordan Wahl, Claims Adjuster, NDIRF (Feb. 14, 2023, 2:32 PM); Email from Toby Kommer to Jordan Wahl, Claims Adjuster, NDIRF (Feb. 15, 2023, 1:37 PM); Email from Michelle Kommer to Jordan Wahl, Claims Adjuster, NDIRF (Feb. 22, 2023, 3:41 PM).

⁴ Email from Toby Kommer to Jordan Wahl, Claims Adjuster, NDIRF (Feb. 15, 2023, 1:37 PM); Email from Michelle Kommer to Jordan Wahl, Claims Adjuster, NDIRF (Feb. 22, 2023, 3:41 PM); Email from Brennan Quintus, Chief Exec. Officer, NDIRF, to Annique M. Lockard, Assistant Att'y Gen., Off. Of Att'y Gen. (June 2, 2023, 8:26 AM).

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and that he had found no evidence of negligence by the City.⁵ He stated that the City had responded in a timely manner, and the NDIRF would not be making payment on the claim.⁶

During the course of communications regarding the claim, on February 15, 2023, Toby Kommer submitted a written request for “a copy of the policy, any notes you have, or anything else relating to this claim that is available to me via an open records request.”⁷ Mr. Wahl responded, indicating that the Memorandum of Coverage was publicly available on the NDIRF website and stated that “the claim information . . . is confidential under N.D. Cent. Code § 26.1-23.1-06.”⁸

In response, Mr. Kommer disputed the NDIRF’s interpretation of the confidentiality statute, arguing the statute cited “does not prevent you from sharing your investigative file with us – it merely prevents the public (a person) from obtaining specific dollar amounts relating to the fund or claims.”⁹ Mr. Kommer stated the Kommers would be “moving forward with litigation” and requested that the damaged water pipe be preserved.¹⁰ However, on February 17, 2023, he noted that they had not yet retained legal counsel.¹¹

Following this exchange, Michelle Kommer sought further clarification from Mr. Wahl regarding the denial.¹² Unsatisfied with Mr. Wahl’s responses, she requested contact information for his supervisor, Michelle Lang, Assistant Director of Claims at the NDIRF.¹³ Ms. Kommer repeated her request for the investigative file.¹⁴ In response, Ms. Lang emailed the Kommers that, after reviewing Mr. Wahl’s investigation, NDIRF found no evidence to support holding the City of Fargo or its employees liable for the damages sustained.¹⁵ Ms. Lang also stated that the Kommers’ open records request was exempt from disclosure under N.D.C.C. § 44-04-18, citing a

⁵ Email from Jordan Wahl, Claims Adjuster, NDIRF, to Toby & Michelle Kommer (Feb. 14, 2023, 1:56 PM).

⁶ *Id.*

⁷ Email from Toby Kommer to Jordan Wahl, Claims Adjuster, NDIRF (Feb. 14, 2023, 2:32 PM).

⁸ Email from Jordan Wahl, Claims Adjuster, NDIRF, to Toby Kommer (Feb. 15, 2023, 11:01 AM).

⁹ Email from Toby Kommer to Jordan Wahl, Claims Adjuster, NDIRF (Feb. 15, 2023, 1:37 PM).

¹⁰ Email from Toby Kommer to Jordan Wahl, Claims Adjuster, NDIRF (Feb. 15, 2023, 11:21 AM).

¹¹ Email from Toby Kommer to Jordan Wahl, Claims Adjuster, NDIRF (Feb. 17, 2023, 2:58 PM).

¹² Email from Michelle Kommer to Jordan Wahl, Claims Adjuster, NDIRF (Feb. 21, 2023, 12:47 PM).

¹³ Email from Michelle Kommer to Jordan Wahl, Claims Adjuster, NDIRF (Feb. 21, 2023, 2:42 PM); Email from Jordan Wahl, Claims Adjuster, NDIRF, to Toby & Michelle Kommer (Feb. 21, 2023, 4:48 PM).

¹⁴ Email from Michelle Kommer to Jordan Wahl, Claims Adjuster, NDIRF (Feb. 22, 2023, 3:41 PM).

¹⁵ Email from Michelle Lang, Assistant Dir. Of Claims, NDIRF, to Toby & Michelle Kommer (Feb. 23, 2023, 12:22 PM).

litigation exemption under N.D.C.C. § 44-04-19.1(12) and referencing a prior email from Brennan Quintus, NDIRF's Chief Executive Officer.¹⁶

Later that same day, on February 23, 2023, Mr. Quintus emailed Michelle Kommer directly in response to her open records request.¹⁷ In his message, he stated that NDIRF had been notified on February 15, 2023, that the Kommers were "moving forward with litigation," and notified on February 17, 2023, that the Vogel Law Firm had been engaged to initiate legal action.¹⁸ Based on this, Mr. Quintus asserted the claim file had been "compiled and prepared by the NDIRF for the purpose of litigation" and was therefore exempt from disclosure as "active litigation records" under N.D.C.C. § 44-04-19.1(12).¹⁹

In a reply dated February 27, 2023, Ms. Kommer disputed this characterization and application of the litigation exemption, stating that while litigation had been discussed during a period of emotional distress, the Kommers had clarified on February 17th that no attorney had been retained.²⁰ She expressed frustration that their concerns were not fully considered and again requested production of the requested records.²¹

On March 2, 2023, Mr. Quintus reaffirmed the NDIRF's denial of both the claim and the open records request, again citing the active litigation exemption.²² Ms. Kommer responded the same day, asserting that NDIRF's refusal was improper and reiterating that litigation was neither ongoing nor contemplated.²³ She again requested the statutes, policies, or procedures that the NDIRF relied upon to deny the claim.²⁴

Following a follow-up email from Ms. Kommer, Mr. Quintus replied on March 10, 2023, stating the NDIRF's position had not changed and that there was nothing further the NDIRF could provide.²⁵

ISSUE

Whether the NDIRF violated N.D.C.C. § 44-04-18 by refusing to provide requested records.

¹⁶ *Id.*

¹⁷ Email from Brennan Quintus, CEO, NDIRF, to Michelle Kommer (Feb. 23, 2023, 4:11 PM).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Email from Michelle Kommer to Brennan Quintus, CEO, NDIRF (Feb. 27, 2023, 9:26 AM).

²¹ *Id.*

²² Email from Brennan Quintus, CEO, NDIRF, to Michelle Kommer (Mar. 2, 2023, 9:04 AM).

²³ Email from Michelle Kommer to Brennan Quintus, CEO, NDIRF (Mar. 2, 2023, 12:24 PM).

²⁴ *Id.*

²⁵ Email from Brennan Quintus, CEO, NDIRF, to Michelle Kommer (Mar. 10, 2023, 8:49 AM).

ANALYSIS

The NDIRF, as an agency of the political subdivision of the City of Fargo, is a “public entity” subject to open record laws.²⁶ “Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours.”²⁷ When a public entity receives a request for records, it must, within a reasonable time period, either provide the records or explain why the records are not being provided.²⁸ If a public entity denies a records request, the denial must indicate the entity’s specific legal authority for denying access to the requested record and be made in writing, if requested.²⁹ A public entity may not deny a request for an open record on the ground the record also contains confidential or closed information.³⁰ “[I]f confidential or closed information is contained in an open record, a public entity shall permit inspection and receipt of copies of the information contained in the record that is not confidential or closed, but shall delete, excise, or otherwise withhold the confidential or closed information.”³¹

The NDIRF initially denied the Kommers’ request for records on the basis that the claim file contained confidential information exempt from disclosure under N.D.C.C. § 26.1-23.1-06, which provides:

Information regarding that portion of the funds or liability reserves of a government self-insured pool established for purposes of satisfying a specific claim or cause of action is confidential. A person is not entitled to discover that portion of the funds or liability reserves established for purposes of satisfying a claim or cause of action, except that the reserve is discoverable in any supplementary or ancillary proceeding to enforce a judgement against the pool or a governmental entity participating in the pool.³²

Previously, this office explained that the exception in N.D.C.C. § 26.1-23.1-06 for confidential information in a government self-insurance pool’s claim file is narrow.³³ Only records specifically referring to “the amount of reserves set aside for a claim” fall under this exception.³⁴

²⁶ The definition of “public entity” includes “[p]ublic or governmental bodies, boards, bureaus, commissions, or agencies of any political subdivision of the state[.]” N.D.C.C. § 44-04-17.1 (13)(b); N.D.A.G. 99-O-02 (NDIRF subject to open records law as an “agency” of various political subdivisions and expends public funds), *citing* N.D.A.G. Letter to Solberg (Aug. 2, 1991); *see also Hagen v. NDIRF*, 2022 ND 53, ¶¶ 13-20, 971 N.W.2d 833.

²⁷ N.D.C.C. § 44-04-18(1).

²⁸ N.D.C.C. § 44-04-18.

²⁹ N.D.C.C. § 44-04-18(7).

³⁰ N.D.C.C. § 44-04-18.10(1).

³¹ N.D.C.C. § 44-04-18.10(2).

³² N.D.C.C. § 26.1-23.1-06(1).

³³ N.D.A.G. 99-O-02.

³⁴ *Id.*

Other documents in the claim file, even if used to help determine reserves, are not exempt from disclosure.³⁵

NDIRF, however, denied the records request in its entirety on February 15, 2023, stating “the claim information . . . is confidential under N.D. Cent. Code § 26.1-23.1-06.”³⁶ A public entity may not deny access to an entire record, or in this case, an entire claim file, simply because it contains some confidential information.³⁷ Instead, it must redact the portions that are confidential and release the remainder.³⁸

When the NDIRF did not provide a redacted file, the Kommers again requested the records on February 21, 2023. This time, NDIRF denied the request under the litigation exemption outlined in N.D.C.C. § 44-04-19.1(12), citing “threatened litigation.” Their reasoning was based on Mr. Kommer’s February 15th statement that they were “moving forward with litigation” after being denied the file. However, on February 17th, the Kommers clarified that no attorney had been retained and that litigation was neither ongoing nor contemplated.³⁹

The file requested on February 15th was the same file requested on February 22nd. The only notable event was that after being denied the file, Mr. Kommer mentioned - but did not substantiate - litigation. The file was still one compiled in the ordinary course of business to evaluate liability, a routine function of the NDIRF that occurs regardless of whether litigation ultimately happens.

Exemptions under the open records laws are to be “narrowly construed” to effectuate the basic policy in favor of public access to government records.⁴⁰ Section 44-04-19.1(12), N.D.C.C., provides:

Unless subject to subsection 6 of section 44-04-18, active litigation records are exempt from section 44-04-18. For purposes of this subsection, “active litigation records” means records obtained, compiled, or prepared by a public entity or the attorney representing a public entity *for the purpose of litigation* unless the records already have been filed publicly or the litigation is completed.⁴¹

³⁵ *Id.*

³⁶ Email from Jordan Wahl, Claims Adjuster, NDIRF, to Toby Kommer (Feb. 15, 2023, 11:01 AM).

³⁷ N.D.C.C. § 44-04-18.10(1).

³⁸ N.D.C.C. § 44-04-18.10(2).

³⁹ Email from Toby Kommer to Jordan Wahl, Claims Adjuster, NDIRF (Feb. 17, 2023, 2:58 PM).

⁴⁰ N.D.A.G. 94-L-194 (citation omitted).

⁴¹ N.D.C.C. § 44-04-19.1(12) (emphasis added).

The requested records were not created “for the purpose of litigation” as required by the statute. The perhaps off-handed use of the word “litigation” did not transform the file that should have been released on February 15th into a litigation file one week later.⁴²

A vague or speculative assertion of future litigation is insufficient to invoke the exemption in N.D.C.C. § 44-04-19.1(12). To interpret the statute so broadly would substantially expand the exemption beyond its plain language, effectively preventing public access to a significant volume of records. For the “active litigation records” exemption to apply, the public entity must demonstrate that the specific records were prepared for the purpose of litigation, not merely in the course of evaluating or responding to a claim. Accordingly, the NDIRF initially violated N.D.C.C. § 44-04-18 when it failed to turn the file over due to an overbroad interpretation of N.D.C.C. § 26.1-23.1-06. Seven days later, the NDIRF again violated the law by claiming that same file constituted “active litigation records.”

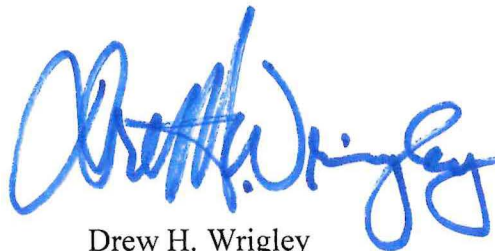
CONCLUSION

The NDIRF violated N.D.C.C. § 44-04-18 by refusing to provide the requested records.

STEPS NEEDED TO REMEDY VIOLATION

The NDIRF must provide the requested records to the Kommers at no charge but may excise information that is confidential under N.D.C.C. § 26.1-23.1-06.

While I have every reason to expect the NDIRF will remedy this situation in accord with this opinion, failure to take those corrective measures 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 21.2.⁴³ Failure to take these corrective measures may also result in personal liability for the person or persons responsible for the noncompliance.⁴⁴



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amr

cc: Michelle Kommer

⁴² If the NDIRF did create a record in response to litigation, then that record may have been protected by N.D.C.C. § 44-04-19.1.

⁴³ N.D.C.C. § 44-04-21.1(2).

⁴⁴ *Id.*