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OPEN RECORDS AND MEETINGS OPINION
2022-O-09

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ISSUED TO: City of Crosby

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Cecile Wehrman, Publisher of The Journal, asking whether the City of Crosby violated N.D.C.C. §§ 44-04-20 and 44-04-18 by failing to provide notice of a special meeting and improperly denying a request for records.¹

FACTS PRESENTED

Thirty minutes before the Crosby City Council's regular meeting on July 12, 2021, the City Council held administrative "nuisance hearings."² Mayor Bert Anderson and Councilmen Doug Anderson, Kjell Vassen, Don Wolf, Jerry King, and Brian Lund attended. No notice was prepared or posted nor was an agenda prepared.³

On July 13, 2021, Brad Nygaard, reporter and photojournalist with the Crosby Journal, requested "copies of the list of properties in alleged violation of City of Crosby Ordinance 305 . . . copies of the packets distributed to City Council members at the administrative hearing, including any photographs, letters, emails, court documents (warrants) or notes. . . . copy of any recordings, minutes, or notes kept by City of Crosby employees during said administrative hearing, including any determinations made, agreements of concessions made between the City of Crosby and individual property owners."⁴ Ordinance 305 was provided the next day.⁵ On July 16, 2021, the Crosby City Attorney informed Mr. Nygaard his request had been fulfilled with the exception of e-mails from the City Attorney's office which were "protected by attorney client privilege."⁶

¹ The Journal also alleged a violation of N.D.C.C. § 44-04-21(2) because the minutes from the July 12 regular meeting made "no mention of the nuisance proceedings." Minutes must be kept of all open meetings and are records subject to N.D.C.C. § 44-04-18. The City of Crosby provided this office with the minutes for the July 12 administrative nuisance hearings; accordingly, there is no violation.

² Letter from Sabrina Ferguson, City Auditor, City of Crosby, to Att'y Gen.'s Office (received on or about Aug. 10, 2021).

³ *Id.*

⁴ E-mail from Brad Nygaard, Reporter and Photojournalist, Crosby Journal, to the Divide County State's Att'y (July 13, 2021, 11:17 AM).

ISSUES

1. Whether the City of Crosby properly noticed its July 12, 2021, administrative nuisance hearings.
2. Whether the City of Crosby properly withheld records as attorney work product.

ANALYSIS

Issue One

All meetings of a governing body of a public entity must be open to the public, and notice of the meeting must be provided in substantial compliance with N.D.C.C. § 44-04-20. A “meeting” occurs when a “quorum” of a governing body is present and the governing body’s “public business” is considered or discussed.⁷

Notice must be given to the public before each meeting.⁸ The notice must include the date, time, and location of the meeting and must list the topics to be considered.⁹ Notice must be posted at the principal office of the governing body holding the meeting and, on the day the public entity meets, at the location of the meeting.¹⁰ The governing body’s presiding officer is responsible for providing an initial public notice at the same time the governing body’s members are notified of the meeting.¹¹

If the public entity creates an agenda for a meeting, the public entity must follow the open meeting posting requirements for the agenda as well as the meeting notice requirements.¹² However, the lack of an agenda on the notice does not affect the validity of the meeting.¹³

⁵ Letter from Sabrina Ferguson, City Auditor, City of Crosby, to Att’y Gen.’s Office (received on or about Aug. 10, 2021).

⁶ E-mail from Seymour R. Jordan, City Att’y, City of Crosby, to Brad Nygaard, Reporter and Photojournalist, Crosby Journal (July 16, 2021, 9:23 AM).

⁷ N.D.C.C. § 44-04-17.1(9) (definition of “meeting”); (12) (definition of “public business”); and (15) (definition of “quorum”). It is a violation of the law when “meetings” occur by email because the public does not have the ability to attend and there is no notice of the meeting. N.D.A.G. 2020-O-01; N.D.A.G. 2018-O-19; N.D.A.G. 2018-O-12; N.D.A.G. 2015-O-14; N.D.A.G. 2015-O-12; N.D.A.G. 2014-O-12.

⁸ N.D.C.C. § 44-04-20(1); *see also* N.D.A.G. 2022-O-03; N.D.A.G. 2020-O-01; N.D.A.G. 2016-O-02.

⁹ N.D.C.C. § 44-04-20(2).

¹⁰ N.D.C.C. § 44-04-20(4).

¹¹ N.D.C.C. § 44-04-20(5); *see also* N.D.A.G. 2021-O-03.

¹² N.D.C.C. § 44-04-20(5).

¹³ N.D.C.C. § 44-04-20(2).

A quorum of the Crosby City Council met and considered public business at the July 12, 2021, administrative nuisance hearings.¹⁴ The City Council did not prepare a meeting notice or meeting agenda for the nuisance hearings, no meeting notice was posted at any of the required locations.¹⁵ Further, the City Council did not realize official notice for this meeting should have been sent to the newspaper.¹⁶ As a result, the City Council violated North Dakota open meetings laws.

Issue Two

“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.”¹⁷ If a public entity denies a records request, the denial must indicate the entity's specific authority for denying access to the requested record and be made in writing, if requested.¹⁸ A public entity may not deny a request for an open record on the ground the record also contains confidential or closed information.¹⁹ “[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.”²⁰

As stated above, Crosby denied a request for records and cited the exemption in N.D.C.C. § 44-04-19.1 for attorney work product as the reason for the denial.²¹

For the purposes of open records, “attorney work product” is defined as:

any document or record that:

- a. Was prepared by an attorney representing a public entity or prepared at such an attorney's express direction;
- 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, in anticipation of reasonably predictable civil or criminal litigation or

¹⁴ Letter from Sabrina Ferguson, City Auditor, City of Crosby, to Att’y Gen.’s Office (received on or about Aug. 10, 2021).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ N.D.C.C. § 44-04-18.

¹⁸ N.D.C.C. § 44-04-18(7).

¹⁹ N.D.C.C. § 44-04-18.10(1).

²⁰ N.D.C.C. § 44-04-18.10(2).

²¹ N.D.C.C. § 44-04-19.1(1).

adversarial administrative proceedings, or for guidance on the legal risks, strengths, and weaknesses of an action of a public entity.²²

All three elements for attorney work product must be present for a record to be exempt under N.D.C.C. § 44-04-19.1.²³

Previous opinions issued by this office illustrate the requisite analysis to withhold records under the attorney work product exemption. In an opinion issued to the City of Minot, this office determined the city improperly withheld records purported to be attorney work product under N.D.C.C. § 44-04-19.1 because only parts of the records were protected by that exemption. After reviewing the requested notes, “it [was] clear that many of the notes [were] a factual narrative and [did] not reflect the impressions of the attorney.”²⁴ “[S]ome statements of the attorney in the notes could be classified as attorney work product or protected under other provisions of N.D.C.C. § 44-04-18.1 for public employees, [but] there are notes that do not fall within any statutory protection.”²⁵ “The mere fact that it was an attorney who made the notes does not automatically mean the elements of attorney work product are met. The public entity must still make an analysis of the records to determine whether there are any statutory exceptions.”²⁶ To remedy the violation, the City of Minot was directed to review the notes and redact any with statutory exceptions.

In an opinion issued to the Wahpeton Public School District, this office concluded the school district properly withheld attorney work product under N.D.C.C. § 44-04-19.1 but also improperly withhold records that did not satisfy the criteria for that exception. The records at issue were created by the school district’s law firm and another law firm in Minneapolis hired to conduct an investigation.²⁷

This office determined the properly withheld records were records that contained discussions of legal impressions and theories; and summaries of information, events, and witness interviews the attorney felt were relevant to the legal issues raised in a complaint. Regarding the improperly withheld records that did not meet the criteria for attorney work product, the opinion stated “[a] simple factual narrative does not include any impressions or work product of the attorney or the entity and would not be protected under N.D.C.C. § 44-04-19.1.”²⁸

²² N.D.C.C. § 44-04-19.1(6).

²³ N.D.A.G. 2021-O-05, citing N.D.A.G. 2002-O-05.

²⁴ N.D.A.G. 2021-O-05.

²⁵ *Id.*

²⁶ *Id.*

²⁷ N.D.A.G. 2002-O-05.

²⁸ *Id.*

In the current matter, Crosby provided the requested e-mails to this office.²⁹ The records included e-mails between city employees and the city attorney relating to the nuisance hearing demolition list and attachments to those e-mails.³⁰ Upon review, some of the emails and attachments do not meet all three requirements for the attorney work product exemption. For example, two attachments are publicly available court records.³¹ Further, the e-mails apparently were not fully analyzed to determine which parts of them may be exempt and which parts must be provided to the requester. The fact that an e-mail from an attorney is included in an e-mail chain does not automatically mean the elements of attorney work product are met, and it certainly does not protect the entire e-mail chain. If any part of the e-mail chain includes an e-mail drafted by an attorney which meets all three elements for the attorney work product exemption in N.D.C.C. § 44-04-19.1, only that portion of the e-mail chain is exempt and may be redacted; the rest of the record must be provided. Crosby violated the open records law when it denied a request for emails by citing attorney work product without fully analyzing all three elements and redacting records that are otherwise open to the public.

CONCLUSION

1. The City of Crosby did not properly notice its July 12, 2021, special meeting.
2. The City of Crosby improperly denied part of a request for records as attorney work product.

STEPS NEEDED TO REMEDY VIOLATION

The July 12, 2021, “nuisance hearing” minutes must be provided to the Journal and anyone else requesting them, free of charge.

The City of Crosby must review the e-mails and may redact any parts of them which satisfy statutory exceptions. The remaining e-mails must be released free of charge to the Journal and anyone else who requests them.

While I have reason to expect the City Council will remedy this situation, failure to take the corrective measures described in this opinion within seven days of its date will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the

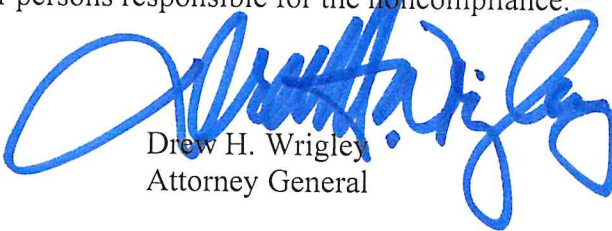
²⁹ E-mail from Seymour R. Jordan, City Att’y, City of Crosby, to Att’y Gen.’s Office (Jun. 1, 2022, 9:26 AM).

³⁰ *Id.*

³¹ See E-mail from Seymour R. Jordan, City Att’y, City of Crosby, to Att’y Gen.’s Office (Jun. 2, 2022, 15:50:26).

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opinion prevails in a civil action under N.D.C.C. § 44-04-21.2.³² The failure also may result in personal liability for the person or persons responsible for the noncompliance.³³



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aml
cc: Cecile Wehrman (via email only)

³² N.D.C.C. § 44-04-21.1(2).

³³ *Id.*