



STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL
www.attorneygeneral.nd.gov
(701) 328-2210

Drew H. Wrigley
ATTORNEY GENERAL

OPEN RECORDS AND MEETINGS OPINION
2022-O-15

DATE ISSUED: October 17, 2022

ISSUED TO: Pelican Township

CITIZEN'S REQUEST FOR OPINION

Tyler J. Leverington requested an opinion under N.D.C.C. § 44-04-21.1 from this office asking whether Pelican Township violated N.D.C.C. § 44-04-18 by denying a request for records.¹

FACTS PRESENTED

Grand Prairie Agriculture, LLP (Grand Prairie) submitted a petition for approval of a proposed animal feeding operation to Pelican Township (Township).² The Township denied the proposal after determining it would not comply with township ordinances.³ Grand Prairie appealed the Township's decision to district court.⁴ The district court affirmed the Township's decision to deny the petition.⁵

Grand Prairie appealed the district court's ruling to the North Dakota Supreme Court.⁶ The Court's Judgment stated the Township's decision was "arbitrary and invalid"⁷ and ordered the Township to reconsider the petition.⁸

On March 12, 2021, the Township adopted seven new zoning ordinances.⁹ On April 16, 2021, pursuant to the Court's remand, the Township reconsidered and denied the petition because the

¹ Letter from Tyler J. Leverington, Att'y, to Att'y Gen.'s Office (May 12, 2021).

² Letter from Tyler J. Leverington, Att'y, to Att'y Gen.'s Office (May 12, 2021); Letter from Scott W. Carlson, Att'y, to Att'y Gen.'s Office (June 17, 2021).

³ Letter from Scott W. Carlson, Att'y, to Att'y Gen.'s Office (June 17, 2021).

⁴ Case No. 36-2019-CV-397.

⁵ Letter from Tyler J. Leverington, Att'y, to Att'y Gen.'s Office (May 12, 2021); Letter from Scott W. Carlson, Att'y, to Att'y Gen.'s Office (June 17, 2021).

⁶ Letter from Scott W. Carlson, Att'y, to Att'y Gen.'s Office (June 17, 2021).

⁷ Letter from Tyler J. Leverington, Att'y, to Att'y Gen.'s Office (May 12, 2021).

⁸ Letter from Scott W. Carlson, Att'y, to Att'y Gen.'s Office (June 17, 2021). The Court's final Judgment was entered on March 15, 2021

⁹ Letter from Tyler J. Leverington, Att'y, to Att'y Gen.'s Office (May 12, 2021).

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proposed animal feeding operation's proximity to the newly adopted zoning districts would not comply with its ordinances.¹⁰ On April 19, 2021, Grand Prairie submitted an open records request to the Township primarily seeking information about the Township's March 12 and April 16 meetings.¹¹ Specifically, Grand Prairie requested the following records from the Township:

- Any and all communications, including but not limited to any letters, emails, text messages, and social media messages sent by or to any current member or officer of the Pelican Township board or planning or zoning committee as well as the same sent by or to any individual who is not now, but was a member or officer of the Pelican Township board or planning or zoning committee between January 1, 2020 to April 19, 2021, regarding, referencing, or related in any way to animal feeding operations or the formal petition for a determination submitted by Grand Prairie Agriculture, LLP for a proposed hog farm to be located in Pelican township.
- Any and all documents, records, reports, submissions, notes, or other materials provided to or generated by any current member of the Pelican Township board or planning or zoning committee as well as the same provided to or generated by any individual who is not now, but was a member of the Pelican Township board or planning or zoning committee at any time between January 1, 2020 to April 19, 2021 regarding, referencing, or related in any way to animal feeding operations or the formal petition for a determination submitted by Grand Prairie Agriculture, LLP for a proposed hog farm to be located in Pelican township.
- Any and all meeting notices, meeting minutes, or meeting notes associated with or related to the March 12, 2021, and April 16, 2021, meeting of the Pelican Township board, planning, or zoning committee.
- Any and all communications, hand-outs, pamphlets, information, reports, or studies that were presented to or considered by the Pelican Township board and/or the planning and zoning commission in adopting the new zoning districts and determining locations.
- Any and all communications, hand-outs, pamphlets, information, reports, or studies that were presented to or considered by the Pelican Township board and/or the planning and zoning commission in reaching its determination at the April 16, 2021

¹⁰ Letter from Scott W. Carlson, Att'y, to Att'y Gen.'s Office (June 17, 2021).

¹¹ Letter from Tyler J. Leverington, Att'y, to Att'y Gen.'s Office (May 12, 2021).

meeting that the animal feeding operation proposed by Grand Prairie Agriculture, LLP would not comply with the Pelican Township zoning regulations.

- Any and all agreements the Township has with Scott Carlson or Farmers' Legal Action Group, Inc.
- Any and all bills the Township has received from Scott Carlson or Farmers' Legal Action Group, Inc.
- Any and all agreements with any individual or entity relating in any way (sic) to the payment of the Township's legal fees.
- A comprehensive set of currently enacted ordinances for Pelican Township.
- The dates of the last three (3) elections of Pelican Township board members.¹²

On April 30, 2021, the Township denied Grand Prairie's request stating it would not "produce any information pursuant to the open records request" at this time. The Township's denial cited N.D.C.C. § 44-04-18(6) and "pending" Case No. 36-2019-CV-397.¹³ The Township said it would respond if Grand Prairie intended to "engage in a formal discovery process, or if Grand Prairie ceases litigation over its petition."¹⁴

ISSUE

Whether Pelican Township 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, and the identity of the requester and purpose of the request are irrelevant.¹⁵ However, identity and purpose become relevant for open records purposes when a party involved in active litigation tries to circumvent the formal civil discovery process by seeking records from a public entity through an open records request.¹⁶ Specifically, the law provides:

¹² Letter from Tyler J. Leverington, Att'y, to Att'y Gen.'s Office (May 12, 2021).

¹³ Letter from Scott W. Carlson, Att'y, to Tyler J. Leverington, Att'y (Apr. 30, 2021).

¹⁴ Letter from Scott W. Carlson, Att'y, to Tyler J. Leverington, Att'y (Apr. 30, 2021). On March 1, 2021, Grand Prairie's counsel (on behalf of a different client) filed new litigation against the Township, seeking, among other things, a declaratory judgment that the Township's Animal Feeding Operation Ordinance—an issue in Case No. 36-2019-CV-397—was invalid and unenforceable. However, this pending litigation was not raised in the Township's April 30th denial.

¹⁵ N.D.C.C. § 44-04-18; *see* N.D.A.G. 98-F-13.

¹⁶ *See* N.D.A.G. 2011-O-11; *see generally* N.D.A.G. 2002-O-05.

Any request under this section for records in the possession of a public entity by a party to a criminal or civil action¹⁷, 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 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.¹⁸

If the requester is a party, or an agent of a party, to an action, the requester “must follow the rules of discovery in order to obtain records related to the lawsuit.”¹⁹

Previous opinions have explained “the legal discovery process is the exclusive method of compelling a public entity to provide records to its adversary in a pending . . . civil action . . .”²⁰ The legislative intent of this statute is to put state agencies on equal footing with private litigants.²¹ Prior to 1997, a requester could obtain records that would be privileged under North Dakota Rules of Civil Procedure Rule 26(b)(3) in possession of a private litigant.²² In 1997, the Legislature enacted N.D.C.C. § 44-04-18(5) (the current N.D.C.C. § 44-04-18(6)). According to 1997 legislative testimony by this office, the last sentence in this subsection was added, at our request, to clarify “that a public entity can deny a request for records from a party to litigation involving the public entity if the records are privileged.”²³

Additionally, “[r]ather than simply state that privileged documents are not subject to mandatory disclosure under N.D.C.C. § 44-04-18, the plain language of subsection 5 instead requires that the request comply with applicable discovery rules.”²⁴ “This prevents a party in an action or proceeding against a public entity from burdening the public entity and its litigation attorney with voluminous requests for records that may not be relevant to the issues in the pending action or proceeding.”²⁵ The statute “authorizes a public entity to rely on legitimate discovery objections to deny a request for records under N.D.C.C. § 44-04-18 from an adversary or agent

¹⁷ North Dakota law defines an “action” as a “proceeding in a court of justice.” N.D.C.C. § 32-01-02. “A civil action is commenced by the service of a summons.” N.D.R.Civ.P. 3.

¹⁸ N.D.C.C. § 44-04-18(6).

¹⁹ N.D.A.G. 2011-O-11.

²⁰ N.D.A.G. 2011-O-11 (citing N.D.A.G. 2002-O-05).

²¹ *Id.*

²² N.D.A.G. 2002-O-05.

²³ N.D.A.G. 2002-O-05 (citing Hearing on S.B. 2117 Before the Senate Comm. On the Judiciary, 2001 N.D. Leg. (Jan. 24) (Written testimony of Assistant Attorney General James C. Fleming at p. 3)).

²⁴ N.D.A.G. 2002-O-05.

²⁵ *Id.*

of an adversary in a pending criminal or civil action or adversarial administrative proceeding.”²⁶ Currently, subsection 6 of N.D.C.C. § 44-04-18 provides protection only for “records that are privileged under applicable discovery rules” and allows a public entity to deny a request “if the request seeks records that are privileged under applicable discovery rules.” If there are no applicable discovery rules at the time an open records request is made by a party to a civil action, the request cannot be denied under this statute. After any applicable discovery periods end, open records are available to anyone requesting them.

Here, the Township relied on Case No. 36-2019-CV-397 in its April 30th denial of records.²⁷ The Court issued its Order on February 18, 2021, and final Judgment was entered in that case on March 15, 2021.²⁸ Grand Prairie sent its records request on April 19, 2021.²⁹ The requested records included meeting notices, minutes, or notes, communications, hand-outs, pamphlets, information, reports, or studies presented in open meetings to the Township board, comprehensive set of currently enacted Township ordinances, and the dates of the last three Township elections of board members. The Township wholly denied Grand Prairie’s request nine business days later.

At the time Grand Prairie made its request, no issues remained for a court to review in Case No. 36-2019-CV-397. No remand was ordered to another court. Neither party had appealed.³⁰ No action occurred in the case after entry of the Court’s final Judgment. Case No. 36-2019-CV-397 was not active for purposes of further litigation. At the time the request was made, and denied, there were no discovery procedures available by which Grand Prairie could access the Township’s records. It is patently unfair, and contrary to a plain reading of the statute and its legislative history, for a public entity to deny access to open records on the basis of a case that is open only as an administrative matter, well past any applicable or available discovery processes. Therefore, it is my opinion that the Township improperly denied Grand Prairie’s records request.

CONCLUSION

Pelican Township improperly denied a request for records after entry of final judgment of an order when there was no further opportunity for discovery, in violation of N.D.C.C. § 44-04-18(6).

²⁶*Id.*

²⁷ Letter from Scott W. Carlson, Att’y, to Tyler Leverington, Att’y (Apr. 30, 2021).

²⁸ “A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order.” N.D.R.App.P. 40.

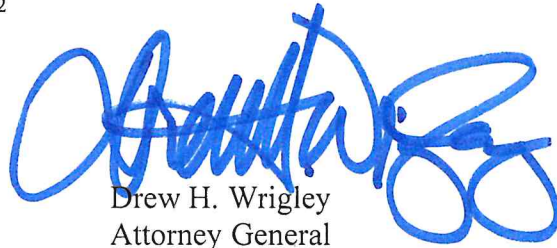
²⁹ Case No. 36-2019-CV-397, Grand Prairie’s first appeal, was closed in district court on May 19, 2021.

³⁰ Letter from Tyler J. Leverington, Att’y, to Att’y Gen.’s Office (May 12, 2021).

STEPS NEEDED TO REMEDY VIOLATION

The Township must review Grand Prairie's April 19, 2021, record request and provide the responsive records.

While I have every reason to expect Pelican Township will remedy this situation, 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. § 44-04-21.2.³¹ Failure to take these corrective measures may also result in personal liability for the person or persons responsible for the noncompliance.³²



Drew H. Wrigley
Attorney General

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cc: Tyler Leverington

³¹ N.D.C.C. § 44-04-21.1(2).

³² *Id.*