

**OPEN RECORDS AND MEETINGS OPINION
2003-O-06**

DATE ISSUED: April 25, 2003

ISSUED TO: Disciplinary Board of the North Dakota Supreme Court

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Larry Dvorak asking whether the Disciplinary Board of the North Dakota Supreme Court violated N.D.C.C. § 44-04-18 by denying his request to see complaints and other records of the board regarding county state's attorneys and judges in the Southwest Judicial District.

ISSUE

Whether N.D.C.C. § 44-04-18 was violated when Mr. Dvorak was denied access to complaints and other records of the county state's attorney's and judges that were in the possession of the Disciplinary Board and the Judicial Conduct Commission of the North Dakota Supreme Court.

ANALYSIS

All records of a public entity are public records, open and accessible to the public, except as otherwise specifically provided by law. N.D.C.C. § 44-04-18; North Dakota Const. art. XI, § 6. Records in the possession of the courts are specifically excluded from the definition of records under the open records law. N.D.C.C. § 44-04-17.1(15)¹.

¹ See also Grand Forks Herald, Inc. v. Lyons, 101 N.W.2d 543, 546 (N.D. 1960) (holding county courts did not come within the designation of "agencies of the state" under the open records law). In addition, the North Dakota Constitution creates three branches of government: legislative, executive, and judicial. Because all of the branches derive their authority from the same constitution, there is an implied exclusion of each branch from the exercise of the functions of the others. City of Carrington v. Foster County, 166 N.W.2d 377, 382 (N.D. 1969). Each branch is supreme in its own sphere. State v. Hanson, 558 N.W.2d 611, 614 (N.D. 1996). Because there is a

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The records Mr. Dvorak requested are in the possession of the Disciplinary Board and the Judicial Conduct Commission of the North Dakota Supreme Court (Court). The power of the Court to discipline attorneys "is constitutional and statutory and is included within the inherent powers of the court." Application of Christianson, 253 N.W.2d 410, 411-12 (N.D. 1977) (citing to what is now N.D. Const. art VI, § 3 and N.D.C.C. § 27-14-01). Pursuant to this authority, the Supreme Court created the Disciplinary Board and adopted rules of disciplinary procedure. N.D.R. Lawyer Discipl. 1.1. The Disciplinary Board is an arm of the Supreme Court. Lashkowitz v. Disciplinary Board, 410 N.W.2d 502, 504 (N.D. 1987).

The Judicial Conduct Commission was established pursuant to N.D.C.C. ch. 27-23. The Judicial Conduct Commission is to investigate and make recommendations to the Supreme Court regarding the discipline, removal, or retirement of any judge. N.D.C.C. §§ 27-23-02; 27-23-03(3). See In re Disciplinary Action Against Hoffman, 595 N.W.2d 592, 595 (N.D. 1999) (the Supreme Court is empowered under N.D.C.C. § 27-03-03, on the recommendation of the Judicial Conduct Commission, to censure or remove a judge for a willful violation of the Rules of Judicial Conduct). The Legislature has specifically required the Supreme Court to create rules implementing N.D.C.C. ch. 27-03 and to provide for the confidentiality of Judicial Conduct Commission proceedings. N.D.C.C. § 27-23-03(5). Therefore, the Commission and its proceedings are governed by rules adopted by the Supreme Court. Like the Disciplinary Board, the Judicial Conduct Commission is an arm or adjunct of the Court. Turner v. Earle, 295 So.2d 609, 610 (Fl. 1974) (the commission authorized to investigate and recommend discipline of judges to the Supreme Court is an adjunct of the judicial branch of government).

Since the Disciplinary Board and the Judicial Conduct Commission are adjuncts of the Court, records in their possession are records in the possession of the Court and are not subject to the open records law pursuant to N.D.C.C. § 44-04-17.1(15).²

specific exemption from the open records laws for records in the possession of the court, this opinion does not address whether the records would be exempt from the open records law under the rationale in Lyons or under the separation of powers doctrine.

² In N.D.A.G. 90-F-04, this office opined that meetings of the State Bar Board (now known as the State Board of Law Examiners) were required by the open meetings laws to be open to the public. The State Bar Board, like the Judicial Conduct Commission, is created by statute and has the powers and duties given it by state law or Supreme Court rule. N.D.C.C. §§ 27-11-06, 27-11-13. N.D.A.G. 90-F-04, however, assumed that the State Bar Board was a public entity subject to the open records laws without addressing whether the State Bar Board was an adjunct of the Supreme Court. It is the duty of the State Bar Board to recommend individuals for admission to the bar. Like the authority to discipline attorneys, the authority to admit attorneys to practice law in this state is vested in the Supreme Court. In re Eaton, 235 N.W. 587, 592 (N.D. 1931).

Access to court records is governed by reasonable rules of the court. See State ex rel. Williston Herald, Inc. v. O'Connell, 151 N.W.2d 758, 763 (N.D. 1967) (the public has a right to inspect judicial records subject to reasonable rules of the court). The Court's rulemaking authority is found both in the state constitution and in statutes. See N.D. Const. art. VI, § 3 (court has authority to adopt rules for the admission to practice, conduct, disciplining and disbarment of attorneys at law); N.D.C.C. § 27-23-03(5) (Supreme Court shall make rules providing for the confidentiality of Judicial Conduct Commission proceedings). The two Court rules that specifically address the requested records are found in the North Dakota Rules for Lawyer Discipline and the Rules of Judicial Conduct. Both rules provide that, before the filing and service of formal charges, all proceedings involving an allegation of misconduct or disability of a lawyer or judge and all associated records, including the complaint, investigative report, and recommendation are confidential. N.D.R. Lawyer Discipl., 6.1; R. Jud. Conduct Comm., 6. Proceedings become public under both rules when a formal petition is filed. Id.

CONCLUSION

It is my opinion that records of disciplinary complaints against county state's attorney's and judges in the possession of the Disciplinary Board and the Judicial Conduct Commission of the North Dakota Supreme Court are not subject to the open records law, but are subject to rules of the Court. Therefore, denial of a request for records based on the Court's rules was not a violation of N.D.C.C. § 44-04-18.

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Article VI, section 3 of the North Dakota Constitution provides that the Supreme Court has the authority to adopt rules for the admission to practice law. If the opinion had analyzed the issue and determined the State Bar Board was an adjunct or arm of the court, it would have been necessary to further analyze whether it was a "public entity," for purposes of the open meetings laws under the rationale in Lyons, 101 N.W.2d 543 and whether it was exempt from those laws under the separation of powers doctrine.