

**OPEN RECORDS AND MEETINGS OPINION
2003-O-17**

DATE ISSUED: October 31, 2003

ISSUED TO: City of Grand Forks

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Patrick Fisher asking whether the City of Grand Forks violated N.D.C.C. § 44-04-18 by failing to provide requested records within a reasonable amount of time.

In a subsequent request, Mr. Fisher asked whether the City of Grand Forks violated N.D.C.C. § 44-04-18 by failing to provide records considered by the City of Grand Forks to be "attorney work product" under N.D.C.C. § 44-04-19.1(3).

FACTS PRESENTED

On May 22, 2003, Patrick Fisher requested several records from the City of Grand Forks (City). Mr. Fisher is an attorney in Grand Forks representing Georgia and Deiter Heitmann in a proceeding under the Federal Uniform Relocation Act. In his letter, Mr. Fisher requested a number of records pertaining to the Heitmann's appeal and general city records about the acquisition of residential property after the 1997 flood. When he did not receive a response, Mr. Fisher wrote a letter to the City dated June 4, 2003, requesting a response to his request. The next day, Mr. Fisher received a fax from John Warcup, the assistant city attorney, requesting written assurance from the Heitmann's that they would pay all charges associated with the request, including copies, labor, materials, postage and equipment. On June 11, 2003, Mr. Fisher wrote Mr. Warcup, confirming that the Heitmann's would pay all reasonable costs for the copies. In a letter dated July 28, 2003, Mr. Fisher requested an opinion from this office because he still had not received any records from the City.

On August 19, 2003, the City provided some of the requested documents to Mr. Fisher. The majority of the documents were provided on August 26, 2003, and the final records were provided on September 16, 2003. According to Grand Fork's attorney, the City supplied 852 copies to Mr. Fisher, in addition to CD's containing recordings of hearings.

According to the City, Mr. Fisher's request was fulfilled in its entirety except it did not provide records it considered to be attorney work product. This was explained to Mr. Fisher in a letter dated September 3, 2003. On September 15, Mr. Fisher asked for an opinion from this office as to whether the City illegally withheld some of the records he had requested.

ISSUES

1. Whether the City of Grand Forks provided the requested records within a reasonable amount of time under N.D.C.C. § 44-04-18.
2. Whether the City of Grand Forks properly withheld certain documents as attorney work product under N.D.C.C. § 44-04-19.1.

ANALYSES

Issue One:

A public entity must respond to an open records request within a reasonable time. N.D.C.C. § 44-04-18(7). Although N.D.C.C. § 44-04-18 does not usually require an immediate response, the delay that is permitted will usually be measured in a few hours or days rather than several days or weeks. N.D.A.G. 2002-O-06 (a delay of approximately a month and a half in providing the requested copies was unreasonable). See also N.D.A.G. 2001-O-12 ("Under most circumstances, a delay of a month in providing copies of requested records would be unreasonable."); N.D.A.G. 98-O-20 (concluding it was unreasonable for a public entity to wait one and one half months before advising the requester that the requested minutes did not exist).

"Depending on the circumstances, a delay may be appropriate for a number of reasons, including excising closed or confidential information, consulting with an attorney when there is a reasonable doubt whether the records are open to the public, or balancing other responsibilities of the public entity that demand immediate attention." N.D.A.G. 2002-O-06. "Whenever possible, a public entity should inform a requester when, or approximately when, access to, or copies of, records will be provided." N.D.A.G. 98-O-22.

The City first provided some of the requested records on August 19, 2003, 89 days after it received the initial request. The total number of copies ultimately provided to Mr. Fisher was substantial; 852. Therefore, taking a few weeks to respond may have been reasonable depending on the circumstances. In this case, however, it took the City a few

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months to respond. Responding to open record requests is an important responsibility of public entities. N.D.A.G. 2002-O-08. Accordingly, it is my opinion that the City violated N.D.C.C. § 44-04-18 by failing to provide the records within a reasonable amount of time.

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. N.D.C.C. § 44-04-18(1). "Attorney work product" is exempt from mandatory public disclosure under N.D.C.C. § 44-04-18, the state open records law. N.D.C.C. § 44-04-19.1(1).

"Attorney work product" means 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, or in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings.

N.D.C.C. § 44-04-19.1(3). "All three elements of this definition must exist for a record to be exempt under N.D.C.C. § 44-04-19.1 as 'attorney work product.'" N.D.A.G. 2002-O-05.

Once any litigation and adversarial administrative proceeding is completed, including exhaustion of all appellate remedies, the attorney work product must be available for public disclosure unless other exceptions apply. N.D.C.C. § 44-04-19.1(6). In conversations between a member of my staff and the Grand Forks city attorney, the latter stated that the administrative proceeding has been completed. In any opinion issued under N.D.C.C. § 44-04-21.1, the Attorney General must base the opinion on the facts given by the public entity. N.D.C.C. § 44-04-21.1(1). Therefore, because the adversarial administrative proceeding has been completed, it is my opinion that N.D.C.C. § 44-04-19.1(6) requires records considered attorney work product to be provided to Mr. Fisher.

CONCLUSIONS

1. It is my opinion that the City of Grand Forks violated N.D.C.C. § 44-04-18 by failing to provide copies of the records requested by Mr. Fisher within a reasonable amount of time.

2. It is my opinion that the City of Grand Forks violated N.D.C.C. §44-04-18 by improperly withholding certain documents as attorney work product under N.D.C.C. § 44-04-19.1.

STEPS NEEDED TO REMEDY VIOLATIONS

Although untimely, the City of Grand Forks has remedied the majority of its violation by providing the requested documents it had available, with the exception of the attorney work product, to Mr. Fisher between August 19, 2003, and September 16, 2003. The documents withheld by the City as attorney work product must be provided to Mr. Fisher free of charge.

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. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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