

**OPEN RECORDS AND MEETINGS OPINION
2004-O-03**

DATE ISSUED: January 20, 2004
ISSUED TO: Jamestown Police Department

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Reese Dunklin asking whether the Jamestown Police Department (Jamestown) violated N.D.C.C. § 44-04-18 by failing to release records regarding an investigation.

FACTS PRESENTED

On September 12, 2003, Reese Dunklin, a reporter with The Dallas Morning News, requested numerous records related to the criminal case against Father Abraham Anthony (a.k.a. Anthony Abraham). Jamestown consulted with the city attorney and the county state's attorney to determine what records, if any, could be released. On approximately September 15 Jamestown faxed Mr. Dunklin a copy of the criminal complaint, the case report, the incident report, another detailed report, and an arrest warrant. On September 19, the Stutsman County State's Attorney, Fritz Fremgen, e-mailed Mr. Dunklin and informed him that Jamestown, on advice of the city attorney, considered the investigation active under N.D.C.C. § 44-04-18.7 but that information not considered criminal investigative information was open.

This investigation began in February 2000. A warrant of arrest was issued, but no arrest has been made because Abraham Anthony fled the country. Thus, Jamestown has not had an opportunity to interview him. Jamestown has indicated it is waiting for a decision from the state's attorney's office on whether to seek extradition. The state's attorney has indicated to our office that a decision was made to not move forward with this matter. Steps have been taken to notify authorities if Abraham Anthony tries to re-enter the United States or obtain a visa.

ISSUE

Whether the Jamestown Police Department violated N.D.C.C. § 44-04-18 by refusing to provide certain records pursuant to N.D.C.C. § 44-04-18.7.

ANALYSIS

“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). “Active criminal investigative information” is “exempt” from the open records laws. N.D.C.C. § 44-04-18.7; N.D.A.G. 98-F-09. An “exempt record” means “all or part of a record . . . that is neither required by law to be open to the public, nor is confidential, but may be open in the discretion of the public entity.” N.D.C.C. § 44-04-17.1(5). “Criminal investigative information must be considered ‘active’ as long as it is related to an ongoing investigation that is continuing with a reasonable good faith anticipation of securing an arrest or prosecution in the foreseeable future.” N.D.C.C. § 44-04-18.7(3).

Once a criminal investigation is no longer active, the criminal investigative information is open and accessible to the public, unless the information is related to another ongoing criminal investigation, is personal information as defined in subsection 6 of N.D.C.C. § 44-04-18.7, or disclosure is otherwise restricted by law. N.D.A.G. 98-F-09.

The phrase “continuing with a reasonable good faith anticipation of securing an arrest or prosecution in the foreseeable future” has not been construed by the North Dakota Supreme Court or in prior opinions of this office. Jamestown asserts that the Abraham Anthony case is active. The Jamestown chief of police stated that Abraham Anthony is registered in the National Crime Information Center database operated by the Federal Bureau of Investigation.¹ Information regarding anyone with a warrant out for his or her arrest is entered into this database and it can be searched by any law enforcement officer in the country. The United States Border Patrol has also been notified that an arrest warrant has been issued for Abraham Anthony should he attempt to reenter the United States or obtain a visa. *Id.* If Abraham Anthony is apprehended, the department intends to interview him. According to the chief, releasing the information would give Abraham Anthony a distinct advantage in preparing for any interview with the police department if the information should somehow come into Abraham Anthony’s possession. *Id.*

¹ Letter from Jamestown Chief of Police to the North Dakota Attorney General’s office, Nov. 3, 2003.

At this time, however, the county state's attorney does not intend to move forward on this matter. If Abraham Anthony returns to this country, and if the state's attorney is made aware of his return, then further action may be taken. No one knows if Abraham Anthony will return to this country. Under this factual situation, there appears to be no ongoing investigation at all and consequently no reasonable good faith anticipation of securing an arrest or prosecution in the foreseeable future. As such, this case is not "active" and, therefore, the criminal investigative information is open to the public, unless the information is related to another ongoing criminal investigation, is personal information as defined in N.D.C.C. §44-04-18.7(6), or disclosure is otherwise restricted by law. See N.D.A.G. 98-F-09.

CONCLUSION

It is my opinion that the Jamestown Police Department violated N.D.C.C. § 44-04-18 when it refused to release criminal investigative information under N.D.C.C. § 44-04-18.7.

STEPS NEEDED TO REMEDY VIOLATION

The criminal investigative information in this matter must be provided to Mr. Dunklin unless the information is related to another ongoing criminal investigation, is personal information as defined in subsection 6 of N.D.C.C. § 44-04-18.7, or disclosure is otherwise restricted by law. See N.D.A.G. 98-F-09 and "Law Enforcement Records Checklist," copies enclosed.

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.

Wayne Stenehjem
Attorney General