

**OPEN RECORDS AND MEETINGS OPINION  
2005-O-13**

DATE ISSUED: August 10, 2005

ISSUED TO: Grand Forks 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 Roland C. Riemers asking whether the Grand Forks Police Department violated N.D.C.C. § 44-04-18 by failing to release records regarding a criminal investigation.

**FACTS PRESENTED**

On April 4, 2005, Roland C. Riemers went to the Grand Forks Police Department (Department) and requested access to evidence logs and other information regarding the criminal case against Randolph Fugere. The Department refused access to the evidence logs telling Mr. Riemers that the information could not be released until Mr. Fugere's trial was completed.

On April 5, 2005, Mr. Riemers requested disclosure of the evidence logs in writing. He explained in his letter that he was interested in "the disclosure of any information in regards to the weapon used by Mr. Fugere in his current Grand Forks arrest." Letter from Riemers to Grand Forks Police Department (Apr. 5, 2005).

On April 14, 2005, the Department sent a written response to Mr. Riemers enclosing copies of media releases dated March 14, 15, and 21, 2005, and the cover sheet of the Incident Report. The Department advised Mr. Riemers that they were not in possession of the majority of the information requested and identified which outside entities to contact to request the information. Mr. Riemers was further advised that all other information requested was considered "active" under N.D.C.C. § 44-04-18.7(3) as it related to an ongoing investigation that was continuing with the intent to prosecute the arrested party.

The Fugere case is a high profile event in which an armed individual with numerous outstanding drug-related felony warrants confronted police, resulting in a shooting. According to the Department, the fact that there was a gun was a fact concerning the arrest and it was, therefore, released to the general public pursuant to N.D.C.C.

§ 44-04-18.7(5)(b).<sup>1</sup> The Department contends that the evidence logs requested are an integral part of an active and ongoing investigation and are therefore not open to disclosure under N.D.C.C. § 44-04-18.7(3). According to the Department, the information is being used to prosecute the case and disclosure now could potentially hinder a successful prosecution in this matter, or any potential future charges.

### ISSUES

1. Whether the Grand Forks Police Department violated N.D.C.C. § 44-04-18 by referring the requester to other agencies for records.
2. Whether any part of the evidence logs must be released.
3. Whether criminal investigative information is still active while a case is being prosecuted.

### ANALYSES

#### Issue One:

In a letter dated April 14, 2005, the Department referred Mr. Riemers to Walsh County for any warrants regarding Mr. Fugere. The Department also referred Mr. Riemers to the Public Safety Answering Point for the radio log, and to the Grand Forks County Correctional Center for the jail booking records. Mr. Riemers asserts that he should not have to visit each separate agency to get each record. According to the Department, it does not have these records in its possession. Rather, the records are in the possession of Walsh County, the Public Safety Answering Point, and the County Correctional Center which are separate agencies from the Department.

All records of a public entity are public records unless specifically exempted. N.D.C.C. § 44-04-18. Record means recorded information of any kind in the possession or custody of a public entity or its agent. N.D.C.C. § 44-04-17.1(15). A public entity does not have to provide access to or a copy of a requested record that it does not have in its possession or custody. N.D.C.C. § 44-04-18(3); N.D.A.G. 2003-O-01.

The definition of "public entity" includes "[p]ublic or governmental bodies, boards, bureaus, commissions, or agencies of any political subdivision of the state. . ." N.D.C.C. § 44-04-17.1(12)(b). Thus, each agency of a political subdivision is responsible only for the records in its possession and not for records that are in the

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<sup>1</sup> A March 14, 2005, news release states that the officer reported the subject was in possession of a handgun. In a subsequent news release issued March 21, 2005, the weapon was further described as a semi-automatic pistol.

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possession of another agency of the same political subdivision. N.D.A.G. 2004-O-05 (the county planning and zoning authority is a separate public entity from other agencies of the county; as such, it was under no obligation to obtain records it did not have or to verify whether records existed from other agencies of the county). Accordingly, the Department did not violate N.D.C.C. § 44-04-18 when it did not provide records in the possession of other political subdivisions and agencies.

### Issue Two:

Mr. Riemers requested the evidence log from the Department. The evidence log was compiled by the Department as part of its criminal investigation into the Fugere case. Unless otherwise provided by law, all records of a public entity are open and accessible to the public. N.D.C.C. § 44-04-18(1); N.D. Const. art. XI, § 6. Some of the most expansive exemptions from the open records law involve law enforcement records. The policy behind the exemptions for certain law enforcement and police records is an attempt to balance the public's general right to know public information with a public policy that the state's efficient operation of law enforcement agencies is necessary and vital for the protection of the health and welfare of its citizens. N.D.A.G. 79-201; N.D.A.G. Letter to McLean (Jan. 27, 1986); Downs v. Aushn, 522 So. 2nd 931, 933 (TX 1998) (the public records act is to be liberally construed in favor of open government to the extent possible to preserve our basic freedom without undermining significant government functions such as crime detection and prosecution). Section 44-04-18.7, N.D.C.C., attempts to meet this balance by specifically identifying the information that is, and that which is not, exempt.

Under N.D.C.C. § 44-04-18.7, active criminal investigative information is exempt. Subsection 5 of that section, however, lists certain information that is not "criminal investigative information." Section 5 provides that "criminal . . . investigative information" does not include:

- a. Arrestee description, including name, date of birth, address, race, sex, physical description, and occupation of arrestee.
- b. Facts concerning the arrest, including the cause of arrest and the name of the arresting officer.
- c. Conviction information, including the name of any person convicted of a criminal offense.
- d. Disposition of all warrants, including orders signed by a judge of any court commanding a law enforcement officer to arrest a particular person.

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- e. A chronological list of incidents, including initial offense report information showing the offense, date, time, general location, officer, and a brief summary of what occurred.
- f. A crime summary, including a departmental summary of crimes reported and public calls for service by classification, nature, and number.
- g. Radio log, including a chronological listing of the calls dispatched.
- h. General registers, including jail booking information.
- i. Arrestee photograph, if release will not adversely affect a criminal investigation.

N.D.C.C. § 44-04-18.7(5).

The information listed in N.D.C.C. § 44-04-18.7(5) is not exempt and must be released.

The active criminal investigative information that is exempt is defined as:

information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including information derived from laboratory tests, reports of investigators or informants, or any type of surveillance. 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).

The exemption in N.D.C.C. § 44-04-18.7 protects information "compiled"<sup>2</sup> by the department in the course of the criminal investigation. The evidence log is a document compiled by the Department and is therefore exempt under N.D.C.C. § 44-04-18.7. Because it is exempt, the decision to disclose it lies within the discretion of the Department, subject to restrictions in other statutes or federal law. N.D.A.G. 98-F-09. The exemption for criminal investigative information is temporary. Once the

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<sup>2</sup> The exception for compilations of criminal investigative information is not unique. The open records law also contains exemptions for other kinds of compilations. See, e.g., N.D.C.C. § 12-60-16.1(3) (definition of criminal history record information); N.D.C.C. § 44-04-18.4 (trade secrets include compilations prepared by a public entity).

investigation is no longer active, the information must be disclosed unless disclosure is restricted under another statute. Id.

Because the definition of criminal investigative information excludes the information listed in N.D.C.C. § 44-04-18.7(5), it is not clear whether the Legislature intended to exempt the entire compilation if it contained information listed in N.D.C.C. § 44-04-18.7(5). Statutes are construed as a whole to determine legislative intent, see N.D.C.C. §§ 1-02-07 and 1-02-38(2), and are not construed to produce absurd or ludicrous results. Huber v. Oliver County, 602 N.W.2d 710, 716 (N.D. 1999); Sorlie v. Workforce Safety & Ins., 695 N.W.2d 453, 458 (N.D. 2005). Rather, statutes are to be construed in a practical manner. Huber, at 710; State v. Hagge, 211 N.W.2d 395, 397 (N.D.1973).

Construing the statute to require the Department to release compilations prepared under N.D.C.C. § 44-04-18.7(3), with everything redacted except for the information available under N.D.C.C. § 44-04-18.7(5) would appear to produce an absurd result as all that information must be disclosed otherwise under N.D.C.C. § 44-04-18.7(5). In addition, construing N.D.C.C. § 44-04-18.7 to allow the entire compilation to be exempt is a practical interpretation and furthers the public policy contained in that statute i.e., that the state's efficient operation of law enforcement agencies is necessary and vital for the protection of the health and welfare of its citizens. Therefore, the Department properly considered the evidence log an exempt record and, as with any exempt record, had the discretion to either keep it closed or disclose it.

#### Issue Three:

Mr. Riemers asserts that the case is not "active" because Mr. Fugere has already been arrested and is being prosecuted for his crimes. Although Mr. Fugere is currently making his way through the judicial system, his prosecution has not been secured. The term "prosecution" is defined as "a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime." Black's Law Dictionary 1221 (6th ed. 1990). His ultimate guilt or innocence has not been determined.

Therefore, it is my opinion that the criminal investigative information is active because the prosecution is not complete.

### CONCLUSIONS

1. It is my opinion that the Grand Forks Police Department did not violate N.D.C.C. § 44-04-18 by referring the requester to other agencies for records.

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2. It is my opinion the evidence log is exempt under N.D.C.C. § 44-04-18.7(3) and the Department did not violate N.D.C.C. § 44-04-18 by refusing to provide it to Mr. Riemers.
3. It is my opinion that criminal investigative information is “active” because the prosecution is not complete.

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