

**OPEN RECORDS AND MEETINGS OPINION
2014-O-15**

DATE ISSUED: September 30, 2014

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 Steve Wagner asking whether the Grand Forks Police Department violated N.D.C.C. § 44-04-18 by failing to release a transcript of an emergency service call.

FACTS PRESENTED

On June 25, 2014, Steve Wagner, editor of the Grand Forks Herald, requested “a copy of the transcript of any 911 calls related to the shooting incident” that occurred on June 24, 2014, from the Grand Forks Police Department (Department).¹ The Department denied Mr. Wagner’s request for the transcript because “the 911 call is part of our investigative file on an open case we are still actively investigating.”² Mr. Wagner argued the transcripts were open records pursuant to N.D.C.C. § 57-40.6-07(4) and should be released within a reasonable time.³ After consulting with the state’s attorney’s office, the Department reiterated it would be denying the request for release of the transcript as “active criminal intelligence and criminal investigative information.”

The information requested is [e]xempt under [N.D.C.C. §] 44-04-18.7. It is Criminal Intelligence and Investigative Information that is “active”, since it related to intelligence gathering conducted with a reasonable good-faith belief that it will lead to detection of ongoing or reasonably anticipated criminal activities. To wit, it pertains to the initial report of a homicide investigation that resulted in a warrant of arrest being issued, but not yet executed, and related to a continually [sic] ongoing investigation. The

¹ See Email from Steve Wagner, Editor, Grand Forks Herald, to Lt. Dwight Love, Grand Forks Police Dep’t. (June 25, 2014, 2:25 PM).

² See Email from Lt. Dwight Love, Grand Forks Police Dep’t., to Steve Wagner, Editor, Grand Forks Herald (June 25, 2014, 3:55 PM).

³ See Email from Steve Wagner, Editor, Grand Forks Herald, to Lt. Dwight Love, Grand Forks Police Dep’t. (June 25, 2014, 4:07 PM).

suspect is on the loose, not yet apprehended, and is to be considered armed and dangerous, which further heightens the need to refrain from releasing the information until – at very least – the suspect is apprehended and there is no longer a heightened public safety concern.⁴

Mr. Wagner argues that N.D.C.C. § 57-40.6-07(4) requires the release of the transcript as a public record and does “not believe you can make otherwise public records confidential by using them in an investigation.”⁵

ISSUE

Whether the Grand Forks Police Department violated N.D.C.C. § 44-04-18 by refusing to provide a transcript of a 911 call, citing the exceptions for active criminal intelligence and criminal investigative information as the bases for the refusal.

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.”⁶ The definition of a “record” includes “recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced.”⁷ An “exempt record” may be released at the discretion of the public entity.⁸

Section 57-40.6-07, N.D.C.C., addresses the accessibility of the records of emergency management systems. In 2011, the Legislature added subsection 4 to N.D.C.C. § 57-40.6-07, which provides:

An audio recording of a request for emergency services or of a report of an emergency is an exempt record as defined in section 44-04-17.1. However, upon request, a person may listen to the audio recording, but may not copy or record the audio. A person also may request a written

⁴ See Email from Lt. Dwight Love, Grand Forks Police Dep’t., and Peter Welte, Ass’t State’s Att’y, to Steve Wagner, Editor, Grand Forks Herald (June 27, 2014, 1:26 pm).

⁵ See Letter from Steve Wagner, Editor, Grand Forks Herald, to Att’y Gen.’s office (July 25, 2014).

⁶ N.D.C.C. § 44-04-18(1).

⁷ N.D.C.C. § 44-04-17.1(16); see also N.D.A.G. 2006-O-12 (definition of “record” includes audio recordings).

⁸ N.D.C.C. § 44-04-17.1(5) (definition of exempt record).

transcript of the audio recording, which must be provided to the person within a reasonable time.⁹

In adding this subsection, the Legislature intended to create additional protections for audio recordings of 911 calls.¹⁰ Although the Legislature recognized that some information contained in the audio recordings was already protected by laws making such information confidential or exempt, they saw a need to further protect the actual recordings from being reproduced and broadcasted.¹¹

Arguably, there are some things in a 911 audio recording that may be confidential or exempt now under some of the existing provisions of the law. However, an express statement in the law that a 911 audio recording is exempt will make clear what is now arguable.¹²

Subsection 4 of N.D.C.C. § 57-40.6-07 sought a compromise between the public's right to access the non-confidential or exempt information and the need to protect victims or those otherwise reporting or seeking aid.¹³ It was not intended to supersede other open records laws that may apply to the recordings of emergency calls.

Mr. Wagner argues that N.D.C.C. § 57-40.6-07(4) requires the disclosure of the transcripts of the 911 calls, regardless of whether the transcripts are part of an investigation. However, the legislative history of this subsection confirms that the transcripts and audio recordings are subject to other provisions of the law that make certain information exempt or confidential. The option of providing a transcript was added, in part, for situations where the audio recording could not be adequately edited to remove exempt or confidential information.¹⁴ Therefore, if there is a law that makes

⁹ 2011 N.D. Sess. Laws ch. 478, § 2.

¹⁰ See Hearing on H.B. 1156, 2011 N.D. Leg.

¹¹ Id.

¹² Written Testimony of Rep. Lawrence R. Klemin for Hearing on H.B. 1156 Before the House Comm. on Political Subdivisions, 2011 N.D. Leg. (Jan. 20); see also Written Testimony of Jack McDonald, N.D. Newspaper Assoc. for Hearing on H.B. 1156 Before the House Comm. on Political Subdivisions, 2011 N.D. Leg. (Jan. 20) ("North Dakota already has laws that allow medical and personal information to be kept confidential and redacted from public records. The 9-1-1 agencies can use these already existing laws to protect much of the information on these tapes).

¹³ See Hearings on H.B. 1156, 2011 N.D. Leg.

¹⁴ See Written Testimony of Mike Dannenfelzer, Burleigh Cnty. Combined Commc'ns Manager, Hearing on H.B. 1156 Before the House Comm. on Political Subdivisions, 2011 N.D. Leg. (Jan. 20) ("The point here is that these records are currently very much open with little protection for a victim in existing law. Even providing the ability to edit

specific information in the audio recording or transcripts exempt or confidential, such information can be withheld or redacted pursuant to open records law.¹⁵

Active criminal intelligence and investigative information is one such exception to the open records law.¹⁶ The Department explains that, at the time Mr. Wagner requested transcripts, it was actively investigating a homicide and the suspect had yet to be arrested and was considered armed and dangerous.¹⁷ For public safety reasons, the need to utilize the information in the recordings for apprehension of the suspect and to further investigate the situation, the audio recordings were active criminal intelligence and investigative information and could not be released at the time of the request. It is therefore my opinion that the Department had the discretion to exempt the transcript of the 911 call as active criminal intelligence and investigative information, pursuant to N.D.C.C. § 44-04-18.7.

CONCLUSION

It was not a violation of open records law for the Grand Forks Police Department to deny a request for 911 transcripts because at the time of the request the information contained therein was exempt active criminal intelligence and investigative information under N.D.C.C. § 44-04-18.7.

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that which is subject to current open records exemptions, it is not possible to remove all that may connect to that exemption. A transcript provides a better way and is offered within HB 1156.”)

¹⁵ See N.D.A.G. 2006-O-12 (recognizing digital recordings of calls to the sheriff’s office are open records although the call “could be exempt if it contained active criminal investigative information).

¹⁶ N.D.C.C. § 44-04-18.7.

¹⁷ Letter from Howard Swanson, Grand Forks City Att’y, to Sandra L. Voller, Ass’t. Att’y Gen. (Aug. 8, 2014).