

**OPEN RECORDS AND MEETINGS OPINION
2015-O-11**

DATE ISSUED: August 6, 2015

ISSUED TO: Bismarck Public School District

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Nick Archuleta asking whether Bismarck Public School properly redacted attorney billing statements under N.D.C.C. § 44-04-19.1(1) and (6) as "attorney work product."

FACTS PRESENTED

On February 25, 2015, Nick Archuleta, President of North Dakota United, requested records from Bismarck Public School District's (School District) Superintendent, Tamara Uselman, for "[a]ny and all records...relating to legal services which have been provided by the law firm of Pearce and Durick to the Bismarck School District from January 1, 2014, to present and the payment of those legal services."¹ After consulting with legal counsel, Superintendent Uselman sent a letter, along with redacted billing statements, to Archuleta on March 31, 2015.² In the letter, Superintendent Uselman indicated that the statements were redacted pursuant to the work product doctrine.³ Archuleta questions whether the billing statements were properly redacted.⁴

¹ Letter from Nick Archuleta, Pres., N.D. United, to Tamara Uselman, Superintendent, Bismarck Sch. Dist. (Feb. 25, 2015).

² Letter from Tamara Uselman, Superintendent, Bismarck Sch. Dist., to Nick Archuleta, Pres., N.D. United, with billing statement attachments (Mar. 31, 2015). There was a delay in providing the records because the original Feb. 25, 2015, record request was never received by Uselman. It is unclear whether the email was lost in a spam filter, but in any event, after a subsequent conversation and follow up request, Uselman, with the help of legal counsel, began responding the request as soon as it came to her attention. See Email from Nick Archuleta, Pres., N.D. United, to Tamara Uselman, Superintendent, Bismarck Sch. Dist. (Mar. 19, 2015, 10:11 AM) and Email from Tamara Uselman, Superintendent, Bismarck Sch. Dist., to Nick Archuleta, Pres., N.D. United (Mar. 24, 2015, 11:16 AM). Archuleta did not request an opinion on whether the records were provided in a reasonable time.

³ Letter from Tamara Uselman, Superintendent, Bismarck Sch. Dist., to Nick Archuleta, Pres., N.D. United (Mar. 31, 2015).

⁴ Letter from Nick Archuleta, Pres., N.D. United, to Att'y Gen.'s office (Apr. 28, 2015).

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ISSUE

Whether Bismarck Public School properly redacted information contained in attorney billing records as attorney work product.

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.”⁵ If a public entity denies a records request, the denial must indicate the entity’s specific authority for denying access to the requested record and be made in writing, if requested.⁶ A public entity may not deny a request for an open record on the ground that the record also contains confidential or closed information.⁷ “[I]f confidential or closed information is contained in an open record, a public entity shall permit inspection and receipt of copies of the information contained in the record that is not confidential or closed, but shall delete, excise, or otherwise withhold the confidential or closed information.”⁸

In the redacted billing statements provided to Archuleta, all descriptions of services provided by the law firm were entirely blocked out; however, the billing statements showed the number of hours worked by each attorney and the corresponding billed amount.⁹ The School District claimed the description of services was exempt as “attorney work product.”¹⁰

⁵ N.D.C.C. § 44-04-18. The Bismarck Pub. Sch. Dist. is a public entity subject to open record laws. N.D.C.C. § 44-04-17.1(13)(b).

⁶ N.D.C.C. § 44-04-18(7).

⁷ N.D.C.C. § 44-04-18.10(1).

⁸ N.D.C.C. § 44-04-18.10(2).

⁹ Letter from Tamara Uselman, Superintendent, Bismarck Sch. Dist., to Nick Archuleta, Pres., N.D. United, with billing statement attachments (Mar. 31, 2015). The letter also requests Archuleta to submit any future open record requests to the School District’s Business Manager in accordance with “Board Policy KBA and Administrative Rule KBA-R” and attached the policies for Archuleta to review. Although not subject to this opinion because Archuleta was not required to follow them in this instance, the policies are concerning in that they require a requestor to sign an official form before any public records can be inspected or released. The policies also state the requestor will be charged for “computer time to produce special reports, and labor for making the copies.” As discussed in several past opinions, a public entity generally cannot require a requestor put a request in writing or demand to know the identity of the requestor or his/her motivation in requesting public records. N.D.C.C. § 44-04-18; N.D.A.G. 2008-O-08. Furthermore, a public entity can only charge the allowable fees of N.D.C.C. § 44-04-18, which do not include time spent in producing a report or labor for making copies. The School District should take a close look at these policies and make the necessary revisions in order to be compliant with open records law.

¹⁰ See Letter from Tamara Uselman, Superintendent, Bismarck Sch. Dist., to Nick Archuleta, Pres., N.D. United (Mar. 31, 2015). In addition to claiming the “attorney work product” exception, the School District also claims the information is protected as “attorney-client privilege.” Open records law requires citation to a specific state or federal law in order to redact or withhold public records and there is no exception for general “attorney-client privilege” in the law. See N.D.A.G. 2015-O-01. (Section 44-04-19.1(10), N.D.C.C., only recognizes attorney client-privilege for entities that are considered public entities only because they receive public funds.) Therefore, the billing statements must be redacted pursuant to a law such as “attorney work product” recognized under N.D.C.C. § 44-04-19.1(1) and (6).

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“Attorney work product” is exempt from open records law¹¹ and is defined as:

[a]ny 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.¹²

All three elements of this definition must exist for a record to be exempt under N.D.C.C. § 44-04-19.1(1) as “attorney work product.”¹³

The billing statements were prepared by the attorneys retained to represent the School District for various issues, so the first requirement is met. However, it is unlikely that every descriptions of services reflect a “mental impression, conclusion, litigation strategy, or legal theory” of the attorneys. In preparing this opinion, this office reviewed the unredacted billing statements to determine whether the second requirement was met. In reviewing the records, several entries redacted in the descriptions reference “review and respond to email,” “review email from” and “draft email to,” and “review” a contract, addendum, deed, etc. The School District provides no support for reasoning that such vague references would reflect mental impressions or legal strategy and theory. Rather, it appears no analysis took place on whether the descriptions of services fit the second prong of “attorney work product” and instead all descriptions were unilaterally redacted.

In addition, the description of services must be in regards to pending or reasonably predictable litigation or administrative proceedings in order to meet the third requirement of “attorney work product.” In responding to inquiries from this office, the School District explains that at the time of the request, it was involved in arbitration with threats of litigation with the Bismarck Education Association, which is affiliated with North Dakota United, and the arbitration work was reflected in the billing statements from the Pearce & Durick law firm.¹⁴ In addition to the arbitration, attorneys at Pearce & Durick were also advising and assisting the School District on other issues including other potential litigation claims and some contractual matters.¹⁵ It is unclear whether all the services reflected in the billing statements were prepared exclusively for

¹¹ N.D.C.C. § 44-04-19.1(1).

¹² N.D.C.C. § 44-04-19.1(6).

¹³ N.D.A.G. 2014-O-04; N.D.A.G. 2010-O-08; N.D.A.G. 2008-O-09; N.D.A.G. 2002-O-05.

¹⁴ Letter from Tamara Uselman, Superintendent, Bismarck Sch. Dist., to Sandra DePountis, Asst. Att’y Gen. (May 20, 2015).

¹⁵ Email from Rachel Bruner-Kaufman, Attorney, Pearce & Durick, to Sandra DePountis, Asst. Att’y Gen. (May 21, 2015, 10:25 AM)

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reasonably predictable or pending litigation.¹⁶ The School District must assess each individual billing statement to ascertain whether it related to pending or reasonably predictable litigation in order to redact the information as “attorney work product” under N.D.C.C. § 44-04-19.1(1).

Based on the foregoing, it is my opinion that the School District violated open records law when it redacted attorney billing statements before doing a proper analysis on whether the description of services contained “attorney work product” under N.D.C.C. § 44-04-19.1(6).

CONCLUSION

The Bismarck Public School District’s response to a request for attorney billing statements violated N.D.C.C. § 44-04-18 because the records were redacted without a proper analysis of whether the description of services contained exempt “attorney work product” as defined by N.D.C.C. § 44-04-19.1(6).

STEPS NEEDED TO REMEDY VIOLATION

The Bismarck Public School District must do an analysis on each description of service in the billing statements to determine whether it meets the definition of “attorney work product” as required by N.D.C.C. § 44-04-19.1(1) and (6) and redact accordingly. After doing such an analysis, the modified redactions to the billing statements must be provided to Mr. Archuleta. Mr. Archuleta should not be charged for the time it takes the School District to redact and should be provided the corrected records, 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. § 44-04-21.2.¹⁷ It may also result in personal liability for the person or persons responsible for the noncompliance.¹⁸

Wayne Stenehjem
Attorney General

sld

cc: Nick Archuleta (via email only)

¹⁶ The use of the phrase “reasonably predictable” in N.D.C.C. § 44-04-19.1 requires more than a simple possibility of litigation. The litigation by or against the public entity must be realistic and tangible. N.D.A.G. 2014-O-08.

¹⁷ N.D.C.C. § 44-04-21.1(2).

¹⁸ Id.