

**OPEN RECORDS AND MEETINGS OPINION  
2018-O-03**

DATE ISSUED: February 9, 2018

ISSUED TO: City of Bismarck

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Jeremy Kutner, on behalf of The Intercept, asking whether the City of Bismarck violated N.D.C.C. § 44-04-18 by refusing to release active criminal investigative and intelligence information. Mr. Kutner also asks whether the initial estimate of costs violated N.D.C.C. § 44-04-18.

**FACTS PRESENTED**

On July 7, 2017, Will Parrish, a reporter for The Intercept, made a request for records to the City of Bismarck and the Bismarck Police Department requesting “e-mails or other memoranda sent or received by Lynn Wanner between Oct. 13, 2016 and Nov. 1, 2016 that include the following e-mail addresses in the body of the e-mail or in the To, From, or CC fields. . .”

The City provided an estimate to Mr. Parrish of \$6,550. This estimate was based upon an estimate of 1,596 responsive documents requiring 225 hours of time to review and redact for exempt or confidential information.

Mr. Parrish withdrew this initial request and instead, on July 11, 2017, requested “e-mails or other memoranda (including e-mail attachments) sent or received by Lynn Wanner from October 25-26, 2016 from or to any of the following e-mail addresses:.... .” The City responded that the requested records contained active criminal intelligence and investigative information exempt from disclosure pursuant to N.D.C.C. §§ 44-04-18.7 and 44-04-19.1(3).<sup>1</sup>

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<sup>1</sup> The City, in responding to a request from this office, explained that the city incorrectly cited N.D.C.C. § 44-04-19.1(3) to Mr. Parrish. However, the City also provided N.D.C.C. § 44-04-18.7, criminal investigative information and criminal intelligence information, to the requester in response to the request.

## ISSUES

1. Whether the City of Bismarck violated the open records law by refusing to provide requested records on the basis that they constituted active criminal investigative and intelligence information.
2. Whether the City of Bismarck provided a reasonable estimate of costs associated with reviewing and redacting records.

## ANALYSIS

### Issue One

All records of a public entity are open for inspection unless they are specifically exempted by law.<sup>2</sup> Section 44-04-18.7, N.D.C.C., provides an exemption for active criminal intelligence information and active criminal investigative information:

1. Active criminal intelligence information and active criminal investigative information are not subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota . . . .<sup>3</sup>  
...

Active criminal intelligence information and active criminal investigative information are exempt records. Criminal intelligence information is defined as:

[I]nformation with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity. Criminal intelligence information must be considered “active” as long as it is related to intelligence gathering conducted with a reasonable good-faith belief it will lead to detection of ongoing or reasonably anticipated criminal activities. Criminal intelligence information also includes training materials and information obtained by a criminal justice agency regarding prospective criminal activities which impact officer safety until the information is publicly disclosed.<sup>4</sup>

Criminal investigative information is defined as:

[I]nformation with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a

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<sup>2</sup> N.D.C.C. § 44-04-18(1); N.D. Const. art. XI, § 6.

<sup>3</sup> N.D.C.C. § 44-04-18.7(1).

<sup>4</sup> N.D.C.C. § 44-04-18.7(3).

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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.<sup>5</sup>

The City explains that at the time of the request, there were criminal cases open or subject to appeal in Morton County.<sup>6</sup> The information “was still relevant to the open cases and to other agencies in on-going cases or threatened protests in other areas of the country. The requested records were mostly emails to and from federal law enforcement officers to the Bismarck Police Department and other participating agencies sharing criminal intelligence related to the DAPL event. . . .”<sup>7</sup>

This office recently issued an opinion regarding this issue finding that it is not a violation of the open records law if a public entity withholds records that are active criminal investigative information or criminal intelligence information.<sup>8</sup> Therefore, it was not a violation of the open records law to withhold such information.

### Issue Two

All records of a public entity are open and accessible to the public unless otherwise specifically provided by law.<sup>9</sup> Certain charges are authorized under the open records law when responding to a request for records. If excising confidential or closed information from the requested records takes longer than one hour, a charge up to \$25 per hour per request, excluding the initial hour, is authorized.<sup>10</sup> These charges apply regardless of whether the request is for paper copies or electronic copies.<sup>11</sup> Before undertaking the monumental task of reviewing and redacting a large number of records, a public entity may provide an estimate of the costs and ask for money upfront.<sup>12</sup> The estimate must be based on legally chargeable fees.<sup>13</sup>

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<sup>5</sup> N.D.C.C. § 44-04-18.7(4).

<sup>6</sup> Letter from Charlie Whitman, Att’y, City of Bismarck, to Mary Kae Kelsch, Asst. Att’y Gen. (Dec. 13, 2017).

<sup>7</sup> *Id.*

<sup>8</sup> N.D.A.G. 2017-O-05.

<sup>9</sup> N.D.C.C. § 44-04-18(1); N.D. Const. art. XI, § 6.

<sup>10</sup> N.D.C.C. § 44-04-18(2).

<sup>11</sup> See N.D.C.C. § 44-04-18(2).

<sup>12</sup> N.D.C.C. § 44-04-18(2).

<sup>13</sup> N.D.A.G. 2011-O-12.

The request by Mr. Parrish resulted in 1,596 responsive records.<sup>14</sup> Bismarck explains that the emails contained criminal intelligence and criminal investigative information involving multiple jurisdictions.<sup>15</sup> To determine the estimate, the City reviewed and redacted a sample group.<sup>16</sup> Based on the sample, it took approximately 10 minutes per email for a total of approximately 225 hours to review the entire group.<sup>17</sup>

The law allows a public entity to provide an estimate regarding the costs associated with providing records. The City's estimate was high due to the number of records requested and the necessity to redact the records for confidential or exempt information. It is my opinion that the estimate was based upon legally allowable charges.

### CONCLUSIONS

1. It is my opinion that the City of Bismarck did not violate the open records law by refusing to release records containing active criminal investigative and intelligence information.
2. It is also my opinion that the City of Bismarck's estimate of costs to review and redact the responsive records for exempt or confidential information was based on legally allowable charges and therefore did not violate the open records law.

Wayne Stenehjem  
Attorney General

cc: Jeremy Kutner (via email only)

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<sup>14</sup> Letter from Charlie Whitman, Att'y, City of Bismarck, to Mary Kae Kelsch, Asst. Att'y Gen. (Dec. 13, 2017).

<sup>15</sup> *Id.* The City explains it is difficult to determine when criminal intelligence information supplied by other law enforcement agencies is no longer active and the vetting and redacting would involve checking with other agencies and other jurisdictions to determine active status and is therefore very time consuming to review.

<sup>16</sup> Letter from Charlie Whitman, Att'y, City of Bismarck, to Mary Kae Kelsch, Asst. Att'y Gen. (Dec. 13, 2017).

<sup>17</sup> *Id.*