

**OPEN RECORDS AND MEETINGS OPINION
2019-O-06**

DATE ISSUED: April 16, 2019

ISSUED TO: North Dakota Highway Patrol, Cass County Sheriff's Office,
Bismarck Police Department, and Mandan 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 Benjamin Stoll asking whether the North Dakota Highway Patrol, Cass County Sheriff's Office, Bismarck Police Department, and Mandan Police Department violated N.D.C.C. § 44-04-18 by denying requests for records.

FACTS PRESENTED

On December 14, 2018, Attorney Benjamin Stoll of the Law Firm Williams & Connolly LLP, made identical open record requests to the North Dakota Highway Patrol (NDHP), Cass County Sheriff's Office (Cass County), Bismarck Police Department (BPD), and Mandan Police Department (MPD) (hereinafter collectively referred to as "law enforcement entities").¹ The record requests related to the Dakota Access Pipeline protest near Backwater Bridge on November 20-21, 2016, including videos and photographs, use of force reports, identifications of officers involved, documents describing physical evidence, records relating to Sophia Wilanksy, and records relating to use of lethal weapons. The law enforcement entities all denied the request for records citing N.D.C.C. § 44-04-18(6) relating to ongoing litigation thus requiring the discovery process to be utilized rather than the open records law.² In addition to N.D.C.C. § 44-04-18(6), the BPD and MPD also referred to previous records already disclosed in response to similar requests made by Mr. Stoll before the filing of the lawsuit.³

¹ See Letters from Benjamin Stoll to N.D. Highway Patrol, Cass Cnty Sheriff's Office, Bismarck Police Dep't, and Mandan Police Dep't) (Dec. 14, 2018).

² Emails from Matthew Sagsveen, Solicitor Gen., Att'y Gen.'s Office, to Benjamin Stoll (Dec. 18, 2018, 3:39 PM, Dec. 19, 2018, 7:06 PM); Letters from Randall Bakke, Att'y at Law, to Benjamin Stoll (Dec. 21, 2018); Letter from Birch Burdick, Cass Cnty. State's Att'y, to Benjamin Stoll (Dec. 26, 2018).

³ Letters from Randall Bakke, Att'y at Law, to Benjamin Stoll (Dec. 21, 2018).

ISSUE

Whether the North Dakota Highway Patrol, Cass County Sheriff's Office, Bismarck Police Department, and Mandan Police Department properly denied a request for records.

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."⁴ A public entity is not required to provide more than one copy of the same record to a requestor.⁵ Therefore, to the extent the records have already been provided to Mr. Stoll, BPD and MPD did not violate open records law by denying to produce further copies of already requested and provided records.⁶

Generally, the identity of the requester and purpose of the request are irrelevant; however, the open records law does not allow a party involved in litigation to circumvent the discovery process when seeking records from a public entity.⁷ All of the law enforcement entities denied the request for records pursuant to N.D.C.C. § 44-04-18(6), which provides:

Any request under this section for records in the possession of a public entity by a party to a criminal or civil action, adjudicative proceeding as defined in subsection 1 of section 28-32-01, or arbitration in which the public entity is a party, or by an agent of the party, must comply with applicable discovery rules or orders and be made to the attorney representing that entity in the criminal or civil action, adjudicative proceeding, or arbitration. The public entity may deny a request from a party or an agent of a party under this subsection if the request seeks records that are privileged under applicable discovery rules.

The intent of this section was to place North Dakota public entities on "equal footing with private litigants by establishing the discovery process, rather than the open records law,

⁴ N.D.C.C. § 44-04-18.

⁵ N.D.C.C. § 44-04-18(2); N.D.A.G. 2015-O-14; N.D.A.G. 2014-O-10.

⁶ See Letter and attachments from Randall Bakke, Att'y at Law, to Att'y Gen.'s Office (Feb. 21, 2019).

⁷ N.D.A.G. 2011-O-11; N.D.A.G. 98-F-13.

as the exclusive method to compel a public entity to provide records to its adversary in a pending criminal or civil action or adversarial administrative proceedings.”⁸

A previous opinion issued in 2011 from this office recognized that the “law does not allow a person to disclaim his or her involvement in litigation or businesses relationships that may be relevant to litigation.”⁹ In that opinion, it was determined that an attorney was an agent of the law firm named in the lawsuit. The attorney therefore could not circumvent the discovery process and make an open records request even if he was not personally named as a party to the lawsuit. The attorney and his firm were required to follow the rules of discovery in order to obtain the records.

Here, Attorney Stoll represents the plaintiff in a civil action filed in North Dakota District Court on Nov. 19, 2018, entitled *Sophia Wilansky v. Morton County, North Dakota; “John Doe” law enforcement officer in his personal capacity; Kyle Kirschmeier, in his personal and official capacity; Paul Laney, in his personal capacity; and Thomas Iverson, in his personal capacity* (Wilansky lawsuit).¹⁰ Mr. Stoll contends that it is the individuals who are named in the lawsuit, in their personal capacities, and not the public entities, and therefore N.D.C.C. § 44-04-18(6) does not apply. But that view ignores the fact that the complaint in the Wilansky lawsuit alleges involvement of the law enforcement officers and sheriffs regarding actions they undertook while “acting under color of law” and employed by the public entities.¹¹ The officers are the agents of the public entities being sued, regardless of whether those claims are brought against them in their official or individual capacity and regardless of whether it was the employee named in the lawsuit or the public entity itself.¹²

⁸ N.D.A.G. 2002-O-05 (“This prevents a party in an action or proceeding against a public entity from burdening the public entity and its litigation attorney with voluminous requests for records that may not be relevant to the issues in the pending action or proceeding” by allowing the public entity to utilize the full range of discovery objections).

⁹ N.D.A.G. 2011-O-11.

¹⁰ D. N.D., Civil No. 1:18-cv-00236-CSM.

¹¹ *Id.*

¹² Letter from Matthew Sagsveen, Solicitor Gen., to Att’y Gen.’s Office (Feb. 7, 2019) (citing 5A Fed. Prac. & Proc. Civ., § 1321 (4th ed.)) “Although helpful to the district court, the contents of the caption usually are not considered a part of the pleader’s statement of the claim or the response thereto...the caption is not determinative as to the identity of the parties to the action, the district court’s personal jurisdiction over the defendant, or its subject matter jurisdiction over the claims.”); see *also* Letter from Randall Bakke, Att’y at Law, to Att’y Gen.’s Office (Feb. 21, 2019).

The open records law applies to records defined by N.D.C.C. § 44-04-17.1(16) which include records of “public business”¹³ in possession of a “public entity”¹⁴ or its agents, including its employees.¹⁵ Therefore, making a request to an employee of a public entity is equivalent to making a request to the public entity itself. Although NDHP, Cass County, BPD, and MPD are not specifically named in the Wilansky lawsuit, employees of the law enforcement entities are named,¹⁶ including a general “John Doe” law enforcement officer, who could be an employee of any of the departments named since all of the entities had officers on site at the times relevant in the complaint.¹⁷

In reading the entire complaint, it is clear that the Wilansky lawsuit involves actions taken by law enforcement while employed by the respective law enforcement entities.¹⁸ I therefore find that N.D.C.C. § 44-04-18(6) applies and Mr. Stoll will need to use the discovery process to obtain the records he requests.

CONCLUSION

The North Dakota Highway Patrol, Cass County Sheriff’s Office, Bismarck Police Department, and Mandan Police Department properly denied a request for records pursuant to N.D.C.C. § 44-04-18(6).

Wayne Stenehjem
Attorney General

cc: Benjamin Stoll (via email only)

¹³ N.D.C.C. § 44-04-17.1(12) (definition of “public business”).

¹⁴ N.D.C.C. § 44-04-17.1(13) (definition of “public entity”).

¹⁵ N.D.C.C. § 44-04-18.

¹⁶ Paul Laney is a sheriff in Cass Cnty and Thomas Iverson is a major in the N.D. Highway Patrol.

¹⁷ Letter from Randall Bakke, Att’y at Law, to Att’y Gen.’s Office (Feb. 21, 2019).

¹⁸ Bismarck Police Dep’t, and Mandan Police Dep’t provide that if the lawsuit was dropped against the “John Doe” law enforcement officer, it would agree to respond to requests under the open records law as it pertains to those entities. Letter from Randall Bakke, Att’y at Law, to Att’y Gen.’s Office (Feb. 21, 2019).