

OPEN RECORDS AND MEETINGS OPINION
2021-O-05

DATE ISSUED: May 13, 2021

ISSUED TO: City of Minot

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Leif Snyder asking whether the City of Minot (City) violated N.D.C.C. § 44-04-18 by improperly denying a request for records.

FACTS PRESENTED

On October 15, 2020, Leif Snyder requested any investigation and/or interview notes, transcripts, audio or video recordings from any interviews of Tom Barry and or Shaun Sipma conducted by the Center for Mediation and Consultation during the personnel investigation done for the City between March 1, 2020, and May 1, 2020. The investigation was carried out by independent counsel, Patricia Monson. The City responded with a statement that there were no transcripts, audio, or video recordings of the interviews of Tom Barry and/or Shaun Sipma and that the interview notes were exempt under N.D.C.C. § 44-04-19.1 as attorney work product.

ISSUE

Whether the City of Minot violated the open records law when it refused to provide the requested 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.”¹ 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,

¹ N.D.C.C. § 44-04-18.

OPEN RECORDS AND MEETINGS OPINION 2021-O-05

May 13, 2021

Page 2

if requested.² A public entity may not deny a request for an open record on the ground that the record also contains confidential or closed information.³ “[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.”⁴

Records relating to a public entity’s internal investigation of a complaint against a public entity or employee for misconduct are exempt until the investigation of the complaint is complete, but no longer than seventy-five calendar days from the dates of the complaint.⁵

As stated above, the City of Minot denied the request citing the exemption found in N.D.C.C. § 44-04-19.1 for attorney work product.

“Attorney work product” 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.⁶

All three elements for attorney work product must be present in order for a record to be exempt under N.D.C.C. § 44-04-19.1.⁷ Here, the requested records were created during the investigation conducted by an attorney who was hired to conduct

² N.D.C.C. § 44-04-18(7).

³ N.D.C.C. § 44-04-18.10(1).

⁴ N.D.C.C. § 44-04-18.10(2).

⁵ N.D.C.C. § 44-04-18.1(6).

⁶ N.D.C.C. § 44-04-19.1(1), (6).

⁷ N.D.A.G. 2002-O-05.

OPEN RECORDS AND MEETINGS OPINION 2021-O-05

May 13, 2021

Page 3

an independent investigation⁸ and to provide findings to the City Council.⁹ Although the notes may at some time be used in a legal action, they were not created exclusively for a legal action.

In 2002, this office issued an opinion to the Wahpeton Public School District in which I determined that the school district properly withheld records under N.D.C.C. § 44-04-19.1 as “attorney work product” that were created by the District’s law firm and another law firm in Minneapolis that was hired to conduct an investigation.¹⁰ In the 2002 opinion, only those records that contained discussions of legal impressions and theories, summaries of information, events, and witness interviews that the attorney felt were relevant to the legal issues posted in a complaint were determined to be properly withheld as attorney work product. The opinion also found that the public entity had improperly withheld records that did not meet the criteria of attorney work product, specifically stating that “[a] simple factual narrative does not include any impressions or work product of the attorney or the entity and would not be protected under N.D.C.C. § 44-04-19.1.”¹¹

The city provided the requested notes to this office. In reviewing these notes, it is clear that many of the notes are a factual narrative and do not reflect the impressions of the attorney. While I agree that some statements of the attorney in the notes could be classified as attorney work product or protected under other provisions of N.D.C.C. § 44-04-18.1 for public employees, there are notes that do not fall within any statutory protection.

The mere fact that it was an attorney who made the notes does not automatically mean the elements of attorney work product are met. The public entity must still make an analysis of the records to determine whether there are any statutory exceptions. Therefore, it is my opinion that the City of Minot violated the open records law when it denied a request for records as attorney work product.

STEPS NEEDED TO REMEDY VIOLATION

The City of Minot must review the notes and may redact any that have statutory exceptions. The remaining notes must be released free of charge to the requester.

⁸ Minutes, Minot City Council, Special Meeting (Mar. 9, 2020).

⁹ *Id.*

¹⁰ N.D.A.G. 2002-O-05.

¹¹ *Id.*

OPEN RECORDS AND MEETINGS OPINION 2021-O-05

May 13, 2021

Page 4

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. § 44-04-21.2.¹² It may also result in personal liability for the person or persons responsible for the noncompliance.¹³

Wayne Stenehjem
Attorney General

cc: Leif Snyder (via email only)

¹² N.D.C.C. § 44-04-21.1(2).

¹³ *Id.*