

February 23, 1978

Mr. Russell Staiger
Assistant Director
State Planning Division
State Capitol
Bismarck, North Dakota 58505

Dear Mr. Staiger:

This is in reply to your letter of February 15, 1978, relative to the open records statute. You state the following facts and questions:

Recently the State Planning Division received a request for copies of documents related to an evaluation of the eight regional councils which is currently underway. The requested documents are in limited numbers and therefore, the Division would have to reproduce additional copies to send to the person requesting them.

As a consequence of this request and the subsequent conversation I had with the requesting party, a number of questions have come to mind related to the Division's responsibility in making the records, documents, and files available to the public. Therefore to avoid any unnecessary future problems regarding this matter, I would appreciate your response to the following questions:

1. Who has the right to examine the documents, records, and files of the Division? Must the requesting parties demonstrate a "right to know" or "need to know"? Do members of the multi media, i.e., radio, television, and newspaper reports have any special access rights not available to the general public? Does someone who is not a resident of North Dakota have a right to access (excluding federal program auditors and related personnel)?
2. What process must be followed by persons requesting to examine the documents, records, and files of the Division? Must they submit a written request specifying a time during normal working hours and also specify what information they are seeking and why they want it?
3. Are any of the documents, records, and files exempt from such requests, such as the personal files of individual staff members and incomplete research?
4. Must the Division print or reproduce extra copies of the requested documents, records, or files which are limited in number so as to provide copies to the persons examining the material? If so, at whose expense? If the Division is responsible for extra copy cost associated with such a request, does the biennial budget authorized by the Legislature include

authorization to utilize the Division's budgeted funds to make extra copies of requested material. If so, to what limit?

5. If the examining parties request that they be allowed to take limited edition copies out of the building to have copies made, what controls are available to the Division to assure that the records are returned promptly and intact?
6. Must the Division mail copies of the documents to persons requesting this done or is making them available for examination in the Division's office sufficient.
7. Can the Division refuse to reproduce copies of requested documents on state owned or leased reproduction equipment because of the difficulties involved in collecting cash which goes to the state General Fund with the Division's line item authorization being reduced by that amount of the interdepartmental billing process regardless of the amount of cash collected?
8. Can the Division refuse access to the various records if the requesting party is knowingly utilizing only one of a series of reports which in itself would present a distorted picture of the facts or would lend itself to being used out of context to the detriment of others?

Your response to these questions at your earliest convenience will be most appreciated. If you should have need for further clarification of this request or any of the enclosed questions, please give me call.

The governing statute on this matter is Section 44-40-18 of the NDCC, as amended, which provides as follows:

ACCESS TO PUBLIC RECORDS--PENALTY.--

1. Except as otherwise specifically provided by law, all records of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.
2. Violations of this section shall be punishable as an infraction.

The State Planning Division is, of course, a governmental body or agency of the state and is governed by the above quoted statute. In examining the statutes applicable to the Planning Division, we have found no specific statute which would exempt any of its records from the statute. With these general provisions in mind, we will consider your questions in the order presented.

1. The statute does not limit the right of inspection of public records to someone who demonstrates a “right to know” or a “need to know.” Members of the multi media have no greater or no lesser right of inspection than does the general public. While the question of whether a person who is not a resident of North Dakota has a right of access may be interesting, we again find no provision in the statute that it is limited to only residents of this state,
2. Presumably any person presenting himself to the Division’s offices during reasonable office hours would have the right to examine the records. If a person desires to examine a specified record or records he may, of course, be requested to specify these records he desires to examine to permit the agency to produce the specific record. On the other hand, if a person merely wishes to look at all records, we assume he is entitled to that right. We have no problem in concluding that a person may be required to signify in writing his request that he be permitted to inspect the records as a method of permitting the department to ascertain who has had access to its records. However, we would question any requirement that this request must be made in advance, that he must specify what information he is seeking (unless he volunteers same) or that he must indicate why he wants the information. None of these limitations are contained in the statute and we would consider them as a limitation on the right granted by the statute to inspect public records.
3. Section 44-04-18 reads that “except as otherwise specifically provided by law” the records are open to public inspection. As noted above, we are unaware of any of the records of the Division which are made confidential by law. I would doubt that “incomplete research” would, however, be classified as a record if that term is used in the context in which I understand it.
4. This office has consistently stated over the years that the open records statute does not demand that persons requesting to inspect records be provided with copies thereof. We have also indicated, however, that if an agency makes records for some persons it should do so for all persons on an equitable basis. This does not necessarily mean that if a person requests a copy of a one page record and is given it that another person requesting a copy of a 500 page record must also be provided with the copy, i.e., the agency might have a policy of making a copy of a single page without charge but might refuse to make copies of additional pages or might charge for copies of additional pages. We have no idea of the budget requests of the Planning Division. We assume that most agencies which have copy machines may make provisions in their budgets for a limited amount of copying of records. This part of your question would appear to involve more of an administrative policy question than it would a legal question. We again reiterate, however, that the agency is under no obligation to make copies free of charge but if it does so for some persons it should do so for all on an equitable basis. We do not indicate that the agency must make copies for all persons, regardless of’ the number of copies requested, free of charge.
5. This again is a matter of administrative policy. There is no requirement that the records may be removed for purposes of copying. If the agency does permit

records to be removed for the purpose of copying same, we would recommend that rather strict regulations be adopted by the agency to preserve the integrity of the records. This may include an agency employee accompanying the person desiring to make the copies. The controls available are those which the agency chooses to adopt since the open records statute does not contain the right of a person to do anymore than inspect the records nor does it contain the right to remove the records from the agency office for purposes of making a copy.

6. We find no requirement that an agency mail copies of documents to persons requesting them. The only requirement is that the records be open to inspection during reasonable office hours. Again, however, if the agency chooses to mail copies to certain persons upon request, they should do so for all persons on a reasonably equitable basis. See our comments on question 4.
7. This question has already been commented upon in our response to question 4. We believe that an agency could refuse to make copies for anyone requesting them on the basis the statute only permits inspection but does not require copies of the records to be provided, even for a fee. I assume your reference to collecting cash which goes to the State General Fund is based on the fact that the cost of making the copies is taken from the moneys appropriated to the Division while the amount collected is, by law, required to be deposited into the general fund in the State Treasury and is not returned to the appropriation. I agree this is the result. However, every department or agency which does not have its own revolving fund is faced with the same problem. The question of whether and how the agency is going to respond to public demand is a question of administrative policy. There may be merit in having a central duplicating service in the State Capitol complex which all agencies may use and which would collect fees for making copies. Whether the Legislature or the Department of Accounts and Purchases would be interested in establishing such a service is not within our knowledge. However, it would appear to be a possible solution for agencies with problems similar to yours.
8. The purpose for which a person requesting access to records wishes to use those records is immaterial to the right of inspection. Therefore our answer to your question is no.

I trust this will adequately set forth our position on the questions presented.

Sincerely,

Gerald W. VandeWalle
Chief Deputy Attorney General