

N.D.A.G. Letter to Wilkes (July 11, 1985)

July 11, 1985

Mr. Richard C. Wilkes
Assistant State's Attorney
Peterson & Wilkes
P.O. Box 39
Bowbells, ND 58721

Dear Mr. Wilkes:

Thank you for your letter of July 3, 1985, concerning an interpretation of events surrounding a record in the possession of the Burke County Weed Control Officer. Although your letter does not state as such, we assume you are writing in your capacity as the Assistant State's Attorney for Burke County.

The essence of your letter is whether a particular record in the possession of the Burke County Weed Control Officer is subject to the open records law of our state. Simply put, our North Dakota Open Records Law states that records in the possession of a public body, board, bureau, agency, or commission are open to public inspection unless specifically otherwise stated by law. A review of the North Dakota Century Code fails to reveal a specific statutory exemption for investigative reports received as to noxious weeds. Furthermore, the North Dakota Supreme Court, in City of Grand Forks v. Grand Forks Herald, Inc., 307 N.W.2d 572 (N.D. 1981), has given the term "records" as found in our open records law an expansive meaning so as to include all records which are in the possession of public bodies as opposed to those required to be kept or of unofficial import. Based upon these facts, I have no hesitation in concluding that the record in question is subject to the open records law.

However, your letter indicates your opinion that the investigation report should be protected from disclosure pursuant to Rule 509 of the North Dakota Rules of Evidence. Enclosed you will find a copy of a recent opinion I have issued in which the subject of evidentiary rules and the open records law was discussed. As you will note, I have concluded that Rules of Evidence as well as Rules of Civil Procedure are not available to public agencies in determining whether a particular record is subject to the open records law. Instead, these rules are only available to administrative agencies who find themselves involved in administrative proceedings. Unless the Burke County Weed Control officials are considered administrative agencies and are now involved in an administrative proceeding pursuant to N.D.C.C. Ch. 28-32, the North Dakota Rules of Evidence may not be relied upon in withholding a record from public inspection which would otherwise be available for such inspection pursuant to the open records law.

However, your letter also indicates a possible criminal investigation involved in this matter. For this reason, I have enclosed a copy of an opinion issued by this office on January 26,

1979, indicating the instances in which criminal investigative reports may be withheld from public disclosure. This opinion continues in effect as of this date and you should consider the conclusion of this opinion as it might apply to your factual situation.

Sincerely,

Nicholas J. Spaeth

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Enclosure