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OPEN RECORDS AND MEETINGS OPINION
2023-O-02

DATE ISSUED: August 7, 2023

ISSUED TO: North Dakota Highway Patrol and State Radio

CITIZEN'S REQUEST FOR OPINION

Forum Communications (The Forum) requested an opinion from this office under N.D.C.C. § 44-04-21.1, asking whether the North Dakota Highway Patrol and State Radio, a division of the North Dakota Department of Emergency Services, violated N.D.C.C. § 44-04-18 by denying The Forum's requests for transcripts of 911 calls.¹

FACTS PRESENTED

On September 19, 2022, April Baumgarten, an investigative journalist for The Forum, requested phone call recordings of 911 calls from the North Dakota Highway Patrol (NDHP).² Captain Niewind, on behalf of NDHP, promptly denied her request, stating "[t]he 911 calls are part of our on-going investigation and can't be released at this time."³ The next day Ms. Baumgarten requested a copy of transcripts of the same 911 calls she had requested the day before from the NDHP.⁴ Captain Niewind referred Ms. Baumgarten to State Radio⁵ because "they would need to provide [her] any transcripts."⁶ Captain Niewind further stated that the NDHP had the audio recordings of the 911 calls, for evidence in an "on-going criminal investigation," but NDHP was unable to release them "because of the active investigation."⁷ He also referred Ms. Baumgarten to the Foster County State's Attorney to inquire about the release of the recording.⁸ Captain Niewind generally cited

¹ E-mail from Matt Von Pinnon, Editor-in-Chief, The Forum, to Annique M. Lockard, Assistant Att'y Gen. (Oct. 10, 2022, 5:19 PM).

² E-mail from April Baumgarten, Investigative Journalist, The Forum, to Captain Bryan J. Niewind, ND Highway Patrol, Se. Region Commander (Sept. 19, 2022, 5:48 PM).

³ E-mail from Captain Bryan J. Niewind, ND Highway Patrol, Se. Region Commander, to April Baumgarten, Investigative Journalist, The Forum (Sept. 19, 2022, 9:18 PM).

⁴ E-mail from April Baumgarten, Investigative Journalist, The Forum, to Captain Bryan J. Niewind, ND Highway Patrol, Se. Region Commander (Sept. 20, 2022, 9:29 AM).

⁵ State Radio is a division of the North Dakota Department of Emergency Services. For more information see, <https://www.des.nd.gov/state-radio-depth> (last visited Aug. 1, 2023).

⁶ E-mail from Captain Bryan J. Niewind, ND Highway Patrol, Se. Region Commander, to April Baumgarten, Investigative Journalist, The Forum (Sept. 20, 2022, 11:00 AM).

⁷ *Id.*

⁸ *Id.*

N.D.C.C. § 44-04-18.7, relating to exemptions for criminal intelligence information and criminal investigative information, in the record denial.⁹

On September 20, 2022, April Baumgarten requested “a copy of dispatch calls Shannon Brandt made to 911 on Sept. 17 or Sept. 18 in McHenry” taken by State Radio from the North Dakota Department of Emergency Services (the Department).¹⁰ Eric Jensen, Strategic Communications Chief for the Department, responded to Ms. Baumgarten’s request the same day asking for additional information about her request, informing her of potential charges to process her request, and citing various sections of North Dakota Century Code that may protect parts of the request.¹¹ Later that day, Matt Von Pinnon, Editor-in-Chief of The Forum, clarified Ms. Baumgarten’s request to State Radio, stating “[w]hat we’re seeking is written transcripts of any and all 911 calls made from the City of McHenry area of North Dakota between midnight and 4 a.m. Sunday, Sept. 18” and that they were “not interested in the identities of people making the calls.”¹² Mr. Von Pinnon referred to N.D.C.C. § 57-40.6-07(4), the Department’s statute on emergency audio recordings, in his request.¹³ The Department responded “[p]er law enforcement, this is still an active investigation, so I am not allowed to process transcripts at this time” and cited “[a]ctive criminal intelligence, criminal investigative information, officer training materials, information that may impact officer safety § 44-04-18.7, and the work schedule of employees of a law enforcement agency § 44-04-18.3(3) as a basis for not processing the request.”¹⁴

⁹ *Id.* Captain Niewind cites “NDCC 44-18-18.7” in his response, N.D.C.C. § 44-04-18.7 is the section that covers denials for active criminal investigations.

¹⁰ E-mail from April Baumgarten, Investigative Journalist, The Forum, to ND Dept. of Emergency Servs. (Sept. 20, 2022, 11:21 AM).

¹¹ E-mail from Eric W. Jensen, Strategic Communications Chief, ND Dep’t. of Emergency Servs., to April Baumgarten, Investigative Journalist, The Forum (Sept. 20, 2022, 12:54 PM).

¹² E-mail from Matt Von Pinnon, Editor-in-Chief, The Forum, to Eric W. Jensen, Strategic Communc’ns Chief, ND Dept. of Emergency Servs. (Sept. 20, 2022, 1:29 PM).

¹³ *Id.*

¹⁴ E-mail from Eric W. Jensen, Strategic Communc’ns Chief, ND Dept. of Emergency Servs., to Matt Von Pinnon, Editor-in-Chief, The Forum (Sept. 20, 2022, 1:43 PM). While an opinion was not requested on the validity of the denial, I caution the Department on its use of broad denials of record requests, lacking legal citations, that may be too expansive to apply to the particular records request, and encourage the Department to review the open record materials and past opinions available on the Attorney General’s website. Specifically, it is not clear what the Department relied on in denying this request based on “officer training materials, information that may impact officer safety § 44-04-18.7, and the work schedule of employees of a law enforcement agency § 44-04-18.3(3).” Existing opinions from this office have made clear that “giving inaccurate reason[s] for denying a record violates N.D.C.C. § 44-04-18.” (See N.D.A.G. 2006-O-12; N.D.A.G. 2004-O-11) In a 2006 opinion, a sheriff denied records as exempt because they were part of an open investigation or “confidential mental health cases.” (See N.D.A.G. 2006-O-12). Ultimately it was determined that this claim was unfounded, and the Attorney General found the sheriff violated open records law “by

On October 7, 2022, Ms. Baumgarten again requested the 911 call transcripts from NDHP because “State Radio said the Highway Patrol owns the transcripts and [The Forum] needs [sic] to request them from [NDHP].”¹⁵ Captain Niewind responded the same day stating he would “forward your request for a transcript for the 911 call to Kara Brinster, Foster County State’s Attorney.”¹⁶ In this third denial e-mail, Captain Niewind stated, “[t]he NDHP does not have a transcript of the 911 call made.”¹⁷

ISSUE

Whether the North Dakota Highway Patrol and State Radio violated N.D.C.C. § 44-04-18 by failing to provide a written transcript of audio recordings of 911 calls.

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.”¹⁸ “‘Record’ means recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business.”¹⁹ “A public entity that receives a request for a copy of specific public records ”shall furnish the requester one copy of the public records requested.”²⁰

Separate requests pertaining to the 911 recordings were made by the Editor-in-Chief of The Forum and one of The Forum’s investigative reporters asking whether 911 transcripts are public records that should be provided prior to the completion of a law enforcement investigation and whether in this instance, it was correct to deny a request for a written transcript. Both requests were made pursuant to N.D.C.C. § 57-40.6-07(4), which states:

failing to describe valid legal authority for denying the request for receipts of confiscated weapons.” (See N.D.A.G. 2006-O-12). While there is presently no information that the Department intended to give an invalid legal reason for the denial, I urge additional caution in the future when responding to record requests and emphasize the importance of ensuring the facts and legal reasons are clearly stated in denials.

¹⁵ E-mail from April Baumgarten Investigative Journalist, The Forum, to Captain Bryan J. Niewind, ND Highway Patrol, Se. Region Commander (Oct. 7, 2022, 12:10 PM).

¹⁶ E-mail from Captain Bryan J. Niewind, ND Highway Patrol, Se. Region Commander, to April Baumgarten, Investigative Journalist, The Forum (Oct. 7, 2022, 12:59 PM).

¹⁷ *Id.*

¹⁸ N.D.C.C. § 44-04-18(1).

¹⁹ N.D.C.C. § 44-04-17.1(16).

²⁰ N.D.C.C. § 44-04-18(2); *see* N.D.A.G. 2006-O-12.

4. An audio recording of a request for emergency services or of a report of an emergency is an exempt record as defined in section 44-04-17.1. However, upon request, a person may listen to the audio recording, but may not copy or record the audio. *A person also may request a written transcript of the audio recording, which must be provided to the person within a reasonable time.* The emergency services communication system coordinator may refer requests to the appropriate investigating agency possessing the recording and shall communicate this referral to the requester. The investigating agency shall answer requests for the records. If an investigating agency does not have possession of the record, the emergency services communication system coordinator shall respond to the request for the record.²¹

Audio recordings specifically “of a request for emergency services” or reports of emergencies are public records but are exempt under N.D.C.C. § 57-40.6-07(4).²² Transcript of the audio recordings also meets the definition of a public record, but N.D.C.C. § 57-40.6-07(4) does not explicitly exempt the transcript. Notably, the statute requires a transcript to be created upon request, which is contrary to the general open records law that does not require a public entity to create or compile a record that does not exist.²³

In order to determine how exemptions apply to a transcript created under N.D.C.C. 57-40.6-07(4), it is helpful to examine the legislative history. Subsection 4 of Section 57-40.6-07 was added by the 62nd Legislative Assembly in 2011. Sponsors of the bill wanted to prevent the broadcast of emotional 911 recordings by media outlets.²⁴ As introduced, House Bill 1156, made the written transcript of “such an audio recording” exempt.²⁵ However, the exempt designation was removed by committee amendment and the bill ultimately passed in the form we have now.²⁶

²¹ N.D.C.C. § 57-40.6-07(4) (emphasis added).

²² *Id.*

²³ N.D.C.C. § 44-04-18(4).

²⁴ “Under the current form the tape is still available to the media for them to listen to and take notes off but that tragedy that prompted the individual to call 911 is no longer to be rebroadcasted in any way, shape, or form.” *Hearing on H.B. 1156 Before Senate Human Services Comm.*, 2011 N.D. Leg (Mar. 8) (Statement of Rep. Porter).

²⁵ H.B. 1156, 2011 N.D. Leg. Introduced. “[E]xempt’ record means all or part of a record that is neither required by law to be open to the public, nor is confidential, but may be open in the discretion of the public entity.” N.D.C.C. 44-04-17.1(5).

²⁶ H.B. 1156, Amendment adopted Jan. 31, 2011 (HJ 305) and Engrossed H.B. 1156 passed 78-16, Feb. 2, 2011 (HJ 332).

Testifying in support of the bill, Representative Todd Porter explained the intent of the committee amendment was for a copy of the audio recording to be exempt, while the recording itself was open to review.²⁷ Representative Lawrence Klemin, the bill's prime sponsor, stated in his testimony to the Senate Human Services Committee, "Subsection 4 of Section 2 is new and provides that an audio recording of a 911 call is an exempt record. However, on request a person may listen to the audio recording but may not copy or record it. The person may also obtain a written transcript of the audio recording on request."²⁸ In the same hearing, bill proponent Mike Dannenfelzer, testified, "[the bill] now permits someone to request to listen to the call, but prohibits them from recording or copying the audio. The bill also allows the release of a transcript of the audio recording."²⁹ He also testified "[t]he point here is that these records are currently very much open with little protection for a victim in existing law. Even providing the ability to edit that which is subject to current open records exemptions, it is not possible to remove all that may connect to that exemption. A transcript provides a better way and is offered within HB 1156."³⁰ The Legislature provided two ways to provide access to the 911 recording: either arrange to listen to the recording or request a transcript of the recording for review. The legislative history makes it clear that the Legislature intended that a transcript be provided – but that if exempt or confidential information was present, it could be redacted.³¹

Here, The Forum's requests for the transcript were not addressed by either the NDHP or State Radio. Instead, both denied the requests and cited the exemption for active criminal intelligence and investigative information.³² Such an exemption was recognized by this office in a 2014 opinion.³³ In that instance, law enforcement denied a request for a 911 call transcript, declaring it exempt as active criminal intelligence and investigative information. This office found the denial proper because the recording contained details necessary to apprehend the suspect fugitive at the time of

²⁷ "Under the current form the tape is still available to the media for them to listen to and take notes off but that tragedy that prompted the individual to call 911 is no longer to be rebroadcasted in any way, shape, or form." *Hearing on H.B. 1156 Before Senate Human Services Comm.*, 2011 N.D. Leg (Mar. 8) (Statement of Rep. Porter).

²⁸ *Hearing on H.B. 1156 Before Senate Human Services Comm.*, 2011 N.D. Leg (Mar. 8) (Statement of Rep. Klemin).

²⁹ *Hearing on H.B. 1156 Before House Political Subdivisions Comm.*, 2011 N.D. Leg (Jan. 20) (Statement of Mike Dannenfelzer).

³⁰ *Hearing on H.B. 1156 Before Senate Human Services Comm.*, 2011 N.D. Leg (Mar. 8) (Testimony of Mike Dannenfelzer).

³¹ *Id.*

³² E-mail from Eric W. Jensen, Strategic Communc'ns Chief, ND Dept. of Emergency Servcs., to Matt Von Pinnon, Editor-in-Chief, The Forum (Sept. 20, 2022, 1:43 PM). E-mail from Captain Bryan J. Niewind, ND Highway Patrol, Se. Region Commander, to April Baumgarten, Investigative Journalist, The Forum (Sept. 20, 2022, 11:00 AM)

³³ N.D.A.G. 2014-O-15.

the request.³⁴ A record request can be denied for active criminal intelligence and criminal investigative information only when a case is considered active.

Under open record law, criminal intelligence information is active as long as a reasonable good-faith belief exists that it will lead to detection of ongoing or reasonably anticipated criminal activities.³⁵ Criminal investigative information is active as long as there exists a reasonable good-faith anticipation of securing an arrest or prosecution in the foreseeable future.³⁶ At the time of the request and denial in the 2014 opinion, the agency was “actively investigating a homicide and the suspect had yet to be arrested and was considered armed and dangerous.”³⁷

According to the legislative history of Subsection 4 of Section 57-04.6-07, this scenario was presented by one of the bill’s proponents.³⁸ Mike Dannenfelzer testified to the House Committee “[i]f it needs to be used to help identify a suspect and be played over the air it could be used for that purpose even though it is not publicly released.”³⁹ The decision to disclose exempt records “lies within the discretion of the Department, subject to restrictions in other statutes or federal law.”⁴⁰ Consistent with past opinions issued by this office, “[t]he exemption for criminal investigative information is temporary. Once the investigation is no longer active, the information must be disclosed unless disclosure is restricted under another statute.”⁴¹

The Forum’s request in this current instance is distinguishable from the 2014 opinion. In that opinion a request was made for a 911 transcript of a shooting that had occurred the day before. The 2014 denial stated, “. . . suspect is on the loose, not yet apprehended, and is to be considered armed

³⁴ *Id.*

³⁵ “‘Criminal intelligence information’ means information 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.” N.D.C.C. § 44-04-18.7(3).

³⁶ “‘Criminal investigative information’ means information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a 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.” N.D.C.C. § 44-04-18.7(4).

³⁷ N.D.A.G. 2014-O-15.

³⁸ *Hearing on H.B. 1156 Before House Political Subdivisions Comm.*, 2011 N.D. Leg (Jan. 20) (Statement of Mike Dannenfelzer).

³⁹ *Id.*

⁴⁰ N.D.A.G. 2005-O-13.

⁴¹ N.D.A.G. 2005-O-13; citing N.D.A.G. 98-F-09.

and dangerous”⁴² This situation is different in the matter now under consideration. At the time of the request at issue in this opinion, two days had passed, the suspect had been apprehended, and criminal charges had been filed. Therefore, the active components of criminal intelligence information and criminal investigative information had been met. However, the 2014 opinion overlooked the public entity’s obligation to provide a redacted transcript under N.D.C.C. § 57-40.6-07(4) and to that extent, the 2014 opinion is superseded.

It is a clear standard in open records law that if a public entity has requested records, they must provide the records. There are two exceptions to this standard.⁴³ Both North Dakota Information Technology (NDIT) and State Radio have statutes that allow them to direct requests for records to the holder of the records or investigating law enforcement agencies. With exceptions, NDIT shall otherwise “refer a request for access to or inspection of information provided by an agency to that agency for response.”⁴⁴ The emergency services communication system coordinator is permitted to “refer requests to the appropriate investigating agency possessing the recording and shall communicate this referral to the requester.”⁴⁵ Pursuant to their statute, the Department has no duty to ask law enforcement about the status of cases. The Department may refer the requester to the appropriate investigating agency and the Department’s involvement in the request ends there.

Specific to the Department, they have the discretion to refer requests to law enforcement agencies⁴⁶ eliminating the difficult, if not impossible, task of the Department determining whether a case is active. If that occurs, “[t]he investigating agency shall answer requests for the records. If an investigating agency does not have possession of the record, the emergency services communication system coordinator shall respond to the request for the record.”⁴⁷ The Department did not exercise that discretion in this request.

A plain reading of Subsection 4 of Section 57-40.6-07, N.D.C.C. shows that while audio recordings are exempt; listening to a recording and requesting a transcript of the recording is not explicitly exempt.⁴⁸ This plain language interpretation is consistent with the legislative history of this subsection. A plain reading of the statute and its legislative history make clear that while copies of the audio recordings of calls for emergency services are exempt records, subject to authorized disclosure and review of legally allowable redactions, listening to the call or requesting a transcript are permissible.

⁴² N.D.A.G. 2014-O-15.

⁴³ N.D.C.C. § 54-59-16; N.D.C.C. § 57-40.6-07(4).

⁴⁴ N.D.C.C. § 54-59-16.

⁴⁵ N.D.C.C. § 57-40.6-07(4).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 2011 N.D. Sess. Laws ch. 478, § 2, *see also* N.D.A.G. 2014-O-15.

It is my opinion that once The Forum requested a transcript, the NDHP or State Radio was required by N.D.C.C. § 57-40.6-07(4) to prepare a transcript “within a reasonable time.” Once created, State Radio may refer to the appropriate investigating agency the responsibility to handle any necessary redactions and actual release of the record, but the statute instructs that if the investigating agency “does not have possession of the record, the emergency service communication system coordinator shall respond to the request for the record.”⁴⁹ The statute anticipates that more than one public entity may be involved in a request for the recording or a transcript of the recording. Here, NDHP and State Radio kept referring The Forum to the other entity, with neither entity taking responsibility for creating and providing the transcript that was requested.⁵⁰ That course was contrary to open records law, specifically N.D.C.C. § 57-40.6-07(4), as it needlessly delayed the provision of records that state law mandates be created and open to the public.

NDHP and State Radio were obligated by statute to work together to create a transcript of the 911 call.⁵¹ Because the transcript is a public record, it may be reviewed for exempt or confidential information.⁵² Because neither entity created a transcript, the response by each entities was premature. As such, it is my opinion that both failed to provide a sufficient reason to deny an open record.⁵³

CONCLUSION

The North Dakota Highway Patrol and State Radio violated the open records law when each entity failed to provide a redacted written transcript of the 911 calls requested by The Forum.

⁴⁹ N.D.C.C. § 57-40.6-07(4). State Radio has the physical recordings of many 911 calls because it makes the recordings of the 911 calls on behalf of law enforcement entities across the state, including Highway Patrol. Although the law allows them to refer to law enforcement to determine if parts of the record are exempt or confidential, State Radio still has a role to play in fulfilling a request for the record. State Radio either has to prepare a transcript for the law enforcement agency to provide to the requester or it can provide the recording to the agency for them to prepare the transcript. Either way, if a requester asks for a transcript, one must be prepared and provided.

⁵⁰ E-mail from Eric W. Jensen, Strategic Communc’ns Chief, ND Dept. of Emergency Servcs., to Matt Von Pinnon, Editor-in-Chief, The Forum (Sept. 20, 2022, 1:43 PM). E-mail from Captain Bryan J. Niewind, ND Highway Patrol, Se. Region Commander to April Baumgarten, Investigative Journalist, The Forum (Sept. 20, 2022, 11:00 AM).

⁵¹ N.D.C.C. § 57-40.6-07(4).

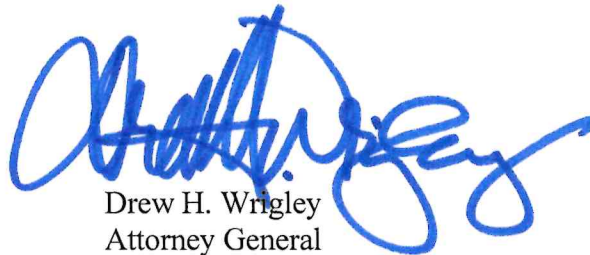
⁵² N.D.C.C. §§ 44-04-18.10, (1), (2). N.D.A.G. 2020-O-08.

⁵³ See N.D.A.G. 2006-O-12 (failing to describe valid legal authority for denying the request for receipts of confiscated weapons); N.D.A.G. 2004-O-11

STEPS NEEDED TO REMEDY VIOLATION

The North Dakota Highway Patrol and State Radio must work together to provide The Forum with transcripts of the requested 911 calls, redacted as allowable by law, free of charge. The transcripts must also be similarly provided to others who have - or may - request them.

While I have every reason to expect NDHP and State Radio will remedy this violation, 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. Failure to take these corrective measures may also result in personal liability for the person or persons responsible for the noncompliance.



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cc: Matt Von Pinnon *via email*