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**OPEN RECORDS AND MEETINGS OPINION**  
**2024-O-03**

DATE ISSUED: January 9, 2024

ISSUED TO: North Dakota Board of Chiropractic Examiners

**CITIZEN'S REQUEST FOR OPINION**

Dr. Jake Schmitz requested an opinion from this office under N.D.C.C. § 44-04-21.1 asking whether the North Dakota Board of Chiropractic Examiners violated N.D.C.C. § 44-04-18 by improperly denying a request for records.

**FACTS PRESENTED**

The North Dakota Board of Chiropractic Examiners (Board) held a special meeting on December 1, 2021,<sup>1</sup> to discuss three pending disciplinary cases, two new complaints, two applications, and their per diem.<sup>2</sup> During the meeting the Board reviewed information in records provided in a response by Dr. Jeffrey Pokorny and voted to request additional information from him before the next Board meeting “to include additional explanations regarding the billing information provided and a fee schedule.”<sup>3</sup>

On December 2, 2021, Dr. Schmitz requested “a copy of Dr. Jeff Pokorny’s response to the board that was discussed yesterday in the meeting” from the Board.<sup>4</sup> The Board responded the next day denying Dr. Schmitz’s request, stating “[t]he records you have requested are confidential and closed to the public.”<sup>5</sup>

**ISSUE**

Whether the Board properly denied a request for records.

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<sup>1</sup> Letter from Dr. Dion Ficek, President, N.D. Bd. of Chiropractic Exam’rs, to Annique M. Lockard, Ass’t Att’y Gen., Off. of Att’y Gen. (Dec. 21, 2021).

<sup>2</sup> Agenda, N.D. Bd. of Chiropractic Exam’rs (Dec. 1, 2021).

<sup>3</sup> Special Meeting Minutes, N.D. Bd. of Chiropractic Exam’rs (Dec. 1, 2021).

<sup>4</sup> Email from Dr. Jake Schmitz to Lisa Blanchard, Exec. Dir., N.D. Bd. of Chiropractic Exam’rs (Dec. 2, 2021, 8:35 AM).

<sup>5</sup> Email from Lisa Blanchard, Exec. Dir., N.D. Bd. of Chiropractic Exam’rs to Dr. Jake Schmitz (Dec. 3, 2021, 10:10 AM).

## 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.”<sup>6</sup> Confidential records are “all or part of a record . . . that is either expressly declared confidential or is prohibited from being open to the public.”<sup>7</sup> “A public entity has a duty to review a record, redact exempt or confidential information, and turn over the remaining portions of the record that are not protected.”<sup>8</sup> “[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.”<sup>9</sup> It is a class C felony for a public servant to disclose records they know are designated confidential by law.<sup>10</sup>

The Board explained that the requested records included a letter from Dr. Pokorny with patient schedules and patient billing records.<sup>11</sup> Upon receiving Dr. Schmitz’s request, the Board’s executive director sent the request to the Board’s general counsel.<sup>12</sup> The Board’s attorney pointed out a statute in the Board’s chapter of the North Dakota Century Code, N.D.C.C. § 43-06-14.1(7), which states: “[a]ll data and information, including patient records acquired by the board or the peer review committee, in the exercise of its duties and functions, are confidential and closed to the public.”<sup>13</sup>

Even though the Board was not acting as a peer review committee here, subsection 7 appears to include records acquired by the Board outside the peer review process. Specifically, the phrase “its duties and functions” is unclear in the context of subsection 7 and could refer to either the Board’s or the peer review committee’s duties or functions. Given the possible consequence of a class C felony charge, the Board reasonably chose to respond conservatively and withhold the records.<sup>14</sup> Fortunately, the opinion process allows me to clarify for a public entity its duties under the law in circumstances like this where statutory language has not been updated to clearly reflect the purpose of the law as determined by the context and legislative history of the subsection.

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<sup>6</sup> N.D.C.C. § 44-04-18(1).

<sup>7</sup> N.D.C.C. § 44-04-17.1(3). *See also* N.D.A.G. 2020-O-10; N.D.A.G. 2020-O-07.

<sup>8</sup> N.D.C.C. § 44-04-18.10. *See also* N.D.A.G. 2020-O-10; N.D.A.G. 2020-O-07; N.D.A.G. 2020-O-01.

<sup>9</sup> N.D.C.C. § 44-04-18.10(2). *See also* N.D.A.G. 2020-O-08.

<sup>10</sup> N.D.C.C. § 12.1-13-01.

<sup>11</sup> Letter from Dr. Dion Ficek, President, N.D. Bd. of Chiropractic Exam’rs, to Annique M. Lockard, Ass’t Att’y Gen., Off. of Att’y Gen. (Dec. 21, 2021).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> According to the Board’s longtime executive director, information of a disciplinary complaint had not been previously requested from the Board.

The pertinent law, subsection 7 of N.D.C.C. § 43-06-14.1, was enacted with the original section 14.1 of N.D.C.C. ch. 43-06 in 1989<sup>15</sup> and, despite legislative attempts to amend N.D.C.C. § 43-06-14.1(7) during the 68th Legislative Assembly,<sup>16</sup> has been unchanged for thirty-four years. Testimony from the President of the Board in 1989 stated the intention of the Board was for this subsection to give the Board authority to review requests from patients, insurance companies, government agencies (third party payors), or chiropractors of “particular situation(s) relative to treatment and costs.”<sup>17</sup> The President’s testimony further provided a thorough explanation of the steps the Board intended to follow to create the peer review process in the whole statute.<sup>18</sup> Subsections 1 – 7 of the law must be read to together.<sup>19</sup>

Reading N.D.C.C. § 43-06-14.1 in its entirety, and reviewing legislative history, section 14.1 applies to an optional peer review process the Board may use to manage complaints. In this instance, the Board did not appoint a peer review committee but reviewed the file as the full Board. In its correspondence with this office, the Board never alleges it intended to function as a peer review committee. Further, the Board discussed the records in its open meeting.<sup>20</sup> While the Board has the duty, and authority, to review disciplinary cases,<sup>21</sup> it is my opinion that the record protections in N.D.C.C. § 43-06-14.1(7) apply specifically to peer review committee records or records in the possession of the Board that relate to a peer review committee once one has been formed or if one is anticipated. Without the formation of the peer review committee, the Board may release the requested records without violating N.D.C.C. § 43-06-14.1(7).

The Board’s decision to withhold the records was reasonable in light of the confusion created by the wording of N.D.C.C. § 43-06-14.1(7) until the Board was directed otherwise. After review and analysis of applicable law and legislative history, absent use of the peer review process or intention to proceed with one soon, it is my opinion that the Board could release part of Dr. Pokorny’s response to Dr. Schmitz under N.D.C.C. § 43-06-14.1(7) without violating N.D.C.C. § 12.1-13-01.

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<sup>15</sup> 1989 N.D. Laws, ch. 506, § 14.

<sup>16</sup> H.B. 1105 and H.B. 1517, 2023 N.D. Leg.

<sup>17</sup> Hearing on H.B. 1207 Before the House Indus., Bus., and Labor Comm., 1989 Leg. (Jan. 10) (Written statement of Dr. David C. Pokorny, President, N.D. Chiropractic Ass’n, and Dr. Carroll H. Winkler, Chairman, Bd. of Chiropractic Exam’rs).

<sup>18</sup> *Id.*

<sup>19</sup> N.D.A.G. 2008-O-28.

<sup>20</sup> Letter from Dr. Dion Ficek, President, N.D. Bd. of Chiropractic Exam’rs, to Annique M. Lockard, Ass’t Att’y Gen., Off. of Att’y Gen. (Dec. 21, 2021); Special Meeting Minutes, N.D. Board. of Chiropractic Exam’rs (Dec. 1, 2021).

<sup>21</sup> Letter from Dr. Dion Ficek, President, N.D. Bd. of Chiropractic Exam’rs, to Annique M. Lockard, Ass’t Att’y Gen., Off. of Att’y Gen. (Dec. 21, 2021).

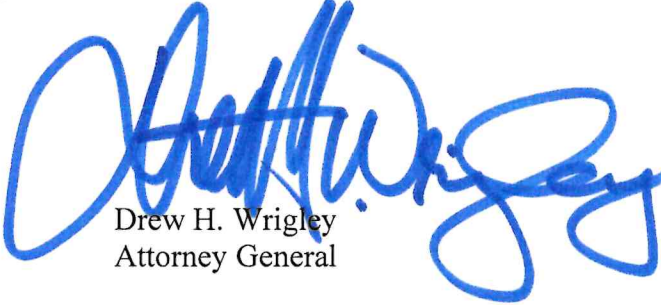
## CONCLUSION

While the legislative language lacked clarity, it is nevertheless my opinion the Board improperly denied a request for records under N.D.C.C. § 43-06-14.1(7).

## STEPS NEEDED TO REMEDY VIOLATION

The Board must review the requested records and make the necessary redactions to comply with open records and other applicable laws. The properly redacted records must be provided to Dr. Schmitz.

While I have every reason to expect the Board will remedy this situation, 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.<sup>22</sup> Failure to take these corrective measures may also result in personal liability for the person or persons responsible for the noncompliance.<sup>23</sup>



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AML/mjh  
cc: Dr. Schmitz

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<sup>22</sup> N.D.C.C. § 44-04-21.1(2).

<sup>23</sup> *Id.*