

TABLE OF CONTENTS

Table of Contents.....	1
Table of Authorities.....	1-3
Argument.....	4-19
Conclusion.....	20
Certificate of Service.....	20

TABLE OF AUTHORITIES

Anchorage Sch. Dist v. Anchorage Daily News, 779 P.2d 1191, (1989).....	
Blum v. Board of Education, 209 Wis. 2d 377, 565 N.W.2d 140 (Ct. App. 1997).....	
Daily Gazette Company, Inc. v. Withrow, 177 W. Va. 110, 115.....	
Des Moines independent v. Des Moines School Dist. 487 N.W. 2D 666, (1992).....	
Dike v. Dike, 75 Wn. 2D 1, 11, 448 P.2d 490 (1968).....	
Gannet v. University of Maine, 555 A. 2d 470, 474 (1989).....	
Journal/Sentinel v. Shorewood School Bd, 186 Wis. 2d 443, 521 N.W.2d 165 (Ct. App. 1994).....	
Knightstown Banner v. Town of Knightstown, 838 N.E.2d 1127, (2005).....	

Lukes v. Department of Public Welfare,
976 A.2d 609 (Pa. Cmwlth. 2009).....

Pathmanathan v. St. Cloud State Univ.,
461 N.W.2d 726 (Minn. App. 1990)
State v. Ingels, (1940) 4 Wn. (2d) 714, (1940).....

State v. Maxon, 110 Wn.2d 564, 567, 756 P.2d 1297 (1988).....

Tribune-Review Publ'g Co. v. Westmoreland County
Housing Authority, 574 Pa. 661, 833 A.2d 112 (2003).....

Underwater Storage, Inc., 314 F. Supp. At 549.....

United States v. Jones, 696 F.2d at 1069, 1072 (4th Cir. 1982).....

United States v. Voigt, 877 F.2d 1465 (10th Cir. 1989).....

Yakima County v. Yakima Herald
Republic, __ Wn.2d ___, (2011).....

STATUTES

RCW 42.56.010.

RCW 42.56.904.

ARTICLES

PROTECTING THE PUBLIC'S RIGHT TO KNOW:
THE DEBATE OVER PRIVATIZATION AND
ACCESS TO GOVERNMENT INFORMATION
UNDER STATE LAW Craig D. Feisser,
27 Fla. St. U.L. Rev. 825).....

McCormick on Evidence § 93, at 371-72.....

I RESPONDENTS DO NOT ADDRESS THE ISSUE OF THE LACK OF ANY BASIS FOR THEIR POST-APPEAL ASSERTION OF OVER 300 NEW EXEMPTIONS WHEN THE ORDER OF REMAND ISSUED SOLELY TO DETERMINE IF THE PREVIOUS REDACTIONS WERE JUSTIFIED AND “FOR DISCLOSURE OF THE INVOICES NOT YET PROVIDED”

One of the circumstances not contemplated by either the this Court's Order of Remand or the Supreme Court's Yakima Herald ruling was the improper assertion of over 300 new post-appeal exemptions by Thurston County.

This transformed what could have been a simple process into a 3 year long exercise in futility, (especially since Thutrston County no longer believes the 302 exempted portions should be withheld).

As this Court's 2008 ruling noted...

The County responded (to the PRA suit) by giving West copies of the first \$250,000 in attorney invoices submitted in the *Broyles* action, with the subject matter redacted. The redacted invoices reflected the dates of service, the timekeepers, and the amount of time each timekeeper billed on a daily basis. (Emphasis added)

Significantly, the Order of Remand issued for determination of...”**whether its (Thurston county's) redactions are justified as work product or privileged information.**” (See *West v. Thurston County*).

Obviously, the original blanket redactions claimed by the County were not justified. This should have been the end of the

review, since nowhere does the order of remand reasonably imply the right to assert an entirely new set of hundreds of new redactions. Had the County sought to expand the scope of the Order of remand or clarify their obligations, they had every opportunity to do so.

The assertion of over 300 new exemptions, and their submission of four groupings of cross-numbered documents greatly inconvenienced the Court and appellant West, and contributed to delays of nearly 3 years in what should have been a simple determination.

Rather than attempt to justify their disregard of the terms of the remand and the inordinate delays resulting from their deliberately confusing assertion of exemptions, counsel, in their response, attempt through specious and technical arguments to deny that West has even objected to the post-appeal exemptions at all.

As the Court's voluminous ruling, complete with tables and references to the 4 separate sets of records disclosed demonstrates, West clearly and specifically objected to the assertion of each of the 302 improperly asserted new exemptions, and the trial court reviewed them and found them all justified under the attorney-Client privilege.

Since the records were examined in camera and reviewed under virtually the same exemptions, West was not aware of the specific nature of the information withheld and obviously could not, within the limitations of an opening brief, deal separately with each

one of over 300 exemptions. Under these circumstances, the respondents attempt to taint West as using a spaghetti or shotgun type strategy is merely a projection of the impossible circumstances caused by their own post-appeal assertion of a multitude of improper exemptions. Respondents created the 302 strands of spaghetti, not the appellant and should not be heard to blame him for their actions..

The county is also in error due to the circumstance that the attorney-client exemption is limited in scope and should not be used as a free pass to exempt any portion of a document and evade any reasonable review based upon the multitude of exemptions claimed.

Appellant also argues that (in the event that additional evidence is admitted, see motion to supplement) the possession and disclosure (to AIG) of the invoices, (in un-redacted form) by Thurston County officer Tammi Devlin waives the attorney-client exemption and makes the issue of addressing the propriety of the exemptions moot, since Thurston County has now disclosed all 302 previously withheld spot exemptions.

II THE REMAINING (OVER \$250,000) INVOICES, WHICH DOCUMENT "EXPENDITURES THROUGH LIABILITY INSURANCE" ON "PRIVATE" COUNSEL AND WERE "PREPARED, USED, OWNED, AND/OR RETAINED" BY THE COUNTY, ARE PUBLIC RECORDS UNDER THE EXPRESS TERMS OF RCW 42.56.904 AND 010, AS WELL AS THE RULING OF THE SUPREME COURT IN YAKIMA HERALD CASE

Respondents arguments concerning the assertion of new exemptions and the allegedly private status of the invoices over \$250,000, while creative, ignore the terms of the remand issued by this Court, the plain language and intent of the Public Records Statute, as well as the express language of the Supreme Court in the Yakima Herald case, which clarifies that the order of remand issued **“for disclosure of the attorney fee invoices not yet provided”**.

As the Supreme Court ruled in Yakima Herald...

In March 2007, the trial court in West dismissed West's public records request to Thurston County for the same attorney fee invoices requested by the plaintiffs in Broyles, relying on the trial court's denial in Broyles under the discovery rules for justification. Shortly thereafter, the legislature enacted RCW 42.56.904 as a result of the West/Broyles litigation to clarify that discovery rules, as they applied to attorney fees paid by a public agency, do not exempt attorney fee invoices in their entirety under the PRA. West, 144 Wn. App. at 581-84 (citing extensive legislative history).

In May 2008, the Court of Appeals reversed the West trial court and remanded for disclosure of the attorney fee invoices not yet provided, relying in part on the legislature's enactment of RCW 42.56.904. Yakima County v. Yakima Herald Republic, __ Wn.2d ___, (2011) (emphasis added)

Significantly, as the Yakima ruling noted, the PRA was specifically clarified as a result of the withholding of the Broyles records to compel disclosure of such invoices.

As the explicit language of the clarification in RCW 42.56.904 reads...

It is the intent of the legislature to clarify that no reasonable construction of chapter 42.56 RCW has ever allowed attorney invoices to be withheld in their entirety by any public entity in a request for documents under that chapter. It is further the intent of the legislature that specific descriptions of work performed be redacted only if they would reveal an attorney's mental impressions, actual legal advice, theories, or opinions, or are otherwise exempt under chapter 391, Laws of 2007 or other laws, with the burden upon the public entity to justify each redaction and narrowly construe any exception to full disclosure. The legislature intends to clarify that **the public's interest in open, accountable government includes an accounting of any expenditure of public resources, including through liability insurance, upon private legal counsel** or private consultants. (emphasis added)

Obviously, the clear intent of the Legislature, the unambiguous terms of statute, and the express ruling of the Supreme Court all compel the same result-the disclosure as public records, of the remaining Broyles invoices,-which represent precisely the type

of records that RCW 42.56.904 was adopted to compel disclosure of, **an expenditure of public resources, through liability insurance, upon “private” counsel.**

III RESPONDENT'S CRABBED CONSTRUCTION OF THE TERMS “PREPARED, OWNED, USED, OR RETAINED” IS CONTRARY TO THE INTENT OF THE PRA AND AT ODDS WITH THE DETERMINATIONS OF EVERY STATE THAT HAS CONSTRUED SIMILAR STATUTORY TERMS TO PROHIBIT EVASION OF THE PUBLIC'S RIGHT TO DISCLOSURE BY DELEGATION OF GOVERNMENT FUNCTIONS

Respondents also attempt to use an improper and crabbed definition of the terms “prepared, owned, used, or retained” to evade the central requirements of the Public Records Act.

As has one Law Review Article (see Craig D. Feisser, 27 Fla. St. U.L. Rev. 825) has recognized, “Unless courts recognize that public documents belong to the public, regardless of who physically possesses them, they are violating one of the essential “spirits” of access laws.

It is a compelling circumstance that, the Florida Law Review Article, as well as all relevant State decisions demonstrate that all of the States with Records Act similar to that of Washington, (and

virtually all of the other States that have considered the issue) have found that records like the Broyles invoices even when in the custody of ostensibly “private” entities (like Patterson) are “possessed” by public entities and subject to public disclosure regardless of what entity is in physical custody at any given point.

In *Knightstown Banner v. Town of Knightstown*, 838 N.E.2d 1127, (2005), which also concerned records related to “private” counsel's actions in a sexual harassment suit, the Indiana Court considered a nearly identical provision of the Indiana Access to Public Records Act (APRA), which defined public records as those “Created, received, retained, maintained, or filed by or with a public agency”, in connection with records exclusively in the possession of the towns' insurance counsel.

Significantly, the Court ruled that...

As compelling as Knightstown might find its own arguments, we are not persuaded. Knightstown focuses on the argument that the definition of public record does not include documents created by private individuals acting on behalf of a public agency. This distinction is without merit... If Knightstown's argument is accepted...this result

would effectively close the openness mandated by Indiana's public records law.

The Indiana Court noted that such a decision was in line with their sister states, , Pennsylvania and Wisconsin, citing *Tribune-Review Publ'g Co. v. Westmoreland County Housing Authority*, 574 Pa. 661, 833 A.2d 112 (2003), and *Journal/Sentinel v. Shorewood School Bd.* 186 Wis. 2d 443, 521 N.W.2d 165 (Ct. App. 1994)

In *Westmoreland*, the Pennsylvania Court found that.. “the housing authority asserts that HARIE is a private entity, .. and that the agreement it holds is not subject to the disclosure requirements of law.

The Court tersely ruled that “We disagree”, relying upon the agency relation and the power of an agent to bind its principle to establish that records in ostensibly “private” agents were in essence public documents.(Id, at 661).

Similar conclusions as to the public nature of such records and the agent and principle relationship were also made by the Attorney general of North Dakota in the appended opinion.

In the Wisconsin case, the school board had attempted to shield records from disclosure on the basis that they were drafted by counsel and ensconced in private files. *Id.* at 169. In the eyes of the Wisconsin Court of Appeals, the (counsel's) creation and retention of custody of the document was attributable to the School Board to the same extent as if the documents were created or kept by school board personnel. It is a record subject to disclosure under the public records law *Id.*, at 171.

Also in a school setting, the Wisconsin Court determined in *Blum v. Board of Education*, 209 Wis. 2d 377, 565 N.W.2d 140 (Ct. App. 1997) that even if documents were in the possession of teachers and Board members, they were nonetheless in the lawful possession or control of the Board (further citations omitted)

As the U.S. District Court for the Eastern District of Wisconsin ruled in *U.S. v. Luften*, Wisconsin Courts have held that **public agencies may not avoid the disclosure requirements of the open records law by having outside agents or contractors**

maintain custody of their records, adding that the agency, not the contractor, is the authority responsible for disclosure.

Although the Knightsbridge Court cited to Westmoreland County Housing Authority, 574 Pa. 661, 833 A.2d 112. (2003), more recently, the Pennsylvania Court squarely addressed the issue, determining “Whether an agency must have immediate, physical possession of a record in order to be required to produce it under the Law”.

As the Pennsylvania Court determined in Lukes...

The expenditure of public funds and the public's oversight of such conduct are of paramount...If this Court were to conclude that only documents within an agency's actual physical possession were subject to disclosure, we believe that public records could be shielded from disclosure by placing them in the hands of third parties. We do not believe the General Assembly intended to provide a loophole for agencies to conceal otherwise public records from public view...such a result is not in the public's interest and is at odds with the purpose of the Law. *Lukes v. Department of Public Welfare*, 976 A.2d 609 (Pa. Cmwlth. 2009).”

As the Westmoreland case noted...similar results have been obtained in not only Ohio, but Iowa, Alaska and Maine. (See Des

Moines independent v. Des Moines School Dist. 487 N.W. 2D 666, (1992), Anchorage Sch. Dist v. Anchorage Daily News, 779 P.2d 1191, (1989) Gannet v. University of Maine, 555 A. 2d 470, 474 (1989)

Nearly identical results were also obtained in West Virginia, in *Daily Gazette Company, Inc. v. Withrow*, 177 W. Va. 110, 115; 350 S.E.2d 738, 748. (1986), where the Court determined that lack of possession of an existing writing by a public body...is not by itself determinative of the question of whether the record is..a writing retained by a public body. The writing is retained if it is subject to control of the public body.

A court in Minnesota has also held that actual physical possession by a public entity is not required for a record to be considered public under the state's access law, as long as the record has a public purpose. The Minnesota Court of Appeals stated in *Pathmanathan v. St. Cloud University*, n165 that because the government had a contract with the private investigator, all of the documents in his possession were public even though they were not

in the university's actual possession. n166 As long as the documents and data were created or maintained [*852] for public purposes, they were public regardless of the nature of the entity in possession. n167 In short, the court adopted the flexible approach of allowing public access to records when the records have some government purpose, finding little relevance in the identity of the actual possessor or its characteristics.

Clearly, it is a universal axiom that a public agency cannot evade its duties of disclosure to the public by delegating functions to a private entity in the manner that Thurston County asserts is proper.

III PATTERSON IS AN AGENT AND OFFICER OF THURSTON COUNTY AND HIS RECORDS ARE SUBJECT TO CONTROL AND "POSSESSION" OF THE COUNTY

Counsel's representations that Patterson is not an officer or agent of Thurston County are incredible, especially in light of the repeated deputization of Patterson and his firm as a special deputy prosecutor, a fact noted by this Court in its 2008 opinion.

Obviously, despite his creative representations, Patterson is at least a de facto officer and agent of the County. This is supported by the Washington RPC, which provides that... A lawyer employed or

retained by an organization represents the organization acting through its duly authorized constituents.

As a principle to their agent and de facto special deputy prosecutor Patterson, Thurston County was in control and “possession” of his records concerning his actions on their behalf. (see attached opinion of the Attorney General of North Dakota)

This Court should rule in accord with virtually every other State in the Union that a public agency can not, by means of a litigious shell game with an ostensibly “private” entity, be allowed to eviscerate the public policy of the Sunshine Laws.

IV THE COURT FAILED TO AWARD COSTS AND FEES TO PLAINTIFF, AS REQUIRED BY LAW, IN A PROCESS ORCHESTRATED BEHIND THE SCENES BY COUNTY COUNSEL, AND FAILED TO DETER EVASION OF THE PRA

Respondents also fail to address the issue of whether the Court properly awarded fees and costs **to the appellant** as required by the express terms of law.

RCW 42.56.550 expressly requires an award of costs and fees **to the plaintiff**. This is especially necessary when counsel makes a

separate deal with the defendants unknown to his client and withdraws prior to the entry of judgment so there is no current counsel to involve.

In this case, it is undisputed that the court failed to make any award of costs or fees to West, but instead awarded not only the fees but also the costs suffered by West to counsel. This greatly complicated the case and required an additional half a dozen appearances by West, even after the penalty and costs had been assessed

Such an obstructive result is blatantly in contrast to the explicit requirements of statute, which requires that...Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

Far from being uninvolved in any fee dispute, as they falsely maintain, Thurston County counsel not only suborned West's

counsel, they contacted two other attorneys to attempt to have them also file liens against the judgment. Only when their overtures to Myers and Hart-Bibberfeld were unsuccessful did they then conspire with Beck to obstruct West from timely collection of his penalties and costs, and to keep their bargain with Beck that they would protect his interest in their private settlement if he would abandon and act contrary to his client's interests..

Such scorched earth tactics demonstrate that far from being deterred by an adequate penalty, the County continues to act in bad faith to delay and deny the public's right to know as zealously as possible.

Outrageously, counsel was able to profit in an amount of nearly \$200,000 by employing scorched earth tactics in obstructing the public's right to know, and making collection of the penalties as difficult and time consuming as possible, while having nothing to fear from any penalty with actual deterrent effect.

Under these circumstances, the Court's penalty award of less than one tenth the amount that counsel profited from nondisclosure

encouraged rather than deterred further delays and obstruction, as evidenced by the fact that numerous hearings were required even after judgment to resolve the confusion counsel had deliberately created with their obstructive conduct, and by the fact that the Court refused to even award West the costs he had personally incurred, instead granting them to an attorney who had unilaterally withdrawn, pursuant to a side deal with county counsel, a deal that was no doubt precipitated by the delaying and obstructive policy of Thurston County.

In the process, the manifest intent of the legislature that a plaintiff be made whole for his efforts in securing disclosure, and that agencies be deterred from further withholding was disregarded.

VI CONCLUSION

Respondents arguments are not credible and do not have the support of any established precedent. If they are accepted, agencies will be able to evade the requirements of disclosure by self serving delegation of their functions.

Patterson and his firm are at the very least agents of the county, and their records generated in defending the County are public records “possessed” by the County.

“Private” counsel acting as an agent of the county was allowed to profit in the amount of nearly \$200,000 of taxpayers money, simply in an unsuccessful attempt to hide their previous outrageous profiteering from the public, and was encouraged to obstruct and delay the case at every turn, in the absence of any type of reasonable deterrent.

For the foregoing reasons, the rulings of the Trial Court should be vacated and overturned.

CERTIFICATE OF SERVICE

I certify that this document was served on counsel by E-mail and mail on May 27, 2011. Done May 27, 2011. I certify the foregoing to be correct and true.

~~Arthur West~~
ARTHUR WEST
DEPUTY
STATE OF MISSISSIPPI
11 MAY 27 AM 9:15
COURT OF APPEALS
JACKSON, MISSISSIPPI

**OPEN RECORDS AND MEETINGS OPINION
2007-O-07**

DATE ISSUED: April 24, 2007

ISSUED TO: Coolin Township

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Lowell Bottrell asking whether Coolin Township ("Township") violated N.D.C.C. § 44-04-18 by denying Mr. Bottrell's request for certain records.

FACTS PRESENTED

J. R. and Linda Gibbens have a conditional use permit from Coolin Township for a concentrated animal feeding operation ("CAFO") on property in Coolin Township. The Coolin Township Board of Supervisors is considering proposed revisions to its zoning ordinance that affect concentrated animal feeding operations. Lowell Bottrell, an attorney who represents J. R. and Linda Gibbens, requested certain records from Douglas Goulding, the attorney who drafted the revised zoning ordinance for the Township. In addition to records that are not at issue here, Mr. Bottrell requested from Mr. Goulding:

[A]ny and all communications, whether evidenced by a written document or by electronic means, that you have had with third parties other than your client, the township, concerning the current ordinance in the township or the proposed ordinance. Specifically, I am looking for any communications that you have had with third parties such as the Botz family, Citizens Against Factory Farming, Grace Factory Farm Project and the Dakota Resource Council. However, this request is not limited to just these entities, but any other entities that you have had communications with concerning these ordinances. If you have drafts of the ordinances that you have received from them, whether in hard form or electronic form, I would like to have copies of those drafts.

. . . [A]ny scientific information that you have gathered concerning the ordinances and how you came up with the various setbacks and other criteria for determination of CAFOs. . . .¹

Mr. Goulding responded to this request for records on October 3, 2006, and stated in relevant part:

¹ Letter from Lowell Bottrell to Douglas Goulding (Sept. 21, 2006) (emphasis added).

OPEN RECORDS AND MEETINGS OPINION 2007-O-07

April 24, 2007

Page 2

I have not had communications with the Botz family, Citizens Against Factory Farming, Grace Factory Farm Project, the Dakota Resource Council, or other third parties regarding the current Coolin Township Zoning Regulations or proposed amendments to the Coolin Township Zoning Regulations. I have not received draft amendments from third parties, and have not circulated draft amendments to third parties.

You also asked for any scientific information that I have gathered concerning the ordinances and how I came up with various setbacks and other criteria for determination of CAFOs. . . . [I]f I understand your request correctly, you are in essence asking for all materials I have read in the course of representing clients on CAFO-related matters. This is overreaching. I will not produce the information in my law office files that I have gathered in the course of undertaking my work for Coolin Township in drafting proposed amendments to the Coolin Township Zoning Regulations. This information is protected against public disclosure pursuant to the attorney-client privilege, the attorney work product doctrine, and the common law deliberative process privilege.

ISSUES

1. Whether the private attorney hired by the Township to draft the Township's revised zoning ordinance was an agent of the Township.
2. Whether not providing copies of communications with third parties violated the open records law.
3. Whether the scientific information gathered by the Township's attorney was properly withheld as "attorney work product" or as "privileged" information.
4. Whether not providing the requester information on how the Township's attorney came up with the various setbacks and other criteria violated the open records law.

ANALYSES

Issue One

The state's open records law applies to "records" of "public entities."² A township is a political subdivision, which is a public entity.³ "Record" means "recorded information of

² N.D.C.C. § 44-04-18.

³ N.D.C.C. §§ 44-04-17.1(10) (definition of a political subdivision) and 44-04-17.1(12) (definition of a public entity).

OPEN RECORDS AND MEETINGS OPINION 2007-O-07

April 24, 2007

Page 3

any kind . . . 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.”⁴ Therefore, if Mr. Goulding was an agent of the Township when he performed his duties as attorney for the Township, the open records law applies to the records relating to those duties.

Under the general law of agency, an attorney is an agent of the client.⁵ Courts in other jurisdictions have held that an attorney in private practice is an agent of a public entity with respect to legal services provided to the public entity.⁶ In addition, this office has previously opined that “client files held by an attorney belong to the client rather than the attorney” and there is “no reason why this general principle should not apply when the client is a municipality instead of a private entity or person.”⁷ The opinion specifically held that “the legal files of a municipality belong to the municipality as the client rather than the city attorney.”⁸

There is no basis under the open records law to treat records of a private attorney doing work for a public entity differently than records of an attorney employed by the public entity. The law does not make such a distinction, and doing so would invite public entities to circumvent the open records law by retaining private counsel.⁹

It is my opinion Mr. Goulding was acting as an agent of the Township with respect to work he performed while drafting the Township’s revised zoning ordinance. Accordingly, the open records law applies to the records relating to those duties.

Issue Two

All records of a public entity are open to the public unless otherwise specifically provided by law.¹⁰ Upon a request for a copy of specific public records, an entity must

⁴ N.D.C.C. § 44-04-17.1(15) (definition of record) (emphasis added).

⁵ Restatement (Third) of the Law Governing Lawyers, Introductory Note to ch. 2 (2000).

⁶ State ex rel. Findlay Publishing Co. v. Hancock Cty. Bd. of Commrs., 684 N.E. 2d 1222, 1225 (Ohio 1997); Creative Restaurants, Inc. v. City of Memphis, 795 S.W.2d 672, 679 (Tenn. Ct. App. 1990); Womack Newspapers, Inc. v. Town of Kitty Hawk, 639 S.E.2d 96 (N.C. Ct. App. 2007).

⁷ N.D.A.G. 95-L-174; see also City of North Miami v. Miami Herald Publishing Co., 468 So.2d 218, 219 (Fl. 1985) (under Florida law, “communications [between a lawyer and his public-entity client] (public records) belong to the client (government entity), not the lawyer”).

⁸ N.D.A.G. 95-L-174.

⁹ Womack Newspapers, Inc. v. Town of Kitty Hawk, 639 S.E.2d 96, 105 (N.C. Ct. App. 2007); State ex rel. Findlay Publishing Co. v. Hancock Cty. Bd. of Commrs., 684 N.E. 2d at 1225; City of Fayetteville v. Edmark, 801 S.W.2d 275, 279 (Ark. 1990).

¹⁰ N.D.C.C. § 44-04-18(1).

OPEN RECORDS AND MEETINGS OPINION 2007-O-07

April 24, 2007

Page 4

furnish the requester one copy of the records requested¹¹ or explain why the records are not being provided.¹²

Mr. Bottrell asked Mr. Goulding for copies of written communications with third parties. Mr. Goulding stated that he has not had communications with third parties and, thus, no records exist. In an open records opinion, this office is required to base the opinion on the facts given by the public entity.¹³ Accordingly, it is my opinion that the Township did not violate N.D.C.C. § 44-04-18 by not disclosing records of communications with third parties, because no such records exist.

Issue Three

Mr. Bottrell asked Mr. Goulding for "any scientific information that you have gathered concerning the ordinances" Mr. Goulding did not supply such records, stating, "[t]his information is protected against public disclosure pursuant to the attorney-client privilege, the attorney work product doctrine, and the common law deliberative process privilege."¹⁴

The attorney-client privilege does not apply to a request for records under the open records law.¹⁵ However, requests for records from a party to a criminal or civil action or adversarial administrative proceeding must comply with applicable discovery rules.¹⁶ Since the requester and the Township are not parties to a criminal or civil action or an adversarial administrative proceeding, N.D.C.C. § 44-04-18(6) is not relevant in this case.

"Attorney work product" is exempt from disclosure under the open records law.¹⁷ Attorney work product means:

[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;

¹¹ N.D.C.C. § 44-04-18(2).

¹² N.D.C.C. § 44-04-18(7).

¹³ N.D.C.C. § 44-04-21.1(1).

¹⁴ Letter from Douglas Goulding to Lowell Bottrell (Oct. 3, 2006).

¹⁵ N.D.A.G. 95-L-1 (the lawyer-client privilege set forth in the North Dakota Rules of Evidence is "applicable only to proceedings in the courts of North Dakota and other related proceedings").

¹⁶ N.D.C.C. § 44-04-18(6), N.D.A.G. 2002-O-05.

¹⁷ N.D.C.C. § 44-04-19.1(1).

OPEN RECORDS AND MEETINGS OPINION 2007-O-07

April 24, 2007

Page 5

- 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.¹⁸

Thus, a record is exempt as “attorney work product” if it 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.”¹⁹

Any attorney work product of Mr. Goulding was not “prepared exclusively” for litigation “or in anticipation of reasonably predictable” litigation. Mr. Goulding drafted a revised zoning ordinance for the Township. Thus, the requested records may not be withheld by the Township’s attorney as “attorney work product.”

The common law deliberative process privilege²⁰ does not provide an exception to North Dakota’s open records law. Exceptions to the open records law will not be implied; exceptions must be specific.²¹

A record in the possession of an agent of a public entity that has been “received or prepared for use in connection with public business or [that] contains information relating to public business” is a public record.²² A township has the authority to enact zoning regulations related to concentrated feeding operations.²³ Therefore, the scientific information gathered by Mr. Goulding in the course of drafting the proposed revisions to the Township zoning ordinance are records under the open records law and copies must be provided to Mr. Bottrell.

¹⁸ N.D.C.C. § 44-04-19.1(4) (emphasis added).

¹⁹ N.D.C.C. § 44-04-19.1(4)(c).

²⁰ As explained by one court: “The deliberative process privilege is unique to the government. It is a widely recognized confidentiality privilege asserted by government officials. The privilege rests on the ground that public disclosure of certain communications would deter the open exchange of opinions and recommendations between government officials, and it is intended to protect the government’s decision-making process, its consultative functions, and the quality of its decisions.” City of Colorado Springs v. White, 967 P.2d 1042, 1046-47 (1998).

²¹ Adams County Record v. Greater North Dakota Ass’n, 529 N.W.2d 830, 833 (N.D. 1995); N.D.A.G. 98-O-23.

²² N.D.C.C. § 44-04-17.1(15).

²³ N.D.C.C. § 58-03-11(3) (“[a] board of township supervisors may regulate the nature and scope of concentrated feeding operations permissible in the township . . .”).

OPEN RECORDS AND MEETINGS OPINION 2007-O-07

April 24, 2007

Page 6

Based on the foregoing, it is my opinion that the Township's attorney violated N.D.C.C. § 44-04-18 by not providing copies of the scientific information gathered in the course of drafting the proposed revisions to the Township's zoning ordinance related to concentrated animal feeding operations.

Issue Four

Mr. Bottrell asked Mr. Goulding "how you came up with the various setbacks and other criteria for determination of CAFOs." A "record" does not include unrecorded thought processes or mental impressions.²⁴ This request of Mr. Bottrell is not a request for records. Accordingly, it is my opinion that the Township's attorney did not violate N.D.C.C. § 44-04-18 by not disclosing how he came up with the various setbacks and other criteria for reasonable operation of CAFOs.

CONCLUSIONS

1. It is my opinion that the private attorney the Township retained to draft the Township's revised zoning ordinance was an agent of the Township.
2. It is my opinion that not providing copies of communications with third parties was not a violation of the open records law because no such records exist.
3. It is my opinion that not providing copies of scientific information gathered by the Township's attorney was a violation of the open records law.
4. It is my opinion that not providing the requester with information on how the Township's attorney came up with the various setbacks and other criteria was not a violation of the open records law.

STEPS NEEDED TO REMEDY VIOLATION

Coolin Township's attorney must provide to the requester copies of the scientific information the attorney gathered concerning the drafting of proposed revisions to the Township's ordinance regulating concentrated animal feeding operations.

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

²⁴ N.D.C.C. § 44-04-17.1(15).

OPEN RECORDS AND MEETINGS OPINION 2007-O-07
April 24, 2007
Page 7

under N.D.C.C. § 44-04-21.2.²⁵ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁶

Wayne Stenehjem
Attorney General

Assisted by: Michael J. Mullen
Assistant Attorney General

²⁵ N.D.C.C. § 44-04-21.1(2).

²⁶ Id.