

**OPEN RECORDS AND MEETINGS OPINION  
2003-O-21**

DATE ISSUED: December 1, 2003

ISSUED TO: Department of Human Services

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Don Kaiser asking whether the Department of Human Services (DHS) violated N.D.C.C. § 44-04-18 by failing to provide a record within a reasonable time and by requiring the request in writing.

**FACTS PRESENTED**

On Thursday, July 24, 2003, Don Kaiser requested a copy of the cost cutting proposal for the Department of Human Services Research and Statistics Division.<sup>1</sup> He was told by Marcie Wuitschick, Senior Personnel Officer, and Dean Mattern, Human Resources Director at DHS that Carol Olson, the Executive Director of DHS, and Tove Mandigo, Special Assistant to the Executive Director, had to be consulted before they could provide the record. The next day, Mr. Kaiser asked if the record was ready and he was told that it was unavailable because Olson and Mandigo were at a senior management meeting. On Monday, July 28, he repeated his request and received the same answer. Later in the afternoon on July 28, Mr. Kaiser received a message from Marcie Wuitschick of the Human Resources Department stating that "they need something in writing." Mr. Kaiser went back to DHS and gave them a paper dated July 28, 2003, asking for the RIF plan submitted to Carol Olson by Mike Sjomeling. At the end of the day on July 31 Mr. Kaiser received the record from DHS; it consisted of one two-sided page.

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<sup>1</sup> Mr. Kaiser is a former employee of the Research and Statistics Division of DHS. He was employed with the Research and Statistics Division of DHS during the time he requested the record. He was released as part of the Reduction In Force (RIF) plan.

## ISSUES

1. Whether DHS violated N.D.C.C. § 44-04-18 by not providing a record within a reasonable time.
2. Whether DHS violated N.D.C.C. § 44-04-18 by requiring a request for records be made in writing.

## ANALYSES

### Issue One

A public entity must respond to an open records request within a reasonable time, either by providing the requested records or copies or by explaining the legal authority for not granting the request. N.D.C.C. § 44-04-18(7); N.D.A.G. 98-O-07; N.D.A.G. 2001-O-04. Although N.D.C.C. § 44-04-18 does not usually require an immediate response, the delay permitted will usually be measured in a few hours or days rather than several days or weeks. N.D.A.G. 2002-O-06. "Depending on the circumstances, a delay may be appropriate for a number of reasons, including excising closed or confidential information, consulting with an attorney when there is a reasonable doubt whether the records are open to the public, or balancing other responsibilities of the public entity that demand immediate attention." N.D.A.G. 2002-O-06.

Prior opinions from this office state, "Whether records have been provided within a reasonable time will depend on the facts of a given situation. . ." N.D.A.G. 2001-O-04; N.D.A.G. 98-O-03. In this case, DHS provided the record to Mr. Kaiser five working days after it received Mr. Kaiser's request. The department explained the amount of time necessary to produce the record was caused by three factors. First, they felt Mr. Kaiser's verbal request for "the RIF stuff" dated July 12 that was allegedly submitted to Carol Olson by a staff member in the Department's Research and Statistics Division" was vague and inaccurate. They reported to my office that they could not find a document dated July 12. This ultimately led staff to ask Mr. Kaiser to place his request in writing, which he did on July 28. Second, staff had to contact Carol Olson and Tove Mandigo because the requested records were in Ms. Olson's possession, and they believed Ms. Mandigo could assist in locating the records.

Finally, after receiving the written request, the reorganization proposal in question was located and department staff held a meeting with senior management to determine whether the record could be released. It was determined that the record had to be released. Mr. Kaiser was informed on July 30 that the record was ready to be picked up.

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When he did not do so, he was contacted again on July 31 and he subsequently picked up the record.

In any opinion issued under N.D.C.C. § 44-04-21.1, the Attorney General must base the opinion on the facts given by the public entity. N.D.C.C. § 44-04-21.1(1). In this instance, the requested document was one page of a number of documents stored in three large binders. The staff reported confusion regarding the document requested by Mr. Kaiser because none of the documents was dated July 12. While some controversy exists as to whether the date of the document is a significant factor, other events must be considered in determining whether DHS provided the document in a timely manner. These events included getting the documents from Ms. Olson, the volume of documents reviewed in order to find the requested record and the need to review the contents of the document with legal counsel. In light of these factors, I do not believe five days was unreasonable for the department to respond to Mr. Kaiser's request.

### Issue Two

North Dakota law clearly provides that a request for a public record need not be made in person or in writing. N.D.C.C. § 44-04-18(2). Situations do arise, however, where an agency may request written clarification. In a recent opinion to Game and Fish, I found no violation of the open records law when a staff person asked a requestor to put his request in writing to clarify the specific computer format that the requestor was requesting. N.D.A.G. 2003-O-09. In that specific situation, Game and Fish was not attempting to deter the requestor from asking for the record because the information was necessary in order to clarify whether they had the requested record in the requested format. I emphasized in the Game & Fish opinion, however, when a public entity asks for a written request, the entity should advise the requester that doing so is not a prerequisite to obtaining access to or a copy of a record. N.D.A.G. 2003-O-09. Furthermore, that opinion was not an invitation for public entities to require requests for records to be made in writing under the pretext of clarification.

In this case, Mr. Kaiser worked at DHS when he made the record request. Department staff could have clarified his request without asking for it in writing. Furthermore, DHS failed to clarify that a written request was not a prerequisite to getting the record. As such, it is my opinion that DHS violated N.D.C.C. § 44-04-18 when it asked Mr. Kaiser to put his record request in writing.

## CONCLUSIONS

1. DHS provided records to Mr. Kaiser within a reasonable time as required by N.D.C.C. § 44-04-18.

2. DHS violated N.D.C.C. § 44-04-18 by requiring a request for records be made in writing.

#### STEPS NEEDED TO REMEDY VIOLATIONS

Mr. Kaiser has already received the record he requested. Therefore, there is no further corrective measure to be taken by DHS.

Wayne Stenehjem  
Attorney General

Assisted by: Mary Kae Kelsch  
Assistant Attorney General

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