

**OPEN RECORDS AND MEETINGS OPINION
2013-O-18**

DATE ISSUED: November 22, 2013

ISSUED TO: North Dakota University System

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from the North Dakota Legislative Council asking whether the North Dakota University System, including North Dakota State University, provided proper responses to an open record request.

FACTS PRESENTED

On April 29, 2013, the North Dakota Legislative Council (Legislative Council), on behalf of a member of the Legislative Assembly, submitted a request to the North Dakota University System¹ (University System) for various records, including: “[c]opies of all emails sent to or received by each University System institution president since July 1, 2012. Please include emails sent or received from a president’s personal email account if the emails are related to University System activities.”²

The request was made to the University System’s general counsel who passed it on to the System Information Technology Services (SITS)³ department. SITS initially surveyed how many emails would meet the request criteria and, because the amount of responsive emails was so voluminous, the University System asked if Legislative Council wanted to narrow the request. On May 1, 2013, Legislative Council narrowed its request for emails to and from the University System presidents for the time period of

¹ The North Dakota University System is a unified system of higher education governed by the State Board of Higher Education. It includes two research universities, four regional universities, and five community colleges.

² See Email from Brady Larson, Legislative Council Fiscal Analyst, to Claire Holloway, University System General Counsel (Apr. 29, 2013, 9:27 AM) (on file with author).

³ The University System’s SITS department, located in both Grand Forks and Fargo, provides technology support for the eleven colleges and universities. Each campus also has in-house Information Technology (IT) departments.

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November 1, 2012, through May 1, 2013, and that include the following words: Chancellor, Shirvani, Seaworth, buyout, no confidence, Hull, and Reichert.⁴

On May 1, 2013, while conducting the survey of available emails, SITS took two “snapshots”⁵ of NDSU President, Dr. Bresciani’s, email account and noticed that approximately 43,604 emails were located in his “Recoverable Items” folder.⁶ The “Recoverable Items” folder contains emails and other items deleted from the “Deleted Items” and “Junk email” folders.⁷ Items in a Recoverable Items folder are available for two weeks. Shortly after discovering the emails in the “Recoverable Items” folder, the University System copied the actual emails in the “Recoverable Items” folder to an external flash drive.⁸ The University System did not, however, immediately inform NDSU about the emails found in President Bresciani’s “Recoverable Items” folder.

SITS was unable to determine how the items went from President Bresciani’s “Deleted Items” and “Junk email” folders to the “Recoverable Items” folder. The SITS employee who copied the emails informed his supervisors and Randall Thursby, the Chief Information Officer for the University System, that it was imperative to secure the back-up system from Microsoft within four weeks in order to determine when and how

⁴ See Email from Brady Larson, Legislative Council Fiscal Analyst, to Claire Holloway, University System General Counsel (May 1, 2013, 8:01 A.M.) (on file with author). This request was further clarified on May 7, 2013, to narrow the search term “Hull” to “Sydney Hull.”

⁵ These “snapshots” recorded the number of emails available but did not copy the actual emails.

⁶ See Letter from Christopher Wilson, NDSU General Counsel, to Atty. Gen.’s office (July 11, 2013) (on file with author). See also Emails between Claire Holloway, University System General Counsel and Randall Thursby, Vice Chancellor for Information Technology and Institutional Research (June 17, 2013, 10:02 A.M. and 11:00 A.M.) (on file with author).

⁷ The “Recoverable Items” folder is created within the email system to capture items that are “purged” from a user’s “Deleted Items” and “Junk emails” folders. In other words, when a user deletes an email from his/her inbox or sent items box, the email goes to the deleted items folder. When the user “empties trash” or “purges” the items from the deleted items folder are transferred to the “Recoverable Items” folder. This “Recoverable Items” folder is not visible to the user, but items within the folder are recoverable for two weeks after the items are purged.

⁸ See Email from Kirsten Franzen, University System Compliance Officer, to John Bjornson (Legislative Council attorney) (July 5, 2013, 4:25 P.M.) (on file with author).

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the items were put into President Bresciani's "Recoverable Items" folder.⁹ However, despite the SITS employee's insistence, the University System failed to secure the backup from Microsoft within the four week time period and it is no longer available.

Unaware of the existence of the 43,604 emails in the possession of the University System, on May 1, 2013, a member of NDSU's staff searched President Bresciani's email account for the emails responsive to the request through a web based search option available through Microsoft.¹⁰ Because President Bresciani's computer records might contain protected student education records,¹¹ the University System and NDSU agreed that NDSU would review President Bresciani's email account for responsive emails. The responsive emails were forwarded to NDSU assistant general counsel for review and redaction of materials that were legally exempt or confidential from public records law.¹² On May 23, 2013, 897 pages of emails were provided electronically to Legislative Council.¹³

Legislative Council questioned why so few emails were provided in response to its request. On June 11 and June 14, 2013, Legislative Council asked the University System how many emails responsive to the original records request were available on April 29, 2013. Legislative Council also asked for information about the "number of emails deleted in the prior two weeks before the request."¹⁴

On June 26, 2013, the University System provided NDSU with the external flash drive containing the copies of the emails in President Bresciani's "Recoverable Items" folder for review. The NDSU assistant general counsel searched the 43,604 items using Legislative Council's search criteria that resulted in approximately 1,950 records. After

⁹ At the time of the request from Legislative Council, Randall Thursby was the Chief Information Officer (CIO) for the University System. He retired at the end of May 2013 and Lisa Feldner, Ph.D., is the current CIO.

¹⁰ See Letter from Christopher Wilson, NDSU General Counsel, to Sandra Voller, Asst. Atty. Gen. (July 11, 2013) (on file with author).

¹¹ There are state and federal laws that protect student educational records.

¹² See Letter from Christopher Wilson, NDSU General Counsel, to Sandra Voller, Asst. Atty. Gen. (July 1, 2013) (on file with author).

¹³ See Email from Christopher Wilson, NDSU General Counsel, to Brady Larson, Legislative Council Fiscal Analyst (May 23, 2013, 12:27 P.M.) (on file with author). Legislative Council was informed that the records "were redacted in accordance with the federal Family Educational Rights and Privacy Act (FERPA) as well as NDCC §§ 44-04-18.15 and 44-04-18.21."

¹⁴ See Email from Brady Larson, Legislative Council Fiscal Analyst, to Claire Holloway, University System General Counsel (June 14, 2013, 3:17 P.M.) (on file with author).

the records were reviewed and redacted, the 1,950 records were provided to Legislative Council on July 3, 2013.¹⁵

In order to be as thorough as possible, NDSU's IT Services ran another search of President Bresciani's email account for all folders, excluding the "Recoverable Items" folder, using a different methodology than what was used by previous NDSU staff on May 1, 2013.¹⁶ The new search yielded 1,150 pages of responsive emails, a large part of which was duplicative of the 897 previous responses provided on May 23, 2013, to Legislative Council.¹⁷

The 1,150 pages were provided to Legislative Council on July 10, 2013.¹⁸

ISSUES

1. Whether the University System responded to Legislative Council's April 29, 2013, open records request in compliance with N.D.C.C. § 44-04-18.
2. Whether the emails provided in response to Legislative Council's April 29, 2013, open records request were properly redacted.

¹⁵ See Email from Christopher Wilson, NDSU General Counsel, to Brady Larson, Legislative Council Fiscal Analyst (July 3, 2013, 2:35 P.M.) (on file with author) "Certain items have been redacted in accordance with the federal Family Educational Rights and Privacy Act (20 U.S.C. § 1232g and 34 CFR Part 99) as well as NDCC 44-04-18.21 and 44-04-18.15. In addition, one item was redacted pursuant to attorney-client privilege relating to an on-going litigation involving Minard Hall."

¹⁶ Former NDSU personnel used web based tool and the second search performed by NDSU IT personnel utilized a desk top tool.

¹⁷ See Letter from Christopher Wilson, NDSU General Counsel, to Atty. Gen.'s office (July 11, 2013) (on file with author). NDSU attributes the approximately 250 page difference to: (1) Duplication of printing of email chains (each email in the chain was printed as opposed to just printing the last email which included all prior emails); (2) the use of a different search tool which led to inconsistent formatting and pagination of emails; (3) the inclusion of all emails containing the word "Hull", not just those pertaining to Sydney Hull, which means that emails pertaining to NDSU's outside counsel, Daniel Hull, were included; and (4) the inclusion of personal emails directly between President Bresciani and Kristi Hanson were included, and they were not included on May 23 because NDSU previously determined them to be personal emails and not related to public business.

¹⁸ See Email from Christopher Wilson, NDSU General Counsel, to Brady Larson, Legislative Council Fiscal Analyst and John Bjornson, Legislative Council Attorney (July 10, 2013, 10:27 A.M.) (on file with author).

ANALYSES

Issue One

All records of a public entity are open and accessible to the public unless otherwise specifically provided by law.¹⁹ The University System and NDSU are public entities subject to open records law.²⁰ The University System presidents, as employees of a public entity, are also subject to open records law.²¹ “Records” include emails “in the possession or custody of a public entity or its agent and which [have] been received or prepared for use in connection with public business or contains information relating to public business.”²²

Upon request for a copy of a specific public record, any entity subject to N.D.C.C. § 44-04-18 must furnish the requester one copy of the records requested.²³ A public entity cannot avoid this constitutional and statutory requirement by destroying the requested records and, once a request is made for open records, N.D.C.C. § 44-04-18 prohibits the public entity from discarding those records.²⁴ Once a request for a record is made, N.D.C.C. § 44-04-18 presumes that a reasonable search must take place by the public entity.²⁵ In past opinions, this office has found public entities in violation of the open records law for failing to thoroughly search for requested records.²⁶

Legislative Council asserts that the May 23, 2013, response from the University System and NDSU was incomplete, in violation of N.D.C.C. § 44-04-18, because the initial response did not include emails deleted from President Bresciani’s account.

Whether the emails were deleted from President Bresciani’s account after Legislative Council made a request for records is a question of fact. This office cannot answer questions of fact in an open records opinion.²⁷ For opinions pursuant to N.D.C.C. § 44-04-21.1, the public entity must provide the facts to this office. Here, the University

¹⁹ N.D.C.C. § 44-04-18; N.D. Const. art. XI, § 6.

²⁰ N.D.A.G. 2013-O-10; N.D.A.G. 2013-O-08.

²¹ See N.D.A.G. 2008-O-07. (“A public entity’s employees and governing body are part of the public entity. If a public record is in the possession of a board member or employee, it is subject to open records law”).

²² N.D.C.C. § 44-04-17.1(16).

²³ N.D.C.C. § 44-04-18(2).

²⁴ N.D.A.G. 98-O-07.

²⁵ N.D.A.G. 2004-O-07.

²⁶ See N.D.A.G. 2008-O-07 and N.D.A.G. 2004-O-07.

²⁷ See N.D.A.G. 2002-L-17 (this office does not issue opinions on questions of fact).

System, which includes NDSU, cannot provide the facts that would explain the deletion because the University System chose not to examine the disaster recovery back-up tape from Microsoft. Without the back-up tape, this office has been provided only with contradictory opinions and theories regarding how 43,604 of President Bresciani's emails appeared in his "Recoverable Items" folder.

NDSU maintains that President Bresciani did not intentionally delete the emails and that the large volume of emails located in the "Recoverable Items" folder were there due to an automatic purge function²⁸ that was supposed to take place the beginning of April 2013.²⁹ The University System, however, believes the number of emails that were in the "Recoverable Items" folder and the dates of the emails indicate an intentional deletion and not an auto-purge.³⁰ The only way to resolve this difference in opinion would be to know the exact date President Bresciani's computer files were purged.

However, the auto-purge function did not begin as early in April as SITS anticipated and without the disaster recovery back-up tape, SITS is unable to provide the exact date on which the auto-purge took place so there is no way now to determine when the two-week time period began or ended.

If the University System suspected the emails in President Bresciani's "Recoverable Items" folder were moved there due to misconduct on his part, it was the obligation of

²⁸ The auto-purge deletes any emails from the "Deleted Items" and "Junk Mail" folders that were more than 30 days old.

²⁹ NDSU points to the dates of the emails in the "Recoverable Items" folder as proof that the items were deleted by the auto-purge since all emails were more than 30 days old. Only twelve items have dates on or after this 30 day deadline that would indicate the items were deleted after the auto-purge. However, these items are all fragments of other messages found in other emails in President Bresciani's account. After several inquiries to SITS, NDSU, and my own IT staff, the most plausible explanation is that President Bresciani's cell phone is responsible for the fragmented messages due to his Android mail application that automatically discards unsent draft messages. See Email from Marc Wallman, NDSU CIO, to Christopher Wilson, NDSU General Counsel (Oct. 11, 2013, 10:38 A.M.) (on file with author). IT staff indicated such messages may go directly into the "Recoverable Items" folder without the user's knowledge.

³⁰ After the auto-purge takes place, the purged items are available for two weeks in the "Recoverable Items" folder. If the auto-purge took place in early April, the University System argues that the purged emails would not still be available in the "Recoverable Items" folder because two weeks had elapsed between the alleged purge date and the request from Legislative Council. Because the items were still available in the folder, it would indicate that the items in the "Recoverable Items" folder were placed there closer to the date of the records request.

the University System to obtain the recovery back-up tape from Microsoft. However, the University System failed in its obligation and can now only provide this office with speculation.

Regardless of how the emails came to be in President Bresciani's "Recoverable Items" folder, the emails were saved from deletion when the University System made a copy of the folder. Once the records were restored to an accessible format, the records should have been searched for items responsive to the request by Legislative Council. Instead, the University System did nothing with the 43,604 emails and only provided the copies of the emails for review and redaction to NDSU on June 24, 2013, after Legislative Council made an additional request to the University System.³¹

Prior to June 24, 2013, NDSU was unaware of these emails because the "Recoverable Items" folder was not visible to NDSU staff when they searched President Bresciani's computer and the University System did not inform NDSU of the copy in its possession. The items in the "Recoverable Items" folder are not readily available through most search options, like the one used by NDSU staff.³² When the University System finally provided the copy of the "Recoverable Items" folder to NDSU, it was searched and all responsive emails were turned over.

The request by Legislative Council was made to the University System so it had the responsibility to make sure all available records were searched.³³ Even though the

³¹ The University System knew about the recovered emails because they were discussed in a senior staff meeting between May 1 and May 6, 2013. Senior staff was told the emails had been recovered and were being maintained by SITS for safekeeping. See Email from Kirsten Franzen, NDUS Compliance Officer, to John Bjornson, Legislative Council attorney (July 5, 2013, 4:25 P.M.) (on file with author).

³² See Letter from Christopher Wilson, NDSU General Counsel, to Atty. Gen.'s office (July 11, 2013) (on file with author). It is not a violation of the open records law to use the search method available on the public entity's computer system. According to the University System's SITS computer specialists and members of my own IT staff, the search of President Bresciani's computer files initially conducted by NDSU was reasonable and comparable to a search that would be conducted by any employee of a public entity using available technology. The IT specialists consulted for this opinion agree that an employee would not know how to access the "Recoverable Items" folder without the extensive use of IT resources for which a charge may be assessed pursuant to N.D.C.C. § 44-04-18(3).

³³ Because the records may contain student education information protected by federal and state law, it was agreed by the University System and NDSU that NDSU would conduct the review of the records. The University System and NDSU could have also

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University System secured a copy of the 43,604 emails, it chose to do nothing with them until prompted to by Legislative Council's subsequent request. It is my opinion that the University System violated the open records law when it failed to review emails it knew it had in its possession in response to an open records request. In addition, because the University System failed to review the 43,604 records, it is further my opinion it failed to adequately respond to the request by Legislative Council's and failed to provide the emails within a reasonable time.

Issue Two

Legislative Council also questions whether the emails provided in response to the records request were properly redacted.

Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection.³⁴ The word "law" as defined in N.D.C.C. § 44-04-17.1(8), includes "federal statutes, applicable federal regulations, and state statutes."³⁵ A denial of an open records request must indicate the public entity's specific authority for denying access to the requested record and must be made in writing, if requested.³⁶

NDSU redacted the emails pursuant to (1) the federal Family Educational Rights and Privacy Act (20 U.S.C. § 1232g and 34 CFR Part 99); (2) N.D.C.C. § 44-04-18.21, which allows an entity to redact electronic mail addresses and telephone numbers; (3) N.D.C.C. § 44-04-18.15, which allows the University System to redact donor information; and (4) attorney-client privilege which related to one email.³⁷

A member of my staff reviewed the emails provided to Legislative Council on July 3 and July 10, 2013, and finds them to be properly redacted in accordance with the above legal authority. It is my opinion that emails provided to Legislative Council were redacted in accordance with the law.

worked together to make sure the copy of the "Recoverable Items" folder were properly reviewed.

³⁴ N.D.C.C. § 44-04-18.

³⁵ N.D.C.C. § 44-04-17.1(8).

³⁶ N.D.C.C. § 44-04-18(7).

³⁷ See Emails from Christopher Wilson, NDSU General Counsel, to Brady Larson, Legislative Council Fiscal Analyst and John Bjornson, Legislative Council Attorney (July 3, 2013, 2:35 P.M. and July 10, 2013, 10:27 A.M.) (on file with author).

CONCLUSIONS

1. The University System violated the open records law when it failed to timely review 43,604 in response to a request for records. Its response to the request for records by Legislative Council was incomplete and unreasonably delayed in violation of N.D.C.C. § 44-04-18(8).
2. The emails provided in response to Legislative Council's April 29, 2013, open records request were properly redacted.

STEPS NEEDED TO REMEDY VIOLATION

The University System has remedied the violation by providing Legislative Council with the emails that were responsive to the request for records.

Wayne Stenehjem
Attorney General

slv/vkk