

**OPEN RECORDS AND MEETINGS OPINION**  
**2022-O-01**

DATE ISSUED: January 19, 2022

ISSUED TO: Stark County Board of Commissioners

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Leslie Ross asking whether the Stark County Board of Commissioners (Stark County) violated N.D.C.C. § 44-04-18 by not providing records within a reasonable time and improperly denying a records request.

**FACTS PRESENTED**

On October 27, 2020, Leslie Ross made a records request to Stark County for records related to finalist applications for a human resources position.<sup>1</sup> After receiving no response, Ms. Ross sent a reminder on November 9, 2020.<sup>2</sup> On November 12, 2020, Mr. James Hope, Assistant Stark County State's Attorney, responded denying Ms. Ross's request because he did not believe that three or more finalists for the position were designated, making the records confidential.<sup>3</sup>

However, after further review by Mr. Hope, he later determined that finalists were designated. This led Mr. Hope to provide the records to Ms. Ross on December 30, 2020.

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<sup>1</sup> E-mail from Leslie Ross to Att'y Gen. Office (Dec. 10, 2020, 9:26 AM); E-mail from Leslie Ross to Natalie Wandler, Stark Cnty. Auditor's Office, and Stark Cnty. Comm'rs (Oct. 27, 2020, 4:22 PM).

<sup>2</sup> E-mail from Leslie Ross to Natalie Wandler, Stark Cnty Auditor's Office, and Stark Cnty. Comm'rs (Nov. 9, 2020, 3:50 PM).

<sup>3</sup> E-mail from James Hope, Asst. State's Att'y, Stark Cnty., to Leslie Ross (Nov. 12, 2020, 5:01 PM).

Ms. Ross alleges Stark County violated open records laws by not responding to an open record request in a timely fashion, denying her entire record request without stating the statutory exemptions, and misapplying N.D.C.C. § 44-04-18.27.<sup>4</sup>

## ISSUES

1. Whether Stark County provided records within a reasonable time.
2. Whether Stark County properly denied a request for records.
3. Whether Stark County properly denied records under N.D.C.C. § 44-04-18.27.

## ANALYSIS

### ISSUE 1

When a public entity receives a request for records, it must, within a reasonable time, either provide the records or explain why the records are not being provided.<sup>5</sup> A delay may be appropriate for a number of reasons, including the number of records requested, reviewing a large volume of documents to respond to a request, excising closed or confidential information, availability and workload of staff who can respond to the request, or balancing other responsibilities of the public entity that demand immediate attention.<sup>6</sup> When determining the reasonableness of a response, this office considers the circumstances of the particular request.<sup>7</sup>

Here, the County replied that it had experienced staff turnover, illnesses, and an election that contributed to the delay in responding to Ms. Ross's request.<sup>8</sup> Part of the delay was due to a misapplication of N.D.C.C. § 44-04-18.27, which provides protection for records of applicants during the application process. The County admits it did not apply the statute correctly.<sup>9</sup> While Ms. Ross's request was voluminous, and the responsive records had to be reviewed for exempt and

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<sup>4</sup> E-mail from Leslie Ross to Att'y Gen. Office (Dec. 10, 2020, 9:26 AM); E-mail from Leslie Ross to Natalie Wandler, Stark Cnty. Auditor's Office, and Stark Cnty. Comm'rs (Oct. 27, 2020, 4:22 PM).

<sup>5</sup> N.D.C.C. § 44-04-18(7). N.D.A.G. 2014-O-06; N.D.A.G. 2013-O-15.

<sup>6</sup> N.D.A.G. 2014-O-06; N.D.A.G. 2013-O-15; N.D.A.G. 2012-O-07; N.D.A.G. 2010-O-04.

<sup>7</sup> N.D.A.G. 2014-O-06; N.D.A.G. 2013-O-15; N.D.A.G. 2012-O-07; N.D.A.G. 2010-O-04.

<sup>8</sup> Letter from James Hope, Asst. State's Att'y, Stark County, to Att'y. Gen. Office (Jan. 19, 2021).

<sup>9</sup>*Id.*

confidential information, the records were not difficult to locate or particularly complicated.

Ultimately, it took eleven business days to acknowledge Ms. Ross's request. Past opinions have interpreted N.D.C.C. § 44-04-18(8) to require entities to "either provide the records or *explain* why the records are not being provided."<sup>10</sup> It took over two months, until December 30, 2020, to start providing the records to Ms. Ross. The County finally did realize that a mistake was made and made attempts to rectify the situation, but, based on past opinions, it is my opinion that a delay of more than two months was unreasonable.<sup>11</sup>

## ISSUE 2

When a public entity denies a request for records, it must describe the legal authority for the denial.<sup>12</sup> While a denial need not cite the specific statute that provides the basis for the exemption, the legal reason for the denial must be described.<sup>13</sup> A denial of an open record request must indicate the entity's specific authority for denying the requested record.<sup>14</sup>

Ms. Ross requested the following:

[A]ll the application packages for the top three picked to go forward according to the Commissioner meeting, resumes, any scoring matrices, committee notes ect. (sic) Also all emails referencing the HR position hire from all commissioners, and employees Stark County email addresses and personal ones, any text messages referencing the HR position to include the State's Attorney's Office and all emails to and from the hiring committee as well as Former Auditor Kay Haag's email address.

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<sup>10</sup> N.D.A.G. 2021-O-09 (emphasis added); N.D.A.G. 2014-O-06; N.D.A.G. 2013-O-15. *See also* N.D.C.C. § 44-04-18(8); N.D.A.G. 2007-O-11 (explanation of delay not provided to requester).

<sup>11</sup> N.D.A.G. 2021-O; N.D.A.G. 2014-O-06 (a two-month delay is unreasonable); N.D.A.G. 2013-O-17 (a three-month delay is unreasonable); N.D.A.G. 98-O-03 (a delay of seven working days will be closely reviewed by this office).

<sup>12</sup> N.D.C.C. § 44-04-18(7).

<sup>13</sup> N.D.A.G. 2004-O-11; N.D.A.G. 97-O-01.

<sup>14</sup> N.D.A.G. 2015-O-17.

In his denial, Mr. Hope stated:

It is my opinion that at this point in time the records relative to the HR selection process remain confidential and are not open to public inspection. This is because the statute requires the governing body to designate three or more finalists. Once that occurs, the records relative to the finalists become open records. At this point, however, no designation of finalists has taken place, and as such, the records remain confidential. If, or when, said finalists are designated, we will comply with your request.

Even though Mr. Hope did not specifically cite the North Dakota Century Code, N.D.C.C. § 44-04-18.27 in his response, he described the statute thoroughly.<sup>15</sup> Therefore, it is my opinion that Stark County adequately described the legal reason for the denial based on the facts known at the time.

### ISSUE 3

Ms. Ross further alleges Stark County misapplied N.D.C.C. 44-04-18.27 in its denial. If a public entity or any person delegated authority by a public entity to review applications or make hiring decisions receives applications from three or more applicants who meet the minimum qualifications for a vacant position, the public entity or other person shall designate three or more of the qualified applicants as finalists for further consideration before the public entity or other person may issue an offer of employment to fill the position.<sup>16</sup> However, if the public entity or other person does not wish to consider any of the applications further and decides not to make an offer of employment for the vacant position, the public entity need not designate any finalist.<sup>17</sup> The applications and any records related to the applications which contain information that could reasonably be used to identify an applicant are exempt.<sup>18</sup> Once the finalists are designated, the applications and related records of the finalists are open to the public.<sup>19</sup> If, by the close of the application period for a vacant position, a public entity receives applications from

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<sup>15</sup> N.D.C.C. § 44-04-18.27 was amended during the 67<sup>th</sup> Legislative session to make the applicant records exempt rather than confidential. S.L. 2021, ch. 328 (H.B. 1349), §2, eff. Aug. 1, 2021.

<sup>16</sup> N.D.C.C. § 44-04-18.27.

<sup>17</sup> *Id.*

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

<sup>19</sup> *Id.*

fewer than three applicants who meet the minimum qualifications, the applications and records related to the applications are open to the public.<sup>20</sup>

According to Stark County, at the time of, Ms. Ross's request, it was in upheaval due to staff turnover. This led to an application and interview process that was poorly managed. Mr. Hope made a good faith effort to determine whether finalists were designated and made his initial denial based on the open records laws and what his understanding of the facts were at the time of the request. After further investigation, and communication with this office, Mr. Hope realized that he had not received correct information about the status of the finalists, so he properly provided the records requested by Ms. Ross. Thus, Mr. Hope already corrected the initial misapplication of N.D.C.C. § 44-04-18.27 and no further action is necessary.

#### CONCLUSION

1. Stark County did not provide the requested records within a reasonable time and failed to communicate with the requester with an explanation for the delay.
2. Stark County properly described the legal reason for its denial.
3. Stark County initially misapplied N.D.C.C. § 44-04-18.27 but voluntarily corrected it as soon as the correct facts were discovered.

#### STEPS NEEDED TO REMEDY VIOLATION

Stark County provided all requested records. Therefore, there are no further corrective measures to be taken.

Wayne Stenehjem  
Attorney General

aml  
cc: Leslie Ross (via email only)

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<sup>20</sup>*Id.*