

**OPEN RECORDS AND MEETINGS OPINION
2004-O-11**

DATE ISSUED: May 17, 2004

ISSUED TO: Halliday Public School District No. 19

CITIZEN'S REQUEST FOR OPINION

This office received a timely request for an opinion under N.D.C.C. § 44-04-21.1 alleging that the president of the Halliday Public School Board (Board) violated the open records law by denying a Board member a copy of a requested record.

FACTS PRESENTED

A preliminary agenda for a regular Board meeting to be held on March 11, 2004, was handed out after a special meeting of the Board on March 2, 2004. An agenda item referred to a "Preliminary/Estimated 2004-05 FY Revenue and Expense Budget" (Preliminary Budget). On March 8, 2004, Board member Darlene Pelton wrote the president of the Board requesting information regarding the Preliminary Budget, noting that this preliminary agenda item had been removed from a later agenda for the regular Board meeting scheduled for March 11, 2004. Ms. Pelton also requested that if the information was not sent to her that the reason for the refusal be put in writing.

On March 10, 2004, the president of the Board wrote Ms. Pelton and advised her that the Preliminary Budget is usually presented at the June meeting and therefore the president decided not to put the item on the March 11, 2004, meeting agenda "as it would be hard to estimate until we know what teachers are returning and what level they will be at." The Board president advised our office that the superintendent had inserted the reference to the Preliminary Budget in the preliminary agenda in case the Board planned to reduce the teaching staff. Because the Board was not planning a reduction, the superintendent was instructed not to prepare a Preliminary Budget at that time and the item was removed from a later agenda prepared for the regular Board meeting on March 11, 2004. The Board president further advised our office that a Preliminary Budget document is a work in progress and has not been prepared.¹

¹ Requested opinions must be based "on the facts given by the public entity." N.D.C.C. § 44-04-21.1(1).

ISSUE

1. Whether the Halliday Public School District violated N.D.C.C. § 44-04-18 by refusing to provide a copy of the Preliminary Budget to Ms. Pelton.
2. Whether the Halliday Public School District's written denial of the record adequately described the legal authority for the denial.

ANALYSIS

Issue One

The Halliday Public School District is a public entity. N.D.A.G. 98-L-128. As such, all of its records are open records accessible to the public unless otherwise provided by law. N.D.C.C. § 44-04-18(1). When a public entity receives a request for records, it must, within a reasonable time, either provide those records or explain why the records are not being provided. N.D.C.C. § 44-04-18(6); N.D.A.G. 98-O-20.

The request for the Preliminary Budget was based upon the reference to it in a preliminary agenda prepared for a future meeting. Because of the circumstances referred to above, no Preliminary Budget document was prepared. The reference to it was removed from the final agenda of the March 11, 2004, meeting. Generally, a public entity is not required to create or compile a record that does not exist. N.D.C.C. § 44-04-18(3). See also N.D.A.G. 2003-O-09 (advising that a public entity does not have to provide a copy of a requested record that does not exist). Here, the request was for a Preliminary Budget document that did not exist and therefore did not have to be provided.

Issue Two

While a denial of a request need not cite the specific legal authority for the denial, the legal reason for the denial must be described. N.D.C.C. § 44-04-18(6); N.D.A.G. 97-O-01. The March 10, 2004, letter to Ms. Pelton did not state, as the president's response to our office did, that there was no Preliminary Budget document.²

² The response to our office also advised that the Preliminary Budget was "a work in progress." It is not a denial of access or a violation of the open records law "to withhold from the public a working paper or preliminary draft until a final draft is completed, the record is distributed to a member of a governing body or discussed by the body at an open meeting . . . or work is discontinued on the draft but no final version has been

Thus, it is my opinion the written response to the request did not adequately describe the legal authority for denying the request.

CONCLUSION

1. In my opinion the Halliday Public School District did not violate N.D.C.C. § 44-04-18 by denying the requester a copy of the Preliminary Budget because there was no Preliminary Budget in existence.
2. It is my opinion the written response to the request did not adequately describe the legal authority for denying the request.

STEPS NEEDED TO REMEDY VIOLATIONS

Although the written response to the request did not adequately describe the legal authority for denying the request, no remedial action is necessary because the requester will receive a copy of this opinion, which describes the reason the Preliminary Budget was not furnished, i.e., no such document existed.

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Attorney General

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