

**OPEN RECORDS AND MEETINGS OPINION
2009-O-01**

DATE ISSUED: February 2, 2009

ISSUED TO: North Dakota State University

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Jonathan T. Garaas asking whether North Dakota State University (NDSU) violated N.D.C.C. § 44-04-18 by failing to provide records within a reasonable time.

FACTS PRESENTED

On May 22, 2008, Jonathan T. Garaas asked NDSU for the following records:

[C]opies of any correspondence, letters, e-mails, fax(s), memorandums, contracts, leases, easements, permits, or other forms of documentation concerning North Dakota State University and FM City Development, LLC [or its agents or representatives] with respect to the use of North Dakota State University's "T" Lot by the "owners of record" of Lots Sixteen (16), Seventeen (17) and Eighteen (18), Block Fourteen (14), Kirkham's 2nd Addition to the City of Fargo [which is FM City Development, LLC].

He also requested copies of the related lease agreement [including all related exhibits and correspondence], and other correspondence, letters, e-mails, fax(s), memorandums, contracts, leases, easements, permits, or other forms of documentation concerning North Dakota State University's use of property owned or controlled by FM City Development, LLC.

NDSU Vice President for Finance and Administration, John C. Adams, responded to Mr. Garaas on May 28 and provided 44 pages of records relating to the use of NDSU's "T" Lot by NDSU and FM City Development, LCC. Mr. Adams, however, refused to provide information regarding a lease agreement claiming that the draft lease was not final; rather it was a working paper and protected from disclosure under N.D.C.C. § 44-04-18(10) which allows public entities headed by a single individual to withhold such working papers. He offered to provide a copy of the lease as soon as it was

executed. When the lease was in final form, NDSU provided a copy to Mr. Garaas on July 21, 2008. A copy of the lease after it was signed was also provided to Mr. Garaas.

Mr. Garaas alleges that NDSU is not headed by a single head of agency and thus, improperly withheld a draft lease agreement under N.D.C.C. § 44-04-18(10).

ISSUE

Whether NDSU violated N.D.C.C. § 44-04-18 when it refused to provide a copy of a preliminary draft of a lease.

ANALYSIS

Except as otherwise specifically provided by law, upon request, a public entity must furnish a requester one copy of the public records requested.¹ However, two subsections of N.D.C.C. § 44-04-18 provide temporary protection for “preliminary drafts” or “working papers.” Under N.D.C.C. § 44-04-18(9) and (10), it is not an unreasonable delay to withhold draft documents until all substantive work has been completed, or, in the case of an entity with a governing body, until a copy of the record is provided to a member of the governing body or until the next meeting of the governing body, whichever occurs first.² The temporary protection for a draft document provided for in subsections 44-04-18(9) and (10) is identical. These subsections differ only in the manner by which the draft document becomes subject to the open records law.

Mr. Garaas is correct that NDSU is an institution administered by the State Board of Higher Education (Board).³ However, the Board is authorized by statute to delegate authority for the management of institutions of higher education under its jurisdiction to those institutions.⁴ This delegation allows each school to conduct its daily business as an autonomous entity.

¹ N.D.C.C. § 44-04-18(1) and (2).

² N.D.C.C. § 44-04-18(9) & (10).

³ See N.D.C.C. § 15-10-01, N.D.C.C. § 15-10-01.3 and N.D.C.C. § 15-10-17.

⁴ N.D.C.C. § 15-10-11 (“[i]n furtherance of its powers, the board [of higher education] has the power to delegate to its employees details of the administration of the institutions under its control”); State Board of Higher Education Policy 305.1(2) (delegating authority to institutions of higher education to administer the affairs of the institution in accordance with Board policies, plans, budgets, and standards, including the management and expenditure of all institutional funds, within budgetary and other limitations imposed by law or by the Board); see also SBHE Policy 840.

NDSU is an example of a public entity that could use either N.D.C.C. § 44-04-18(9) or (10) under different circumstances. Not every public entity can be clearly classified as either an entity headed by a governing body or by a single individual. In such cases, the facts surrounding the record will determine when it must be released.

Here, NDSU had the authority to sign its own lease agreements without approval of the Board. Thus, it is my opinion that it was reasonable in this instance for NDSU to cite N.D.C.C. § 44-04-18(10) as a response to the request for records. When work was substantially completed on the lease, a copy was provided to Mr. Garaas.⁵ Therefore, it is further my opinion that NDSU did not cause an unreasonable delay by withholding a draft lease until work on the lease was substantially completed.

CONCLUSION

NDSU did not violate the open records law by withholding a preliminary draft of a lease until all substantive work on the lease was completed.

Wayne Stenehjem
Attorney General

mjm/vkk

⁵ The Attorney General must base an open records opinion on the facts stated by the public entity. N.D.C.C. § 44-04-21.1(1).