

**OPEN RECORDS AND MEETINGS OPINION
2014-O-06**

DATE ISSUED: July 14, 2014

ISSUED TO: North Dakota Industrial Commission

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Ryan Taylor asking whether the North Dakota Industrial Commission violated N.D.C.C. § 44-04-18 by unreasonably delaying access to records.

FACTS PRESENTED

On March 5, 2014, Dr. Ellen Chaffee, working as a volunteer for Mr. Ryan Taylor's campaign for North Dakota Agriculture Commissioner, sent an email to the North Dakota Industrial Commission's general account, requesting "minutes of all meetings of the North Dakota Industrial Commission from January 1, 2009, through March 1, 2014."¹ The email asked to receive the records in electronic format (.pdf or .pst file) and requested citations to any authority for withholding or redacting any of the records.² On March 10, 2014, Ms. Karlene Fine,³ on behalf of the Industrial Commission, responded to Dr. Chaffee, explaining that she would be completing a project for a major program "in the next day or so and then will turn to getting the minutes into pdf files to be distributed to you."⁴

¹ Letter from Ryan Taylor to Attorney General's office (Apr. 11, 2014); see also Email from Dr. Ellen Chaffee to ndicinfo.nd.gov (Mar. 5, 2014 8:03 AM).

² Email from Dr. Ellen Chaffee to ndicinfo.nd.gov (Mar. 5, 2014, 8:03 AM).

³ Ms. Fine is the Industrial Commission's Executive Director and Secretary and is responsible for preparing the minutes of the Commission and responding to records requests. See Letter from Karlene Fine to Attorney General's office (Apr. 28, 2014).

⁴ Email from Karlene Fine, Ind. Comm'n Exec. Dir. and Secy., to Dr. Ellen Chaffee (Mar. 10, 2014, 9:28 AM). In the email, Ms. Fine also apologized for the delay in responding as the email was sent to the general account and was among a number of emails related to a Drilling Permit Review Policy.

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Dr. Chaffee contacted Ms. Fine on March 18 and again on March 30, inquiring into the status of the records request.⁵ On April 4, 2014, Ms. Fine sent Dr. Chaffee minutes for all meetings held by the Industrial Commission for the year 2009.⁶ In the email, Ms. Fine also proposed a schedule for providing the remaining records, with the 2010 minutes coming the next week, the 2011 minutes the week after that, and so on.⁷ Later that day, Dr. Chaffee replied with “Thank you very much, Karlene.”⁸

On April 11, 2014, Mr. Ryan Taylor requested an opinion from this office on whether the Industrial Commission violated the open records law by not providing the meeting minutes within a reasonable time.⁹ That same day, Ms. Fine sent an email to Dr. Chaffee, explaining that the delay in responding to the records request was due, in large part, to the need to review the minutes for confidential information.¹⁰ Ms. Fine also reiterated that when she laid out a proposed schedule for providing the minutes she believed the schedule was acceptable based on the acknowledging email from Dr. Chaffee.¹¹ Ms. Fine assured Dr. Chaffee she would work diligently to expedite the request.¹² Over the next two weeks, Ms. Fine produced the remaining requested records, including records in response to an extension of the original request for 2014 minutes,¹³ ultimately providing over two thousand pages of meeting minutes.¹⁴ On

⁵ See Emails from Dr. Ellen Chaffee to Karlene Fine, Ind. Comm’n Exec. Dir. and Secy. (Mar. 18, 2014, 9:41 AM; Mar. 30, 2014, 6:39 PM).

⁶ See Email from Karlene Fine, Ind. Comm’n Exec. Dir. and Secy., to Dr. Ellen Chaffee (Apr. 4, 2014, 5:26 PM).

⁷ Id.

⁸ Email from Dr. Ellen Chaffee to Karlene Fine, Ind. Comm’n Exec. Dir. and Secy. (Apr. 4, 2014, 8:35 PM).

⁹ Letter from Ryan Taylor to Attorney General’s office (Apr. 11, 2014).

¹⁰ Email from Karlene Fine, Ind. Comm’n Exec. Dir. and Secy., to Dr. Ellen Chaffee (Apr. 11, 2014 8:19 PM). The email explained that the Industrial Commission meets every month and deals with both confidential and non-confidential information and, although the office tries to separate the confidential minutes from the non-confidential minutes, the records still needed to be reviewed to verify that no confidential information was being released.

¹¹ Email from Karlene Fine, Ind. Comm’n Exec. Dir. and Secy., to Dr. Ellen Chaffee (Apr. 11, 2014, 8:19 PM).

¹² Id.

¹³ Email from Dr. Ellen Chaffee to Karlene Fine, Ind. Comm’n Exec. Dir. and Secy. (Apr. 18, 2014, 9:15 AM) (requesting to extend the original request to include minutes from Mar. 1, 2014, to the most current).

¹⁴ Emails from Karlene Fine, Ind. Comm’n Exec. Dir. and Secy., to Dr. Ellen Chaffee (Apr. 15, 2014; Apr. 16, 2014; Apr. 21, 2014; Apr. 25, 2014; and Apr. 28, 2014).

April 28, 2014, Dr. Chaffee confirmed that all records responsive to the request had been provided.¹⁵

ISSUE

Whether the North Dakota Industrial Commission responded to a request for records within a reasonable time.

ANALYSIS

The Industrial Commission, as a commission created and recognized by state statute to perform governmental functions, is a public entity subject to open record and meeting laws.¹⁶ “Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours.”¹⁷ When a public entity receives a request for records, it must, within a reasonable time period, either provide the records or explain why the records are not being provided.¹⁸ A delay may be appropriate for a number of reasons, including the number of records requested, reviewing large volumes 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.¹⁹ When determining the reasonableness of a response, this office considers the circumstances of the particular request.²⁰

In this case, it took approximately two months to provide all the records responsive to Dr. Chaffe’s request. Ms. Fine explained that time necessary to review the minutes for confidential information contributed to the delay.²¹ The Industrial Commission holds a minimum of 12 meetings a year.²² During these meetings, there is at least one executive session because many of the agencies under the management of the

¹⁵ Email from Dr. Ellen Chaffee to Karlene Fine, Ind. Comm’n Exec. Dir. and Secy. (Apr. 28, 2014, 2:47 PM).

¹⁶ N.D.C.C. § 44-04-17.1(13)(a) (definition of “public entity”); see also N.D.C.C. ch. 54-17, Industrial Commission.

¹⁷ N.D.C.C. § 44-04-18(1).

¹⁸ N.D.C.C. § 44-04-18(8); N.D.A.G. 2013-O-15.

¹⁹ N.D.A.G. 2013-O-15; N.D.A.G. 2012-O-07; N.D.A.G. 2010-O-04.

²⁰ N.D.A.G. 2013-O-15; N.D.A.G. 2012-O-07; N.D.A.G. 2010-O-04.

²¹ Letter from Karlene Fine, Ind. Comm’n Exec. Dir. and Secy., to Attorney General’s office (Apr. 28, 2014); see also Email from Karlene Fine, Ind. Comm’n Exec. Dir. and Secy., to Sandra L. Voller, Asst. Att’y. Gen. (May 16, 2014, 2:12 PM).

²² Email from Karlene Fine, Ind. Comm’n Exec. Dir. and Secy., to Sandra L. Voller, Asst. Att’y. Gen. (May 16, 2014, 2:12 PM).

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Industrial Commission have records what are confidential by statute.²³ Although the Commission generally keeps separate minutes for executive sessions, all minutes needed to be reviewed to verify that no confidential information was included in the open meeting minutes.²⁴ In response to the request for records, Ms. Fine reviewed over 2,500 pages of minutes in order to assure that no confidential information would be released.²⁵

In addition, the Commission's administrative office only has two staff members and it is the Executive Director of the Commission who responds to record requests.²⁶ At the time of Dr. Chaffee's request, the administrative staff was working on several big projects, including implementing the first awards for the Outdoor Heritage Fund Grant applications and dealing with a significant new policy regarding Drilling Permit Review.²⁷

In response to inquiries from this office, Ms. Fine acknowledges the response to Dr. Chaffee's request "could have been better and I should have provided an explanation for my delay."²⁸ Ms. Fine also adds that changes have been made in how minutes of the Commission are processed in order to be more responsive in the future, including posting meeting minutes on the Commission's website.²⁹

Although I recognize that this was a voluminous request that came at an inopportune time and required a detailed review to assure no confidential information was released,

²³ For example, the Industrial Commission oversees the Bank of North Dakota and certain records of the bank are confidential under N.D.C.C. § 6-09-35.

²⁴ Email from Karlene Fine, Ind. Comm'n Exec. Dir. and Secy., to Sandra L. Voller, Asst. Att'y. Gen. (May 16, 2014, 2:12 PM).

²⁵ Id.

²⁶ Email from Karlene Fine, Ind. Comm'n Exec. Dir. and Secy., to Sandra L. Voller, Asst. Att'y. Gen. (May 16, 2014, 2:12 PM); Letter from Karlene Fine, Ind. Comm'n Exec. Dir. and Secy, to Sandra L. Voller, Asst. Att'y. Gen. (April 28, 2014). The Industrial Commission's Administrative Office has two staff members: the Executive Director and the Executive Director's administrative assistant. Ms. Fine, acting as the Executive Director, handles the open record requests that come in for the Commission, and she generally does not consult with any Commission members when receiving open record requests. Ms. Fine did not consult with any Commission member regarding this matter until after the request for an opinion was filed with the Attorney General's office.

²⁷ Letter from Karlene Fine, Ind. Comm'n Exec. Dir. and Secy., to Sandra L. Voller, Asst. Att'y. Gen. (Apr. 28, 2014). Although the law does not require it, if providing the records within a reasonable time is not feasible given the current work load of a public entity, consideration should be given to approving extra time or staff if resources are available.

²⁸ Id.

²⁹ Id.

such reasoning does not justify a nearly two month delay in responding to a request for meeting minutes. I therefore find the Industrial Commission violated open records law when it failed to timely reply to a records request.

CONCLUSION

The North Dakota Industrial Commission violated open records law when it failed to provide requested records within a reasonable time.

STEPS NEEDED TO REMEDY VIOLATION

Dr. Chaffee has received all requested records. Therefore, there are no further corrective measures to be taken by the Industrial Commission.

Wayne Stenehjem
Attorney General

slv/vkk