

**OPEN RECORDS AND MEETINGS OPINION
2014-O-10**

DATE ISSUED: August 22, 2014

ISSUED TO: North Dakota Department of Public Instruction

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Rob Port asking whether the North Dakota Department of Public Instruction provided proper responses to an open records request.

FACTS PRESENTED

On May 8, 2014, Rob Port sent emails to Kirsten Baesler, State Superintendent of the North Dakota Department of Public Instruction (DPI), and Dale Wetzel, DPI Information Communications & Research/Public Information Specialist, requesting “a copy of the last 30 days of emails from the north.dakota.schools@gmail.com address.”¹ In his request for records, Mr. Port also asked whether north.dakota.schools@gmail.com was used for DPI business.² In a follow up email, Ms. Baesler confirmed receipt of Mr. Port's request and stated that the email address was Mr. Wetzel's personal address “not set up at the direction of DPI to do DPI work,” but directed Mr. Wetzel to comply with the request.³ Mr. Wetzel contends the email address was not used for DPI business but was created “[s]o that the members of the press and legislators in North Dakota would know more background about an English teacher from Oshkosh, Wis., who presents

¹ Emails from Rob Port, Editor, Sayanythingblog.com, to Kirsten Baesler, St. Supt., Dep't of Public Inst., and Dale Wetzel, Public Info Specialist, Dep't of Public Inst. (May 8, 2014, 8:33 AM; 12:10 PM; 6:13 PM).

² Emails from Rob Port, Editor, Sayanythingblog.com, to Kirsten Baesler, St. Supt., Dep't of Public Inst., and Dale Wetzel, Public Info Specialist, Dep't of Public Inst. (May 8, 2014, 8:33 AM; 12:10 PM; 6:13 PM).

³ Email from Kirsten Baesler, St. Supt., Dep't of Public Inst., to Rob Port, Editor, Sayanythingblog.com, and Dale Wetzel, Public Info. Specialist, Dep't of Public Inst. (May 8, 2014, 7:30 PM).

himself as an expert on Common Core.”⁴ Mr. Wetzel produced three emails⁵ in response to Mr. Port’s request on May 9, 2014, with assurances that the three emails were the only emails sent to or from the account in the last 30 days.⁶

On May 12, 2014, WDAY talk radio host Jay Thomas forwarded six emails to Mr. Port documenting email exchanges between WDAY/Jay Thomas and the north.dakota.schools@gmail.com address that occurred on May 5, 2014. Mr. Port had not received any of those forwarded emails in response to his records request and therefore questions whether DPI fully complied with N.D.C.C. § 44-04-18 and produced all records responsive to his request.

ISSUE

Whether DPI responded to Mr. Port’s open records request in compliance with N.D.C.C. § 44-04-18.

ANALYSIS

All records of a public entity are open and accessible to the public unless otherwise specifically provided by law.⁷ DPI is a public entity subject to open records law and

⁴ Email from Dale Wetzel, Public Info Specialist, Dep’t of Public Inst., to Rob Port, Editor, Sayanythingblog.com (May 8, 2014, 11:52 PM).

⁵ See Emails between Dale Wetzel, Public Info Specialist, Dep’t of Public Inst., and Rob Port, Editor, Sayanythingblog.com (May 9, 2014) (emails produced related to (1) “talking points;” (2) “showing bouncebacks from a couple of recipients;” (3) email “from a reporter that I responded to by phone.”).

⁶ That same day, when Mr. Port asked Mr. Wetzel whether the three emails “represent all the emails sent to or from that account for the last 30 days?”, Mr. Wetzel initially responded “Yes. It was only set up May 5.” Shortly thereafter, Mr. Wetzel sent another email describing the three emails and saying “That’s it.” Later that morning, Mr. Wetzel sent a third email noting he would check the email account that day and advise Mr. Port of any results. The final email from Mr. Wetzel to Mr. Port that day said that Mr. Wetzel had “forwarded to [Mr. Port] the only email [Mr. Wetzel] received so far on the north.dakota.school@gmail.com account today. That’s all.” See Emails between Dale Wetzel, Public Info. Specialist, Dep’t of Public Inst., and Mr. Port, Editor, Sayanythingblog.com (May 9, 2014, 10:40 AM; 10:45 AM; 11:28 AM; and 1:41 PM).

⁷ N.D.C.C. § 44-04-18.

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Mr. Wetzel, as an employee of a public entity, is also subject to open records law.⁸ “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 [contain] information related to public business.”⁹

This office repeatedly recognizes that emails in the possession of employees of a public entity that relate to public business are subject to open records law, regardless of whether the emails are stored at home, on a private computer, or sent/received from a personal email address.¹⁰ “Public business” is broadly defined as “all matters that relate or may foreseeably relate in any way to:

- a. The performance of the public entity’s governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power; or
- b. The public entity’s use of public funds.”¹¹

Thus, if Mr. Wetzel created records regarding public business, those records are subject to open records law regardless of whether the records originate from a “private” email address the public entity did not direct the employee to create.¹² The emails at issue in this opinion address the Common Core standard of instruction, a topic that unquestionably relates to the public business of DPI.¹³ By Mr. Wetzel’s own admission, the email address was created to disseminate information about an alleged expert on Common Core, a topic related to DPI’s public business.¹⁴ Therefore, emails in the

⁸ See N.D.C.C. § 44-04-17.1(13) (definition of “public entity”); see also 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.”).

⁹ N.D.C.C. § 44-04-17.1(16) (definition of “record”); see also N.D.A.G. 2013-O-08.

¹⁰ See N.D.A.G. 2013-O-18; N.D.A.G. 2008-O-07; N.D.A.G. 2007-O-06.

¹¹ N.D.C.C. § 44-04-17.1(12) (definition of “public business”).

¹² See N.D.A.G. 2008-O-07 (“The open records law applies to public records regardless of where a public employee or board member possesses the record.”).

¹³ See DPI website discussing Common Core State Standards: http://www.dpi.state.nd.us/standard/common_core.shtm.

¹⁴ See Email from Dale Wetzel, Public Info. Specialist, Dep’t of Public Inst., to Rob Port, Editor, Sayanythingblog.com (May 8, 2014, 11:52 PM).

north.dakota.schools@gmail.com account, related to DPI's "public business" are subject to open records law.¹⁵

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.¹⁶ A public entity is not required to provide more than one copy of a record to the same requestor.¹⁷ Mr. Wetzel explains that he did not provide all of the responsive emails to Mr. Port because he believed, as a guest host of a WDAY radio talk show, Mr. Port would have access to the emails he already provided to Mr. Thomas, the regular host of a WDAY radio talk show.¹⁸ However, Mr. Port is not a WDAY employee and does not have access to the WDAY account. Moreover, Mr. Wetzel's emails do not refer Mr. Port to any previously provided emails. Rather, Mr. Wetzel's responses indicated there were no other emails sent to or from the account during the 30 days identified in Mr. Port's request.¹⁹

Mr. Port is a separate requestor who is entitled to his own copy of the emails subject to his request under open records law. DPI therefore violated open records law when it failed to produce copies of all records responsive to a records request.

CONCLUSION

DPI violated N.D.C.C. § 44-04-18 when it failed to produce all records responsive to Mr. Port's open records request.

STEPS NEEDED TO REMEDY VIOLATION

DPI must forward all emails subject to Mr. Port's records request free of charge, including any emails sent or received through the north.dakota.schools@gmail.com address on May 5, 2014.

¹⁵ There were 2 emails in Mr. Wetzel's "spam" folder that he did not turn over to Mr. Port. Upon reviewing the emails, I do not find they relate to DPI's "public business" and it was not in violation of N.D.C.C. § 44-04-18 that Mr. Wetzel did not turn these emails over to Mr. Port.

¹⁶ N.D.C.C. § 44-04-18(2).

¹⁷ Id.; see also N.D.A.G. 2013-O-14.

¹⁸ See Email from Dale Wetzel, Public Info. Specialist, Dep't of Public Inst., to Sandra Voller, Asst. Att'y Gen. (May 30, 2014; 6:24 PM).

¹⁹ See Email from Rob Port, Editor, Sayanythingblog.com, to Sandra Voller, Asst. Att'y Gen. (June 25, 2014; 12:10 PM).

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2.²⁰ It may also result in personal liability for the person or persons responsible for the noncompliance.²¹

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slv/cn/vkk

²⁰ N.D.C.C. § 44-04-21.1(2).

²¹ Id.