

**OPEN RECORDS AND MEETINGS OPINION
2015-O-07**

DATE ISSUED: April 20, 2015

ISSUED TO: Fargo-Moorhead Diversion Authority Agricultural Policy
Subcommittee

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Trana Rogne asking whether the Agricultural Policy Subcommittee of the Fargo-Moorhead Diversion Authority violated N.D.C.C. § 44-04-18 by unreasonably delaying access to requested records.

FACTS PRESENTED

The Fargo-Moorhead Diversion Authority (Diversion Authority) was created through a joint powers agreement among six governmental entities to work with the U.S. Army Corps of Engineers in operating the Fargo-Moorhead Metropolitan Area Flood Risk Management Project.¹ The Diversion Authority established an Agricultural Policy Subcommittee (Subcommittee) on April 12, 2012, for the purpose of assisting the Diversion Authority in developing policies and procedures to mitigate project related impacts to agriculture.² The Subcommittee is tasked with taking agricultural topics referred by the Diversion Authority Board, the Land Management Committee, or the Subcommittee members, and developing and evaluating applicable policy options and making recommendations.³

¹ Letter from Erik Johnson, Attorney for Fargo-Moorhead Diversion Authority, to Sandra DePountis, Asst. Att'y Gen. (Feb. 25, 2015); see N.D.A.G. 2013-O-03 and Diversion Authority's website: www.fmdiversion.com. The six governmental entities include the cities of Fargo, North Dakota and Moorhead, Minnesota; the counties of Cass, North Dakota and Clay, Minnesota; and water districts for the project area: Buffalo Red River Watershed District and the Cass County Joint Water Resource District.

² Letter from Erik Johnson, Attorney for Fargo-Moorhead Diversion Authority, to Sandra DePountis, Asst. Att'y Gen. (Feb. 25, 2015); see Flood Diversion Auth. Agric. Policy Sub-Comm. Charter.

³ Flood Diversion Auth. Agric. Policy Sub-Comm. Charter.

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The Diversion Authority contracted with North Dakota State University's Department of Agribusiness and Applied Economics (Department) for the purpose of conducting an assessment of agricultural impacts resulting from the operation of the proposed diversion project.⁴ On December 12, 2014, a representative from the Department gave a presentation with accompanying PowerPoint at a public meeting of the Subcommittee on the progress being made on the Department's study.⁵ At the time of the meeting, the Department's study was not completed and it was known that important variables were not included in the presentation and thus the presentation was merely meant to be a preliminary report on the study that was in progress.⁶

On December 21, 2014, Trana Rogne requested records from the Subcommittee, including the PowerPoint presentation, from the December 12, 2014, meeting and supporting documents.⁷ On January 6, 2014, the Subcommittee responded that the information presented at the meeting was part of uncompleted working materials.⁸ Information was relayed to Mr. Rogne that, after the presentation, the hydraulic modeling group working on the study confirmed that incomplete information produced inaccurate and potentially misleading results because the presentation did not account for the effect of culverts on the dissipation of water.⁹ Mr. Rogne was informed that they were working on updating the modeling used in the presentation to incorporate the additional information, and once this was completed, they would provide both the original and corrected slides.¹⁰ In a follow up email, Mr. Rogne demanded the release of the materials presented during the open meeting.¹¹ The Subcommittee again denied the request citing North Dakota law protecting preliminary drafts until the final draft is

⁴ Letter from Erik Johnson, Attorney for Fargo-Moorhead Diversion Authority, to Sandra DePountis, Asst. Att'y Gen. (Feb. 25, 2015).

⁵ Id.

⁶ Id.

⁷ Email from Trana Rogne to Eric Dodds (Dec. 21, 2014, 3:03 PM). Eric Dodds is with AE2S (Advanced Engineering and Environmental Services), an engineering and consulting firm that engages in a variety of services for the Diversion Authority. Mr. Dodds serves as the main point of contact for the agricultural impact studies that NDSU conducts for the Diversion Authority and, as such, all requests for information related to the study are routed through Mr. Dodds. See Email from Erik Johnson, Attorney for Fargo-Moorhead Diversion Authority, to Sandra DePountis, Asst. Att'y Gen. (Feb. 26, 2015, 3:45 PM).

⁸ Email from Eric Dodds, AE2S, to Trana Rogne (Jan. 6, 2015 11:45 AM).

⁹ Id.

¹⁰ Id.

¹¹ Email from Trana Rogne to Eric Dodds, AE2S (Jan. 9, 2015, 3:37 PM).

finished.¹² Once completed, the Subcommittee provided both the original December 12, 2014, presentation and the revised, corrected presentation to Mr. Rogne on February 24, 2015.¹³

ISSUE

Whether the Subcommittee violated N.D.C.C. § 44-04-18 by delaying access to records relating to a preliminary report presented to the Subcommittee in an open meeting on December 12, 2014.

ANALYSIS

“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.”¹⁴ When a public entity receives a request for records, it must, within a reasonable time period, either provide the records or explain why those records are not being provided.¹⁵

It is not an unreasonable delay or a denial of access under this section to withhold from the public a record that is prepared at the express direction of, and for presentation to, a governing body until the record is mailed or otherwise provided to a member of the body or until the next meeting of the body, whichever occurs first. It also is not an unreasonable delay or a denial of access 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 prepared, whichever occurs first.¹⁶

In this case, the preliminary study included in the requested PowerPoint records was presented at a public meeting of the Subcommittee. The Subcommittee argues, however, that the preliminary study was a result of a contract with the Diversion Authority and it was not the Diversion Authority’s meeting on December 12, 2014; therefore, it is still considered a “working paper or preliminary draft” because the

¹² Email from Eric Dodds, AE2A, to Trana Rogne (Jan. 13, 2015, 11:01 PM).

¹³ Letter from Erik Johnson, Attorney for Fargo-Moorhead Diversion Authority, to Sandra DePountis, Asst. Att’y Gen. (Feb. 25, 2015); see Email to Trana Rogne from Eric Dodds, AE2S (Feb. 24, 2015, 6:05 PM).

¹⁴ N.D.C.C. § 44-04-18(1).

¹⁵ N.D.C.C. § 44-04-18; N.D.A.G. 2014-O-06.

¹⁶ N.D.C.C. § 44-04-18(9) (emphasis added).

governing body that requested the study had yet to receive the preliminary study or consider it at an open meeting.¹⁷

This office previously recognized the Diversion Authority to be a public entity subject to open record laws and the Diversion Authority Board to be a “governing body” subject to open meetings law.¹⁸ The definition of “governing body” includes “any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.”¹⁹ When the Diversion Authority created the Subcommittee to perform its function of developing policies and procedures to mitigate project related impacts to agriculture, the Subcommittee became a “committee” of the Diversion Authority with its own “governing body” that is subject to open records and meetings law. The Department’s study falls within the business that was delegated from the Diversion Authority onto the Subcommittee. Therefore, when the Subcommittee received the preliminary report at a public meeting, the preliminary report became an open record.²⁰ It was a violation of the open records law when the Subcommittee refused to provide the slides of the presentation until they were updated to include corrected, additional information.

CONCLUSION

It was a violation of open records law when the Subcommittee withheld records presented at a public meeting until the records were updated and corrected to reflect additional information.

¹⁷ Letter from Erik Johnson, Attorney for Fargo-Moorhead Diversion Authority, to Sandra DePountis, Asst. Att’y Gen. (Feb. 25, 2015).

¹⁸ N.D.A.G. 2013-O-03 (“A joint enterprise created by a joint powers agreement of several political subdivisions whereby the subdivisions delegate their performance of a governmental function to the joint enterprise is an ‘agency’ of those subdivisions and a ‘public entity’ subject to open records and meeting laws.”).

¹⁹ N.D.C.C. § 44-04-17.1(6).

²⁰ In addition, the co-chair of the Subcommittee, Rodger Olson, is also a Diversion Board of Authority member, and was present at the December 12, 2014, meeting. Also present was Darrell Vanyo, Chairman of the Diversion Authority. Therefore, even though the meeting on December 12, 2014, was not a meeting of the Diversion Authority, Diversion Authority members were present and received the information. Meeting Notes, Diversion Auth. Agric. Policy Subcomm. (Dec. 12, 2014).

STEPS NEEDED TO REMEDY VIOLATION

Mr. Rogne received all requested records. Therefore, there are no further corrective measures to be taken by the Diversion Authority or Subcommittee.

Wayne Stenehjem
Attorney General

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cc: Trana Rogne (via email only)
Eric Dodds (via email only)
Erik Johnson (via email only)