

**OPEN RECORDS AND MEETINGS OPINION
2015-O-17**

DATE ISSUED: October 19, 2015

ISSUED TO: City of Dickinson:

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from attorney Peter Welte, on behalf of his clients, Jan Prchal and Dean Kubas, asking whether the City of Dickinson violated N.D.C.C. § 44-04-18 by failing to produce records within a reasonable time.

FACTS PRESENTED

On November 13, 2014, Jan Prchal emailed the Dickinson City Engineer requesting a copy of a watershed study believed to be completed by Apex Engineering Group (Apex) as well as a copy of the State Avenue Improvement Plans.¹ When asked by the City Engineer, Apex explained that it did not complete its own watershed study but instead only reviewed a study completed by Toman Engineering Company in 2013.² On December 5, 2014, the Dickinson City Engineer sent an email to Jan Prchal with attached copies of the preliminary plans for State Avenue Improvements, but did not provide the Toman Engineering study or explain why the Apex study was not provided.³ The City Engineer did not hear from Ms. Prchal again so he believed the matter was resolved.⁴

¹ Email from Jan Prchal to Craig Kubas, City Eng'r, City of Dickinson (Nov. 13, 2014, 9:45 AM).

² Email from Craig Kubas, City Eng'r, City of Dickinson, to various representatives from Apex Eng'g Group (Nov. 13, 2014, 9:59 AM); Email from Scott Schneider, Apex Eng'g Group, to Mike Berg, Apex Eng'g Group (Nov. 15, 2014, 6:19 AM); Letter from Shawn Kessel, City Adm'r, City of Dickinson, to Att'y Gen.'s office (Sept. 3, 2015).

³ Email from Craig Kubas, City Eng'r, City of Dickinson, to Jan Prchal (Dec. 5, 2014, 11:39 AM).

⁴ Letter from Shawn Kessel, City Adm'r, City of Dickinson, to Att'y Gen.'s office (Sept. 3, 2015).

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Peter Welte was hired by Ms. Prchal, and another landowner, Dean Kubas, in April 2015, to represent their interests relating to development projects by the City of Dickinson.⁵ Mr. Welte contacted Christina Wenko, Dickinson City Attorney, on June 24, 2015, to request a copy of the Apex watershed study.⁶ He again requested the Apex watershed study during the July 6, 2015, Dickinson City Commission meeting.⁷

On July 17, 2015, Ms. Wenko emailed a copy of the 2013 watershed study performed by Toman Engineering to Mr. Welte.⁸ On July 29, Mr. Welte again asked Ms. Wenko for the Apex watershed study.⁹ Ms. Wenko immediately replied back to Mr. Welte stating “I sent the watershed study done in 2013 by Toman Engineering. Is that not what you need?”¹⁰ In a follow up email, Mr. Welte requested further records including the draft and final copies of the Developer Agreements, but did not mention or further reference the watershed study.¹¹ Mr. Welte did not bring up the watershed study again until August 3, 2015, in which he sent a letter to Ms. Wenko requesting several records, including the Apex watershed study.¹² Ms. Wenko finally explained that Apex did not perform a watershed study but, instead, was hired to review Toman Engineering’s 2013 study in her response to Mr. Welte on August 19, 2015.¹³

ISSUE

Whether the City of Dickinson responded to a request for records within a reasonable time.

⁵ Letter from Peter Welte, Att’y at Law, to Sandra DePountis, Asst. Att’y Gen. (Aug. 18, 2015).

⁶ Id., see also Letter from Shawn Kessel, City Adm’r, City of Dickinson, to Att’y Gen.’s office (Sept. 3, 2015).

⁷ Letter from Peter Welte, Att’y at Law, to Sandra DePountis, Asst. Att’y Gen. (Aug. 18, 2015); Letter from Shawn Kessel, City Adm’r, City of Dickinson, to Att’y Gen.’s office (Sept. 3, 2015).

⁸ Email from Christina Wenko, Att’y, City of Dickinson, to Peter Welte, Att’y at Law (July 17, 2015, 3:29 PM).

⁹ Email from Peter Welte, Att’y at Law, to Christina Wenko, Att’y, City of Dickinson (July 29, 2015, 8:19 AM).

¹⁰ Email from Christina Wenko, Att’y, City of Dickinson, to Peter Welte, Att’y at Law (July 29, 2015, 8:22 AM).

¹¹ Email from Peter Welte, Att’y at Law, to Christina Wenko, Att’y, City of Dickinson (July 29, 2015, 8:29 AM).

¹² Letter from Peter Welte, Att’y at Law, to Christina Wenko, Att’y, City of Dickinson (Aug. 3, 2015).

¹³ Letter from Christina Wenko, Att’y, City of Dickinson, to Peter Welte, Att’y at Law (Aug. 19, 2015).

ANALYSIS

All records of a public entity are open and accessible to the public unless otherwise specifically provided by law.¹⁴ 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.¹⁵ 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.¹⁶ When determining whether a response is reasonable, this office considers the circumstances of the particular request.¹⁷

The original request for records from Ms. Prchal in November 2014 was for the watershed study she believed to be conducted by Apex. The city did not explain to Ms. Prchal that there was no Apex watershed study and that Apex only reviewed Toman Engineering's 2013 watershed study. This omission resulted in continued requests for the "Apex" study.

A denial of an open record request must indicate the entity's specific authority for denying the requested record, and this office previously recognized in past opinions that this requirement applies even if the request is denied on the basis that the requested records do not exist.¹⁸ It was not until August 19, 2015, that it was conclusively explained that there is no Apex watershed study as Apex only reviewed Toman Engineering's 2013 study, which was previously provided to Mr. Welte.

There is no evidence to indicate the City of Dickinson was attempting to intentionally withhold or mislead Mr. Welte or his clients; instead, it appears there were misunderstandings among emails and responses on what was being requested. However, this misunderstanding could have been avoided if Ms. Prchal had been informed that no Apex watershed study existed at the time of the initial request back in November 2014. Dickinson City Officials, including the City Engineer, the City Commission, and City Attorney, have a duty under the open records law to provide

¹⁴ N.D.C.C. § 44-04-18.

¹⁵ N.D.C.C. § 44-04-18(7), (8); N.D.A.G. 2014-O-25.

¹⁶ N.D.A.G. 2014-O-06; N.D.A.G. 2013-O-15; N.D.A.G. 2012-O-07; N.D.A.G. 2010-O-04.

¹⁷ N.D.A.G. 2014-O-06.

¹⁸ N.D.C.C. § 44-04-18(7); N.D.A.G. 2014-O-22; N.D.A.G. 2011-O-10; N.D.A.G. 98-O-10.

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access, copies, or a denial of records within a reasonable time. A denial is necessary even when the records do not exist. The City of Dickinson violated N.D.C.C. § 44-04-18 by failing to provide an explanation as to why records were not provided within a reasonable time.

CONCLUSION

The City of Dickinson violated open records law by failing to provide an explanation as to why records were not provided within a reasonable time.

STEPS NEEDED TO REMEDY VIOLATION

Mr. Welte eventually received an explanation on why an Apex watershed study was not provided. Therefore, there are no further corrective measures to be taken by the City of Dickinson.

Wayne Stenehjem
Attorney General

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cc: Peter Welte (via email only)