

**OPEN RECORDS AND MEETINGS OPINION
2016-O-08**

DATE ISSUED: April 25, 2016

ISSUED TO: City of Golva

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Richard Volesky asking whether the City of Golva violated N.D.C.C. § 44-04-18 by unreasonably delaying access to public records.

FACTS PRESENTED

Richard Volesky sent an email to the City of Golva on December 10, 2015, asking for a copy of Golva's 2016 final budget and tax levy records.¹ Mr. Volesky sent a follow up request for these records by mail on December 14, 2015.² After receiving no reply or other communication, Mr. Volesky sent another email for the records on December 31, 2015.³ After receiving no reply or communication, Mr. Volesky contacted this office for an opinion.⁴

This office attempted to contact the City of Golva to obtain the records. A representative from this office spoke to Golva's Mayor, Darin Maus, who said that no one checks the city's email account anymore so they did not receive the request. The city did not communicate this to the requestor, or any member of the public, did not delete or suspend the email account, and did not have any sort of automatic reply or away message for incoming emails. The Mayor also denies ever receiving the request by mail.

¹ Email from Richard Volesky, Editor/Reporter, Golden Valley News and Billings Cnty. Pioneer, to City of Golva (Dec. 10, 2015, 8:51 pm).

² Letter from Richard Volesky, Editor/Reporter, Golden Valley News and Billings Cnty. Pioneer, to Att'y Gen.'s office (Jan. 8, 2016).

³ Email from Richard Volesky, Editor/Reporter, Golden Valley News and Billings Cnty. Pioneer, to City of Golva (Dec. 31, 2015, 10:24 am).

⁴ Letter from Richard Volesky, Editor/Reporter, Golden Valley News and Billings Cnty. Pioneer, to Att'y Gen.'s office (Jan. 8, 2016).

OPEN RECORDS AND MEETINGS OPINION 2016-O-08

April 25, 2016

Page 2

The Mayor confirmed to this office that the city's budget was prepared and available, but refused to provide the records until he received the request and refused to check the city's email account to obtain the request. This office then mailed Mr. Volesky's request to the city and it was only after receiving this correspondence that Golva provided Mr. Volesky with the city's budget and tax levy information on January 20, 2016.⁵

ISSUE

Whether the City of Golva violated N.D.C.C. § 44-04-18 by unreasonably delaying access to public records and by requiring a request be made in writing.

ANALYSIS

"Except as otherwise specifically provided by law, all records of a public entity are public records" that must be provided within a reasonable time.⁶ Once a person makes a request for records, it is the responsibility of the public entity to respond to the request within a reasonable time and the requester is not required to contact the entity again to find out when the records will be provided or made available.⁷ Once a request for records is made, a public entity does not have discretion to decide whether the request is meritorious and may only deny the request if a law specifically provides that the record is either exempt or confidential.⁸ A request for a public record need not be made in writing and therefore a verbal request in person or by telephone has the same effect as a "formal" written request.⁹ It is a violation of open records law to require a request for public records be made in writing.¹⁰

Mayor Maus explains the City of Golva does not check its email account regularly and only wants to receive correspondence through the United States Postal Service.¹¹ This was not communicated to Mr. Volesky, who, just days before his request for the budget records, received a copy of meeting minutes from the city auditor through the city's

⁵ Letter from Darin Maus, Mayor, City of Golva, to Sandra DePountis, Asst. Att'y Gen. (Feb. 16, 2016); Cover sheet from Att'y Gen.'s office to Golva City Auditor (Jan. 13, 2016); and Email from Richard Volesky, Editor/Reporter, Golden Valley News and Billings Cnty. Pioneer, to City of Golva (Jan. 22, 2016, 3:51 pm).

⁶ N.D.C.C. § 44-04-18.

⁷ N.D.A.G. 2014-O-07; N.D.A.G. 2005-O-05; N.D.A.G. 2004-O-20.

⁸ N.D.A.G. 2014-O-07; N.D.A.G. 2013-O-17.

⁹ N.D.C.C. § 44-04-18(2); N.D.A.G. 2008-O-08.

¹⁰ N.D.C.C. § 44-04-18(2).

¹¹ Letter from Darin Maus, Mayor, City of Golva, to Sandra DePountis, Asst. Att'y Gen. (Feb. 16, 2016).

email account.¹² If the Mayor decides to stop using the city's email account, the account should be canceled, or have an automatic reply message informing senders that the email account is no longer being used or checked. A public entity cannot circumvent the open records law by suddenly refusing to use available means of communication without warning or providing an alternative option. If a city has an active email account, it is the city's responsibility to check the account and respond to any record requests.¹³

In 2013, I found that the City of Golva violated the open records law when it took three months to provide records to Mr. Volesky.¹⁴ In 2013, officials for the city claimed they did not understand the legal responsibilities under the open records law.¹⁵ Three years later, the Mayor still does not understand the city's legal responsibilities. It took over a month, and intervention from this office, for Mr. Volesky to receive the city's budget and tax information, records that Mayor Maus confirmed were in existence and readily accessible. Even after being contacted by this office, the Mayor refused to comply until he received Mr. Volesky's request in writing.¹⁶

The City of Golva violated open records law when it unreasonably delayed access to public records and when it required that the request be made in writing before it would respond.

CONCLUSION

The City of Golva violated open records law when it required a request to be made in writing and when it unreasonably delayed access to the city's budget and tax levy records.

STEPS NEEDED TO REMEDY VIOLATION

The City of Golva must decide whether it will be using its email account. Either the email account should be deleted or the city must begin checking this account, every day, in order to avoid the confusion and violations outlined in this opinion.

¹² Email from JessiKay Noll, Auditor, City of Golva, to Richard Volesky, Editor/Reporter, Golden Valley News and Billings Cnty. Pioneer, (Nov. 29, 2015, 12:10 pm).

¹³ A public entity is not legally required to have an email account.

¹⁴ N.D.A.G. 2013-O-17.

¹⁵ Id.

¹⁶ N.D.C.C. § 44-04-18(2). Given the similarity in violations in this opinion and in N.D.A.G. 2013-O-17, the Mayor and other employees of the City of Golva should consider the potential consequences of knowingly violating the open records and meetings law. A knowing violation of these laws is a crime pursuant to N.D.C.C. §§ 44-04-21.3 and 12.1-11-06.

OPEN RECORDS AND MEETINGS OPINION 2016-O-08

April 25, 2016

Page 4

Just as in 2013, I strongly encourage the Mayor Maus and the Golva City Auditor to read the Open Records Manual.¹⁷ They should also consider attending a seminar on the open records and meetings law if provided by the North Dakota League of Cities. 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. § 44-04-21.2.¹⁸ It may also result in personal liability for the person or persons responsible for the noncompliance.¹⁹

Wayne Stenehjem
Attorney General

sld

cc: Richard Volesky (via email only)

¹⁷ <https://www.ag.nd.gov/Manuals/OROMManuals/OpenRecordsManual.pdf>.

¹⁸ N.D.C.C. § 44-04-21.1(2).

¹⁹ Id.