

**OPEN RECORDS AND MEETINGS OPINION
2016-O-10**

DATE ISSUED: May 4, 2016

ISSUED TO: North Dakota University Systems

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Timothy Carlson asking whether the North Dakota University System violated N.D.C.C. § 44-04-18 by failing to respond to a request for records within a reasonable time.¹

FACTS PRESENTED

On December 7, 2015, Timothy Carlson, former Chief Auditor with the North Dakota University Systems (NDUS), sent the following records request via email to Rebecca Wimer, NDUS Executive Assistant to the Chancellor, and Linda Donlin, NDUS Vice Chancellor of Strategic Engagement:

During the first quarter of 2015, the Interim Chancellor Skogen stated during a taped public meeting that I, as the previous Chief Auditor, had resigned.

Please provide the record, specifically stating a written resignation had been tendered, that these public comments (made to the SBHE) were based upon.²

After conferring with counsel, Ms. Wimer emailed Mr. Carlson the separation agreement, signed by Mr. Carlson and former Interim Chancellor Larry Skogen, on

¹ Mr. Carlson asks several other questions in his request for an opinion regarding the response received from NDUS but such questions were not reviewable issues under N.D.C.C. § 44-04-21.1. See Emails from Timothy Carlson, to Att'y Gen.'s office (Dec. 21, 2015, 10:45 pm; Dec. 22, 2015, 8:41 pm; and Dec. 23, 2015, 8:27 pm).

² Email from Timothy Carlson to Rebecca Wimer, Exec. Asst., NDUS, and Linda Donlin, Vice Chancellor of Strategic Engagement, NDUS (Dec. 7, 2015, 8:37 pm).

OPEN RECORDS AND MEETINGS OPINION 2016-O-10

May 4, 2016

Page 2

December 16, 2015.³ Mr. Carlson questions whether the records were provided within a reasonable time.

ISSUE

Whether NDUS responded to a records request within a reasonable time.

ANALYSIS

All records of a public entity are open and accessible to the public unless otherwise specifically provided by law.⁴ 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.⁵ The definition of “record” does not include “unrecorded thought processes or mental impressions.”⁶ Questions posed by a requestor are not considered a request for a record; rather, the open records law requires a request to reasonably identify a “specific public record.”⁷

When determining whether a response was provided within a reasonable time, this office considers the circumstances of the particular request.⁸ A delay may be appropriate for a number of reasons, including the number of records requested, the time necessary to redact closed or confidential information, and the workload of staff who must balance other responsibilities.⁹

Mr. Carlson requested “the record, specifically stating a written resignation had been tendered, that [Interim Chancellor Skogen’s] public comments (made to the SBHE) were

³ Letter from Nick Vaughn, Asst. Att’y Gen., to Sandra L. DePountis, Asst. Att’y Gen. (Jan. 19, 2016); see also Email from Rebecca Wimer, Exec. Asst., NDUS, to Timothy Carlson (Dec. 16, 2015, 8:30 am).

⁴ N.D.C.C. § 44-04-18.

⁵ N.D.C.C. § 44-04-18(7), (8); N.D.A.G. 2015-O-17; N.D.A.G. 2014-O-25.

⁶ N.D.C.C. § 44-04-17.1(16) (definition of “record”).

⁷ N.D.A.G. 2014-O-22; N.D.A.G. 2007-O-07; N.D.A.G. 2006-O-09; N.D.A.G. 2003-O-08; N.D.A.G. 2003-O-04; N.D.A.G. 98-O-20.

⁸ N.D.A.G. 2015-O-17; N.D.A.G. 2014-O-06.

⁹ N.D.A.G. 2015-O-17; 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.

OPEN RECORDS AND MEETINGS OPINION 2016-O-10

May 4, 2016

Page 3

based upon.”¹⁰ Because Mr. Carlson referred to a record that was the basis of comments made by former Interim Chancellor Skogen, the NDUS employees were concerned there was a record responsive to the request in the previous Chancellor’s old files.¹¹ The NDUS employees conducted an extensive search of documents and emails of the previous Chancellor, along with a search of the former NDUS Chief of Staff and Director of Legal Services records and emails, for records that contained any mention of Mr. Carlson’s resignation during the three month time period specified in the request.¹²

Ms. Wimer began searching for responsive records on December 9, 2015. She searched the relevant email accounts and State Board of Higher Education meeting minutes and audio records for anything pertaining to Mr. Carlson’s separation.¹³ Ms. Wimer was the only one in the office at this time who had access to files of former employees.¹⁴ Ms. Wimer searched for approximately an hour each business day, completing the search on December 14, 2015.¹⁵ Ms. Wimer then emailed NDUS legal

¹⁰ Email from Timothy Carlson to Rebecca Wimer, Exec. Asst., NDUS, and Linda Donlin, Vice Chancellor of Strategic Engagement, NDUS (Dec. 7, 2015, 8:37 pm). Under the open records law, public entities are not required to provide legal conclusions, opinions, or explanations in response to questions. Rather, public entities must provide a response to requests for copies of “specific public records” within a reasonable time. N.D.C.C. § 44-04-18. If a public entity is unsure about what records are actually being requested, it may seek clarification with the requestor within a reasonable time.

¹¹ Letter from Nick Vaughn, Asst. Att’y Gen., to Sandra L. DePountis, Asst. Att’y Gen. (Jan. 19, 2016).

¹² Id.

¹³ Id. see also Email from Rebecca Wimer, Exec. Asst., NDUS, to Nick Vaughn, Asst. Att’y Gen., (Feb. 1, 2016, 9:01 pm), Email from Nick Vaughn, Asst. Att’y Gen., to Sandra DePountis, Asst. Att’y Gen. (Feb. 3, 2016, 2:46 pm). Email accounts were searched for any email containing the words: “internal,” “internal audit,” “audit,” “Carlson,” “Timothy P. Carlson,” “separation agreement,” and “resigned.”

¹⁴ Email from Nick Vaughn, Asst. Att’y Gen., to Sandra DePountis, Asst. Att’y Gen. (Feb. 3, 2016, 2:45 pm). NDUS explains that former employees emails were only accessible to certain individuals. Core Technology Services, NDUS’s IT department, also had access to the email accounts but for them to conduct the search would have required a formal request to pull the required emails and would have taken additional time to obtain.

¹⁵ Email from Rebecca Wimer, Exec. Asst., NDUS, to Nick Vaughn, Asst. Att’y Gen. (Feb. 1, 2016, 9:01pm). During this time, Ms. Wimer was also balancing other responsibilities and commitments while working on the records request. Letter from Nick Vaughn, Asst. Att’y Gen., to Sandra L. DePountis, Asst. Att’y Gen. (Jan. 19, 2016).

OPEN RECORDS AND MEETINGS OPINION 2016-O-10

May 4, 2016

Page 4

counsel for assistance in identifying responsive records.¹⁶ Legal counsel reviewed the request and the results of the search on December 15, 2015, and recommended NDUS provide Mr. Carlson's written separation agreement as the record responsive to the request.¹⁷ The separation agreement was then emailed to Mr. Carlson on December 16, 2015, approximately nine days after Mr. Carlson's records request.¹⁸

I recognize that public employees must balance work responsibilities and commitments while responding to record requests. In this case, Ms. Wimer was the only one with access to the former employees' files and was balancing other workload while attempting to fulfill the request. Mr. Carlson did not request a specific record but instead requested a record that "comments (made to the SBHE) [by a former employee] were based upon." It was therefore reasonable for NDUS to conduct an extensive search for records responsive to such a request. It is my opinion that the nine days it took to conduct the search, and to contact and receive advice from legal counsel, was a reasonable time to respond to Mr. Carlson's records request.

CONCLUSION

NDUS responded to a records request within a reasonable time.

Wayne Stenehjem
Attorney General

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cc: Timothy Carlson (via email only)

¹⁶ Letter from Nick Vaughn, Asst. Att'y Gen., to Sandra L. DePountis, Asst. Att'y Gen. (Jan. 19, 2016).

¹⁷ Letter from Nick Vaughn, Asst. Att'y Gen., to Sandra L. DePountis, Asst. Att'y Gen. (Jan. 19, 2016).

¹⁸ Email from Rebecca Wimer, Exec. Asst., NDUS, to Timothy Carlson (Dec. 16, 2015, 8:30 am). During this time, legal counsel was also responding to other various inquiries from Mr. Carlson. See Letter from Nick Vaughn, Asst. Att'y Gen., to Sandra L. DePountis, Asst. Att'y Gen. (Jan. 19, 2016).