

**OPEN RECORDS AND MEETINGS OPINION
2018-O-21**

DATE ISSUED: December 10, 2018

ISSUED TO: Office of the Governor

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from S. Paul Jordan asking whether the Governor's Office violated N.D.C.C. § 44-04-18 by failing to provide records within a reasonable time.

FACTS PRESENTED

S. Paul Jordan emailed the Governor's Office on May 4, 2018, attaching several letters and requesting: "Since you or your office must have exchanged communications by email with the head of the North Dakota Department of Transportation (DOT), I request a copy of an email or any other record that contains the email address for the head of the DOT...".¹ The Governor's Office interpreted the open records request to seek "[c]opies of emails or other record of communications between Governor Burgum or his staff members, that contain the email address for the head of the DOT."² Finding no time frame in the request, the Governor's Office imposed its own time frame of correspondence between December 15, 2016, and May 4, 2018.³ The paraphrased request was sent to staff and the Governor's Office ultimately compiled approximately 1,400 responsive records, which were then reviewed for confidential and exempt information.⁴ Mr. Jordan was notified via

¹ Email from S. Paul Jordan to the Gov.'s Office (May 4, 2018, 4:51 PM).

² Email from Leslie Bakken Oliver, Gen. Counsel, Gov.'s Office, to Gov.'s Office All Staff (May 4, 2018, 9:00 PM).

³ *Id.*

⁴ Letter from Leslie Bakken Oliver, Gen. Counsel, Gov.'s Office, to Att'y Gen.'s Office (June 13, 2018).

email on June 1, 2018, that the responsive records were ready.⁵ Mr. Jordan picked up the records from the Governor's Office on June 5, 2018.⁶

ISSUE

Whether the Governor's Office responded to a records request within a reasonable time.

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."⁷ When a public entity receives a request for records, it must, within a reasonable time, either provide the records or explain why the records are not being provided.⁸ Whether records have been produced within a reasonable time will depend on the facts of a given situation.⁹ A delay may be appropriate for a number of reasons, including 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, balancing other responsibilities of the public entity that demand immediate attention, access requested records, consulting with an attorney when there is a reasonable doubt whether the records are open to the public, sorting out what has previously been provided to a requester, and seeking clarification on vague requests.¹⁰

The Governor's Office explains that even though its General Counsel was out of the office at a business meeting when she received the request, she still sent an email with her interpretation of the open records request on to staff members that evening.¹¹ The general request for all correspondence between the Governor's Office and the director of the DOT

⁵ Email from Leslie Bakken Oliver, Gen. Counsel, Gov.'s Office, to S. Paul Jordan (June 1, 2018, 3:12 PM).

⁶ Letter from Leslie Bakken Oliver, Gen. Counsel, Gov.'s Office, to Att'y Gen.'s Office (June 13, 2018). Mr. Jordan was given the option to pick up the documents or receive the documents by mail. Email from Leslie Bakken Oliver, Gen. Counsel, Gov.'s Office, to S. Paul Jordan (June 1, 2018, 3:12 PM). Mr. Jordan chose to pick up the documents.

⁷ N.D.C.C. § 44-04-18(1).

⁸ N.D.C.C. § 44-04-18.

⁹ N.D.A.G. 2017-O-10.

¹⁰ N.D.A.G. 2017-O-10; N.D.A.G. 2014-O-25; N.D.A.G. 2014-O-21; N.D.A.G. 2014-O-20; N.D.A.G. 2014-O-06; N.D.A.G. 2013-O-17; N.D.A.G. 2013-O-15; N.D.A.G. 2012-O-07; N.D.A.G. 2010-O-04; N.D.A.G. 2008-O-08; N.D.A.G. 2004-O-05; N.D.A.G. 2003-O-21; N.D.A.G. 98-O-20; N.D.A.G. 98-O-04.

¹¹ Letter from Leslie Bakken Oliver, Gen. Counsel, Gov.'s Office, to Att'y Gen.'s Office (June 13, 2018).

generated a large volume of responsive records, approximately 1,400 pages, which needed to be reviewed by legal counsel for redaction of closed or confidential information.¹² The review and redaction process was completed May 31, 2018, and the next day Mr. Jordan was informed the records were ready.¹³

Generally, a four week time frame to compile, review, and produce 1,400 records would be reasonable. However, in this instance, Mr. Jordan did not ask for 1,400 records. His request was for “a copy of an email or any other record that contains the email address for the head of the DOT.”¹⁴ This was a request for one record – a record showing the email address for the head of the DOT. The Governor’s office unintentional misinterpretation of the request resulted in a four week delay in providing records he did not request.¹⁵

As explained in past opinions, “while it is commendable for a public entity to attempt to obtain records that entity does not have from another source, a long delay may still be unreasonable and violate N.D.C.C. § 44-04-18.”¹⁶ In those opinions, instead of the entity promptly notifying the requestor that it did not possess the record or that the record did not exist, the entity attempted to obtain the record from outside sources or create the record, but failed to do so within a reasonable time.¹⁷ Likewise, although the Governor’s Office went above and beyond the request and provided 1,400 responsive records, all that was actually requested was one record. The four weeks it took to provide the requested record was unreasonable.

CONCLUSION

The Governor’s Office did not respond to the request for records within a reasonable time.

¹² *Id.* Redactions included “[p]rivileged information identified pursuant to [N.D.C.C. §] 44-04-18.1(2)...personal cell phone numbers and/or home addresses.”

¹³ Letter from Leslie Bakken Oliver, Gen. Counsel, Gov.’s Office, to Att’y Gen.’s Office (June 13, 2018).

¹⁴ Email from S. Paul Jordan to the Gov.’s Office (May 4, 2018, 4:51 PM) (emphasis added).

¹⁵ A public entity is allowed to ask for clarification of a request to determine what records are being requested. See N.D.C.C. § 44-04-18(2).

¹⁶ N.D.A.G. 2013-O-14; N.D.A.G. 2008-O-08; N.D.A.G. 2007-O-11.

¹⁷ N.D.A.G. 2017-O-06; N.D.A.G. 2015-O-17; N.D.A.G. 2013-O-14; N.D.A.G. 2008-O-08; N.D.A.G. 2007-O-11; N.D.A.G. 98-O-20.

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STEPS NEEDED TO REMEDY VIOLATION

Since the record was ultimately provided to Mr. Jordan, no further action is necessary.

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sld
cc: S. Paul Jordan