



STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

www.attorneygeneral.nd.gov

(701) 328-2210

Drew H. Wrigley
ATTORNEY GENERAL

OPEN RECORDS AND MEETINGS OPINION
2024-O-10

DATE ISSUED: November 12, 2024

ISSUED TO: Mandan Park District

CITIZEN'S REQUEST FOR OPINION

S. Paul Jordan requested an opinion from this office under N.D.C.C. § 44-04-21.1 asking whether the Mandan Park District violated N.D.C.C. § 44-04-18 by improperly denying a request for records.

FACTS PRESENTED

Mr. Jordan and Mandan Park District (District) have an extensive open records history.¹ Currently Mr. Jordan has an outstanding invoice for \$25.00 to the District for previously requested records.² Mr. Jordan was informed by letter on July 16, 2019, that all his records requests would need to be communicated to the District in person to verify the records requested and to accurately monitor the District's responses.³ Included in the letter was notice that Mr. Jordan could no longer request records via email, telephonically, or orally, and a reminder that Mr. Jordan had an outstanding invoice from a previous records request.⁴ Mr. Jordan was informed that any subsequent records requests would not be filled until his overdue charge was paid in full.⁵ On or about July 16, 2019, the District blocked the email of Mr. Jordan, after determining that his constant communications and record requests were disrupting their essential functions.⁶

¹ Email from Cole Higlin, Dir., Mandan Park Dist., to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Sept. 26, 2022, 8:22 AM).

² *Id.* See also, Email from S. Paul Jordan, to Cole Higlin, Dir., Mandan Park Dist. (July 15, 2019, 9:49 AM); Email from S. Paul Jordan, to Cole Higlin, Dir., Mandan Park Dist. (July 19, 2019, 2:29 PM); Certified Letter from Arlen M. Ruff, Att'y, Kelsch Ruff Kranda Nagel & Ludwig, to S. Paul Jordan (July 16, 2019); Email from S. Paul. Jordan, to Cole Higlin, Dir., Mandan Park Dist. (July 23, 2019, 4:00 PM).

³ Email from Cole Higlin, Dir., Mandan Park Dist., to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Sept. 26, 2022, 8:22 AM); Certified Letter from Arlen M. Ruff, Att'y, Kelsch Ruff Kranda Nagel & Ludwig, to S. Paul Jordan (July 16, 2019).

⁴ *Id.*

⁵ *Id.*

⁶ Email from Cole Higlin, Dir., Mandan Park Dist., to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Sept. 26, 2022, 8:22 AM).

On January 21, 2021, Mr. Jordan provided a personal check to the District in the amount of \$25.00.⁷ In the memo line he transcribed, “THEFT IF CASHED/DEPOSITED.”⁸ Upon the advice of their attorney, the District never cashed this check.⁹ His overdue balance remains; his email is still blocked; and the status of his records request with the District is unchanged.¹⁰

On July 24, 2022, Mr. Jordan sent an email to Cole Higlin, Director of the District, requesting, “a copy of the last email you sent to the Mandan Park Board that shows each of their email addresses.”¹¹ This email was never received by Mr. Higlin because Mr. Jordan’s email address had been blocked.¹² Later that day, Mr. Jordan emailed Mr. Arlen Ruff, the District’s attorney, with the same records request.¹³ Mr. Ruff replied stating, “I refer your attention to the attached letter. Please make your request as set out therein. It’s my understanding you still have an outstanding invoice with the Parks District.”¹⁴ Within the letter attached to Mr. Ruff’s email reply, is a statement to Mr. Jordan that none of his records requests will be fulfilled “[u]nless the outstanding invoice is paid.”¹⁵ No records have been supplied to Mr. Jordan for his records request from August 2, 2022.¹⁶

ISSUE

Whether the District properly denied the open records request because Mr. Jordan had overdue fees from previously requested records.

⁷ *Id.*

⁸ *Id.* (*Emphasis in original*).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Email from S. Paul Jordan, to Cole Higlin, Dir., Mandan Park Dist. (July 24, 2022, 9:11 PM).

¹² Email from Cole Higlin, Dir., Mandan Park Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Sept. 26, 2022, 8:22 AM).

¹³ Email from S. Paul Jordan, to Arlen M. Ruff, Att’y, Kelsch Ruff Kranda Nagel & Ludwig (Aug. 2, 2022, 10:42 AM).

¹⁴ Email from Arlen M. Ruff, Att’y, Kelsch Ruff Kranda Nagel & Ludwig, to S. Paul Jordan (Aug. 2, 2022, 3:48 PM).

¹⁵ Certified Letter from Arlen M. Ruff, Att’y, Kelsch Ruff Kranda Nagel & Ludwig, to S. Paul Jordan (July 16, 2019).

¹⁶ Email from Cole Higlin, Dir., Mandan Park Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Sept. 26, 2022, 8:22 AM) (“We have not provided a list of emails of Park Commissioners due to the outstanding invoice . . .”).

ANALYSIS

The District is a public entity as defined in North Dakota law and is therefore subject to North Dakota open records laws.¹⁷ “[A]ll records of a public entity are public records, open and accessible for inspection.”¹⁸ In addition to these records being open to the public, the entity has the responsibility to provide access to these records to the public upon request, unless a legal exception applies.¹⁹ The requested record is an email containing the email addresses of the District’s board, and, based on the information provided this office, does not contain information that would qualify as a legal exception.²⁰ Although Mr. Jordan’s initial request for records was never received by the District as his email address was blocked, the receipt of Mr. Jordan’s request by their attorney, an agent of the District, satisfies a proper request for an open record.²¹

The email requested was not provided to this office, but given the context of Mr. Jordan’s request, the email addresses of the board members was the information he sought. All email addresses of the members of the Mandan Park Board are publicly available on the District’s website.²² “[A] public entity is not required to provide a copy of a record that is available to the requester on the public entity’s website or on the internet. The public entity *shall notify* the requester the record is available online and direct the requester to the website where the record can be accessed.”²³ In the correspondence with Mr. Jordan, however, the availability of the information on the website was not identified as a reason for denying his request.

“An initial request need not be made in person or in writing.”²⁴ The mandate from the District that Mr. Jordan make his requests in person, is not supported by North Dakota law.²⁵ Additionally, North Dakota law states the entity, “may not ask for the motive or reason for requesting the records

¹⁷ N.D. Const. art. XI § 6; N.D.C.C. § 44-04-17.1(11), (13).

¹⁸ N.D.C.C. § 44-04-18(1).

¹⁹ *Id.*

²⁰ Email from Cole Higlin, Dir., Mandan Park Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Sept. 26, 2022, 8:22 AM). All email addresses of the Mandan Park Board are publicly available on the District website <https://mandanparks.com/park-board/> (last visited Nov. 12, 2024).

²¹ N.D.A.G. 2018-O-27 (spam filter prevented receipt of email); N.D.A.G. 2018-O-24 (Entity never received request); N.D.A.G. 19-O-04 (Hacked email account resulted in the disappearance of all inbound and outbound emails); N.D.A.G. 2015-O-14 (Discussing the expansion of open records laws to agents of entities. “The application of the open records law is not limited to the public entity itself.” *citing* N.D.C.C. § 44-04-17.1(16) (the definition of “record” includes records in the possession or custody of a public entity or its agent.)).

²² Mandan Park Board, <https://mandanparks.com/park-board/> (last visited Nov. 12, 2024).

²³ N.D.C.C. § 44-04-18(4) (*emphasis added*).

²⁴ N.D.C.C. § 44-04-18(2).

²⁵ *Id.*

or for the identity of the person requesting public records.”²⁶ The requirement that Mr. Jordan personally request an open record, denies the requester anonymity as provided by statute.²⁷

In their many communications, the District did communicate to Mr. Jordan that his, “requests are becoming burdensome to the Mandan Parks District, and at times appear to be harassing Mandan Parks District personnel.”²⁸ Mr. Jordan’s multiple requests may disrupt essential functions of the District, but a denial on these grounds needs to be specifically cited and supplied to the requester in writing pursuant to N.D.C.C. § 44-04-18(13). The District never cited this provision as their basis for denial of Mr. Jordan’s repeated requests for records.²⁹

North Dakota law mandates that a denial of a records request must “describe the legal authority for the denial.”³⁰ The reason for denial provided to Mr. Jordan by the District expressly stated that he had unpaid fees.³¹ Denial based on unpaid fees is allowable by law; specifically, “[t]he public entity may withhold records pursuant to a request until such time as a requester provides payment for any outstanding balance for prior requests.”³² Here, Mr. Jordan has provided payment for his past due balance, but the District did not cash the check provided, apparently because of Mr. Jordan’s notations on the check.³³

²⁶ N.D.C.C. § 44-04-18(2). *See also*, N.D.A.G. 2007-O-03 “Bismarck Park District violated the open records law because it . . . gave the impression that it must be signed in order to obtain copies of records” *citing* N.D.A.G. 2006-O-15.

²⁷ N.D.C.C. § 44-04-18(2). *See* N.D.A.G. 2007-O-03 (Noting that the “identity of the requester . . . is irrelevant.” *citing* N.D.A.G. 2006-O-15; and N.D.A.G 95-F-13).

²⁸ Letter from Arlen M. Ruff, Att’y, to S. Paul Jordan (July 16, 2019). *See also*, N.D.C.C. § 44-04-18(13); Email from Cole Higlin, Dir., Mandan Park Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y (Sept. 26, 2022, 8:22 AM). (Attached to the District’s response was a copy of an email from Cole Higlin to a seandejaun stating he believed this was an alternate email used by Mr. Jordan to circumvent the District’s blocking Mr. Jordan’s emails. The email informed the author that their requests had become a burden, and the District was going to be discussing legal options and invited the requester to call him and provided a number for the request to call or the requester could meet with Mr. Higlin to resolve the requesters questions. (Email from Cole Higlin, Dir. Mandan Park Dist. to seandejuan@yahoo.com (Feb. 7, 2020, 7:52 AM)).

²⁹ Email from Cole Higlin, Dir., Mandan Park Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Sept. 26, 2022, 8:22 AM); N.D.C.C. § 44-04-18(13).

³⁰ N.D.C.C. § 44-04-18(7).

³¹ Email from Cole Higlin, Dir., Mandan Park Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Sept. 26, 2022, 8:22 AM); Certified Letter from Arlen M. Ruff, Att’y, Kelsch Ruff Kranda Nagel & Ludwig, to S. Paul Jordan (July 16, 2019).

³² N.D.C.C. § 44-04-18(2).

³³ Email from Cole Higlin, Dir., Mandan Park Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Sept. 26, 2022, 8:22 AM). *See also*, *In re Spears Carpet Mills, Inc.*, 86 B.R. 985, 993 (Bankr. W.D. Ark. 1987). The memo line on a personal check is, “helpful, but not required, and of no legal effect.”

It does not appear that the District refused to cash Mr. Jordan's check for the purpose of preventing access to public records. This office strongly advises public entities against doing so.³⁴ Allowing an entity to refuse payment to avoid an open records obligation would effectively endorse a circumvention of open records laws. The North Dakota Supreme Court as well as this office have rejected circumvention of open records laws based on apparent procedural loopholes.³⁵

Regardless of the reasons for the District's refusal to cash the check from Mr. Jordan, the District's denial of records became invalid on January 21, 2021, when Mr. Jordan provided a personal check for the entire amount owed. Previous opinions from this office have clarified that denial of a records request for an inaccurate reason is a violation of open records law.³⁶ The decision by the District not to deposit Mr. Jordan's check for payment does not disqualify the payment provided, and the past due amount is no longer a sufficient reason to deny Mr. Jordan's request for records.

CONCLUSION

The District's denial of the records request violated North Dakota open records laws, as Mr. Jordan has provided payment for the past records requested.

STEPS NEEDED TO REMEDY VIOLATION

The District must respond to Mr. Jordan request, and they must provide the requested records to Mr. Jordan, free of charge. This office urges the District to revisit the open records laws and their responsibilities therein, anticipate further records requests from familiar requestors, and develop procedures to comply with North Dakota open records laws.

While I have every reason to expect the District will remedy this situation, 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. § 44-04-21.2.³⁷ Failure to take these corrective

³⁴ N.D.C.C. § 44-04-18(2).

³⁵ N.D.A.G. 2004-L-25, *quoting Forum Publishing Co. v. City of Fargo*, 391 N.W.2d 169, 172 (N.D. 1986) (“[w]e do not believe the open-record law can be circumvented by the delegation of a duty to a third party.”); N.D.A.G. 2008-O-07 (“To allow a person to circumvent the open records law by maintaining public records on a private computer would be inconsistent with past court decisions and Attorney General’s opinions.”); *See also* N.D.A.G. 2017-O-07; N.D.A.G. 2016-O-03; N.D.A.G. 2014-O-24; N.D.A.G. 2007-O-07; N.D.A.G. 2001-O-10; N.D.A.G. 93-L-95.

³⁶ N.D.A.G. 2006-O-12. *See also* N.D.A.G. 2004-O-11.

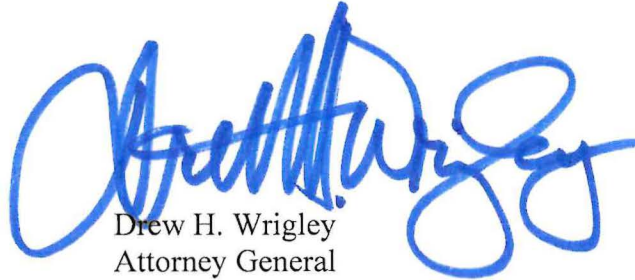
³⁷ N.D.C.C. § 44-04-21.1(2).

OPEN RECORDS AND MEETINGS OPINION 2024-O-10

November 12, 2024

Page 6

measures may also result in personal liability for the person or persons responsible for the noncompliance.³⁸



Drew H. Wrigley
Attorney General

MEO/AML/mjh
cc: S. Paul Jordan

³⁸ *Id.*