

**OPEN RECORDS AND MEETINGS OPINION
2010-O-02**

DATE ISSUED: February 26, 2010

ISSUED TO: Pembina County Emergency Management Office

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Scott Heck asking whether the Pembina County Emergency Management office (Emergency Services) violated N.D.C.C. § 44-04-18 by failing to provide records within a reasonable time.

FACTS PRESENTED

On November 5, 2009, Mr. Heck made an open records request to Emergency Services for the organizational documents for Pembina Rural Fire District, the Drayton Rural Fire District, and the Cavalier Rural Fire District.¹ He requested a copy of each fire district's petition required by N.D.C.C. § 18-10-01 and the Pembina County Commission minutes from the meetings at which the Commission approved each of the rural fire districts. He received no reply from Emergency Services.²

After being contacted by this office, the Emergency Services manager sent a letter to Mr. Heck explaining that the Emergency Services office did not have any petitions from fire departments and that he would have to ask the local auditors for their respective meeting minutes.

ISSUE

Whether the Pembina County Emergency Management office responded to a request for records within a reasonable period of time.

¹ These three fire districts are three of many political subdivisions that entered into a Joint Powers Agreement/Mutual Aid Agreement that was encouraged by the Pembina County Emergency Management office.

² Pursuant to a previous request, the Pembina County Emergency Management office provided a copy of the Joint Powers/Mutual Aid agreement to Mr. Heck.

ANALYSIS

All records of a public entity are open to the public unless “otherwise specifically provided by law.”³ The definition of “public entity” includes a public or governmental “agency” of a county.⁴ Therefore, the records of the county emergency services office are open to the public unless a law specifically provides otherwise.

It is a violation of N.D.C.C. § 44-04-18 to fail to provide a copy of a record within a reasonable time.⁵ “Depending on the circumstances, a delay may be appropriate for a number of reasons, including excising closed or confidential information, consulting with an attorney when there is a reasonable doubt whether the records are open to the public, or balancing other responsibilities of the public entity that demand immediate attention.”⁶ “Whether a response has been provided within a reasonable time will depend on the facts of a given situation.”⁷

A public entity does not have to provide access to, or a copy of, a requested record that it does not have in its possession or custody.⁸ Each agency of a political subdivision is responsible only for the records in its possession and not for records that are in the possession of another agency, even if they are part of the same political subdivision.⁹ However, even if a public entity does not have the requested records, it must explain to the requester that the records do not exist and are not being provided within a reasonable time.¹⁰

Here, the Emergency Services office did not tell Mr. Heck that it did not have the requested records until December 16, 2009; almost six weeks after the request was sent. The manager explained that although Mr. Heck’s request was in her “to do” pile she was new to the job when the request was made and she was also training an

³ N.D.C.C. § 44-04-18(1); N.D. Const. art. XI, § 6.

⁴ N.D.C.C. § 44-04-17.1(10), (12)(b).

⁵ N.D.C.C. § 44-04-18(8).

⁶ N.D.A.G. 2004-O-05; N.D.A.G. 2002-O-06; N.D.A.G. 98-O-20; N.D.A.G. 98-O-04.

⁷ N.D.A.G. 2006-O-15; N.D.A.G. 2005-O-05; N.D.A.G. 2003-O-09.

⁸ N.D.C.C. § 44-04-17.1(15) (definition of record). N.D.C.C. § 44-04-18(4) (a public entity does not have to create or compile a record that does not exist). See also N.D.A.G. 2004-O-05 (open records law does not require public entity to provide a copy of records it does not possess); N.D.A.G. 2004-O-01 (same).

⁹ N.D.A.G. 2005-O-13. See also N.D.A.G. 2004-O-05 (no obligation to verify whether records existed from other agencies of the county).

¹⁰ N.D.A.G. 2007-O-11 (a delay of multiple months in responding to a request for records that are not in the possession of the public entity is unreasonable); N.D.A.G. 98-O-20.

assistant.¹¹ Additionally, the office was inundated with FEMA paperwork related to the flooding that occurred in the county in 2009.¹²

In past opinions, a significant delay in responding to a request for records has been found reasonable in circumstances where the request was for a large number of records, where closed or confidential information had to be excised, or where other responsibilities of the public entity demanded immediate attention.¹³ Mr. Heck's request, however, was neither voluminous nor complicated.

If a crisis or the workload of a public entity prevents it from immediately searching for the records or making copies, the entity should advise the requester of the circumstances and indicate when a copy of the records will be provided.¹⁴ Here, no information was provided to the requester until Emergency Services was prompted by this office to contact the requester. The manager only had to inform Mr. Heck that the records were not in the possession of Emergency Services.

It is my opinion that Emergency Service's delay of almost six weeks to respond to Mr. Heck's request was unreasonable and violated N.D.C.C. § 44-04-18.

STEPS NEEDED TO REMEDY VIOLATION

After intervention from this office, Emergency Services did reply to Mr. Heck. Thus, no further remedy is necessary. I suggest that the Emergency Management office review the Open Records Manual located at <http://www.ag.nd.gov>.

Wayne Stenehjem
Attorney General

mkk/vkk

¹¹ E-mails from Jill M. Pedersen, Pembina County Emergency Manager (Dec. 16, 2009), (Jan. 29, 2010).

¹² E-mail from Jill M. Pedersen, Pembina County Emergency Manager (Dec. 16, 2009).

¹³ N.D.A.G. 2007-O-06; N.D.A.G. 2004-O-05.

¹⁴ See N.D.A.G. 2004-O-05 (three working days after open records request was submitted, the entity notified requester of actions being taken in response to his request).