

**OPEN RECORDS AND MEETINGS OPINION
2008-O-08**

DATE ISSUED: April 2, 2008

ISSUED TO: Pierce County Social Services

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from John Ford asking whether Pierce County Social Services violated N.D.C.C. § 44-04-18 by asking that Mr. Ford submit his request in writing and for failing to provide the records requested within a reasonable time.

FACTS PRESENTED

On October 23, 2007, Mr. Ford visited Pierce County Social Services ("Pierce County") requesting information about foster care reimbursements.¹ Mr. Ford spoke with an administrative assistant who advised him that she did not have the information requested and the person who could provide the information, Mary Hermanson² (the "Director"), was not available.³ Pierce County explained that the assistant did not understand what Mr. Ford wanted or know how to gather the information, and there was no other staff available to understand or answer Mr. Ford's questions.⁴

The administrative assistant advised Mr. Ford that "he may want to put his request in writing as she was not sure what information he wanted from the agency."⁵ Mr. Ford indicated during a telephone conversation with my staff that he was aware that he was not required to put his request in writing and advised the assistant of this fact, but his impression of the discussion was that he needed to put the request in writing or it would

¹ Letter from Pierce County Social Services to Matthew Sagsveen (Dec. 7, 2007).

² Ms. Hermanson is the director of both Pierce and McHenry County Social Services; she splits her time between the two counties.

³ Letter from Pierce County Social Services (Dec. 7, 2007); Letter from John Ford to Wayne Stenehjem (Nov. 16, 2007).

⁴ Letter from Pierce County Social Services (Dec. 7, 2007); E-mail from Pierce County Social Services to Matthew Sagsveen (Dec. 20, 2007).

⁵ Letter from Pierce County Social Services (Dec. 7, 2007).

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not be answered. Mr. Ford submitted a written request by e-mail to the Director that same day:

I am requesting the following financial information regarding pierce [sic] County Social Services foster care payments under the open records laws:

1) The county's share of payments made to Dakota Boys and Girls Ranch for foster care of any children for the period of August 2006 through May of 2007.

[] asked me to make this request in writing directly to you, and while the law doesn't require me to do so, in an effort to expedite the receipt of this information, I am making the request by e mail. Should you decide not to furnish this information, please do so in writing citing any laws that you may beleive [sic] shield the requested information from the open records law.⁶

Although the Director was in McHenry County, she received the e-mail request the same day.⁷ The information requested was not readily available to the Director in that office.⁸ The Director did not return to Pierce County until October 30, 2007, when she learned that she had been named in a lawsuit on October 25, 2007. Mr. Ford is an opposing party in the lawsuit. The Director spent time on October 30, November 1, and the 7th and 8th (days she was in Pierce County) addressing issues relating to the lawsuit.

On November 8, 2007, the Director e-mailed the North Dakota Department of Human Services ("DHS") explaining the request and that Pierce County did not have the information requested, did not understand how to compute the appropriate percentage, did not have time for the request, and felt that she needed to provide a response.⁹

⁶ E-mail from John Ford to Mary Hermanson (Oct. 23, 2007). The Director explained that she has computers in both counties where she accesses the same e-mail account; when she works in Pierce County, she tries to do Pierce County work and McHenry County work in McHenry County. E-mail from Mary Hermanson to Matthew Sagsveen (Dec. 20, 2007).

⁷ E-mail from Pierce County (Dec, 20, 2007).

⁸ Id.

⁹ E-mail from Mary Hermanson to North Dakota Department of Human Services (Nov. 8, 2007).

The Director states that sometime after the November 8 e-mail, she made contact with DHS, but was advised that DHS could not release the information requested by her because Mr. Ford was involved in a lawsuit against DHS.¹⁰ The Director collected as much information on her own as she could for Mr. Ford.¹¹

On November 29, 2007, the Director mailed a response to Mr. Ford explaining that it was very difficult to compute the county's share of expenses for children in foster care because the share is based upon a complex formula.¹² She further explains:

Each county's percentage is slightly different. I do not compute these numbers and I trust that the State office is reimbursing my county correctly. The State office issues all foster care payments after payment has been authorized by the county with financial responsibility. They submit the information to the Federal authorities and the State receives the proper reimbursements, which they distribute back to the appropriate counties using the formula with the correct data for each county.

I am sending you the data on the amounts paid for the time period requested. I have deleted all identifying information from the printouts that I am sending to you regarding your "Open Records Law" request. . . . I am assuming that the percentage formula is computed the same regardless of what funding stream is being utilized for foster care payment purposes. . . . You can use the print sheets to total the amounts and then use the percentages to compute the correct totals for Pierce County's share of costs.

ISSUE

1. Whether Pierce County violated N.D.C.C. § 44-04-18 by having Mr. Ford put his request in writing.

¹⁰ Letter from Pierce County (Dec. 7, 2007). Human Services advised the Director to contact counsel for Human Services which the Director attempted to do. The Director released the information gathered to Mr. Ford before hearing back from Human Services.

¹¹ Id.

¹² Letter from Mary Hermanson to John Ford (Nov. 27, 2007). In her December 7, 2007, letter to Assistant Attorney General Matthew Sagsveen, Ms. Hermanson explains that the date of her draft letter was not changed when put in final form and mailed to Mr. Ford.

2. Whether the timeliness of Pierce County's response to Mr. Ford was reasonable.¹³

ANALYSIS

Issue One

Upon a request for a copy of specific public records, an entity shall furnish the requester one copy of the public records requested.¹⁴ The right to access public records belongs to all persons equally, therefore the identity of the requester and the purpose of the request are generally irrelevant.¹⁵ A request for a public record "need not be made in person or in writing."¹⁶ A verbal request in person or by telephone has the same effect as a "formal" written request.¹⁷

In past opinions I found violations of the open records law when the Department of Transportation and the Bismarck Parks and Recreation District required requesters to complete forms in order to receive requested records.¹⁸ Like Mr. Ford, the requesters in both situations were given the impression that putting their respective requests in writing was a prerequisite to obtaining the records.¹⁹

Here, Pierce County did not require Mr. Ford to fill out a form. Rather, they asked that he put his request in writing to clarify his request. In an opinion to DHS, I determined that DHS violated the open records law when it required a requester to put his request in writing for clarification.²⁰ As I explained in the opinion to DHS, a public entity may not require requests for records to be in writing under the pretext of clarification.²¹ Staff of a public entity can clarify a request without asking for it in writing.²² Here, Mr. Ford's

¹³ Mr. Ford originally alleges that Pierce County violated the open records laws because he had received no response from the county, no records, and no legal justification for any denial. As indicated above, Pierce County did not deny the request; thus, this issue is moot.

¹⁴ N.D.C.C. § 44-04-18(2).

¹⁵ N.D.A.G. 2007-O-03.

¹⁶ N.D.C.C. § 44-04-18(2) (emphasis added); N.D.A.G. 2001-O-12; N.D.A.G. 2005-O-09; 2007-O-03.

¹⁷ N.D.A.G. 2007-O-03; N.D.A.G. 98-O-03.

¹⁸ See N.D.A.G. 2006-O-15; N.D.A.G. 2007-O-03.

¹⁹ Id.

²⁰ N.D.A.G. 2003-O-21.

²¹ Id.

²² Id.

request was straightforward; the complication came in gathering the records he requested.

The staff of a public entity is required to know and follow the open records law.²³ Even though Mr. Ford was aware of the fact that he was not required to put his request in writing, the knowledge of his rights does not relieve Pierce County of its duty to follow the law. Therefore, it is my opinion the Pierce County violated the open records laws by asking Mr. Ford to put his request in writing.²⁴

Issue Two

It is a violation of N.D.C.C. § 44-04-18 when a copy of a record is not provided within a reasonable time.²⁵ Although N.D.C.C. § 44-04-18 does not usually require an immediate response, the delay permitted will usually be measured in a few hours or a few days rather than several days or weeks.²⁶ “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.”²⁷ “Whether a response has been provided within a reasonable time will depend on the facts of a given situation.”²⁸

In a 2004 opinion, I explained that although it took a public entity approximately 20 days to respond to a request, the delay was reasonable under the circumstances: time was needed to prepare 24 pages of transcripts for two meetings; the secretary was a part-time employee and had other responsibilities; the public entity sought to obtain records it did not have and verify from other departments of county government whether records existed, although it was not required to do so; three working days after the open records request was submitted to it, the public entity advised the requester of the actions being taken in response to his request; and, finally, draft minutes of the meeting were provided to the requester the same day they were completed.²⁹

²³ See N.D.A.G. 2006-O-15, N.D.A.G. 2001-O-02, N.D.A.G. 82-23.

²⁴ If an employee of a public entity does not understand a request for records, it is more appropriate for the employee to write down the request and have the requester confirm the accuracy of the writing.

²⁵ N.D.C.C. § 44-04-18(8).

²⁶ N.D.A.G. 2004-O-07; N.D.A.G. 2002-O-06.

²⁷ 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.

²⁸ N.D.A.G. 2006-O-15; N.D.A.G. 2005-O-05; N.D.A.G. 2003-O-09.

²⁹ N.D.A.G. 2004-O-05 (citations omitted).

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At the time of Mr. Ford's request or immediately thereafter, Mr. Ford was a party to a civil action in which the public entity is a party. Pierce County could have rejected the request under N.D.C.C. § 44-04-18(6) and advised Mr. Ford that his request had to be made to the attorney representing that entity in the civil action and comply with the applicable discovery rules. Pierce County could also have denied Mr. Ford's request if he sought records that were privileged under the applicable discovery rules.³⁰ Pierce County did not deny Mr. Ford's request or advise him to redirect his request to the attorney representing Pierce County. Instead, the Director chose to research the question seeking an answer for Mr. Ford.

Pierce County explains that the information requested by Mr. Ford was not readily available to the Director or other staff at that agency.³¹ The employee who authorized payments for the time period requested by Mr. Ford no longer worked at the agency. In order to gather the information, the Director researched the question on her own. After the Director gathered the information available to her, she was able to determine the amount of the payments, but not the county's share of payments. Pierce County advised my staff that DHS makes the actual payment to a facility where a foster child is placed, accounts for the county's share, and also bills the federal government for a share of costs at whatever rate is appropriate.³² Since the information requested by Mr. Ford was not available to the Director, she sought assistance from DHS.

A public entity is under no duty to create a record,³³ and a document that is not in an entity's possession is not a record of that entity.³⁴ Thus, when a public entity receives a request for records, it must either provide those records or explain why the records are not being provided within a reasonable time.³⁵ As I explained in a previous opinion, while it is commendable for a public entity to attempt to obtain records the entity does not have from another source, a long delay may still be unreasonable and violate N.D.C.C. § 44-04-18. I have also previously explained that "[e]very state official and the

³⁰ N.D.C.C. § 44-04-18(6).

³¹ Letter from Pierce County to Matthew Sagsveen (Dec. 7, 2007).

³² The county's share is taken out of any other moneys that the county would get as program costs. The Director further explained "[t]he County is to cover administrative costs and the state is to cover program costs. [Pierce County] Social Services does not send a check to the state at any time or to any of the foster care facilities. We also do not receive any child support money collected. It all goes to the State." E-mail from Pierce County to Matthew Sagsveen (Dec. 20, 2007).

³³ N.D.A.G. 98-O-20.

³⁴ N.D.A.G. 2003-O-01.

³⁵ 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.

employees of any department should start with the assumption that every public record is to be open and accessible pursuant to section 44-04-18, N.D.C.C. Likewise, every state official and the employees of any department should know what records are excepted by statutes or case law decisions from the requirements . . . [of the open records] law."³⁶ Determining that there has been a violation of the open records law is difficult in this case, because the Director was, in fact, working with reasonable diligence to comply with the request. Nonetheless, when an entity is aware that it does not possess a record, it should promptly notify the requester.

At the latest, Pierce County was aware by November 8, 2007, 12 working days after Mr. Ford's request, that it did not possess part or all of the records requested by Mr. Ford.³⁷ It would have been reasonable by this date for Pierce County to advise Mr. Ford that the county did not have the information requested or that he needed to follow different procedures because he had named Pierce County in a lawsuit.³⁸ It is my opinion that because Pierce County waited until November 29, 2007, 15 more working days to respond to Mr. Ford, Pierce County violated the open records laws by failing to provide a response to the request for records within a reasonable time.

CONCLUSION

1. Pierce County violated the open records law by asking the requester to put the request for records in writing.
2. Pierce County failed to provide a response to the request for records within a reasonable time.

³⁶ N.D.A.G. 2006-O-15; N.D.A.G. 82-23.

³⁷ E-mail from Mary Hermanson to North Dakota Department of Human Services (Nov. 8, 2007).

³⁸ See generally N.D.C.C. § 44-04-18(6).

STEPS NEEDED TO REMEDY VIOLATION

The unreasonable delay has been remedied to the greatest extent possible by providing the requested copies of records to Mr. Ford.

Wayne Stenehjem
Attorney General

Assisted by: Matthew Sagsveen
Assistant Attorney General

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