

**OPEN RECORDS AND MEETINGS OPINION
2008-O-25**

DATE ISSUED: October 31, 2008

ISSUED TO: Cavalier Fire Department

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 Cavalier Fire Department violated N.D.C.C. § 44-04-18 by failing to provide Mr. Heck with the records requested within a reasonable time.

FACTS PRESENTED

On April 10, 2008, Scott Heck sent an open records request to the Cavalier City Fire Department ("Fire Department") asking for a copy of the Fire Department's 2006 checking account statements, including each month's canceled checks. The request was sent by first-class, certified mail.

On May 7, 2008, Mr. Heck submitted an open records complaint to this office because the Fire Department had failed to respond to his request. My staff called Robert Fleming, assistant city attorney who represents the Fire Department, seeking information about the complaint. Mr. Fleming later indicated he was unaware of the request and stated it was not in the Fire Department's file.¹ After Mr. Fleming was notified of the request, he advised Mr. Heck that the bank statements and canceled checks were available.² The requested records were mailed to Mr. Heck on May 29, 2008.

¹ Letter from Robert Fleming to Scott Heck (May 23, 2008) ("it appears to the Attorney General that you want additional records consisting of the 2006 bank statements and the cancelled checks"); letter from Robert Fleming to Assistant Attorney General Matthew Sagsveen (Aug. 8, 2008).

² Letter from Robert Fleming to Scott Heck (May 23, 2008).

ISSUE

Whether the Fire Department violated N.D.C.C. § 44-04-18 by not responding to Mr. Heck's request within a reasonable time.

ANALYSIS

A public entity must provide one copy of an open record upon request.³ When a public entity receives a request for records, it must either provide those records within a reasonable time, or explain why the records are not being provided.⁴

The Fire Department is a municipal fire department, an agency of the City of Cavalier.⁵ Therefore, as an agency of a municipality, it is a public entity.⁶ As noted above, Mr. Fleming stated on behalf of the Fire Department that he never received Mr. Heck's request and it could not be found in the Fire Department's file.⁷ He further argued that losing track of Mr. Heck's April 10 open records request was not unreasonable because the Fire Department had received a number of "ongoing" open records requests from Mr. Heck.⁸

There is a presumption that a letter properly mailed and properly addressed is received,⁹ and in this case a United States Postal Service tracking record shows Mr. Heck's request was delivered on April 11 to P.O. Box 183, Cavalier, North Dakota 58220-0183, the postal address of the Fire Department.¹⁰ The fact that Mr. Fleming did not have the request and could not find it is not a defense to the city's duty to provide a copy of records and respond to the request within a reasonable time.

³ N.D.C.C. § 44-04-18(1) and (2).

⁴ N.D.C.C. § 44-04-18(8).

⁵ Cavalier N.D. Municipal Code ch. 32.

⁶ N.D.A.G. 2008-O-06; see N.D.C.C. §§ 44-04-17.1(10) (city is a political subdivision) and 44-04-17.1(12)(b) (department of a political subdivision is a public entity).

⁷ Letter from Robert Fleming to Assistant Attorney General Matthew Sagsveen (Aug. 8, 2008).

⁸ Id.

⁹ N.D.C.C. § 31-11-03(24).

¹⁰ United States Postal Service web Track & Confirm report stating "[y]our item was delivered at 11:00 AM on April 11, 2008 in CAVALIER ND 58220." Receipt number 7007 3020 0001 6737 0029 (printed April 23, 2008).

In addition, the Fire Department's argument concerning Mr. Heck's multiple record requests does not justify the Fire Department's losing track of a request for records. Citizens have a right to make multiple requests for different sets of public records.¹¹ A public entity must keep track of all open records requests, make a diligent search for records, and respond in a reasonable amount of time.¹² Properly responding to a request for records is an important duty of a public entity.¹³

Here, the Fire Department responded to Mr. Heck's April 10 request seven weeks after it was delivered and only after being contacted by this office.¹⁴ It is my opinion that the Fire Department violated N.D.C.C. § 44-04-18 when it failed to respond to Mr. Heck's request within a reasonable time.

CONCLUSION

It is my opinion that the Cavalier Fire Department violated N.D.C.C. § 44-04-18 by failing to provide a copy of records or explain the denial of a request within a reasonable time.

STEPS NEEDED TO REMEDY VIOLATION

Although untimely, the Fire Department has provided Mr. Heck with the records he requested. This is the Fire Department's second violation of N.D.C.C. § 44-04-18 regarding public records requested by Mr. Heck.¹⁵ Public officials in the City of Cavalier should be aware that they may be subject to criminal penalties if they have been found

¹¹ See, e.g., N.D.A.G. 2008-O-07; N.D.A.G. 2008-O-05; and N.D.A.G. 2008-O-04 (individual made multiple requests for public records to a state agency).

¹² See N.D.A.G. 2007-O-03 (“[t]here is nothing that prohibits a public entity from [tracking and] accounting for records it provides through open records requests”); see also N.D.A.G. 2004-O-07 (“a public entity is required by N.D.C.C. § 44-04-18 to make a diligent search for records and to disclose records relevant to [a] request”); N.D.C.C. § 44-04-18(8); N.D.A.G. 2008-O-06 (entity must provide copy of public record within a reasonable time).

¹³ N.D.A.G. 2002-O-08.

¹⁴ See Letter from Robert Fleming to Scott Heck (May 23, 2008) (“it appears . . . that you want additional records consisting of the 2006 bank statements and the cancelled checks”).

¹⁵ See N.D.A.G. 2008-O-06.

by the Attorney General in more than one opinion to have violated the open records law.¹⁶

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mjm/vkk

¹⁶ N.D.C.C. § 44-04-21.3. The law provides: The attorney general may refer to the appropriate state's attorney any public servant as defined in section 12.1-01-04 who has been found in more than one opinion issued pursuant to section 44-04-21.1 to have violated section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21. A public servant as defined in section 12.1-01-04 who knowingly violates section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 is guilty of an offense under section 12.1-11-06 [knowing refusal to perform a public duty].