

**OPEN RECORDS AND MEETINGS OPINION  
2013-O-14**

DATE ISSUED: August 28, 2013

ISSUED TO: Griggs County Commission

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from John Wakefield asking whether the Griggs County Commission violated N.D.C.C. §§ 44-04-18 and 44-04-20 by unreasonably delaying access to records requested and by holding a meeting that was not preceded by public notice.

**FACTS PRESENTED**

On February 12, 2013, there was a community forum held at the Cooperstown City Hall. The forum was sponsored by an informal group of citizens who support the construction of a new Griggs County Courthouse. The Griggs County Commissioners (Commissioners) were invited to attend the meeting and four of the five Commissioners chose to attend. Mr. John Wakefield also attended the meeting and asked the Commissioners to answer several questions about the proposed courthouse, which they did. Mr. Wakefield alleges that because a quorum was present, the meeting should have been noticed as a meeting of the Griggs County Commission (Commission).

On March 26, 2013, Mr. Wakefield requested several records from Griggs County Assistant State's Attorney Marina Spahr including the minutes of the Griggs County Court House Building Authority (Building Authority), the By-Laws and Articles of Incorporation of the Building Authority, and minutes of any meetings held by the Building Authority.<sup>1</sup> The requested information was provided to Mr. Wakefield on May 28, 2013.<sup>2</sup>

On March 30, 2013, Mr. Wakefield e-mailed several Commissioners asking for all Commission meeting minutes from March 6, 2013, to March 31, 2013, and minutes of

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<sup>1</sup> Mr. Wakefield also requested answers to certain questions. A request to answer a question or provide an explanation is not a request for a public record and therefore not subject to open records law.

<sup>2</sup> See E-mail from Catherine Band, Griggs Cnty. State's Atty. Secretary/Legal Assistant, to Mr. Wakefield (May 28, 2013) (on file with author).

all Building Authority meetings from inception to March 31, 2013.<sup>3</sup> Griggs County had already provided March 2013 county commission meeting minutes to Mr. Wakefield on March 14, 2013.<sup>4</sup> The remaining county commission March minutes were provided to him on April 5, 2013.<sup>5</sup> Mr. Wakefield alleges he was not provided the requested records within a reasonable time.

## ISSUES

1. Whether the Commission provided records requested within a reasonable time.
2. Whether attendance by a quorum of the Commission at a February 12, 2013, "community forum" meeting constituted a "meeting" of the Commission that was required to be preceded by public notice.

## ANALYSIS

### Issue One

"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."<sup>6</sup> When a public entity receives a request for records, it must, within a reasonable time period, either provide the records or explain why the records are not being provided, pursuant to N.D.C.C. § 44-04-18.<sup>7</sup> Although N.D.C.C. § 44-04-18 does not usually require an immediate response, the delay permitted generally will be measured in a few hours or a few days, rather than several days, weeks, or months.<sup>8</sup> Whether a response has been provided within a reasonable time will depend on the facts of a given situation.<sup>9</sup>

### Griggs County Building Authority Record Requests

On March 26, 2013, Mr. Wakefield requested minutes, meeting notices, By-Laws and Articles of Incorporation of the Griggs County Building Authority (Building Authority)

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<sup>3</sup> See E-mail from John Wakefield to Ron Halvorson, Bob Johnson, Dennis Halvorson, and Keith Monson (Mar. 30, 2013) (on file with author).

<sup>4</sup> See E-mail from Cindy Anton, Griggs Cnty. Auditor, to Mr. Wakefield (Mar. 14, 2013) (on file with author).

<sup>5</sup> See E-mail from Cindy Anton, Griggs Cnty. Auditor, to Mr. Wakefield (Apr. 5, 2013) (on file with author).

<sup>6</sup> N.D.C.C. § 44-04-18(1).

<sup>7</sup> N.D.C.C. § 44-04-18(7); N.D.A.G. 2012-O-07.

<sup>8</sup> N.D.A.G. 2011-O-07; N.D.A.G. 2008-O-08.

<sup>9</sup> N.D.A.G. 2008-O-08; N.D.A.G. 2008-O-06; N.D.A.G. 2006-O-15.

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from the Griggs County Assistant State's Attorney, Ms. Marina Spahr.<sup>10</sup> Four days later, on April 1, Ms. Spahr responded that the request "will be handled according to date received and importance of any deadlines that may be associated with it. Please keep in mind the numerous requests that you have already made that take time to answer and come before this response."<sup>11</sup>

At the time of this response, Griggs County did not have possession of the By-Laws, Articles of Incorporation, or any other records related to the Building Authority. According to Ms. Spahr, the Building Authority is a separate, private, non-profit corporation not subject to open record laws and the records subject to the request were not in the possession of Griggs County but actually held by a separate, private attorney.<sup>12</sup> However, instead of explaining that the records were not subject to open record laws or that they were not in the possession of Griggs County, Ms. Spahr's e-mail to Mr. Wakefield implied the records would be forthcoming.<sup>13</sup> On May 23, 2013, almost two months after Mr. Wakefield's request, Ms. Spahr acquired the records from the Building Authority's private attorney.<sup>14</sup> On May 28, 2013, Mr. Wakefield was informed that the documents were ready for his review.<sup>15</sup>

As I 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.<sup>16</sup> If the entity is aware that it does not possess a record, or is of the opinion that a record is not subject to open records law, it should promptly notify the requester. Here, even though Ms. Spahr did not think the records were subject to the open records law and did not have the records, she told Mr. Wakefield that the records would be provided. Mr. Wakefield waited for two months

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<sup>10</sup> See E-mail from Mr. Wakefield to Marina Spahr, Griggs Cnty Asst. State's Attorney (Mar. 26, 2013) (on file with author).

<sup>11</sup> See E-mail from Marina Spahr, Griggs Cnty. Asst. State's Atty. to Mr. Wakefield (Apr. 1, 2013) (on file with author).

<sup>12</sup> Id. This office will not advise or comment on whether the Building Authority is a public entity subject to open record and meeting laws for the purpose of this opinion.

<sup>13</sup> Id.

<sup>14</sup> See Letter from Ronald Halvorson, Griggs Cnty. Comm'n Chair, to Attorney General's office (May 28, 2013) (on file with author).

<sup>15</sup> See E-mail from Catherine Band, Griggs Cnty. State's Atty. Secretary/Legal Assistant, to Mr. Wakefield (May 28, 2013) (on file with author). In addition, the records provided on May 28, 2013, to Mr. Wakefield appear to encompass numerous record requests made by Mr. Wakefield to Ms. Spahr. Although I understand the reasoning in trying to provide all the records at once, if certain documents are immediately available, such documents should be produced as soon as they are available, instead of delaying disclosure for months in order to provide all requested records.

<sup>16</sup> N.D.A.G. 2008-O-08; N.D.A.G. 2007-O-11.

to get the records he was promised by the county. It is therefore my opinion that Griggs County's delayed response was unreasonable and violated the open records law.

#### Griggs County Commission Meeting Minutes Record Requests

On March 30, 2013, Mr. Wakefield e-mailed four of the five Commissioners requesting meeting minutes from all county commission meetings, including special meetings, held from March 6, to March 31, 2013. In addition to requesting these records from the Commission, Mr. Wakefield had previously sent a request for Commission meeting minutes to the Griggs County Auditor on March 14, 2013,<sup>17</sup> and to Ms. Spahr on March 26, 2013.<sup>18</sup> A public entity is not required to provide more than one copy of a record to the same requestor.<sup>19</sup> Mr. Wakefield is therefore entitled to receive a copy of a requested record once, even if he is requesting the same record from multiple entities all within Griggs County.

Griggs County provided several reasons for the delay in providing the requested Commission meeting records to Mr. Wakefield. Mr. Wakefield inundated Griggs County with multiple requests. He requested certain records from the Griggs County Auditor, and would thereafter request the same records from the assistant state's attorney or the county commissioners.<sup>20</sup> The requests were often repetitious, lengthy, and requests for information rather than for records.<sup>21</sup> This method of requesting records created confusion as to what records had already been provided, who would be providing the requested records, whether the requests were meant to subsume the previous requests, and what requests were actually outstanding.

The Griggs County Auditor had already provided Mr. Wakefield with all Commission meeting minutes from 2012 to March 6, 2013, on March 14, 2013.<sup>22</sup> Therefore, after

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<sup>17</sup> See E-mail from Mr. Wakefield to Cindy Anton, Griggs Cnty. Auditor (Mar. 14, 2013) (on file with author).

<sup>18</sup> See E-mail from Mr. Wakefield to Marina Spahr, Griggs Cnty. Asst. State's Atty. (Mar. 26, 2013) (on file with author).

<sup>19</sup> N.D.A.G. 98-O-20.

<sup>20</sup> For example, Mr. Wakefield requested Commission meeting minutes from 2012 and 2013 from the Griggs County Auditor on March 14, 2013. Mr. Wakefield then asked for meeting minutes of the Commission from Ms. Spahr on March 25, 2013, from the County Auditor on March 28, 2013, and from the County Commissioners on March 30, 2013.

<sup>21</sup> This office has repeatedly explained that the definition of "record" under N.D.C.C. § 44-04-17.1(16) does not include unrecorded thought processes or requests for information. See N.D.A.G. 2006-O-09; N.D.A.G. 97-O-01.

<sup>22</sup> See E-mail from Cindy Anton, Griggs Cnty. Auditor, to Mr. Wakefield (Mar. 14, 2013) (on file with author).

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sifting through the multiple requests, Griggs County determined that the only records still outstanding at the time of Mr. Wakefield's March 30, 2013, request to the Commissioners, were meeting minutes for any meeting held from March 7 to March 31, 2013. There were two additional meetings held during this timeframe and at the time the records were requested, these minutes were not drafted. The auditor provided the March 12 and March 21, 2013, minutes to Mr. Wakefield as soon as she prepared them on April 5, 2013.<sup>23</sup>

As of April 5, 2013, Mr. Wakefield had all of the meeting minutes pertaining to his March 30, 2013, request. It is my opinion that the six days it took Griggs County to sort through Mr. Wakefield's multiple requests and prepare the undrafted minutes did not constitute an unreasonable delay in providing the Commission meeting minutes requested by Mr. Wakefield.

### Issue Two

All meetings of a public entity's governing body must be open to the public<sup>24</sup> and preceded by sufficient public notice.<sup>25</sup> A "meeting" is defined as a "formal or informal gathering ... of: [a] quorum of the members of the governing body of a public entity regarding public business."<sup>26</sup> "Public business" includes all matters that relate or may foreseeably relate in any way to the performance of the public entity's governmental functions or use of public funds.<sup>27</sup>

Mr. Wakefield alleges that a meeting held at Cooperstown City Hall on February 12, 2013, attended by a quorum of Commissioners, which was not preceded by public notice, violated open meeting laws. The Commission denies it had to provide notice of the February 12, 2013, meeting because it was just a "community forum," organized and held by a group of citizens trying to promote the building of a new courthouse, and the Commissioners attended the meeting in their individual capacities as "concerned citizens" and not as Commissioners.<sup>28</sup>

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<sup>23</sup> The auditor explained that there had been several commission meetings in March so she was behind in getting the minutes prepared. But see N.D.C.C. § 44-04-21(2) (disclosure of draft minutes may not be conditioned on the approval of the minutes by the governing body).

<sup>24</sup> N.D.C.C. § 44-04-19.

<sup>25</sup> N.D.C.C. § 44-04-20.

<sup>26</sup> N.D.C.C. § 44-04-17.1(9)(a).

<sup>27</sup> N.D.C.C. § 44-04-17.1(12).

<sup>28</sup> See Letter from the Commission to the Attorney General's office (Apr. 18, 2013) (on file with author). See also N.D.C.C. § 44-04-21.2(1): "In any opinion issued under this section, the attorney general shall base the opinion on the facts given by the public entity."

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As I have explained in past opinions, when a quorum of members of a governing body attends a meeting of another group, and the group's discussion pertains to the public business of the governing body, the attendance of the members of the governing body is a "meeting" for which notice must be provided, even if the attendance of a quorum at the meeting is unplanned and unexpected.<sup>29</sup>

At the February 12, 2013, "community forum," the Commissioners answered numerous questions posed to them from people in attendance. They were asked questions because they were Commissioners and represented themselves as Commissioners by their answers. When a public forum is conducted regarding an issue closely associated with public business it is nearly impossible for members of a governing body to attend only as "concerned citizens" and not in their capacity as Commissioners. Even if they did not speak, a quorum of the Commission gathered information at the meeting on a topic that relates to the Commission's public business. The gathering of information is a step in the decision-making process, which I have explained subjects the Commission to the open meetings law.<sup>30</sup>

Regardless of the capacity in which the Commissioners attended the "community forum," a quorum was present. The topic of discussion at the forum related to the construction of a courthouse in Griggs County, a topic that has been before the Commission and undoubtedly relates to its "public business." Thus, it is my opinion that the attendance of four of the five Commissioners at the "community forum" was a "meeting" of the Commission, required to be open to the public under N.D.C.C. § 44-04-19, preceded by public notice in compliance with N.D.C.C. § 44-04-20, and followed by minutes in compliance with N.D.C.C. § 44-04-21.<sup>31</sup>

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<sup>29</sup> N.D.A.G. 2005-O-07; N.D.A.G. 98-O-18. The Commission alleges it did not know that a quorum would be present at this "community forum." This is suspect considering the notice of the "community forum" was printed in a newspaper article discussing the Commission. The Commission is cautioned that if it is reasonable to suspect beforehand that a quorum might attend a meeting, public notice should be provided when the members learned of the gathering. If it is a surprise, notice must be provided immediately at the meeting or in some circumstances, after the meeting.

<sup>30</sup> N.D.A.G. 2009-O-05. See also N.D.A.G. 2006-O-02; N.D.A.G. 2004-O-15; N.D.A.G. 98-F-16; N.D.A.G. 98-O-08

<sup>31</sup> Although the Commission issued a general statement after the "community forum" stating: "A few of the Griggs County Commissioners attended the Community meeting at City Hall in the City of Cooperstown on February 12, 2013, at 6:15 p.m.," this statement failed to provide notice of the meeting in substantial compliance with N.D.C.C. § 44-04-20. See "Notice to the Public", dated Apr. 17, 2013.

### CONCLUSIONS

1. The Commission failed to provide a response to Mr. Wakefield's record requests of the Building Authority's By-Laws and Articles of Incorporation within a reasonable time. However, the Commission provided Mr. Wakefield with Commission meeting minutes within a reasonable time.
2. Attendance by a quorum of the Commission at the February 12, 2013, meeting constituted a meeting of the Commission and was required to be preceded by public notice in substantial compliance with N.D.C.C. § 44-04-20 and meeting minutes should have been prepared as required by N.D.C.C. § 44-04-21.

### STEPS NEEDED TO REMEDY VIOLATIONS

Because all records requested were eventually provided to Mr. Wakefield, there are no further corrective measures to be taken.

The Commission must draft meeting minutes of the February 12, 2013, meeting consistent with N.D.C.C. § 44-04-21(2) and provide them to Mr. Wakefield, free of charge.

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.<sup>32</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>33</sup>

Wayne Stenehjem  
Attorney General

slv/vkk

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<sup>32</sup> N.D.C.C. §44-04-21.1(2).

<sup>33</sup> Id.