

**OPEN RECORDS AND MEETINGS OPINION
2013-O-15**

DATE ISSUED: September 5, 2013

ISSUED TO: City of Lincoln – Lincoln Police Department

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Thomas Nagel asking whether the Lincoln Police Department violated N.D.C.C. § 44-04-18 by unreasonably delaying access to records he requested.

FACTS PRESENTED

Thomas Nagel sent a letter dated March 20, 2013, to Marcel Sim, Chief of Police of the Lincoln Police Department (Police Department), requesting true and correct copies of “[a]ll vehicle inspection reports for the vehicles used by the Lincoln Police Department from November 01, 2012 thru November 15, 2012.”¹ It is the Police Department’s policy to immediately forward any record requests from Thomas Nagel to the city attorney for review.² The letter from Thomas Nagel was received by the city attorney on March 25, 2013.³ Later that day, the city attorney requested Chief Sim to prepare copies of the

¹ See Letter from Thomas Nagel to Chief Marcel Sim, Lincoln Police Dep’t (Mar. 20, 2013) (on file with author).

² Galen Nagel, Thomas Nagel’s brother, was issued citations by the Police Department in October of 2012, which thereafter resulted in numerous record requests by both Galen Nagel and Thomas Nagel and ongoing litigation between Galen Nagel and the Police Department as well as threats of litigation against the City of Lincoln. It is therefore the policy between the Police Department and city attorney that any letters received from either Thomas Nagel or Galen Nagel are promptly forwarded to counsel for review. See Letter from Lincoln city attorney Jackie Stebbins to the Att’y. Gen.’s office (June 6, 2013) (on file with author).

³ See Letter from Thomas Nagel to Chief Marcel Sim, Lincoln Police Dep’t (Mar. 20, 2013), receipt stamped of Mar. 25, 2013 (on file with author); see also, E-mail from Lincoln city attorney Jackie Stebbins to Chief Marcel Sim, Lincoln Police Dep’t (Mar. 25, 2013) (on file with author).

requested documents.⁴ Chief Sim compiled the records subject to the request and sent copies of the records to the city attorney on March 31, 2013, for review.⁵ The city attorney reviewed the records and on April 4, 2013, provided copies of the records to Thomas Nagel.⁶

ISSUE

Whether the Lincoln Police Department responded to a request for records within a reasonable time.

ANALYSIS

The Police Department, as an agency of the political subdivision of the City of Lincoln, is a “public entity” subject to open record laws.⁷ “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.”⁸ 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.⁹ 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.¹⁰ 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, availability and workload of staff who can respond to the record request, sorting out what has previously been provided to a requestor, reviewing large volumes of documents to respond to a record request, the availability and accessibility of the records requested, or balancing other responsibilities of the public entity that demand immediate attention.¹¹ Whether a response has been provided within a reasonable time will depend on the facts of a given situation.¹²

⁴ Id.; see also Letter from Lincoln city attorney Jackie Stebbins to the Att’y. Gen.’s office (June 6, 2013) (on file with author).

⁵ Letter from Lincoln city attorney Jackie Stebbins to the Att’y. Gen.’s office (June 6, 2013) (on file with author).

⁶ Id.

⁷ The definition of “public entity” includes “[p]ublic or governmental bodies, boards, bureaus, commissions, or agencies of any political subdivision of the state...” N.D.C.C. § 44-04-17.1(13)(b); see also N.D.A.G. 2005-O-13; N.D.A.G. 2004-O-05.

⁸ N.D.C.C. § 44-04-18(1).

⁹ N.D.C.C. § 44-04-18(7); N.D.A.G. 2012-O-07.

¹⁰ N.D.C.C. § 44-04-18(8).

¹¹ N.D.A.G. 2012-O-07; N.D.A.G. 2010-O-04; N.D.A.G. 2008-O-08; N.D.A.G. 2004-O-05; N.D.A.G. 2003-O-21; N.D.A.G. 98-O-20; N.D.A.G. 98-O-04.

¹² 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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In this case, it took from March 25, 2013, the day in which the Police Department's counsel received the request, until April 4, 2013, to provide the records.¹³ According to the Police Department, at the time of the records request, Chief Sim was the sole officer employed with the Police Department and the only person with access to the requested records.¹⁴ As the sole officer for the Police Department, Chief Sim had numerous duties and responsibilities beyond the regular duties demanded of a police officer, including handling administrative responsibilities, the recruiting and training of new officers, and handling internal affairs.¹⁵ Some of Chief Sim's regular duties as a police officer, such as responding to calls and incidents resulting in arrests, required immediate attention.

This office has explained in numerous opinions that a number of circumstances, including available staff and balancing other responsibilities of the public entity that demand immediate attention, could reasonably delay providing records in response to an open record request.¹⁶ Considering Chief Sim's workload, other responsibilities, and the fact he was the only person who was able to respond to the record request, it is my opinion that the time it took for Chief Sim to compile the records and provide them to the city attorney for review, from March 25 to March 31, 2013, was not an unreasonable delay.

This office has previously recognized that it is appropriate to take a reasonable amount of time to consult with the public entity's attorney on a records request as long as there is a legitimate legal or factual question on whether the requested records are open.¹⁷ There is an exception to the open record laws under N.D.C.C. § 44-04-18(6), which requires parties and people acting on behalf of parties engaged in litigation against public entities to utilize applicable discovery rules, instead of open record laws, for record requests.¹⁸ The Police Department wanted the city attorney to review the

¹³ Although it is unknown when the Police Department actually received the March 20, 2013, letter, it is the practice of the Police Department to immediately transmit letters received from Thomas Nagel or Galen Nagel as soon as they are received. It is therefore the position of the Police Department that it received the letter on March 25, 2013, the date in which counsel received the letter. Opinions must be based on the facts given by the public entity. N.D.C.C. § 44-04-21.1.

¹⁴ See Letter from Lincoln city attorney Jackie Stebbins to the Att'y. Gen.'s office (June 6, 2013) (on file with author). At full staff, the Police Department should have three full-time officers and one part-time officer.

¹⁵ Id. The letter details numerous duties and responsibilities of Chief Sim at the time the record request was received.

¹⁶ N.D.A.G. 2010-O-04.

¹⁷ N.D.A.G. 2003-O-21; N.D.A.G. 2001-O-04; N.D.A.G. 2001-O-02; N.D.A.G. 98-O-03.

¹⁸ This office will not advise or comment on whether N.D.C.C. § 44-04-18(6) applies to Thomas Nagel's records request at issue in this opinion.

records requested because of ongoing litigation between the Police Department/City of Lincoln and Thomas Nagel's brother, Galen Nagel, which may have subjected the records to applicable discovery rules.¹⁹ The city attorney also reviewed the police records for confidential information. At the time of the request, the city attorney was preparing for Galen Nagel's upcoming trial for the City of Lincoln and the records requested by Thomas Nagel appeared to be related to the underlying incident. Therefore, it is my opinion that it was reasonable for the Police Department to consult with its attorney to determine what records it could release to Thomas Nagel and that the amount of time it took to do so was reasonable.

CONCLUSION

The Lincoln Police Department provided the requested records within a reasonable time.

Wayne Stenehjem
Attorney General

slv/vkk

¹⁹ See Letters from Lincoln city attorney Jackie Stebbins to the Att'y. Gen.'s office (May 1, 2013, and June 6, 2013) (on file with author).