

**OPEN RECORDS AND MEETINGS OPINION
2014-O-20**

DATE ISSUED: November 21, 2014

ISSUED TO: Office of State Tax Commissioner

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Chad Nodland asking whether the Office of State Tax Commissioner provided proper responses to an open records request.

FACTS PRESENTED

On September 8, 2014, Mr. Chad Nodland, editor of NorthDecoder.com, sent an email to Joe Morrisette, Deputy Tax Commissioner, requesting "[a]ny records of communications to or from anybody who works in the North Dakota Tax Department ... relating in any way to the events" involving the Tax Commissioner's leave of absence.¹ Mr. Morrisette provided responsive documents to Mr. Nodland on September 11, 2014, and invited Mr. Nodland to contact him with any questions.² Mr. Nodland asked if the responsive records included communications to/from the Commissioner.³ Mr. Morrisette explained that information technology resources were utilized to access the Commissioner's state email account and emails responsive to the request were produced. However, Mr. Morrisette also explained that the Commissioner was inaccessible at the time and the Office of State Tax Commissioner

¹ Email from Chad Nodland, Editor, NorthDecoder.com, to Joe Morrisette, Deputy Tax Comm'r, (Sep. 8, 2014, 9:38 AM). After several email exchanges between Mr. Nodland and Mr. Morrisette regarding the bulk of responsive records, Mr. Nodland ultimately narrowed his request to communications between managers, supervisors, and division directors of the Tax Department. See Emails between Chad Nodland, Editor, NorthDecoder.com, and Joe Morrisette, Deputy Tax Comm'r (Sep. 8, 2014)

² Email from Joe Morrisette, Deputy Tax Comm'r, to Chad Nodland, Editor, NorthDecoder.com (Sep. 11, 2014, 12:29 PM).

³ Email from Chad Nodland, Editor, NorthDecoder.com, to Joe Morrisette, Deputy Tax Comm'r (Sep. 12, 2014, 9:20 AM).

(Department) did not have access to any messages or emails stored on the Commissioner's personal devices.⁴ Mr. Morrissette further explained that the Department did not deny that the Commissioner's personal devices might contain records that would be considered public. Rather, the Department was not able to access the Commissioner's personal devices or contact him due to his voluntary leave of absence in order to receive inpatient medical treatment at an undisclosed facility at the time of the request.⁵

ISSUE

Whether the Office of State Tax Commissioner violated the open records law when it did not produce records that were inaccessible at the time of a records request.

ANALYSIS

All recorded information regarding "public business" in the possession of a public entity is open to the public unless otherwise specifically provided by law.⁶ The Office of State Tax Commissioner is a public entity subject to the open records law and its employees, including the Tax Commissioner, are also subject to the open records law.⁷ The definition of "record" includes:

recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business.⁸

The above definition includes emails in the possession of employees of a public entity related to public business, regardless of whether the emails are stored at home, on a

⁴ See Email from Joe Morrissette, Deputy Tax Comm'r, to Chad Nodland, Editor, NorthDecoder.com (Sep. 12, 2014, 10:28 AM).

⁵ Email from Joe Morrissette, Deputy Tax Comm'r, to Chad Nodland, Editor, NorthDecoder.com (Sep. 15, 2014, 12:53 PM).

⁶ N.D.C.C. § 44-04-18.

⁷ See N.D.C.C. § 44-04-17.1(13) (definition of "public entity"), see also N.D.A.G. 2014-O-10.

⁸ N.D.C.C. § 44-04-17.1(16) (definition of "record") (emphasis added).

OPEN RECORDS AND MEETINGS OPINION 2014-O-20

November 21, 2014

Page 3

private computer, or sent/received from a personal email address.⁹ Likewise, this definition would include text messages in the possession of employees of public entities that relate to public business.¹⁰

The Department does not deny that emails, texts, or other recorded information containing public business on personal devices, such as cell phones or home computers, are subject to open records law. The Department, however, was not able to produce some of these records because at the time of the request, the Department could not access the records. In order to provide the records, the public entity must have a means to access the records. Although rare, there are situations in which records may not be available for immediate production for various reasons. Here, an employee's personal devices were inaccessible for an undetermined amount of time because the employee was on a leave of absence receiving inpatient medical treatment.¹¹ The Department never refused to produce the records but rather produced all records in its possession at the time of the request and explained to Mr. Nodland why it was unable to provide all of the Commissioner's records.¹²

The Department performed its due diligence under the open records law in attempting to produce all responsive records in its possession at the time of the request and agreed to turn over any other records when they became accessible.¹³ I therefore do not find the Department's response to Mr. Nodland's request to be a violation of the open records law.¹⁴

⁹ See N.D.A.G. 2014-O-10; N.D.A.G. 2013-O-08; N.D.A.G. 2008-O-07; N.D.A.G. 2007-O-06.

¹⁰ N.D.C.C. § 44-04-17.1(16) (definition of "record" includes recorded information of any kind regardless of physical form related to public business).

¹¹ Letter from Joe Morrissette, Deputy Tax Comm'r, to Sandra Voller, Asst. Att'y Gen. Sep. 30, 2014).

¹² The records accessible from the Commissioner's state email account were provided.

¹³ As soon as the Commissioner was accessible, the Department fully responded to the request and no additional records were found. See Email from Donnita Wald, Gen. Counsel for the Office of State Tax Comm'r, to Chad Nodland, Editor, NorthDecoder.com (Oct. 9, 2014, 2:59 PM).

¹⁴ I find the Department's response to Mr. Nodland to be a correct reply under the unique circumstances of this case. The Department produced the records it had in its possession as soon as possible instead of waiting for the Commissioner to become available to fully respond to the request.

CONCLUSION

The department provided all records accessible at the time of the request and agreed to turn over all remaining records as soon as it could access the personal electronic devices on which the records were stored. The department did not violate the open records law.

Wayne Stenehjem
Attorney General

sld/vkk