

**OPEN RECORDS AND MEETINGS OPINION  
2021-O-09**

DATE ISSUED: September 3, 2021

ISSUED TO: Office of the Governor

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Editor, NorthDecoder, asking whether the Office of the Governor violated N.D.C.C. § 44-04-18 by failing to provide records within a reasonable time.

**FACTS PRESENTED**

On November 25, 2020, the Governor's office received a request for records from Editor, NorthDecoder, (Editor) for [A]ll communications/correspondence between Doug Burgum and anybody in the Governor's office and the lawyers, in their capacity as counsel to Mr. Burgum in working on the District 8 legislative seat matter. Records requested would presumably include communication, emails, notes of phone calls, memoranda, etc., if any relating to and leading up to Mr. Burgum's issuance of the attached press release (dated November 4, 2020, at 10:22:16 AM, from Mike Nowatzki and entitled "Burgum fulfills constitutional duty, appoints Wade Boeshans to unfilled District 8 House seat"), and thereafter.<sup>1</sup>

Editor received an acknowledgment of receipt from the Governor's office on November 25, 2020. When he did not hear anything for several weeks, he followed up with a clarification to his request on December 10, 2020.<sup>2</sup> Editor received no communication from the Governor's office until December 16, 2020.<sup>3</sup> On that date, the Governor's office provided 334 pages of records.<sup>4</sup>

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<sup>1</sup> E-mail from Editor, [northdecoder@gmail.com](mailto:northdecoder@gmail.com) (Nov. 25, 2020).

<sup>2</sup> E-mail from Editor, [northdecoder@gmail.com](mailto:northdecoder@gmail.com), to Gov.'s Office (Dec. 16, 2020, 2:25 PM).

<sup>3</sup> E-mail from Leslie Bakken Oliver, Att'y at Law, Gov.'s Office, to Editor, [northdecoder@gmail.com](mailto:northdecoder@gmail.com), (Dec. 16, 2020, 10:24 PM).

<sup>4</sup> Letter from Leslie Bakken Oliver, Att'y at Law, Gov.'s Office, to Att'y Gen.'s Office (Jan. 2, 2021).

## ISSUE

1. Whether the Governor's office provided records within a reasonable time.
2. Whether the Governor's office provided all the responsive records.

## ANALYSIS

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.<sup>5</sup> A delay may be appropriate for a number of reasons, including the number of records requested, reviewing large volumes of documents to respond to a request, excising closed or confidential information, availability and workload of staff who can respond to the request, or balancing other responsibilities of the public entity that demand immediate attention.<sup>6</sup> When determining the reasonableness of a response, this office considers the circumstances of the particular request.<sup>7</sup>

In this instance, there was a three-week time-period between the request, made on November 25, 2020, and the records being provided on December 16, 2020. According to the Governor's office, this delay was due to a "significantly larger volume of open records requests."<sup>8</sup> This increase in open records requests began approximately three months after the public health emergency was declared.<sup>9</sup> The Governor's office further explains that the on-going public health emergency added to the Governor's office's workload and required all staff members to balance "normal" job duties and responsibilities with the additional work demands.<sup>10</sup> Because of the high volume of open records request during the pandemic, the Governor's office adopted the practice of responding to the requests in order of receipt.<sup>11</sup>

The pandemic created unprecedented circumstances for a number of public entities. In the case of the Governor's office, it created extra challenges, including an increase in the number of open records requests. Given the large volume of requests, during

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<sup>5</sup> N.D.C.C. § 44-04-18(8); N.D.A.G. 2014-O-06; N.D.A.G. 2013-O-15.

<sup>6</sup> N.D.A.G. 2014-O-06; N.D.A.G. 2013-O-15; N.D.A.G. 2012-O-07; N.D.A.G. 2010-O-04.

<sup>7</sup> N.D.A.G. 2014-O-06; N.D.A.G. 2013-O-15; N.D.A.G. 2012-O-07; N.D.A.G. 2010-O-04.

<sup>8</sup> Letter from Leslie Bakken Oliver, Att'y at Law, Gov.'s Office, to Att'y Gen.'s Office (Jan. 22, 2021).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

an unprecedented time, it was reasonable to implement a system that answered the requests in the order received. However, it does not appear that part of the process was informing the requesters that there would be a delay and the reason for the delay. Past opinions have interpreted N.D.C.C. § 44-04-18(8) to require entities to “either provide the records *or explain* why the records are not being provided.”<sup>12</sup> This communication is an administrative task that does not require an attorney.<sup>13</sup>

Here, given the circumstances, a certain amount of delay is understandable and reasonable, however, prior opinions have explained that delayed responses are closely scrutinized.<sup>14</sup> Based on past opinions, a three-week delay to provide 334 pages is unreasonable.<sup>15</sup> The responsive records had to be reviewed for exempt and confidential information, but they were not hard to locate or particularly complicated. I must also consider the lack of communication to the requester to explain the delay. Therefore, it is my opinion that the delay in providing the records was unreasonable.

## II.

Editor also questions whether the Governor’s office turned over all the responsive records. According to the Governor’s office, it provided all responsive records other than one email communication from a legislator, withheld pursuant to N.D.C.C. § 44-04-18.6. In any opinion issued under N.D.C.C. § 44-04-21.1, the attorney general shall base the opinion on the facts given by the public entity.<sup>16</sup> Therefore, it is my opinion that no violation of the open records law occurred.

## CONCLUSION

1. The Governor’s office did not provide the requested records within a reasonable time and failed to communicate with the requester with an explanation for the three-week delay.
2. The Governor’s office provided all the responsive records.

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<sup>12</sup> N.D.A.G. 2014-O-06 (emphasis added); N.D.A.G. 2013-O-15. *See also* N.D.C.C. §44-04-18(8); N.D.A.G. 2007-O-11 (explanation of delay not provided to requester).

<sup>13</sup> See N.D.A.G. 2001-O-04 (legal advice not required to inform requester that records do not exist).

<sup>14</sup> N.D.A.G. 2008-O-06.

<sup>15</sup> N.D.A.G. 2014-O-06 (a two-month delay is unreasonable); N.D.A.G. 2013-O-17 (a three-month delay is unreasonable); N.D.A.G. 98-O-03 (a delay of seven working days will be closely reviewed by this office).

<sup>16</sup> N.D.C.C. § 44-04-21.1(1).

STEPS NEEDED TO REMEDY VIOLATION

Editor, NorthDecoder, has received all requested records. Therefore, there are no further corrective measures to be taken by the Governor's office.

Wayne Stenehjem  
Attorney General

cc: Editor (via email only)