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OPEN RECORDS AND MEETINGS OPINION
2023-O-04

DATE ISSUED: September 28, 2023

ISSUED TO: City of Fargo

CITIZEN'S REQUEST FOR OPINION

Christopher Coen requested an opinion from this office under N.D.C.C. § 44-04-21.1 regarding whether the City of Fargo (Fargo) violated N.D.C.C. § 44-04-18 by unreasonably delaying the release of requested records.

FACTS PRESENTED

On February 17, 2022, Mr. Coen made two open record requests to Fargo for records related to the Fargo Police Advisory and Oversight Board.¹ His first letter requested records “that define terms used in the proposed ordinance, including but not limited to the terms: ‘community,’ ‘community relations,’ ‘police relations,’ ‘community representatives,’ ‘community perspective,’ and ‘community impacts.’”² The second letter requested, “letters, emails, texts and/or any other communication documents” between the Fargo city attorney, assistant city attorneys, city attorney staff, and any other parties who were included in the creation of Fargo Police Advisory and Oversight Board.³ The date range of the records requested was between April 1, 2021, and November 30, 2021.⁴

Fargo’s Director of Communications and Government Affairs, Gregg Schildberger, sent a confirmation email acknowledging the request to Mr. Coen the following day, February 18, 2022.⁵ Next, Mr. Schildberger contacted the relevant Fargo departments and began processing

¹ Emails from Christopher Coen to Gregg Schildberger, Dir. of Commc’ns & Gov’t Affairs, City of Fargo (Feb. 17, 2022, 4:56 PM and Feb. 17, 2022, 4:57 PM); Letter from Nancy J. Morris, City Att’y, City of Fargo, to Annique M. Lockard, Assistant Att’y Gen., Att’y Gen.’s Office (Apr. 20, 2022).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Letter from Nancy J. Morris, City Att’y, City of Fargo, to Annique M. Lockard, Assistant Att’y Gen., Att’y Gen.’s Office (Apr. 20, 2022).

Mr. Coen's request.⁶ On March 11, 2022, after determining search parameters, Mr. Schildberger emailed Mr. Coen and advised Mr. Coen that a response was anticipated the following week. On March 15, 2022, all documents determined to be responsive to Mr. Coen's requests were provided, with none of the records being denied on any legal basis.⁷ On March 14, 2022, Mr. Coen requested an opinion from this office regarding the timeliness of Fargo's response, specifically noting his desire to have the records before the March 7, 2022, Fargo City Commission vote concerning the Fargo Police Advisory and Oversight Board.⁸

ISSUE

Whether Fargo responded to Mr. Coen's record request within a reasonable time.

ANALYSIS

North Dakota has a long tradition of providing access to public records.⁹ Providing access to, or copies of, public records is part of doing business as a public entity.¹⁰ If a copy of a specific public record is requested, a public entity must provide the records or explain why the records are not being provided within a reasonable time.¹¹ The open records law is violated when a person's right to review a copy of a record that is not exempt or confidential is denied or unreasonably delayed.¹² A delay may be reasonable if "the request was for a large number of records, where closed or confidential information had to be excised, or where other responsibilities of the public entity demanded immediate attention."¹³ Records are not required to be on hand, but response to the public request is expected within a matter of hours or days and not weeks.¹⁴ If a request is unclear, a public entity may request clarification from the requester.¹⁵

The requests made by Mr. Coen were broad in nature, pertained to an eight-month timeframe, and included various city personnel who may be in different departments.¹⁶ Rather than ask Mr.

⁶ *Id.*

⁷ *Id.*

⁸ Email from Christopher Coen to Office of Att'y Gen. (Mar. 14, 2022, 3:58 PM).

⁹ *See generally*, N.D. Const. art. XI, § 6.

¹⁰ *See generally*, N.D.C.C. § 44-04-18.

¹¹ N.D.C.C. §§ 44-04-18(2), (8). N.D.A.G. 2021-O-09; N.D.A.G. 2014-O-06; N.D.A.G. 2013-O-15.

¹² N.D.C.C. §§ 44-04-18(3), (8).

¹³ N.D.A.G. 2007-O-06; N.D.A.G. 2004-O-05.

¹⁴ N.D.A.G. 2004-O-07; N.D.A.G. 2002-O-06.

¹⁵ N.D.C.C. § 44-04-18(2).

¹⁶ Emails from Christopher Coen to Gregg Schildberger, Dir. of Comm'n's & Gov't Affairs, City of Fargo (Feb. 17, 2022, 4:56 PM and Feb. 17, 2022, 4:57 PM); Letter from Nancy J. Morris, City Att'y, City of Fargo, to Annique M. Lockard, Assistant Att'y Gen., Att'y Gen.'s Office (Apr. 20, 2022).

Coen to narrow or clarify his request, Fargo admits that it “determined to undergo a comprehensive search for the records requested by Mr. Coen.”¹⁷ Fargo spent significant time to determine all persons who may possess the responsive documents before they started to locate the records.¹⁸ Ultimately, it took 26 days to provide 59 pages of responsive records to the first letter request and of those records, none needed redaction.¹⁹ There were no records responsive to the second letter request.²⁰

The nearly four-week delay was exacerbated because Fargo failed to communicate with Mr. Coen to explain the long wait. This failure to communicate regarding the cause of the delay is relevant because N.D.C.C. § 44-04-18(8) requires entities to “either provide the records or *explain* why the records are not being provided” within a reasonable time.²¹ Records provided by Fargo show, aside from initial receipt confirmation, no communication or updates were provided to Mr. Coen until March 11, 2022, a span of over nearly four weeks.²² Explaining to Mr. Coen the reason for his delay may have mitigated the situation, encouraged him to narrow his request, or perhaps altogether avoided his request for an opinion from this office.

Consistent with past opinions issued by this office, communication with a requester is imperative when there will be a delay in providing responsive records.²³ When Fargo decided to undertake a comprehensive records search Fargo should have contacted Mr. Coen to inform him of the status of his request. The facts of this situation echo a 2021 opinion from this office that found a three-

¹⁷ Letter from Nancy J. Morris, City Att’y, City of Fargo, to Annique M. Lockard, Assistant Att’y Gen., Att’y Gen.’s Office (Apr. 20, 2022).

¹⁸ *Id.* The city notes that it was simultaneously “processing at least four other open records requests from Mr. Coen” as well as “an additional eighteen website request forms submitted by Mr. Coen” during this time period. *Id.*

¹⁹ Email from Gregg Schildberger, Dir. of Communc’ns & Gov’t Affairs, City of Fargo, to Christopher Coen (Mar. 15, 2022, 6:13 PM).

²⁰ Email from Gregg Schildberger, Dir. Of Communc’ns & Gov’t Affairs, City of Fargo, to Christopher Coen (Mar. 15, 2022, 6:15 PM).

²¹ N.D.C.C. § 44-04-18(8). N.D.A.G. 2021-O-09, *citing* 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).

²² Letter from Nancy J. Morris, City Att’y, City of Fargo, to Annique M. Lockard, Assistant Att’y Gen., Att’y Gen.’s Office (Apr. 20, 2022). Fargo discusses 218 emails exchanged between Mr. Coen and Mr. Schildberger and/or other city staff between September 14, 2021, and March 14, 2022, but does not clarify that any of this correspondence was in relation to Mr. Coen’s record request.

²³ N.D.A.G. 2021-O-09. (“I must also consider the lack of communication to the requester to explain the delay.”); *See also* N.D.A.G. 2014-O-06. (The Industrial Commission Executive Director acknowledged “I should have provided an explanation for my delay.”); N.D.A.G. 2013-O-17 (If a public entity is unclear on what records are being requested the entity “should have contacted the requester for clarification in a timely manner.”).

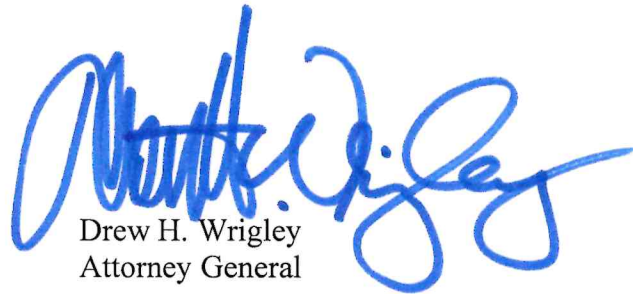
week delay to provide 334 records, with no explanation to the requester, was unreasonable.²⁴ I determine that a delay of nearly four weeks to produce just 59 records is likewise unreasonable.

CONCLUSION

Fargo ran afoul of the open records laws by not providing requested records within a reasonable time and failing to give the requester an explanation for the nearly four-week delay.

STEPS NEEDED TO REMEDY VIOLATION

Mr. Coen has received all requested records. Therefore, there are no further corrective measures required.



Drew H. Wrigley
Attorney General

meo/aml

cc: Christopher Coen, *via e-mail*

²⁴ N.D.A.G. 2021-O-09.