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OPEN RECORDS AND MEETINGS OPINION
2023-O-06

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ISSUED TO: North Dakota Board of Chiropractic Examiners

CITIZEN'S REQUEST FOR OPINION

Dr. Jake Schmitz requested an opinion from this office under N.D.C.C. § 44-04-21.1 asking whether the North Dakota Board of Chiropractic Examiners violated N.D.C.C. § 44-04-18 by unreasonably delaying providing requested records.

FACTS PRESENTED

On December 6, 2021, Dr. Schmitz requested phone logs for all of the North Dakota Board of Chiropractic Examiners (Board) members and executive director.¹ Three days later, the Board's executive director responded to Dr. Schmitz's request informing him that the Board would hold a special meeting, on December 20, 2021, to discuss the exempt information responsive to his request.² At the special Board meeting, the Board voted to exercise its discretion to redact certain information contained in the records under N.D.C.C. §§ 44-04-18.1(2) and 44-04-18.1(4). During the week after the special meeting, the Board members "began providing the Executive Director with their redacted phone logs."³ On December 29, 2021, the Board provided Dr. Schmitz an estimate of the cost to redact the records.⁴ Dr. Schmitz mailed the check to the Board the same day.⁵ Payment was received by the Board on January 3, 2021, and the Board provided the records and the explanation of the redactions to Dr. Schmitz on January 4, 2022.⁶

On January 4, 2021, Dr. Schmitz requested "the names of the individuals who called the board members and the board phone to talk about board business" from the executive director and the

¹ E-mail from Dr. Schmitz to N.D. Bd. of Chiropractic Exam'rs (Dec. 6, 2021, 2:01 PM).

² E-mail from Lisa Blanchard, Exec. Dir., N.D. Bd. of Chiropractic Exam'rs, to Dr. Schmitz (Dec. 9, 2021, 4:31 PM). Prior to this request, the Board had not delegated authority to its executive director regarding decisions about exempt records, so the Board had to hold a meeting to exercise its discretion to release or protect the responsive records.

³ Letter from Dr. Eric Froehling, President, N.D. Bd. of Chiropractic Exam'rs, to Annique M. Lockard, Assistant Att'y Gen., Att'y Gen.'s Office (Jan. 31, 2022).

⁴ *Id.*

⁵ E-mail from Dr. Schmitz to Att'y Gen.'s Office (Jan. 5, 2021, 12:59 PM).

⁶ Letter from Dr. Eric Froehling, President, N.D. Bd. of Chiropractic Exam'rs, to Annique M. Lockard, Assistant Att'y Gen., Att'y Gen.'s Office (Jan. 31, 2022).

board's legal counsel.⁷ The Board's legal counsel responded the next day denying Dr. Schmitz's request for the names, reminding him that they were exempt pursuant to N.D.C.C. § 44-04-18(4).⁸

ISSUE

Whether the Board provided records within a reasonable time.

ANALYSIS

Public entities must, within a reasonable time, provide records responsive to a request or explain why the records cannot be provided.⁹ Requests for information are not requests for records under the open meeting laws,¹⁰ and public entities are under no obligation to provide documents that do not exist.¹¹ Failing to provide records within a reasonable time is a violation of the open record laws.¹² Delays 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.¹³ This office considers the circumstances of particular requests when determining the reasonableness of responses.¹⁴ Numerous past opinions recognize "circumstances, including available staff and balancing other responsibilities of the public entity that demand immediate attention, could

⁷ E-mail from Dr. Schmitz to Att'y Gen.'s Office (Jan. 5, 2021, 12:59 PM). *See also*, e-mail from Dr. Schmitz to N.D. Bd. of Chiropractic Exam'rs and Allyson Hicks, Assistant Atty' Gen. and Gen. Couns., N.D. Bd. of Chiropractic Exam'rs (Jan. 4, 2021, 5:10 PM).

⁸ E-mail from Allyson Hicks, Assistant Atty' Gen. and Gen. Couns., N.D. Bd. of Chiropractic Exam'rs, to Dr. Schmitz (Jan. 5, 2021, 8:12 AM). Dr. Schmitz alleges that the second denial proves the Board held an unnoticed meeting by telephone. However, no communication between Board members was necessary to respond to his follow up request because the Board had the same legal response as it authorized for the first request.

⁹ N.D.C.C. § 44-04-18(8); N.D.A.G. 2021-O-09; N.D.A.G. 2014-O-06; N.D.A.G. 2013-O-15.

¹⁰ Dr. Schmitz alleges the Board improperly refused to provide information; however, the Board has no legal duty to respond to requests for information. N.D.C.C. § 44-04-18(4) only requires records be provided, not that they be created. The definition of record in N.D.C.C. § 44-04-17.1 does not extend to include "unrecorded thought processes or mental impressions." *See* N.D.A.G. 2020-O-08; N.D.A.G. 2018-O-23; N.D.A.G. 2014-O-22; N.D.A.G. 2007-O-07; N.D.A.G. 2006-O-09; N.D.A.G. 97-O-01.

¹¹ N.D.A.G. 2014-O-22.

¹² N.D.C.C. § 44-04-18(8); *see also* N.D.A.G. 2013-O-15.

¹³ N.D.A.G. 2021-O-09; 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.

¹⁴ *Id.*

reasonably delay providing records in response to an open record request.”¹⁵ This office has also “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.”¹⁶ Ongoing communication with the requester of any delay is also a factor when considering timeliness of responses.¹⁷

Past opinions explain that a “public entity’s response to an open records request cannot be automatically extended until the next scheduled meeting of the governing body simply to enable the governing body to give its permission to release the records.”¹⁸ This is because “[p]roviding access to records which are open to the public is a ministerial act which will not require action of a governing body in most cases.”¹⁹ However, here, the requested records were exempt, which means they may be provided or protected at the discretion of the public entity.²⁰ The Board had never previously delegated any authority to its executive director to exempt certain records. Without any delegation, the Board had to meet to decide whether to provide or protect the records.²¹

Here, the Board took twenty-one days to provide the requested records. Usually, a delay of this length would cause concern. However, there are circumstances in this situation that must be considered. Even though there was some delay due to having to hold a special meeting, considering it was the Christmas and New Year holidays, the Board’s special meeting was prompt. The Board has one full-time employee who had to review and redact three months of five board members’ phone records. Additionally, the executive director remained in contact with Dr. Schmitz, keeping him apprised of the status of his request. Ultimately, the Board provided Dr. Schmitz with the responsive records the day after it received payment. For all these reasons it is my opinion that the Board did provide the requested records within a reasonable time.

¹⁵ N.D.A.G. 2013-O-15; *citing* N.D.A.G. 2010-O-04.

¹⁶ N.D.A.G. 2013-O-15; *citing* 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.

¹⁷ N.D.A.G. 2019-O-09 and N.D.A.G. 2021-O-09.

¹⁸ N.D.A.G. 2019-O-09, *citing* N.D.A.G. 2017-O-06; N.D.A.G. 2001-O-02.

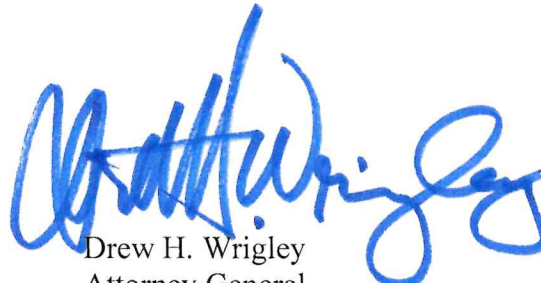
¹⁹ N.D.A.G. 2019-O-09, *citing* N.D.A.G. 2001-O-02.

²⁰ N.D.C.C. § 44-04-17.1(5).

²¹ The Board changed this practice and adopted a new policy at its next regular meeting in January 2021 to allow the board president to quickly review and approve requests for exempt information.

CONCLUSION

The Board provided records within a reasonable time.



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AML/mjh
cc: Dr. Jake Schmitz