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OPEN RECORDS AND MEETINGS OPINION
2023-O-08

DATE ISSUED: November 20, 2023

ISSUED TO: Office of the Governor
North Dakota Department of Agriculture
North Dakota Information Technology

CITIZEN'S REQUEST FOR OPINION

Karen Jordan requested an opinion from this office under N.D.C.C. § 44-04-21.1 asking whether the Office of the Governor (Governor's Office), the North Dakota Department of Agriculture (Agriculture Department), and the North Dakota Information Technology department (NDIT) violated N.D.C.C. § 44-04-18 by failing to respond to requests for records.

FACTS PRESENTED

On June 28, 2022, Karen Jordan sent an email to the Governor's Office requesting records and received no response.¹ On July 19, 2022, she made a request for records to the Agriculture Department and received no response.² On August 10, 2022, she requested records from NDIT by emailing Shawn Riley, who was the CIO at the time.³

ISSUE

Whether the Governor Office's, the Agriculture Department, and the NDIT violated the open records law by failing to respond to requests for records.

ANALYSIS

The North Dakota open records law provides that a public entity must provide "one copy" of a specific public record when requested.⁴ The public entity must either provide or deny the record

¹ Email from Karen Jordan to governor@nd.gov and ryan.norrell@nd.gov (June 28, 2022, 8:23 PM).

² Email from Karen Jordan to Deputy Agric. Comm'r Bodine (July 19, 2022, 12:00 AM); Letter from J.P. "Dutch" Bialke, Gen. Couns./Senior Pol'y Advisor, Agric. Dep't, to Mary Kae Kelsch, Dir. State and Loc. Gov't Div., Att'y Gen.'s Office (Oct. 4, 2022).

³ Email from Karen Jordan to sriley@nd.gov (Aug. 10, 2022, 10:42 PM).

⁴ N.D.C.C. § 44-04-18(2).

in a reasonable time.⁵ A public entity does not have to “create or compile a record that does not exist” and only has to search the records in its possession.⁶

The Governor’s Office, the Agriculture Department, and the NDIT were not aware that Mrs. Jordan requested records from them until this office asked them to reply to her complaint.⁷ Upon hearing from our office, the agencies searched their email accounts for her request and also for the records she had requested.⁸ The Governor’s Office and the Agriculture Department did not have responsive records.⁹ NDIT found a responsive record and provided it to Mrs. Jordan.¹⁰

When searching for Mrs. Jordan’s email to NDIT’s then CIO, Shawn Riley, NDIT discovered that her email was filtered out of the inbox because CIO Riley had email rules set up to control the number of spam messages coming into his inbox.¹¹ Based on research done by NDIT on behalf of the Governor’s Office, it appears Mrs. Jordan’s emails were not received because they were being filtered out by the security measures put in place for the State’s IT network to block senders of malicious emails.¹² This means that the emails are quarantined for 30 days and then are deleted.¹³ The Agriculture Department is also on the NDIT system, so the same security measures were in place for their emails.¹⁴

Neither the Governor’s Office, the Agriculture Department, nor the NDIT intentionally ignored the request by Mrs. Jordan for records. Every mode of communication has vulnerabilities. Once detected, the systems were corrected to allow Mrs. Jordan to email the Governor’s Office, the Agriculture Department, and the NDIT.

⁵ N.D.C.C. § 44-04-18.

⁶ N.D.C.C. § 44-04-18(4).

⁷ Letter from Ryan Norrell, Gen. Couns., Gov.’s Office, to Mary Kae Kelsch, Assistant Att’y Gen., Att’y Gen.’s Office (Oct. 13, 2022); Letter from J.P. “Dutch” Bialke, Gen. Couns./Senior Pol’y Advisor, Agric. Dep’t, to Mary Kae Kelsch, Dir. State and Loc. Gov’t Div., Att’y Gen.’s Office (Oct. 4, 2022); Email from Greg A. Hoffman, Deputy Chief Info. Officer, NDIT, to Mary Kae Kelsch, Dir. State and Loc. Gov’t Div., Att’y Gen.’s Office (Oct. 10, 2022, 3:56 PM).

⁸ *Id.*

⁹ Letter from Ryan Norrell, Gen. Couns., Gov.’s Office, to Mary Kae Kelsch, Assistant Att’y Gen., Att’y Gen.’s Office (Oct. 13, 2022); Letter from J.P. “Dutch” Bialke, Gen. Couns./Senior Pol’y Advisor, Agric. Dep’t, to Mary Kae Kelsch, Dir. State and Loc. Gov’t Div., Att’y Gen.’s Office (Oct. 4, 2022).

¹⁰ Email from Greg A.Hoffman, Deputy Chief Info. Officer, NDIT, to Mary Kae Kelsch, Dir. State and Loc. Gov’t Div., Att’y Gen.’s Office (Oct. 10, 2022, 3:56 PM).

¹¹ *Id.*

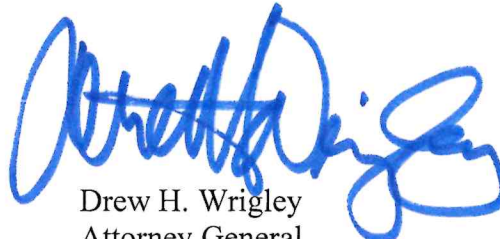
¹² Letter from Ryan Norrell, Gen. Couns., Gov.’s Office, to Mary Kae Kelsch, Assistant Att’y Gen., Att’y Gen.’s Office (Oct. 13, 2022).

¹³ *Id.*

¹⁴ Letter from J.P. “Dutch” Bialke, Gen. Couns./Senior Pol’y Advisor, Agric. Dep’t, to Mary Kae Kelsch, Dir. State and Loc. Gov’t Div., Att’y Gen.’s Office (Oct. 4, 2022).

CONCLUSION

Neither the Governor's Office, the Agriculture Department, nor the NDIT violated the open records law when they failed to respond to a request for records that they did not receive.



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cc: Karen Jordan