

**OPEN RECORDS AND MEETINGS OPINION  
2006-O-15**

DATE ISSUED: December 18, 2006

ISSUED TO: Bismarck Parks and Recreation District

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Augie Werner asking whether the Bismarck Parks and Recreation District (Park District) violated N.D.C.C. § 44-04-18 by failing to provide records within a reasonable time, charging fees for copies not allowed by law, and giving the impression to the requester that he needed to sign a form in order to get copies of the records.

**FACTS PRESENTED**

On Thursday, June 22, 2006, Augie Werner attended a meeting of the Bismarck Parks and Recreation Board (Board). During the meeting Mr. Werner spoke to the Board about the waterfall located at Keel Boat Landing in Bismarck and told the Board he wanted to know how much it cost to repair the waterfall. After the meeting, Mr. Werner asked Steve Neu, the Director of the Park District, for the cost information regarding the waterfall repairs. Mr. Neu told Mr. Werner that he would get him the costs, but did not understand Mr. Werner's statement as a request for records.

Fifteen days later, on Friday, July 7, 2006, Mr. Werner reminded Mr. Neu in an e-mail that he wanted the information regarding the cost of the waterfall repairs. In addition to cost information, Mr. Werner asked that three specific types of records pertaining to the repairs be provided by e-mail and asked to review certain records at the Park District office including "[a]ll paperwork, e-mail, and anything else associated with the 2003 construction of the centennial beach project."<sup>1</sup> Mr. Neu responded by e-mail on Sunday, July 9, and informed Mr. Werner that he had been out of town, was leaving again the next day, and would not be back until Wednesday, July 12, "at which time we will review your request as you have place[d] before us and respond accordingly in a timely manner."<sup>2</sup>

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<sup>1</sup> July 7, 2006, e-mail from Augie Werner to Steve Neu.

<sup>2</sup> July 9, 2006, e-mail from Steve Neu to Augie Werner.

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Five days later, on Friday, July 14, Mr. Neu provided responses by e-mail to several of Mr. Werner's requests and told Mr. Werner that records would be available for him to review at the Park District office on Wednesday, July 19. Mr. Werner asked to view the records at 1:00 p.m., Tuesday, July 18. Mr. Neu denied this request because he was going to be out of the office on July 18 and would be "unable to work on [Mr. Werner's] request."<sup>3</sup>

Mr. Werner went to the Park District office Thursday, July 20, and reviewed the records. On Monday, July 31, Mr. Werner e-mailed Mr. Neu listing 11 specific records that were not included in the records he reviewed on July 20. He believed they should have been included because his initial July 7 request asked for "all paper-work, e-mails, and anything else associated with the 2003 construction of the centennial beach project."<sup>4</sup> Randy Bina, an employee of the Park District, replied to Mr. Werner's e-mail on Tuesday, August 1, informing him that because Mr. Neu was out of the office all week, Mr. Neu would get back to Mr. Werner the following week. Ten days later, on Friday, August 11, Mr. Neu e-mailed Mr. Werner and told him that the records regarding his "new" request would be ready Monday, August 14.

Both of the times Mr. Werner picked up copies of records, the Park District had him sign an "Open Records Information Release Form." The form asks for the requester's name, address, home and work phone numbers, and signature. It also states that "[p]roper identification must be shown, such as a driver's license, etc." It contains a space for a description of the information requested and the signature of the employee releasing the information.

Mr. Werner was charged \$83.75 for the copies he received and \$75.00 for the time the staff used to locate the records, for a total of \$158.75. Mr. Werner disputes the \$75.00 charge for locating the records.

### ISSUES

1. Whether the Park District responded to the request for records within a reasonable time.
2. Whether the Park District charged more than is authorized by law for the time it took to locate the records.

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<sup>3</sup> July 17, 2006, e-mail from Steve Neu to Augie Werner.

<sup>4</sup> July 7, 2006, e-mail from Augie Werner to Steve Neu.

3. Whether the Park District violated the open records law by giving the impression to the requester that he had to sign a form to get copies of the records.

## ANALYSES

### Issue One

The open records law is violated when a public entity does not provide access to or copies of a record within a reasonable time.<sup>5</sup> “Once a person makes a request for open records, it is the responsibility of the public entity to respond to the request within a reasonable time and the requester is not required to contact the entity again to find out when the records will be provided or made available.”<sup>6</sup> “Whether a response has been provided within a reasonable time will depend on the facts of a given situation.”<sup>7</sup>

Three times Mr. Werner was told that the response to his request would be delayed because Mr. Neu was out of the office. The Park District has 16 employees who work at the main office location. Five of them are directly involved in administration and have experience with information requests. The fact that Steve Neu, the Park District director, was out of the office is not a sufficient reason to delay a request for records. “Every state official and the employees of any department should start with the assumption that every public record is to be open and accessible pursuant to section 44-04-18, N.D.C.C. Likewise, every state official and the employees of any department should know what records are excepted by statutes or case law decisions from the requirements of . . . [the open records] law.”<sup>8</sup> This office has said in past opinions that “[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.”<sup>9</sup> Likewise, providing access to records generally does not require the approval, supervision, or action by a head of a department. Mr. Neu is not the only Park District employee who is responsible for responding to open records requests. Nothing in the Park District’s response indicates that Mr. Neu’s participation was indispensable in locating the records. The response from the Park District was delayed approximately ten days due to Mr. Neu being out of the office. The Park District cannot use Mr. Neu’s absence from the office as a reason to delay providing Mr. Werner access to records.

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<sup>5</sup> See N.D.C.C. § 44-04-18(8).

<sup>6</sup> N.D.A.G. 2001-O-12; N.D.A.G. 98-O-04.

<sup>7</sup> N.D.A.G. 2003-O-09; N.D.A.G. 2005-O-05.

<sup>8</sup> N.D.A.G. 82-23.

<sup>9</sup> N.D.A.G. 2001-O-02.

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The Park District claims that Mr. Werner's July 31 e-mail was a new request for records. Mr. Werner's original July 7 e-mail request asked for "[a]ll paper work, e-mails, and anything else associated with the 2003 construction of the centennial beach project." The records provided on August 14 all related to the 2003 centennial beach project. Mr. Werner's July 31 request was therefore not a new request. It took Mr. Werner two trips to the Park District office and 38 days to see all the records he requested to see on July 7. Accordingly, it is my opinion that the Park District violated N.D.C.C. § 44-04-18 by failing to provide records within a reasonable time.

### Issue Two

"An entity may impose a fee not exceeding twenty-five dollars per hour per request, excluding the initial hour, for locating records if locating the records requires more than one hour."<sup>10</sup> Mr. Werner was charged \$75 for locating the records he requested. According to the city, it took staff in excess of four hours to locate the records because the files requested by Mr. Werner were housed in different locations. Some were archived offsite and some were housed at the engineering firm. In any open records or meetings opinion, "the attorney general shall base the opinion on the facts given by the public entity."<sup>11</sup> Accordingly, it is my opinion that the Park District did not violate N.D.C.C. § 44-04-18 by charging for three hours for locating the records.

### Issue Three

A request for a public record "need not be made in person or in writing."<sup>12</sup> The right to access public records belongs to all persons equally, therefore, in normal circumstances, the identity of the requester and purpose of the request are irrelevant.<sup>13</sup> The Park District uses a form entitled "Open Records Information Release Form." According to the Park District, it is used to clarify requests for records and copies, and is not mandatory. The Park District states that the form is used to itemize the copies provided and the amount charged for accounting purposes. In past opinions, when some aspect of a request involved either a written request or written clarification, this office has said that the public entity should advise the requester that providing a written request or clarification is not a prerequisite to obtaining access to or a copy of a record.<sup>14</sup> There is no prohibition against providing to a requester a sheet of paper itemizing the records being provided and the costs for locating and copying them.

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<sup>10</sup> N.D.C.C. § 44-04-18(2).

<sup>11</sup> N.D.C.C. § 44-04-21.1(1).

<sup>12</sup> N.D.C.C. § 44-04-18(2).

<sup>13</sup> N.D.A.G. 98-F-13. See also N.D.A.G. 2002-O-05.

<sup>14</sup> N.D.A.G. 2003-O-21; N.D.A.G. 2003-O-09.

However, half of the Park District's form is dedicated to gathering information about the requester. The form states "[p]roper identification must be shown, such as a driver's license, etc." and it has spaces for the requester's name, address, home and work phone numbers, and signature. Although the Park District claims the form is not mandatory, Mr. Werner was given the impression that if he did not sign the form, he would not be permitted to see the records. Nor does the form anywhere make it clear that providing the information is not required. The form asks for information that is not necessary by law to disclose in order to see or obtain copies of public records. Requiring such information may be a deterrent to someone who requests access to public records. The Park District could keep track of copies it provides for administrative purposes in a less intimidating manner. Therefore, it is my opinion the Park District violated the open records law by implying to the requester that he must sign a form in order to obtain copies of the records.

### CONCLUSIONS

1. The Park District did not respond to a request for records within a reasonable time.
2. The Park District did not violate N.D.C.C. § 44-04-18 by charging \$75 for locating records.
3. The Park District violated the open records law by giving the impression to the requester that he had to sign a form to get copies of the records.

### STEPS NEEDED TO REMEDY VIOLATIONS

Because the Park District did not respond to Mr. Werner's request for records within a reasonable time, the Park District must return the money Mr. Werner paid for copies (\$83.75). The "Open Records Information Release Form" is unacceptable because it plainly appears to require a requester to provide identification and other extraneous information. Any reasonable view of the form would lead to a conclusion that its intent, or at least its effect, is to intimidate or deter those requesting public records. There may be legitimate reasons that a requestor may provide written information to the Park District, such as an address to have a record mailed or to clarify a complicated request, but generally records must be provided without the information required by the Park District.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action

under N.D.C.C. § 44-04-21.2.<sup>15</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>16</sup>

Wayne Stenehjem  
Attorney General

Assisted by: Mary Kae Kelsch  
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<sup>15</sup> N.D.C.C. § 44-04-21.1(2).

<sup>16</sup> Id.