

**LETTER OPINION
2004-L-06**

January 20, 2004

Honorable Jim Poolman
Commissioner of Insurance
600 E. Boulevard Ave., Dept. 401
Bismarck, ND 58505-0320

Dear Commissioner Poolman:

Thank you for requesting my opinion on two issues related to the “miscellaneous charge” the Information Technology Department (ITD) has added to its agency billings. As you note in your letter, ITD has asserted it is assessing the charge in order to make up for a \$1,000,000 budget shortfall. E-mail from Mike Ressler to “Grp-ITD Coordinators-Lead; -Grp-OMB Fiscal Officer Contacts” (Oct. 10, 2003).¹ Your first question is whether ITD has the authority to assess that charge.

The department’s appropriation is provided for in 2003 N.D. Sess. Laws ch. 665. That was not the first appropriation the 2003 Legislative Assembly approved for ITD, however; the Governor vetoed ITD’s original appropriation. 2003 N.D. Sess. Laws ch. 568. The department’s original appropriation contained a provision mandating that all state agencies purchase information technology equipment through ITD. The department was authorized to charge a “ten percent purchasing fee” for its services. Id. at § 7. The first \$1,000,000 of those fees was to be deposited in ITD’s operating account. Id.

The subsequent appropriation did not include the purchasing mandate or the ten percent fee. 2003 N.D. Sess. Laws ch. 665. As a result, the Legislative Assembly made the following notation in ITD’s spending authority: “Less budget adjustment (1,000,000).” Id. at § 1. The “estimated income” notation in ITD’s appropriation reflected the \$1,000,000 reduction in ITD’s spending authority by reducing the estimated income by an identical \$1,000,000. Compare 2003 N.D. Sess. Laws ch. 665, § 1 (indicating an estimated income of \$98,117,301) with 2003 N.D. Sess. Laws ch. 568, § 1 (indicating an estimated income

¹ Although this e-mail identifies a \$1,000,000 shortfall, ITD is only seeking to assess \$750,000 of that amount through agency billings; the remaining \$250,000 is to be covered by making cuts to ITD’s general fund initiatives. E-mail from Mike Ressler to “-Grp-ITD Coordinators-Lead; -Grp-OMB Fiscal Officer Contacts” (Oct. 10, 2003).

of \$99,117,301). The general fund appropriation for ITD did not change from the earlier appropriation. Compare 2003 N.D. Sess. Laws ch. 665, § 1 with 2003 N.D. Sess. Laws ch. 568, § 1 (providing identical general fund appropriations of \$8,194,803).

The Legislative Assembly's intent regarding the \$1,000,000 "budget adjustment" is unclear from the language of 2003 N.D. Sess. Laws ch. 665. The legislative history can therefore be used to help interpret that language. See N.D.C.C. §1-02-39(3); Kim-Go v. J.P. Furlong Ent. Inc., 460 N.W.2d 694, 696 (N.D. 1990). The legislative history indicates the \$1,000,000 budget adjustment was meant to be an overall reduction in ITD's spending authority. Hearing on H.B. 1505 Before the House Appropriations Comm., 2003 N.D. Leg. (May 5, 2003) (Statement of Rep. Svedjan) ("[ITD] would need to find 1M [sic] in [ITD's] budget, but it is not specific to any area.") (In an exchange between Rep. Svedjan and the Legislative Council staff, Rep. Svedjan asked, "[B]ecause the general fund appropriation of 8.194 M does not change it's assumed that 1 M in the budget adjustment will be found anywhere in their budget, correct?" Roxanne, Legislative Council, answered, "[Y]es"). The Legislative Assembly left to ITD the determination of how it would reduce its spending to accommodate the budget adjustment. Id. As such, the Legislative Assembly specifically intended to remove \$1,000,000 from ITD's spending authority.

Nothing in either 2003 N.D. Sess. Laws ch. 665 or the legislative history gives any indication ITD was to have the authority to recover the budget adjustment from other state agencies. In fact, the legislative history shows the opposite: the Legislative Assembly intended to remove that amount from ITD's spending authority.² Without the spending authority, ITD's attempt to spend those funds would violate the requirement in Article X, section 12, of the North Dakota Constitution that agencies may only spend funds "pursuant to appropriation first made by the legislature." N.D. Const. art. X, § 12. Accordingly, it is my opinion ITD does not have the authority to assess the "miscellaneous charge" to other state agencies.

² The department does have some broad general statutory authority to plan and implement charges for its services. See N.D.C.C. §§ 54-59-06(4) (ITD must develop a business plan which must "[d]efine rates and funding mechanisms necessary to finance proposed activities of the department."); 54-59-14 ("Unless exempted by law, each agency or institution provided with information technology or network services shall pay to the department the charges as determined by the department."). However, these general powers must yield to the specific intent of the Legislative Assembly in passing H.B. 1505 that the \$1,000,000 in question was to be taken from the ITD budget. See N.D.C.C. § 1-02-07.

LETTER OPINION 2004-L-06
January 20, 2004
Page 3

Your second question is whether state agencies have the authority and are required to pay ITD's miscellaneous charge. Because I have concluded that ITD does not have the authority to assess that charge, there is no need to address this question.

Sincerely,

Wayne Stenehjem
Attorney General

sam/vkk