

**OPEN RECORDS AND MEETINGS OPINION  
2004-O-20**

DATE ISSUED: September 7, 2004

ISSUED TO: City of Napoleon

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Leona Roehrich asking whether the city of Napoleon (City) violated N.D.C.C. § 44-04-18(7) by failing to provide access to draft ordinances within a reasonable time; violated N.D.C.C. § 44-04-18(7) by charging a fee in excess of the actual cost of copying public records; violated N.D.C.C. § 44-04-20(6) by considering a matter at a special meeting that that was not included in the agenda for the meeting; and violated N.D.C.C. § 44-04-19(3) by refusing to permit a citizen to videotape a meeting of a public entity.

**FACTS PRESENTED**

The Napoleon City Council (Council) held its regular meeting on June 7, 2004. Roehrich and her brother videotaped the initial portion of the meeting. During a short break the mayor called the city attorney asking whether Roehrich could legally videotape the meeting. The city attorney advised the mayor that he could order the taping to cease. Roehrich and her brother were told that they could not videotape a Council meeting without approval of the Council, and were instructed to turn off their recorder, which they did.

On June 1, Roehrich went to the city auditor's office and asked to see proposed ordinances the City was in the process of reenacting. There was one copy of the proposed ordinances and they were kept in a binder. She was denied access to the proposed ordinances because they were at the home of a Council member and no other copies existed. Roehrich told the auditor that she would be back at a later date to look at the ordinances. On June 8, Roehrich again asked for access to the proposed ordinances and again was told they were at the home of a Council member. After the Council meeting on June 22, Roehrich again asked to see the proposed ordinances and received the same response. Finally, on Wednesday, June 23, 2004, Roehrich asked

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the auditor if she could see the proposed revised ordinances and the auditor provided them for her review. Roehrich identified the ordinances she wanted copied. Roehrich was told that she would have to pay for copies at a rate of 15 cents a page. The mayor then decided to call an attorney regarding a reasonable copy price. The attorney told the mayor to charge her 50 cents a copy because considering "the cost of ink, power, paper, and your time doing this – it all adds up." A city employee made copies of 13 pages of designated records. Roehrich was charged 50 cents a page, for a total of \$6.50.

On June 22, the Council held a special meeting on reorganization. The mayor, on his copy of the agenda, hand-wrote "price per copy of ordinance" and "parades" at the end of the agenda under "New Business." These agenda items were not added to the agendas that were distributed to the Council members and the reporter from the official newspaper when they arrived at the meeting. No notice was posted at the City office before the meeting, or outside the meeting room. A copy of the agenda was not delivered to the auditor until after the meeting.

At the special meeting, a motion was approved to "charge 50 cents a copy for the ordinances plus \$25 per hour after 1 hour. . . ."

### ISSUES

1. Whether the City violated N.D.C.C. § 44-04-18(1), (7) by failing to provide access to draft ordinances within a reasonable time.
2. Whether the City violated N.D.C.C. § 44-04-18(7) by charging more than the actual cost to the City of making a copy of specified public records.
3. Whether the Council violated N.D.C.C. § 44-04-20 by considering an increase in the cost of copying public records at a special meeting on June 23, 2004, when notice of this topic was not included in the agenda of the special meeting.
4. Whether the Council violated N.D.C.C. § 44-04-19(3) by refusing to allow a citizen to videotape a meeting.

### ANALYSES

#### Issue One

"Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours. N.D.C.C. § 44-04-18(1). A response to a request to review records or to make copies must not

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be “unreasonably delayed.” N.D.C.C. § 44-04-18(7). Once a person makes a request for 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. N.D.A.G. 2003-O-09. When determining whether a delay in responding to a request for information is reasonable, this office looks at hours and days, not weeks. Id.

In this case, Roehrich requested access to the proposed city ordinances on three occasions only to be told that they were located at the home of a Council member. Only when she requested to see them a fourth time, more than three weeks after the first request, were they located in the auditor’s office and provided to her. When the auditor first told Roehrich that the draft ordinances were not available, Roehrich told the auditor that she would be back to see the ordinances at a later date. The City was then on notice that Roehrich would return to see the draft ordinances. If existing records are not available when requested, a public entity has a duty under the open records law to provide access or copies of the records within a reasonable time. N.D.A.G. 2003-O-19. See also N.D.A.G. 2001-O-12 (public entity violated N.D.C.C. § 44-04-18 by not responding to a request for access to records within a reasonable time). There is no reason the draft ordinances could not have been retrieved from the Council member and a copy made so they would be available the next time Roehrich requested them. It took over three weeks after the initial request for the City to make the draft ordinances available and Roehrich requested access to them four times. It is my opinion that the City violated N.D.C.C. § 44-04-18(1), (7) by not providing Roehrich with access to the draft ordinances within a reasonable time.

### Issue Two

When providing copies of records under N.D.C.C. § 44-04-18, the public entity is allowed to charge a “reasonable fee” and obtain payment of the fee in advance. N.D.C.C. § 44-04-18(2). N.D.A.G. 98-O-22. The definition of “reasonable fee” limits a public entity to charging no more than its actual cost of making the copies, including labor, materials, and equipment. Id. The definition of “reasonable fee” also prohibits public entities from passing on to the requester the time spent locating the records (if it takes one hour or less to locate them), providing access to public records, or excising exempt or confidential information. N.D.A.G. 98-O-03; N.D.C.C. § 44-04-18(2).

Ms. Roehrich paid a fee of \$6.50 for 13 pages of records she received from the City. The City based the cost of 50 cents a page on advice from its attorney that with “the cost of ink, power, paper, and your time doing this – it all adds up.” The amount of 50 cents results from an estimate rather than an actual calculation of the actual cost of making the copies. Prior to Roehrich’s request for copies, the City charged 15 cents per page for copies. The facts indicate that the 35 cent increase of the per copy cost was

not prompted by an increase of the actual costs of making copies of public documents, but rather, motivated by a request for copies from a specific person. The fee for making copies should not be raised to punish or deter certain requestors. It is my opinion that 50 cents per page was not a reasonable fee based on N.D.C.C. § 44-04-18(2).

### Issue Three

Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity. N.D.C.C. § 44-04-20(1). The notice must contain the date, time, and location of the meeting, and the topics to be discussed, if practicable. N.D.C.C. § 44-04-20(2). In the case of a special meeting, the topics to be considered are limited to those included in the notice. N.D.C.C. § 44-04-20(6); N.D.A.G. 2002-O-11 (governing body may not discuss topics not included in the notice of a special meeting).

In this case, the Council did not post the June 22, 2004 notice of the special meeting in advance. Instead, the agenda was handed out to the Council members and the media when they arrived at the meeting. At the meeting, the additional topics of “price per copy of ordinance” and “parades” were discussed even though they were not on the agenda. Because the Council considered topics at a special meeting that were not included in its notice and agenda, it is my opinion that the Council violated N.D.C.C. § 44-04-20(6).<sup>1</sup>

### Issue Four

The right of a person attending the meeting of a governing body includes:

[T]he right to photograph, to record on audio or video tape and to broadcast live on radio or television the portion of the meeting that is not held in executive session, provided that there is no active interference with the conduct of the meeting. The exercise of this right may not be dependent upon the prior approval of the governing body. However, the governing body may impose reasonable limitations on recording activity to minimize the possibility of disruption of the meeting.

N.D.C.C. § 44-04-19(3). The right to record, by audio or videotape, a meeting was statutorily added to N.D.C.C. § 44-04-19 in the 1997 legislative session. Prior to the statutory change, this office in a 1996 opinion, concluded that a citizen was permitted to videotape meetings of a governing body as long as the activity did not unreasonably

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<sup>1</sup> Whether the City properly posted the notice for the special meeting was not raised as an issue by the requestor. However, during discussions with the City, it became apparent that they did not properly post the special meeting notice. The City should start posting meeting notices in compliance with N.D.C.C. § 44-04-20.

disrupt the meeting. N.D.A.G. 96-F-09. In that opinion, this office explained that a meeting is not unreasonably disrupted when members of the public unobtrusively make audio or video recordings of the meeting while sitting in their seats or standing at the back or side of the room. Because there is no evidence that videotaping June 7, 2004, meeting interfered with the Council's meeting, and the Council has not claimed that taping was disruptive, the mayor was not authorized to order the taping to be terminated.

### CONCLUSIONS

1. The City violated N.D.C.C. § 44-04-18(1)(7) by failing to provide access to draft ordinances within a reasonable time.
2. The City violated N.D.C.C. § 44-04-18(7) by charging more than the actual cost of making a copy of specified public records.
3. The Council violated N.D.C.C. § 44-04-20(6) by discussing topics at a special meeting on June 22, 2004, that were not included on the notice and agenda.
4. The Council violated N.D.C.C. § 44-04-19(3) by refusing to allow a citizen to make a videotape of a meeting.

### STEPS NEEDED TO REMEDY VIOLATIONS

Ms. Roehrich has now received copies of the ordinances she requested, but the City must determine its actual costs of the copies in accordance with N.D.C.C. § 44-04-18(2) and refund to Ms. Roehrich the difference.

The Council must prepare an amended notice of the June 22, 2004, meeting containing all the topics that were discussed at the meeting. The notice must be posted at the Council's principal office, filed with the city auditor, and given to the city's official newspaper and to any representatives of the news media who have requested to be notified of special or emergency meetings. The notice should clearly state that if any member of the public wants to review the minutes of the meeting, they will be available at the city auditor's office. Copies of the minutes must be given free of charge upon request. The notice should remain posted until after the next regularly scheduled meeting. Due to the thoroughness of the minutes, a new meeting is unnecessary to remedy the violation.

At the first three Council meetings following publication of this opinion, the Council shall post next to the meeting notice posted outside the auditor's office, and outside the room in which the Council meets, the following notice:

NOTICE

A person attending a city council meeting may photograph, or record on audio or video tape as well as broadcast live on radio or television, any portion of a Council meeting that is not held in executive session, provided that there is no active interference with the conduct of the meeting. You do not need prior approval. The Council, however, may impose reasonable limitations on recording activity to minimize the possibility of disruption of the meeting.

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. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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