

**OPEN RECORDS AND MEETINGS OPINION
2006-O-13**

DATE ISSUED: August 14, 2006

ISSUED TO: University of North Dakota School of Aerospace Sciences

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Mr. Bjorn Dahlen asking whether the University of North Dakota John D. Odegard School of Aerospace Sciences ["UND"] violated N.D.C.C. § 44-04-18 by charging in excess of what the law allows for creating an electronic copy of public records.

FACTS PRESENTED

On February 17, 2006, Mr. Dahlen made two separate requests for e-mails. The first request was for access to and a copy of all e-mail messages maintained by the School of Aerospace Sciences that UND sent to or received from Dr. George Seielstad between January 1, 2005, and February 17, 2006. The second request was for access to and a copy of all e-mail messages sent to or received by the School of Aerospace Sciences that contain or made reference to Bjorn Dahlen between June 1, 2005, and February 17, 2006.

Mr. Dahlen stated that he preferred to receive the requested information "in a digital (electronic) format copied to a CD or sent to me by Email" and that he was willing to pay reasonable fees up to \$30 for each request. He also asked to be notified if the charges would exceed \$30 per request.¹

Dr. Seelan responded by e-mail on February 22 explaining that UND would charge \$25 per hour, after the first hour, for reviewing and redacting the e-mails and would also charge for "CD copying, media, handling, and mailing." Dr. Seelan further stated that "[i]t is not possible to estimate the total cost, but it is likely to exceed \$30.00. As soon [as] the job is done, UND will invoice you on the exact amount and after receiving the payment, the information will be released to you."

¹ UND did not notify Mr. Dahlen that the fees would exceed \$30 per request before it proceeded to make the copies, however, that is a risk UND took as Mr. Dahlen could have decided not to pick up and pay for the copies.

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Two days later, on February 24, Mr. Dahlen received an invoice from Ms. Becky Mann, finance manager for UND School of Aerospace Sciences. The invoice listed the charges as follows:

Tech support personnel (70 minutes – no charge)	\$0
Faculty effort (7 hr – 2 free hr = 5 hr @ \$25/hr)	\$125
Estimated media copy charges & mailing cost	\$2
Total fee (\$63.50 per request)	\$127

Mr. Dahlen asked Ms. Mann for clarification of the charges on February 24. He wanted to know how many records were found, how many were copied to the CD, and what format they would be in. He also specifically asked, in regard to the charges for "Faculty Effort," how much time was spent reviewing and redacting exempt information from the records.

Ms. Mann responded indicating that she did not know the answers to his questions and that Dr. Seelan was out of town. She did tell him that the CD contained about 350 files in word, text, PDF, etc. She also said "[m]y thoughts are that it would be difficult to break down the hours as you have suggested and would also take more time which would increase the amount of the invoice."

On March 1, Ms. Mann e-mailed Mr. Dahlen and asked him whether he had "connected" with Dr. Seelan yet as she still had the CD. Mr. Dahlen replied that day that he had not, but that he intended to pick up the CD. On March 21, Mr. Dahlen e-mailed Ms. Mann and asked if he could view the CD first. Ms. Mann e-mailed Dr. Seelan a few minutes later asking if Mr. Dahlen would have to pay before he could view the CD. Dr. Seelan contacted general counsel to determine whether Mr. Dahlen could be required to pay before he viewed the CD. Before Ms. Mann got back to Mr. Dahlen, he came to the office, paid for, and picked up the CD.

The records requested by Mr. Dahlen were in e-mails and attachments stored in a server in Dr. Seelan's office. The e-mails were stored in different folders in an archived proprietary format. The attachments were in Word, PowerPoint, Adobe, XL, etc. Using the "find and save" procedure available on the software, the records were segregated and saved as a separate folder. The find and save procedures permitted UND to sort through the documents and convert the e-mail messages to Word documents. According to UND each e-mail record had to be saved individually. And according to UND, the format change sped up the later process of redacting confidential and closed

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information² and also allowed Dr. Seelan to copy the records in electronic form to a CD, as preferred by Mr. Dahlen. The records consisted of approximately 300 e-mails, but with attachments, the total volume of data consisted of 719 pages of documentation.

In its explanation to this office regarding the charges for “faculty effort” UND said:

The term “Faculty effort” includes only the allowable billing time that was billed by Dr. Seelan. It does not include all of the time spent by Dr. Seelan to prepare to answer the request. He spoke with JDSOS personnel to determine billing procedures. Dr. Seelan spoke with the General Counsel to understand the redacting process and the law’s requirements. Dr. Seelan then began the process by retrieving several records, pertinent to the request, that contained large attachments in order to re-familiarize himself with the subject matter in the project folders and to understand what information contained therein might need to be redacted. This took about two and one-half hours. After this initial review, Dr. Seelan contacted General Counsel seeking further clarification of the law. Dr. Seelan then spent 70 minutes with Mr. Copp on the morning of the 23rd working on the search process, providing access to his computer, identifying and locating folders for verification, etc. After the meeting with Mr. Copp, Dr. Seelan went through each of the records, redacting when necessary, and saving them to a separate folder for release. He then verified the information provided, to make sure the procedure established to extract the records worked accurately. Dr. Seelan then copied the records onto a CD and walked to Ms. Becky Mann’s office and provided the CD and the needed information to her for billing. On the 23rd, Dr. Seelan spent from 8 a.m. until 2:40 p.m. working on the request. He stopped for ten minutes for lunch. During this time day, he met with Mr. Copp for 70 minutes. Dr. Seelan did not charge Mr. Dahlen for the first two hours of redaction because there were two requests for records. Dr. Seelan did not charge for his time and that of Mr. Copp in retrieving the records because there were two requests and the law grants the first hour of retrieval at no charge. Dr. Seelan did charge for 5 hours to review and redact the information requested, and to transfer that information onto the CD. There was no charge for General Counsel’s time, Ms. Mann’s time, Mr. Copp’s time, or Dr. Seelan’s time while he gathered information regarding the billing process in the JDOSAS; the charges for open

² After reviewing the records and consulting with UND’s general counsel it was determined that the e-mails and attachments might contain educational records and other personal information regarding students that UND was required to redact from the records because of the requirements of the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. § 1232g.

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copies including labor, materials, equipment, and costs attributable to the use of information technology resources.⁸ Section 44-04-18, N.D.C.C., also provides:

Except as provided in this subsection, nothing in this section requires a public entity to create or compile a record that does not exist. Access to an electronically stored record under this section, or a copy thereof, must be provided at the requester's option in either a printed document or through any other available medium. A computer file is not an available medium if no means exist to separate or prevent the disclosure of any closed or confidential information contained in that file. Except as reasonably necessary to reveal the organization of data contained in an electronically stored record, a public entity is not required to provide an electronically stored record in a different structure, format, or organization.⁹

Mr. Dahlen believes that, under the time identified under "faculty effort" he was charged for creating new electronic records. But, as UND explained, UND did not charge for any time spent finding, saving, and creating a separate folder for the responsive e-mails. Even if this process was considered "creating a new record" Mr. Dahlen was not charged for it.

Once the separate folder was created, Dr. Seelan reviewed each e-mail and attachments, redacted confidential information, and then copied the documents to a CD. This process is similar to the process of making a paper copy of the records and reviewing and redacting confidential information from the paper copies, only it was done electronically. No "new" record was created. Thus, Mr. Dahlen was not charged for creating a new record.

Mr. Dahlen also asserted it was a violation of the law to charge him for explaining how the costs were calculated. In response to an e-mail to Mr. Dahlen, Ms. Mann, finance manager for UND School of Aerospace Sciences, stated that providing a detailed breakdown of the cost for copying the requested records "would [] take more time which would increase the amount of the invoice." This statement is incorrect because there is no authority to charge an individual requesting a record an additional amount for explaining how the fee was determined.¹⁰ In this case, however, no additional fee was charged for explaining the invoice and, therefore, no violation of N.D.C.C. § 44-04-18 occurred.

⁸ N.D.C.C. § 44-04-18(2), (3).

⁹ N.D.C.C. § 44-04-18(4).

¹⁰ See N.D.C.C. § 44-04-18(2), (7).

CONCLUSION

UND did not violate N.D.C.C. § 44-04-18 because the fees charged for providing a copy of electronic records on electronic media did not exceed charges allowed by law.

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mjm/vkk