

**OPEN RECORDS AND MEETINGS OPINION
2007-O-01**

DATE ISSUED: February 12, 2007

ISSUED TO: North Dakota Department of Transportation

CITIZEN'S REQUEST FOR OPINION

On October 3, 2006, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Paul Kanitra of Carfax asking whether the North Dakota Department of Transportation (Department) violated the open records law by refusing to provide information from a Department database.

FACTS PRESENTED

Carfax is a company that provides vehicle history reports to used car buyers and sellers. On August 23, 2006, Carfax requested access to the Department's electronically stored automobile accident record information in any form available. Keith Magnusson, deputy director of the Department, denied the request because a computer program would have to be developed in order to remove the fields of confidential information from the database and to transmit the remaining fields to Carfax.

According to the Department, it receives accident reports electronically or by mail. The Department either scans or electronically places accident reports into the Department's Electronic Document Management System (EDMS). In addition to the EDMS system, the separate pieces of information from the accident report are also entered into a multiple field database called the Crash Report System (CRS).¹ The Department uses the database to create reports from the CRS for use by the federal government, the North Dakota Highway Patrol, the Department's engineers, and by the Department to update drivers' license records. The reports that are currently run from the CRS system contain aggregate statistical information and do not contain the exact information requested by Carfax. The reports may be printed, but the data in the database, as a whole, cannot be printed.

¹ A database is collection of data, or information that is specially organized for rapid search and retrieval by a computer. www.britannica.com (definition of database) Information is extracted from a database by a set of instructions written in a "program" or a "database management system."

Carfax seeks access to the nonconfidential raw data contained in the CRS. In order to provide an electronic copy of the information from the database as requested by Carfax, the Department would have to develop a new computer program that would cost a minimum of \$4,000.

ISSUES

1. Whether the Department improperly denied Carfax records under N.D.C.C. § 44-04-18(4).
2. Whether the Department may charge the statutorily authorized fee of two dollars for database records.

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.”² “A ‘record’ means recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity.”³ This definition includes electronic records stored in computers.⁴

The Department contends that if it created a new program that would allow it to provide Carfax with the non-confidential information it requested from the database, it would be creating a new record, and providing information from the database in a new structure. To support this contention, the Department points to language in N.D.C.C. § 44-04-18(4) that states, in part, that “nothing in this section requires a public entity to create or compile a record that does not exist. . . a public entity is not required to provide an electronically stored record in a different structure, format, or organization.”⁵

The Department overlooks a relevant part of N.D.C.C. § 44-04-18(4) that states “[a]ccess to an electronically stored record under this section [44-04-18], or a copy thereof, must be provided at the requester’s option in either a printed document or through any other available medium.”⁶ The CRS is an electronically stored record to which the Department is required to provide access. Although certain reports containing aggregate statistical information can be printed from the database, the raw

² N.D.C.C. § 44-04-18. (Emphasis added.)

³ N.D.C.C. § 44-04-17.1(15).

⁴ N.D.A.G. Letter to Tracy (Sept. 10, 1992).

⁵ N.D.C.C. § 44-04-18(4).

⁶ N.D.C.C. § 44-04-18(4). (Emphasis added.)

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data stored in the database cannot be printed, making the Department's CRS database essentially inaccessible.

This office has never addressed the extent of a public entity's obligation to provide access to a database in its possession. In Florida, as in North Dakota, an agency is not generally required to reformat its records to meet a requester's particular needs.⁷ However, Florida law expressly states that "[a]utomation of public records must not erode the right of access to those records."⁸ Florida statutes also prohibit Florida public agencies from entering into contracts for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records of that agency, including public records that are online or stored in an electronic recordkeeping system used by the agency.⁹ A Florida court recognized that a public entity may be required to provide access through a specially designed program where:

- 1) available programs do not access all of the public records stored in the computer's data banks;
- 2) the information in the computer accessible by the use of available programs would include exempt information necessitating a special program to delete such exempt items;
- 3) for any reason the form in which the information is proffered does not fairly and meaningfully represent the records; or
- 4) the court determines other exceptional circumstances exist warranting this special remedy.¹⁰

In this case, the existing programs cannot provide access to all records on the CRS. Writing a computer program that would allow access to the CRS database is not the creation of a new record. Rather, the program developed would provide the means through which Carfax could access the public records maintained in the database. This office has not addressed whether providing a means to access records would be so costly or cumbersome that it would require more effort or expense than the open records law requires of the public entities subject to it. I need not reach that issue here as Carfax has agreed to pay for the cost to develop the program needed to access the data.¹¹

⁷ Government in the Sunshine Manual, 2006 Edition, pg. 75, Florida.

⁸ Fla. Stat. § 119.01(2)(a).

⁹ Fla. Stat. § 119.01(2)(c).

¹⁰ Seigle v. Barry, 422 So. 2d 63, 66-67 (Fla. 1982).

¹¹ See Mayer v. Freedom of Information Com'n, 472 A.2d 321, 325 (Conn. 1984) (where none of the existing computer programs would produce the magnetic tapes requested,

Rather than create a new program to access CRS, the Department suggests that it print out the actual accident reports maintained in the EDMS system. It contends that because another record contains the information Carfax is seeking the Department does not have to provide access to the CRS database. This argument ignores the fact that Carfax did not request copies of the actual accident reports; it requested access to the database.

A similar argument was made in a recent case decided by a Wisconsin Court of Appeals. A company requested property assessment records in the format created and maintained by municipalities in a computer database.¹² In response, the municipalities provided the company with a portable document file (PDF) in place of what was actually requested, and argued that the response satisfied the request because the PDF essentially provided the same information as was contained in the database.¹³ The municipalities, like the Department in this situation, argued that providing access to the databases would require the creation of a new record.

The Wisconsin Court of Appeals found that the municipalities could not provide the PDF record in place of access to the database. It also rejected the argument that providing access to the database would require the creation of a new record. With regard to providing the PDF as an alternative, the Court explained that the open records law and the public policy underpinning the open records law require more than just providing an alternative record containing similar information. The open records law requires access to the source material – material as it is both put into and stored in the database, regardless of its physical form or characteristics.¹⁴ The Court made clear that the “data, maintained at public expense in the database, was as much a part of the public record as if it were written on paper property cards and organized and stored in a file cabinet.”¹⁵ Therefore, because the database was created by the municipalities, the requester had a right to ask for access to the database for purposes of examination and copying the source data.¹⁶

North Dakota and Wisconsin’s open records laws define “record” in a similar manner. Both consider “recorded information of any kind, regardless of the physical form or characteristic by which the information is stored. . .” to be a record subject to

and the cost of a new program was to be borne by the requester, an order compelling production of the tapes was within the commission’s authority).

¹² WIREdata, Inc. v. Village of Sussex, Slip Op., 2007 WL 10110, Wis. App. January 3, 2007, (NO. 2005AP1473, 2006AP174, 2006AP175).

¹³ WIREdata, Inc., at ¶ 63.

¹⁴ Id.

¹⁵ WIREdata, Inc., at ¶ 64.

¹⁶ WIREdata, Inc., at ¶ 66.

inspection.¹⁷ Like the information in the Wisconsin database, the information in the CRS database is a record subject to the open records law and thus required to be accessible.

It is my opinion that because the records in question are not accessible by current programs, the Department must develop a program that will provide access to the records.¹⁸ The Department is not obligated to develop a program that precisely meets Carfax's specifications, but it does have to provide some form of meaningful access to the database. It is my further opinion that the Department improperly denied the Carfax request.

Issue Two

By statute, the Department may charge a fee of two dollars for a copy of the portion of an investigating officer's accident report which does not disclose the opinion of the reporting officer.¹⁹ The Department has asked this office whether the charges allowed under N.D.C.C. § 39-08-13 are appropriate with regard to access to or copies generated from the CRS.

As explained in the "FACTS" portion of this opinion, when the Department receives an accident report, the actual document is scanned into the EDMS. When it receives a request for a copy of an accident report, the Department prints it from the EDMS and charges the requester two dollars as allowed by N.D.C.C. § 39-08-13. The record received is considered for all purposes the "accident report."

When the Department enters the pieces of information from the accident report into the CRS database, the information loses its identity as an "accident report," and a new record is created. If Carfax had asked for electronic scans of each report from the EDMS, the Department could charge the two dollar fee because the scan retains the same form as the accident report. However, the records provided from the CRS database are not in the form of an "accident report" as described in the statute. Therefore, the Department cannot charge the fees allowed in N.D.C.C. § 39-08-13 for providing a copy of the data in the CRS database.

The open records law allows public entities to charge a fee for copies of records, but the law specifically relates to paper copies.²⁰ Generally, access to public records is free and there is no statutory fee for records provided electronically. The open records law authorizes a state-level public entity, such as the Department, to provide access from an outside location to any computer data bases or electronically filed or stored

¹⁷ N.D.C.C. § 44-04-17.1(15).

¹⁸ According to Carfax, it will pay for any formatting costs incurred by the Department.

¹⁹ N.D.C.C. § 39-08-13.

²⁰ N.D.C.C. § 44-04-18(2).

information maintained by that entity.²¹ The entity may charge a reasonable fee for providing that outside access.²² The Department may not charge a fee if Carfax accesses the database at the Department. It may, however, charge a reasonable fee for making an electronic copy of the data.²³ A reasonable fee means the actual cost of making the copy, including labor, materials, and equipment.²⁴

CONCLUSIONS

The Department improperly denied the request by Carfax for access to the CRS database. It must develop a program that will provide access, in a meaningful form, to Carfax. The Department may not charge the two dollar fee allowed under N.D.C.C. § 39-08-13, but may charge a reasonable fee for providing outside access to Carfax or for making an electronic copy of the data.

STEPS NEEDED TO REMEDY VIOLATION

The Department must write a program that will allow meaningful access to the CRS database.

Failure to take the corrective measures described in this opinion within seven days of the date on which 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. § 44-04-21.2.²⁵ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁶

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²¹ N.D.C.C. § 44-04-18(5).

²² Id.

²³ N.D.C.C. § 44-04-18(3).

²⁴ N.D.C.C. § 44-04-18(2).

²⁵ N.D.C.C. § 44-04-21.1(2).

²⁶ Id.