

**OPEN RECORDS AND MEETINGS OPINION
2008-O-16**

DATE ISSUED: July 9, 2008

ISSUED TO: City of Mandan

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Susan Beehler asking whether the City of Mandan violated N.D.C.C. § 44-04-18 by charging an excessive fee for e-mail records.

FACTS PRESENTED

On December 4, 2007, Susan Beehler e-mailed the following request for records to Jim Neubauer, the city administrator for the City of Mandan ("Mandan"):

I am requesting the e-mails to the city commissioners from Tom Little's office. . . . I would like the e-mails and the commissioners responses to them which have been sent from Tom Little's office this past year.

I am also requesting all e-mails to city commissioners from your office or to your office or any other city office in regards to communication on Library Square this past year and the commissioners responses . . . I am requesting any e-mail communication between you and/or the city commissioners with any employee of the Lewis & Clark Regional Council and/or Community Works North Dakota regarding any matter and also regarding either Library Square project or with Metro Plains employees.

I am also requesting any correspondence electronically or snail mail specifically in regards to the former library/old post office, this past year between you and any or all city commissioners.

I do not necessarily need paper copies, you may forward these e-mail messages to the above e-mail address.

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Mr. Neubauer spoke to Ms. Beehler on December 4, 2007, after receiving her request and informed her that he would be unavailable for a time period in December and asked if it would be acceptable to get the information to her by December 31, 2007. Ms. Beehler agreed this would be fine. On January 4, 2008, Mr. Neubauer informed Ms. Beehler of the status of her request and provided an estimate of the cost involved.¹ On January 10 or 11, 2008, Mr. Neubauer informed Ms. Beehler that the e-mail records she requested had been retrieved and placed on a compact disk for her to pick up and that the cost involved was \$250.

Ms. Beehler objected to the cost and asked Mr. Neubauer for a breakdown of the costs. Mr. Neubauer informed Ms. Beehler that both he and Ellen Huber, business development director for Mandan, had searched their e-mails for the requested information. Mr. Neubauer then reviewed all of the relevant e-mails to make sure no confidential information needed to be redacted. Mr. Neubauer broke down the charges to Ms. Beehler as follows:

Ellen's time = 3 hours
Jim's time = 8.68 hours
Total 11.68 hours
Less first hour is free = 10.68 hours
Multiply by State Rate of \$25/hour
Total cost = \$267

Mr. Neubauer offered to waive \$17 and charge an even \$250. Ms. Beehler continued to object to the cost and has not retrieved any of the e-mail records she requested.

ISSUE

Whether the fees charged by Mandan for the records requested by Ms. Beehler were authorized under N.D.C.C. § 44-04-18.

ANALYSIS

Unless otherwise specifically provided by law, all records of a public entity are open and available to the public.² A public entity may impose a fee not exceeding \$25 per hour per request, excluding the initial hour, for locating records if locating the records

¹ Mandan originally quoted Ms. Beehler a fee of \$403 for the records she requested. Mandan calculated that cost by using an outdated city ordinance. Mandan has since passed a new ordinance to comply with North Dakota state law.

² N.D.C.C. § 44-04-18(1).

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requires more than one hour.³ An entity may impose a fee not exceeding \$25 per hour per request, excluding the initial hour, for excising confidential or closed material under N.D.C.C. § 44-04-18.10.⁴

Mandan located in excess of 300 e-mails that when printed out, amounted to around 500 pages. In Mandan's reply to a request for information from this office, Mandan explained that the charges to Ms. Beehler were based on the time it took to search and retrieve the e-mails from the Outlook computer systems of Ellen Huber and Jim Neubauer and the time that Mr. Neubauer spent reviewing all of the e-mails for confidential information that might need to be redacted. Mandan ultimately determined that no information contained in the e-mails needed to be redacted.

An open records opinion must be based on the facts given by the public entity.⁵ Based on the amount of information that Ms. Beehler requested and the number of e-mails that were retrieved, the time calculated appears a reasonable time for Mandan to have spent on this request. Mandan, however, charged Ms. Beehler in excess of what the law allows when it failed to deduct an hour for the time spent redacting the records. An entity may only charge for the specific charges allowed by law.⁶ The law requires that the first hour for locating records is free and the first hour for redacting records is free.⁷ Therefore, it is my opinion that Mandan violated N.D.C.C. § 44-04-18 by not deducting an hour for redacting the records.

CONCLUSION

The fees charged by Mandan for the records requested by Ms. Beehler were in excess of what is authorized under N.D.C.C. § 44-04-18.

STEPS NEEDED TO REMEDY VIOLATION

Mandan must provide the records to Ms. Beehler. Mandan must issue a revised cost estimate to Ms. Beehler in the amount of \$225. 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

³ N.D.C.C. § 44-04-18(2).

⁴ *Id.*

⁵ N.D.C.C. § 44-04-21.1(1).

⁶ N.D.A.G. 2005-O-05.

⁷ N.D.C.C. § 44-04-18(2).

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the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2.⁸ It may also result in personal liability for the person or persons responsible for the noncompliance.⁹

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⁸ N.D.C.C. § 44-04-21.1(2).

⁹ Id.