

**LETTER OPINION
2012-L-03**

April 12, 2012

The Honorable John M. Andrist
State Senator
PO Box E
Crosby, ND 58730-0660

Dear Senator Andrist:

Thank you for your letter requesting my opinion whether the requirement in N.D.C.C. § 40-01-09.1 for publishing the list of individual checks written and approved by a city includes payments made by electronic fund transfer; whether the check numbers must be included when the list of checks is published by a city or county; and whether individual charges made to a credit card held by a city, county or school board must be listed instead of listing the check paid to the credit card company.

For the reasons indicated below, it is my opinion that the requirement contained in N.D.C.C. § 40-01-09.1 for publishing the list of individual checks written and approved by a city does not include payments made by electronic fund transfer. It is my further opinion that check numbers are not required to be published by cities under N.D.C.C. § 40-01-09.1, but the check or warrant number must be included under the law that requires counties to publish their checks. Also, individual charges made to a credit card are not required to be listed under N.D.C.C. § 40-01-09.1 (regarding cities), or by other laws regarding counties and school districts.

ANALYSIS

State law provides as follows:

40-01-09.1. Publication of city government proceedings - Electorate to decide. Beginning with the 1996 biennial municipal elections, and every four years thereafter, all cities in North Dakota, regardless of their form of government, must put on the ballot the question of whether the minutes of its governing body shall be published in its official newspaper. If voters approve publication, the governing body shall, within seven days after each of its meetings, give its official newspaper, for publication, the complete

minutes, or a complete summary showing the substantive actions taken at the meeting.

Roll call votes must be published, but may be indicated as “unanimous” when appropriate. A list of the individual checks written by the city and approved by the governing body, showing the payee and the amount of each check, must be published. However, employee salary checks need not be published if the governing body elects to publish an annual salary schedule for each employee. When applicable, these minutes may be labeled as being published subject to the governing body’s review and revision. The minutes shall continue to be published until disapproved at a succeeding quadrennial election.¹

In your letter you indicate your belief that the provisions of N.D.C.C. § 40-01-09.1 requiring publication of a list of individual checks written and approved by a city were intended to include payments made by electronic fund transfer. You point out that this statute was created by an initiated measure approved in 1994.²

“Generally, the language of an initiated measure is interpreted and understood in its ordinary sense.”³ The basic rules of statutory construction apply with equal force to legislation enacted by the people through the initiative process or by referendum.⁴ Applying the general rules of statutory construction to an initiative, it should be noted that “[g]enerally, the law is what the Legislature says, not what is unsaid.”⁵ Further:

It must be presumed that the Legislature intended all that it said, and that it said all that it intended to say. The Legislature must be presumed to have meant what it has plainly expressed. It must be presumed, also, that it made no mistake in expressing its purpose and intent. Where the language of a statute is plain and unambiguous, the “court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it.”⁶

¹ N.D.C.C. § 40-01-09.1 (emphasis added).

² See 1995 N.D. Sess. Laws ch. 637, § 1.

³ N.D.A.G. 2011-L-10; N.D.A.G. 2004-L-59.

⁴ Id. (citing 42 Am. Jur. 2d Initiative and Referendum § 49 (2d ed. 2000)).

⁵ Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993).

⁶ Id. (quoting City of Dickinson v. Thress, 290 N.W. 653, 657 (N.D. 1940)); see also N.D.A.G. 98-L-107.

If the wording of a statute is clear and unambiguous, the letter of the statute is not to be disregarded under the pretext of pursuing its spirit.⁷ “Where the legislative intent is apparent from the face of the statute, there is no room for construction and the Court will follow the rule of literal interpretation in applying the words of the statute. . . . When a statute is unambiguous, it is improper for the Court to attempt to construe the provisions so as to legislate that which the words of the statute do not themselves provide.”⁸ “[W]hen the plain meaning of a statute is apparent, it is unwise and unnecessary to delve further.”⁹

Implicit in your question is whether the term “check” may be interpreted to include other forms of payment such as electronic fund transfers. In this instance, I do not believe the term “check” is ambiguous so I may not resort to extrinsic aids in an attempt to interpret its meaning.¹⁰ Because of that, and the fact that the term is not defined in N.D.C.C. ch. 40-01, the plain and ordinary meaning of the term should be utilized.¹¹ Common usage of the word “check” includes a “written order to a bank to pay the amount specified from funds on deposit; draft.”¹² The term has also been defined as a “draft drawn upon a bank and payable on demand, signed by the maker or drawer, containing an unconditional promise to pay a sum certain in money to the order of the payee.”¹³ The North Dakota Uniform Commercial Code definition of “check” is “a draft, other than a documentary draft, payable on demand and drawn on a bank or a cashier’s check, teller’s check, or demand draft. An instrument may be a check even though it is described on its face by another term such as ‘money order’.”¹⁴

In contrast, an electronic fund transfer has been defined as:

A transaction with a financial institution by means of a computer, telephone or electronic instrument. An electronic funds transfer is typically initiated by a bank customer (the originator) who requests the bank to transfer credit to

⁷ N.D.C.C. § 1-02-05.

⁸ Hayden v. N.D. Workers Comp. Bureau, 447 N.W.2d 489, 496 (N.D. 1989) (citations omitted) (emphasis supplied).

⁹ Little, 497 N.W.2d at 705. See also N.D.A.G. 98-L-107 (“It is improper to construe a statute ‘so as to legislate that which the words of the statute do not themselves provide.’”) (quoting Peterson v. Heitkamp, 442 N.W.2d 219, 221 (N.D. 1989)).

¹⁰ N.D.C.C. § 1-02-39.

¹¹ See N.D.C.C. § 1-02-02 (words to be understood in their ordinary sense); N.D.C.C. § 1-02-03 (words and phrases must be construed according to the context and the rules of grammar and approved usage of the language; words defined by a statute must be construed according to such meaning or definition).

¹² The American Heritage Dictionary 262 (2d coll. ed. 1991).

¹³ Black’s Law Dictionary 237 (6th ed. 1990).

¹⁴ N.D.C.C. § 41-03-04(6).

the account, usually in another bank, of another person (the beneficiary). Such transactions are governed by federal and state laws.¹⁵

The term has also been defined in reference to the Electronic Fund Transfer Act of 1978 (“EFTA”)¹⁶ as “any transfer of funds, other than a transaction originated by a paper instrument, that is initiated through an electronic terminal, telephone, or computer or magnetic tape and that orders or authorizes a financial institution to debit or credit an account. An example would be an ATM (AUTOMATIC TELLER MACHINE) transaction. Also called *wire transfer*.”¹⁷ Similarly, a pertinent federal regulation (Regulation E) promulgated under the EFTA has defined an electronic fund transfer as follows:

The term electronic fund transfer means any transfer of funds that is initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer’s account.¹⁸

....

The term electronic fund transfer does not include: (1) Checks. Any transfer of funds originated by check, draft, or similar paper instrument; or any

¹⁵ Black’s Law Dictionary 520 (6th ed. 1990).

¹⁶ 15 U.S.C. § 1693 et seq. As explained by the court in Fischer & Mandell LLP v. Citibank, N.A., 2009 WL 1767621 (S.D.N.Y.):

The EFTA “provide[s] a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems.” 15 U.S.C. § 1693(b). In enacting the EFTA, Congress delegated to the Board of Governors of the Federal Reserve System (the “Board”) the authority and responsibility to “prescribe regulations to carry out the purposes” of the Act. 15 U.S.C. § 1693b(a). In particular, the Board has promulgated certain administrative regulations codified at 12 C.F.R. § 205 (“Regulation E”).

¹⁷ Dictionary of Fin. and Inv. Terms 211 (7th ed. 2006) (emphasis added). The EFTA by its terms describes an electronic fund transfer as “any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape” 15 U.S.C. § 1693a(6) (emphasis added).

¹⁸ 12 C.F.R. § 205.3(b).

payment made by check, draft, or similar paper instrument at an electronic terminal.¹⁹

In support of your position, you indicate that the term “check” was meant to be applied broadly and to incorporate any new technologies that might later appear. However, Congress passed the Electronic Fund Transfer Act in 1978,²⁰ well before the year N.D.C.C. § 40-01-09.1 was enacted by the people through an initiated measure in 1994. In addition, the above-quoted definitions of “check” and “electronic fund transfer” from the 1990 edition of Black’s Law Dictionary appeared some four years prior to the enactment of the publication statute in question. Even though electronic fund transfers may have been relatively new in 1994, they were common enough to appear in dictionaries at the time and to be regulated by federal law.

Moreover, it is apparent that the terms “electronic fund transfer” and “check” mean something different and that an electronic fund transfer is not a paper transfer of funds like a check. A check is a written paper order and is excluded from the common meanings of electronic fund transfers. In addition, there are other places in state law that set out or describe the terms “check” and “electronic funds transfer” separately, also indicating that they are independent types of transfers or transactions.²¹

Consequently, it is my opinion that a city is not required under N.D.C.C. § 40-01-09.1 to publish a list of electronic fund transfers since electronic fund transfers are separate from, and not included within, the term “check,” as set out in that statute. Nothing would prohibit a city from choosing to publish electronic fund transfer information. And, of course, this information is an open record under N.D.C.C. § 44-04-18, except that financial account numbers and certain other information may be exempt or confidential under other laws.²²

This opinion does not apply to the publication requirement contained in N.D.C.C. § 15.1-09-31 concerning school board publication requirements since that statute uses the broader term “obligations” which could reasonably include electronic fund transfers instead of the more specific limiting term “checks” as used in N.D.C.C. § 40-01-09.1. Nor does this opinion apply to N.D.C.C. § 11-11-37 regarding county publication requirements. Although this office has previously determined that N.D.C.C. § 11-11-37 requires that

¹⁹ 12 C.F.R. § 205.3(c) (emphasis added).

²⁰ See Curde v. Tri-City Bank, 1990 WL 151211 (Tenn. Ct. App.).

²¹ See N.D.C.C. § 6-08-16 (NSF check statute); N.D.C.C. §§ 6-08-16.1 and 6-08-16.2 (no account check statutes); N.D.C.C. § 12.1-06.1-01(3)(g) (RICO statute); and N.D.C.C. § 13-08-01 (deferred presentment service provider statute).

²² See, for example, N.D.C.C. § 44-04-18.9 (financial accounts) and N.D.C.C. § 44-04-18.1 (personal information).

payment vouchers must be separately listed and published, that law also does not specifically use the limiting term “checks.”²³

You also ask whether check numbers must be included when checks are listed in the minutes for cities, counties, and school boards. It is my opinion that, under a plain reading of N.D.C.C. § 40-01-09.1, the check number is not required to be included in the list of checks published by cities. Only the payee and the amount of the check are required to be published under that statute.²⁴

Counties are required to publish “a full and complete report of [their] official proceedings.”²⁵ The record of a board of county commissioners’ proceedings is required to include all “orders and vouchers for . . . payment of moneys . . . [and the] same shall be dated and numbered with the number of the warrant.”²⁶ Thus, it is my opinion that a county’s published report of expenditures must include the number of the warrant used in payment.

The electors of a school district may require publication of the school board’s proceeding.²⁷ If so, the publication must include “an itemized list of obligations approved for payment.”²⁸ In your letter, you indicate that an itemized list of obligations approved for payment should include, at a minimum, the check number, name of payee and the amount. I concur that, to the extent the electors require a school district to publish an itemized list of checks, it is good practice, although not a legal requirement, to include the check number, name of payee, and amount of such check in order to more easily identify any individual payment made by the school board.

Finally, you ask whether a lump sum payment to a credit card company representing a number of individual charges requires listing and publication of the individual charges. Assuming the lump sum credit card bill is paid by check, and reading the statute literally as I must do here, all that N.D.C.C. § 40-01-09.1 requires is that the “list of the individual checks written by the city and approved by the governing body, showing the payee and the amount of each check, must be published.” Similarly, N.D.C.C. §§ 11-11-37 and 11-11-35 (governing counties) and N.D.C.C. § 15.1-09-31 (governing school districts) only

²³ See N.D.A.G. Letter to Hagerty (Dec. 24, 1985).

²⁴ Nothing in this statute prohibits a city from publishing additional information such as the check number.

²⁵ N.D.C.C. § 11-11-37.

²⁶ N.D.C.C. § 11-11-35.

²⁷ N.D.C.C. § 15.1-09-31.

²⁸ Id.

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require the specific payment to be published and do not require a breakdown of any individual components that constitute the complete payment.²⁹

Sincerely,

Wayne Stenehjem
Attorney General

jff/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.³⁰

²⁹ However, nothing would prohibit a city, county or a school district from choosing to publish in greater detail.

³⁰ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).