

**OPEN RECORDS AND MEETINGS OPINION  
2012-O-08**

DATE ISSUED: August 3, 2012

ISSUED TO: North Dakota State University Research and Technology Park

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from C.T. Marhula asking whether the North Dakota State University Research and Technology Park (Research Park) violated N.D.C.C. § 44-04-18 when it charged Mr. Marhula a \$75 fee to locate and review records of the entity.

**FACTS PRESENTED**

In February 2012, C.T. Marhula requested to examine and review the minutes and all audits of the Research Park since its formation.<sup>1</sup> Lowell Bottrel, the attorney for the Research Park, e-mailed Mr. Marhula a cost estimate for providing the records. Mr. Bottrell informed Mr. Marhula that the Research Park believed it would take three hours to assemble and review the minutes for confidential information. Of the three hours, the Research Park would charge for two hours. It would also charge one hour of the estimated two hours necessary to review the Research Park audits. Thus, the estimated total provided to Mr. Marhula was three hours at \$25 each hour for a total charge of \$75.

Executive Director Tony Grindberg reviewed twelve years of minutes for confidential information. It took him two and one-half hours to read all of the minutes and half an hour to prepare the documents that needed confidential information redacted.

The Research Park attributes two hours to locating the audit records. Only the last four years of audit reports are maintained electronically. The remaining audits are scattered among several boxes in storage.

The Research Park provided approximately 175 pages of records for Mr. Marhula's review. Before Mr. Marhula viewed the records, he paid \$75. Mr. Marhula brought his own copier so he was not charged for copies.

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<sup>1</sup> The first request was made February 22 and the second was on February 28, 2012.

## ISSUE

Whether the fee imposed by the Research Park was excessive and in violation N.D.C.C. § 44-04-18.

## ANALYSIS

The Research Park is a nonprofit corporation created pursuant to the authority set forth in N.D.C.C. § 15-10-17(8) and does not dispute that it had an obligation under the open records law to provide the requested records.<sup>2</sup>

Unless otherwise provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours.<sup>3</sup> Subsection 2 of N.D.C.C. § 44-04-18 authorizes three separate fees, one for copying public records, one for locating records if it takes the public entity longer than one hour to find the requested records, and one for excising confidential or closed information if it takes the public entity longer than one hour to excise such information from the records.<sup>4</sup> A public entity may impose a fee not exceeding \$25 per hour for locating the records and for excising confidential or closed information.<sup>5</sup>

The Research Park explains that it took three hours to review the minutes for confidential information, to prepare the documents for redaction, and to redact the documents. It took the Research Park two hours to locate the audit records. The law does not allow a fee to be charged for the first hour of locating or the first hour of reviewing the records for confidential information, so the requestor was charged for the remaining three hours.

Mr. Marhula asserts that the time taken by the Research Park to locate the records and review them for confidential information was excessive. He argues that the minutes and audits of public entities are clearly open records and thus should not have to be reviewed for confidential information.

According to the Research Park, however, the minutes were reviewed for confidential information because the Research Park did not realize it was subject to the open records and meetings law until 2006.<sup>6</sup> Prior to 2006, the Research Park may have included information that was trade secret, proprietary, commercial, or financial

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<sup>2</sup> See N.D.A.G. 2010-O-04 and N.D.A.G. 2006-O-01.

<sup>3</sup> N.D.C.C. § 44-04-18.

<sup>4</sup> N.D.C.C. § 44-04-18(2).

<sup>5</sup> N.D.C.C. § 44-04-18(2).

<sup>6</sup> See N.D.A.G. 2006-O-01.

information because it was unaware that the minutes would be subject to public scrutiny. The Research Park's executive director spent two and a half hours reading the minutes. Half an hour was spent preparing the minutes for redaction which required the information to be crossed out and then recopied in order to completely conceal the confidential information from view.

In 2005, I explained to North Dakota State University (NDSU) that a person should not be charged for making additional copies during the process of redacting closed or confidential information or for time accrued counting documents.<sup>7</sup> Likewise here, any time spent doing the ministerial task of duplicating the documents in order to conceal confidential information, cannot be computed as part of the time spent reviewing the records for confidential information. Thus, it is my opinion that the Research Park was not authorized by law to charge Mr. Marhula for the time spent making additional copies to conceal confidential information.

The Research Park also charged Mr. Marhula for the time it took to locate the audits. According to the Research Park, only four years of audits are stored electronically while the rest of the audits are in boxes held in the storage room of their building. The boxes had not been organized since the Research Park moved into the building so staff had to go through each box to locate the audits, which took two hours. Mr. Marhula was not charged for the first hour of locating the audits.<sup>8</sup> In any opinion issued pursuant to N.D.C.C. § 44-04-21.1, I must base the opinion on the facts given by the public entity. As long as the fee charged by the Research Park was for an activity authorized under N.D.C.C. § 44-04-18(2), the fee is lawful. It is thus my opinion that the Research Park did not violate N.D.C.C. § 44-04-18(2) when it charged Mr. Marhula for the amount of time it took to review the minutes for confidential information and to locate the audits.

#### CONCLUSION

The fee imposed by the NDSU Research Park that was based on the time spent locating the requested records and reviewing them for confidential information was authorized by law. However, the portion of the fee attributable to the time spent preparing the records for redaction was not authorized by law.

#### STEPS NEEDED TO REMEDY VIOLATION

The Research Park must return \$12.50 to Mr. Marhula.

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

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<sup>7</sup> N.D.A.G. 2005-O-05.

<sup>8</sup> See N.D.C.C. § 44-04-18(2) (the first hour of locating records is free).

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reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2.<sup>9</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>10</sup>

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<sup>9</sup> N.D.C.C. § 44-04-21.1(2).

<sup>10</sup> Id.