

**OPEN RECORDS AND MEETINGS OPINION
2014-O-18**

DATE ISSUED: November 5, 2014

ISSUED TO: City of Minot

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Colleen Auer asking whether the City of Minot violated N.D.C.C. § 44-04-18 by charging an excessive fee for copies of requested records.

FACTS PRESENTED

Ms. Colleen Auer requested numerous records from the City of Minot through several open record requests and asked for such records be provided "in electronic form where available."¹ On July 17, 2014, after producing several records and while in the process of responding to all of Auer's requests,² the City of Minot sent a bill to Auer for the records produced thus far, providing the following breakdown of charges:

1. The City of Minot:
Total time: 30.5 hrs. x \$25.00 per hour \$762.50

¹ Letter from Colleen Auer to Attorney General's office (July 25, 2014). The open records requests at issue in this opinion are Ms. Auer's May 2, May 20, May 27, June 4, and June 9, 2014, requests.

² Id., see also Letter from Shawn Grinolds, counsel for City of Minot, to Sandra Voller, Asst. Att'y Gen. (Aug, 19, 2014) (responding to Auer's May 2 request on May 13 and 30; to Auer's May 20 request on May 30; to Auer's May 27 and June 4 requests on June 13 with supplemental responses to the June 4 request on June 18; and Auer's June 9 request on June 23 and July 18). Auer was formally employed under a probationary appointment on March 31, 2014, as a City Attorney for Minot and was terminated roughly one month later. Auer has since threatened legal action against the City and filed a Charge of Discrimination and a Charge of Retaliation against the City. The City, in responding to Auer's requests, informed her of its right to deny production of records pursuant to N.D.C.C. § 44-04-18(6) because of the pending charges. The City however, "in the spirit of cooperation...fully and forthrightly responded to [Auer's] records requests."

Copy costs: 3,785 pages x \$.25 per page \$976.25
Subtotal Costs Incurred\$1,738.75

2. Smith Bakke Porsborg Schweigert & Armstrong:

Total time: 29.1 hrs x \$25.00 per hour \$727.50

Copy costs: 2,867 pages x \$.20 per page \$573.40

6 CDs x \$5.00 per CD \$ 30.00

Minus the 1st free hour for each open records requests pursuant to N.D.C.C.

§ 44-04-18(2): 5 hrs x \$25.00(\$125.11)

Subtotal Costs Incurred\$1,205.90

Total Costs Incurred.....\$2,994.65³

Auer requests an opinion on whether the fees charged are allowable by law.⁴

ISSUE

Whether the fees imposed by the City of Minot in responding to open record requests were excessive and in violation of N.D.C.C. § 44-04-18.

ANALYSIS

All records of a public entity are open and accessible to the public unless otherwise specifically provided by law.⁵ Certain charges are authorized under the open records law when responding to a request for records.⁶ The public entity may charge up to \$25 per hour for locating the requested records, excluding the initial hour.⁷ Similarly, a public entity may charge \$25 per hour for excising closed or confidential information, excluding the initial hour.⁸ These charges apply regardless of whether the request is for

³ Letter from Randall J. Bakke, counsel for City of Minot, to Ms. Colleen Auer (July 17, 2014).

⁴ Ms. Auer also requests this office to review a denial of records by the City she received on June 23, 2014, alleging the denial was based on improper legal authority. Pursuant to N.D.C.C. § 44-04-21.1, requests for an opinion on alleged improper denial of records must be received by this office within 30 days. This office received Ms. Auer's request on July 29, 2014, past the 30-day deadline. Accordingly, this office cannot address the complaint of alleged improper denial.

⁵ N.D.C.C. § 44-04-18.

⁶ N.D.C.C. § 44-04-18(2).

⁷ Id.

⁸ Id.

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paper copies or electronic copies.⁹ The public entity may also charge \$.25 per page for a paper copy.¹⁰ An entity may require payment before making or mailing the copy.¹¹

The City of Minot explained the process it utilized in responding to Auer's record requests which corresponds with how it computed the charges outlined in its bill.

Each of Ms. Auer's records requests encompassed a large quantity of documents, including records which were only available in physical form. Other records, such as email communications, although available in electronic form, could not realistically be directly provided to Ms. Auer in electronic form. The requested records were in the possession of numerous different employees of City, in files at different locations, and on different electronic devices. Each City employee had to search through their email history, computer files, and hard copy files to locate records responsive to Ms. Auer's requests. Once located, each employee had to make a tangible copy for provision to the City Clerk who compiled the records and scanned them into electronic format for forwarding to City's counsel, whether via email or on CD. City's counsel is located in Bismarck making transfer of voluminous physical records from the City to City's counsel costly. Such shipping expenses were avoided by converting the records into electronic format. Staff for City's counsel's then printed the records for review by City's counsel to ascertain whether each record was exempt from production, or whether each record contained any confidential or closed information which needed to be redacted as exempt from disclosure. Ms. Auer was not charged for any time associated with printing the documents by staff for City's Counsel, or for time associated with scanning any records back into electronic format after any redacting was completed.¹² Instead, Ms. Auer was only charged the per page cost for making the hard-copies. Once this process was

⁹ Id., see also N.D.A.G. 2011-O-12.

¹⁰ N.D.C.C. § 44-04-18(2); N.D.A.G. 2011-O-12.

¹¹ N.D.C.C. § 44-04-18(2)

¹² Ms. Auer also requested that the City of Minot identify any records it is withholding by date, type of record, author/recipients, and general subject matter and the legal basis for the non-disclosure. "Although federal courts construing the federal Freedom of Information Act may require a public entity to prepare a list or an index describing any documents that are withheld, there is no similar requirement in the North Dakota open records law." N.D.A.G. 2008-O-05. The City of Minot, however, did provide Ms. Auer with "privilege logs" detailing the requested information. The City of Minot confirms it did not charge Ms. Auer for the time it spent preparing such logs.

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completed, the records were provided to Ms. Auer in electronic format on a CD.¹³

As this office explained previously, a public entity may only charge for the specific charges allowed by law and an estimate given to a requester must be based only on legally chargeable fees.¹⁴

Past opinions provide that although N.D.C.C. § 44-04-18(2) allows the public entity to charge for locating records, it does not allow the entity to charge for time it takes to forward emails, count documents, or “transfer” emails to a new folder.¹⁵ As explained above, the City of Minot charged for the time it spent gathering, copying, organizing, forwarding, scanning, and printing the records; time it spent saving responsive records to a zip drive; and time spent corresponding with others regarding the record requests.¹⁶ None of the time spent doing these tasks, other than locating the records, are allowed to be charged under N.D.C.C. § 44-04-18(2).

The open records law also provides:

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. ...a public entity is not required to provide an electronically stored record in a different structure, format, or organization.¹⁷

Although Auer requested the records “in electronic form where available,” the City of Minot explains some records were not in electronic format¹⁸ and the electronic records that were available needed to be printed out in order to excise closed and confidential

¹³ Letter from Shawn Grinolds, counsel for City of Minot, to Sandra Voller, Asst. Att’y Gen. (Aug. 19, 2014). The records were provided in an electronic form, i.e. placed on a CD as this was the form requested by Auer.

¹⁴ N.D.A.G. 2005-O-05.

¹⁵ See N.D.A.G. 2012-O-08; N.D.A.G. 2011-O-12; N.D.A.G. 2006-O-13; N.D.A.G. 2005-O-05.

¹⁶ Letter from Shawn Grinolds, counsel for City of Minot, to Sandra Voller, Asst. Att’y Gen. (Aug. 19, 2014) and exhibits B, D, E, and F.

¹⁷ N.D.C.C. § 44-04-18(4).

¹⁸ The City is not required to create or compile a record that does not exist. N.D.C.C. § 44-04-18(4). Therefore, the City does not have an obligation to reformat records in physical form into an electronic form. The City did so here at the request of Auer but did not charge for the time it spent doing so.

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information.¹⁹ The law allows a public entity to charge \$.25 for a printed copy of an electronic record when this is the only method to remove closed or confidential information.²⁰ However, when it is necessary to print out the document to excise such information, the document printed from the computer is the copy for which the person may be charged.²¹ The person should not be charged for multiple copies of the same record.²² In addition, the \$.25 per page copying cost also covers the employee time associated with printing the document.

Here, the City of Minot properly charged \$.25 per page for the copies that needed to be printed in order to excise confidential or closed information.²³ However, the City of Minot improperly charged for additional copies of the same records it decided to make in order to organize, scan, or provide to legal counsel for review. It also improperly charged for the time employees spent “printing.”

Finally, although the City of Minot deducted \$25 for the first hour of each request for locating the record, it failed to deduct the additional \$25 for the first hour for each request for the time it took excising closed or confidential information.²⁴

The City of Minot violated the open records law when it charged for time spent gathering, copying, organizing, forwarding, scanning, and printing the records; saving records to a zip drive; and corresponding with others about the record requests. It was

¹⁹ Letter from Shawn Grinolds, counsel for City of Minot, to Sandra Voller, Asst. Att’y Gen. (Aug. 19, 2014)

²⁰ See N.D.A.G. 2003-O-04 (an entity may not charge for the cost of making printed copies of emails except where a printed copy of a specific email is required in order to remove closed or confidential information).

²¹ N.D.A.G. 2005-O-05.

²² N.D.A.G. 2005-O-05 (“When a person requests a paper copy of an electronic record, the document printed from the computer is the copy for which the person may be charged. The person should not be charged for duplicate copies made thereafter by an employee even if it is necessary to make additional copies during the process of redacting closed or confidential information.”).

²³ Although not required by open records law, at the request of Auer, the City, after redacting closed and confidential information, scanned the excised documents into electronic format, reiterating it did not charge Auer for the time it spent scanning the documents onto CDs. Auer was then given the CDs of the records. N.D.C.C. § 44-04-18(2) allows a public entity to charge the actual cost of materials or equipment for non-paper copies. Auer requested the electronic format and retained the CDs. Auer must therefore pay for the actual cost of the CDs.

²⁴ Letter from Shawn Grinolds, counsel for City of Minot, to Sandra Voller, Asst. Att’y Gen. (Aug. 19, 2014) (the City recognized such mistake and agreed to redact \$125 for the initial hours of the five record requests).

a further violation of the open records law for City employees to charge \$.25 per page for initially printing the responsive records which were thereafter rescanned and forwarded to counsel for review. Finally, it was a violation of law when the City charged for the first hour per request for redacting closed or confidential information.

CONCLUSION

The City of Minot violated open record laws by charging excessive fees for records responsive to open record requests.

STEPS NEEDED TO REMEDY VIOLATION

The City of Minot may only impose those fees allowed by law, and must now determine how much time was actually spent locating the records and redacting closed or confidential information. The City of Minot may charge \$25 per hour, minus the first hour per request, for locating the records and may charge \$25 per hour, minus the first hour per request, for redacting the records. The City of Minot may charge \$.25 per page for those records that were required to be printed in order to excise closed or confidential information. The City may also charge the actual cost of the CDs it provides to Auer. The City of Minot must amend its billing to reflect these legally allowable charges.

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 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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Attorney General

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²⁵ N.D.C.C. §44-04-21.1(2).

²⁶ Id.