

**OPEN RECORDS AND MEETINGS OPINION
2020-O-10**

DATE ISSUED: September 30, 2020

ISSUED TO: Mandan Police Department

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Susan Franciere asking whether the Mandan Police Department violated N.D.C.C. § 44-04-18 by improperly charging for copies of records, failing to provide the legal authority for redacting records, and improperly redacting records.

FACTS PRESENTED

On June 30, 2020, Susan Franciere sent an open records request to the Mandan Police Department (MPD) for two incidents involving dog attacks.¹ The MPD sent a cost estimate to Ms. Franciere which included 32 paper copies at \$.25 per page and the option of either receiving actual color copies of eleven photographs at \$1.00 per page or a CD with the color photos for \$5.² Ms. Franciere ultimately received 32 pages of redacted records and the CD of the photos.³

ISSUES

1. Whether the Mandan Police Department charges for records provided in response to an open records request were in compliance with N.D.C.C. § 44-04-18.
2. Whether the Mandan Police Department violated N.D.C.C. § 44-04-18 for failing to communicate the legal authority for redacting records to a requestor.
3. Whether records provided in response to a request were properly redacted.

¹ Letter from Susan Franciere to the Mandan Police Dep't (June 30, 2020).

² Email from Lori Flaten, Deputy Chief, Mandan Police Dep't to Att'y Gen.'s Office (Aug. 24, 2020, 8:17 AM); Mandan Police Dep't Records Request Form (July 8, 2020).

³ Email from Lori Flaten, Deputy Chief, Mandan Police Dep't, to Att'y Gen.'s Office (Aug. 24, 2020, 8:17 AM).

ANALYSIS

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.”⁴ A public entity is allowed to charge for responding to an open records request, if the charge is specifically authorized by law.⁵ A public entity may estimate the cost associated in fulfilling a request for records based on the legally allowable charges and can require payment based on the estimate before preparing or providing copies of the requested records.⁶ Section 44-04-18, N.D.C.C., allows a public entity to charge “twenty-five cents per impression of a paper copy” and may charge a “reasonable fee” for any copy of a record that is not a paper copy.⁷ A “reasonable fee” is limited to “the actual cost to the public entity of making the copy, including labor, materials, and equipment.”⁸ Labor costs can be calculated by taking the amount of time it took to make the copies and multiplying it by the per minute or hour wage of the employee.⁹

The MPD compiled 32 paper copies and eleven color photos responsive to the request.¹⁰ After compiling the records, the MPD sent a cost estimate to the requestor for the cost of copying 32 records at \$.25 per page, totaling \$8.00, and the option to receive the color photos either in duplicate at \$1.00 each or the “cost to transfer photos to a CD instead of printing” of \$5.00.¹¹ The requestor ultimately received the CD and the 32 paper copies, thus being charged a total of \$13.00.¹²

⁴ N.D.C.C. § 44-04-18(1).

⁵ N.D.C.C. § 44-04-18.

⁶ N.D.C.C. § 44-04-18(2); N.D.A.G. 2018-O-03.

⁷ N.D.C.C. § 44-04-18(2). “Paper copy” is defined as “a one-sided or two-sided duplicated copy of a size not more than eight and one-half by fourteen inches [19.05 by 35.56 centimeters].”

⁸ N.D.C.C. § 44-04-18(2).

⁹ N.D.A.G. 2002-O-04; *see also* N.D.A.G. 98-O-03 (“[T]he largest part of a public entity’s actual expense in making copies will usually be the labor charge . . .”).

¹⁰ Email from Lori Flaten, Deputy Chief, Mandan Police Dep’t to Att’y Gen.’s Office (Aug. 24, 2020, 8:17 AM); Mandan Police Dep’t Records Request Form (July 8, 2020).

¹¹ Email from Lori Flaten, Deputy Chief, Mandan Police Dep’t to Att’y Gen.’s Office (Aug. 24, 2020, 8:17 AM); Mandan Police Dep’t Records Request Form (July 8, 2020).

¹² Email from Lori Flaten, Deputy Chief, Mandan Police Dep’t to Att’y Gen.’s Office (Aug. 24, 2020, 8:17 AM); Mandan Police Dep’t Records Request Form (July 8, 2020). In follow up, Ms. Franciere made her check out in the wrong amount of \$18.00. In noticing the error, the Mandan Police Dep’t issued a \$5.00 refund to Ms. Franciere. Email from Lori Flaten, Deputy Chief, Mandan Police Dep’t to Att’y Gen.’s Office (Aug. 24, 2020, 10:05 AM).

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The MPD explains that the cost of the CD was \$.26¹³ and it took approximately ten to fifteen minutes for an employee who makes \$44.30 per hour to transfer eleven photographs, which is approximately \$.74 per minute.¹⁴ Even taking the ten minute estimate, at \$.74 per minute and adding the cost of the CD, the labor and material cost of copying the records to the CD would be \$7.66, which is higher than the actual amount charged to the requestor, and therefore considered reasonable. The paper copies of 32 records were correctly charged at \$.25 per page. Based on the foregoing, the amount of \$13.00 for copies of records was reasonable.¹⁵

Issue Two

“A denial of a request for records made under this section must describe the legal authority for the denial, or a statement that a record does not exist, and must be in writing if requested.”¹⁶ In her record request, Ms. Franciere specifically asked for any denial of records or information to be in writing.¹⁷ The MPD redacted the responsive records but failed to provide the legal basis for withholding the information to the requestor, thus violating open records law.¹⁸

Issue Three

All records of a public entity are open and accessible to the public unless otherwise specifically provided by law.¹⁹ Records that are “confidential” may only be released in accordance with the law while “exempt” records may be disclosed at the discretion of the public entity.²⁰ A public entity has a duty to review a record, redact exempt or

¹³ Email from Lori Flaten, Deputy Chief, Mandan Police Dep’t to Att’y Gen.’s Office (Aug. 24, 2020, 10:05 AM).

¹⁴ Email from Lori Flaten, Deputy Chief, Mandan Police Dep’t to Att’y Gen.’s Office (Aug. 25, 2020, 8:03 AM). Opinions issued under N.D.C.C. § 44-04-21.1 must be based on the facts of the public entity. N.D.C.C. § 44-04-21.1(1).

¹⁵ Ms. Franciere also takes issue with the MPD asking for a cashier’s check or money order for payment. Section 44-04-18, N.D.C.C., does not dictate a specific form or medium of payment, and therefore it is not a violation under the open records law for the MPD to have such a policy in place. In any event, Ms. Franciere provided a personal check, which was accepted by the MPD in this instance. Email from Lori Flaten, Deputy Chief, Mandan Police Dep’t to Att’y Gen.’s Office (Aug. 24, 2020, 8:17 AM).

¹⁶ N.D.C.C. § 44-04-18(7).

¹⁷ Letter from Susan Franciere to the Mandan Police Dep’t (June 30, 2020).

¹⁸ Email from Lori Flaten, Deputy Chief, Mandan Police Dep’t to Att’y Gen.’s Office (Aug. 24, 2020, 8:17 AM).

¹⁹ N.D.C.C. § 44-04-18; N.D. Const. art. XI, § 6.

²⁰ N.D.C.C. § 44-04-17.1(3) (definition of “confidential record”); N.D.C.C. § 44-04-17.1(5) (definition of “exempt record”); N.D.A.G. 2020-O-07.

confidential information, and turn over the remaining portions of the record that are not protected.²¹

The records at issue in this opinion are law enforcement reports and case files for two separately investigated incidents. Section 44-04-18.7, N.D.C.C., allows law enforcement agencies to redact “personal information” from active or nonactive criminal intelligence and investigative files.²²

“Personal information” means a person’s medical records or medical information obtained from the medical records; motor vehicle operator’s identification number; social security number; any credit, debit, or electronic fund transfer card number; month and date of birth; height; weight; home street address; home telephone number or personal cell phone number; and any financial account numbers.²³

In addition, N.D.C.C. § 12.1-35-03, protects the name and identifying biographical information of a child victim or child witness of a crime.²⁴

The redacted records were reviewed by this office. The MPD properly redacted the name of the child victim and witnesses, including biographical information. It was also permissible for the MPD to redact “personal information” of adults named in the records as specifically authorized by law, such as the month and date of birth, height, weight, and home street address and phone numbers.

However, the MPD also redacted information not considered “personal information” such as the sex, race, ethnicity, hair and eye color, age, and year of birth, of the adults named within the case files.²⁵ They also went beyond the protections found in N.D.C.C. § 44-04-18.7(6), by redacting the city, county, state, and zip code. There is also no authority to redact the business address of the veterinarian or the location of the

²¹ N.D.C.C. § 44-04-18.10; N.D.A.G. 2020-O-07.

²² N.D.C.C. § 44-04-18.7(1).

²³ N.D.C.C. § 44-04-18.7(6).

²⁴ N.D.C.C. § 12.1-35-03(1) (except for criminal offenses under Title 39, Motor Vehicle, or a child victim of a fire). There is a similar provision that protects certain information of adult victim or witnesses under N.D.C.C. § 12.1-34-02, but this only applies to “crimes” as defined by N.D.C.C. § 12.1-34-01(2), which does not include the dog offenses cited in the police reports and case files. North Dakota Constitution, Article I, Section 25(1)(e), also known as Marsy’s Law, also protects certain information if the rights are specifically asserted by the victim. See N.D.A.G. 2016-L-04. In follow up with the MPD, no victims in the incidences invoked these rights. Email from Lori Flaten, Deputy Chief, Mandan Police Dep’t to Att’y Gen.’s Office (Aug. 26, 2020, 7:59 AM).

²⁵ If criminal justice agencies wish to protect such information, it should update its law to include such information as “personal information” that would allow redaction.

incident, unless the incident occurred at the home of the individuals named therein. Finally, nothing in the law protects the information regarding the dogs at issue in the report including their sex, date of birth, color, species, breed, license number, etc.

It is therefore my opinion that the MPD violated open records law when it improperly redacted requested records.

CONCLUSIONS

1. The amount of money charged by the Mandan Police Department in response to an open records request was in compliance with N.D.C.C. § 44-04-18.
2. The Mandan Police Department violated N.D.C.C. § 44-04-18 for failing to communicate the legal authority for redacting records to a requestor.
3. The records requested were not properly redacted under open records law.

STEPS NEEDED TO REMEDY VIOLATION

The Mandan Police Department should review the requested records and update its redactions to comply with open records law. The properly redacted records must be provided to Ms. Franciere free of charge.

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. § 44-04-21.2.²⁶ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁷

Wayne Stenehjem
Attorney General

sld
cc: Susan Franciere

²⁶ N.D.C.C. § 44-04-21.1(2).

²⁷ *Id.*