



STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

www.attorneygeneral.nd.gov

(701) 328-2210

Drew H. Wrigley
ATTORNEY GENERAL

OPEN RECORDS AND MEETINGS OPINION
2025-O-07

DATE ISSUED: March 7, 2025

ISSUED TO: Milnor Public School District No. 2

CITIZEN'S REQUEST FOR OPINION

Dr. Andrew Hennessey requested an opinion from this office under N.D.C.C. § 44-04-21.1 asking whether the Milnor Public School District No. 2 violated N.D.C.C. § 44-04-18 by charging fees for copies of requested records not allowed by law.

FACTS PRESENTED

On June 25, 2022, Dr. Andrew Hennessey sent an open records request to Dr. Chris Larson, Superintendent of Milnor Public School District No. 2 (District).¹ Specifically, Dr. Hennessey requested “any emails, texts, etc., that [Dr. Larson] had used to communicate information to another person or persons, regarding [Dr. Hennessey]” from the beginning of Dr. Hennessey’s employment to the time of the request.² Dr. Larson elected to hire Devi Engelstad to complete the search for the requested records due to her “technology background” and because “she was off work/available during that time of the summer.”³ Ms. Engelstad quoted an amount of fifty dollars per hour, plus travel time, and mileage for her services.⁴ Dr. Larson sent a cost estimate of five hundred dollars to Dr. Hennessey which, according to the District, he accepted.⁵ On June 20, 2022, Ms. Engelstad completed the search and on July 20, 2022, provided an invoice to the District with the following breakdown of charges:

¹ E-mail from Dr. Andrew Hennessey to Dr. Chris Larson, Superintendent, Milnor Pub. Sch. Dist. (June 25, 2022, 5:31 PM).

² *Id.*

³ E-mail from Dr. Chris Larson, Superintendent, Milnor Pub. Sch. Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. Of Att’y Gen. (Sept. 21, 2022, 2:30 PM). Dr. Larson does not explain what technology background Ms. Engelstad had or what position she held at the school.

⁴ E-mail from Dr. Chris Larson, Superintendent, Milnor Pub. Sch. Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. Of Att’y Gen. (Sept. 21, 2022, 2:30 PM). According to Dr. Larson, the state rate was used to calculate the cost for mileage and the travel time was at a rate less than fifty dollars but still to compensate for Ms. Engelstad’s time.

⁵ E-mail from Dr. Chris Larson, Superintendent, Milnor Pub. Sch. Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Sept. 21, 2022, 2:30 PM).

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Mileage (158 miles round trip)	\$95.00
Travel time (3 hours)	\$105.00
IT service	<u>\$300.00</u>
Total Due	\$500.00 ⁶

Once Dr. Hennessey received the invoice for payment, he requested an opinion from this office asking whether the District violated the open records laws by charging fees not allowed by law.⁷

In the District's response to a request for information from this office, Dr. Larson explained it took Ms. Engelstad six hours to locate the records on his computer and cell phone.⁸ In its explanation regarding a breakdown for the charges of "IT service," Dr. Larson stated Ms. Engelstad arrived at 9:00 a.m. to locate the records.⁹ Dr. Larson then reviewed the open records request with Ms. Engelstad and "discussed how to most efficiently accomplish the [search]."¹⁰ Dr. Larson logged into his email account after which Ms. Engelstad began searching and saving the emails responsive to the records request.¹¹ According to Dr. Larson, Ms. Engelstad went through his email folders and created several batches of emails that fit the scope of the request.¹² Dr. Larson then reviewed the emails in the early afternoon.¹³ Dr. Larson then gave his cellphone and passcode to Ms. Engelstad so she could locate text messages responsive to the request.¹⁴ Ms. Engelstad took screenshots of information that fit the scope of the request and saved them into a OneDrive folder.¹⁵ Dr. Larson then reviewed the folder.¹⁶ Ms. Englestad completed her work around 3:00 p.m. and provided an invoice for a total cost of \$500 for her services.¹⁷ Dr. Larson admits he could have completed the search himself or had the District's IT person locate the records.¹⁸

⁶ Invoice from Devi Englestad to Milnor Pub. Sch. Dist. (July 20, 2022).

⁷ E-mail from Dr. Andrew Hennessey to Mary Kae Kelsch, Dir., Gen. Couns. Div., Off. of Att'y Gen. (Aug. 17, 2022, 5:56 PM).

⁸ E-mail from Dr. Chris Larson, Superintendent, Milnor Pub. Sch. Dist., to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Sept. 21, 2022, 2:30 PM).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

The District's search resulted in approximately "[h]undreds, if not thousands" of pages of records responsive to Dr. Hennessey's request.¹⁹ According to Dr. Larson, none of the records required any redactions of confidential or exempt information.²⁰

ISSUE

Whether the fees charged by the Milnor Public School District in responding to an open record request were in violation of N.D.C.C. § 44-04-18.

ANALYSIS

"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."²¹ A public entity is allowed to charge a fee for responding to an open records request, if the charge is specifically authorized by law.²² 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.²³ A public entity may impose "a fee not exceeding twenty-five dollars per hour" for locating the records and for excising confidential or close information.²⁴

Additionally, subsection 3 of N.D.C.C. § 44-04-18, provides:

An electronic copy of a record must be provided upon request at no cost, other than costs allowed in subsection 2, except if the nature or volume of the public records requested to be accessed or provided requires extensive use of information technology resources, the agency may charge no more than the actual cost incurred for the extensive use of information technology resources incurred by the public entity.²⁵

"Extensive is defined as a request for copies of electronic records which take more than one hour of information technology resources to produce."²⁶ The term "[i]nformation technology resources"

¹⁹ *Id.*

²⁰ *Id.*

²¹ N.D.C.C. § 44-04-18(1).

²² N.D.C.C. § 44-04-18.

²³ N.D.C.C. § 44-04-18(2).

²⁴ *Id.*

²⁵ N.D.C.C. § 44-04-18(3).

²⁶ *Id.*

includes “data processing hardware and software or technology support services necessary to facilitate a response to a request for electronic records.”²⁷

The District attempts to justify its charges based on the actual cost incurred for the use of extensive informational technology resources. It does not appear that data processing hardware or software was used to produce the records, therefore, only “technology support services” would be applicable. However, the District fails to explain how searching through an email account and cell phone qualifies as “technology support services” necessary to facilitate a response to a records request when Dr. Larson admits he could have completed the search himself.²⁸ Because no “information technology resources” were required to locate and copy the e-mails and text messages, the District is limited to charging the fees allowed under subsection 2 of N.D.C.C. § 44-04-18.

As previously stated above, a public entity “may impose a fee not exceeding twenty-five dollars per hour per request, excluding the initial hour, for locating records, including electronic records, if locating the records requires more than one hour.”²⁹ In addition, a public entity “may impose a fee not exceeding twenty-five dollars per hour per request, excluding the initial hour, for [time spent] excising confidential or closed [information].”³⁰

Here, the District charged Dr. Hennessey for mileage, travel time, and for an “IT service.”³¹ Subsection 2 of N.D.C.C. § 44-04-18 does not allow a public entity to charge for mileage and travel time. When asked to detail the breakdown for the “IT service” charge, the District explained that it took Ms. Engelstad six hours to locate the records on Dr. Larson’s computer and cell phone. Part of the six hours included time spent between Dr. Larson and Ms. Engelstad discussing the open records request.³² Additionally, the six hours included the time Ms. Engelstad spent organizing,

²⁷ N.D.C.C. § 44-04-17.1(7).

²⁸ E-mail from Dr. Chris Larson, Superintendent, Milnor Pub. Sch. Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Sept. 21, 2022, 2:30 PM). *See* N.D.A.G. 2008-O-18 (public entity could charge requester the amount the entity’s information technology support company charges for making an electronic copy when the entity’s staff did not have the required training necessary to make an electronic copy); N.D.A.G. 2008-O-17 (public entity could pass on the actual cost to have its software provider make the electronic copy as “costs attributable to the use of information technology resources” when the public entity did not have the ability to make the electronic copy of the records).

²⁹ N.D.C.C. § 44-04-18(2).

³⁰ *Id.*

³¹ Invoice from Devi Englestad to Milnor Pub. Sch. Dist. (July 20, 2022).

³² E-mail from Dr. Chris Larson, Superintendent, Milnor Pub. Sch. Dist., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Sept. 21, 2022, 2:30 PM).

forwarding, and saving the e-mails and saving text messages into a OneDrive folder.³³ Lastly, the six hours included the time spent by Dr. Larson reviewing the e-mails and text messages.³⁴

This office previously determined that subsection 2 of N.D.C.C. § 44-04-18 allows a public entity to charge for time spent locating records but the open records law does not allow a public entity to charge for the time it spends “gathering, copying, organizing, forwarding, scanning, and printing the records,” “saving records to a zip drive,” or time spent “corresponding with others [regarding the] record requests.”³⁵ Likewise, the time spent between Dr. Larson and Ms. Engelstad conversing about the open records request and the time Ms. Engelstad spent organizing, forwarding, and saving the e-mails and text messages into a OneDrive folder are not allowable charges under N.D.C.C. § 44-04-18(2).

The District may charge a fee not exceeding twenty-five dollars per hour, excluding the initial hour, for time Ms. Engelstad spent locating the records and for the time spent excising confidential or closed information. It does not appear the District deducted the initial hour for the time Ms. Engelstad spent locating the records. Further, it is not clear whether Dr. Larson reviewed the emails and text messages to excise confidential or closed information or if he reviewed them to see if the records were responsive. If Dr. Larson reviewed the records to excise confidential or closed information, the District may charge a fee not exceeding twenty-five dollars per hour, excluding the initial hour. The District may not charge a fee if it took Dr. Larson less than an hour to review the records to excise confidential or closed information.

Accordingly, the District violated the open records law when it charged for mileage costs, travel time, time spent conversing about the open records request, and for time spent organizing, forwarding, and saving the e-mails and text messages into a OneDrive folder. It was a further violation of the open records law for the District to charge the initial hour for locating the records.

CONCLUSION

The Milnor Public School District No. 2 violated N.D.C.C. § 44-04-18 by charging fees for copies of requested records not allowed by law and by failing to exclude the initial hour for locating the records.

STEPS NEEDED TO REMEDY VIOLATIONS

The Milnor Public School District No. 2 may only impose those fees allowed by law. The District must calculate how much time was actually spent locating the records and how much time, if any, was spent reviewing the records for closed or confidential information. The District may charge

³³ *Id.*

³⁴ *Id.*

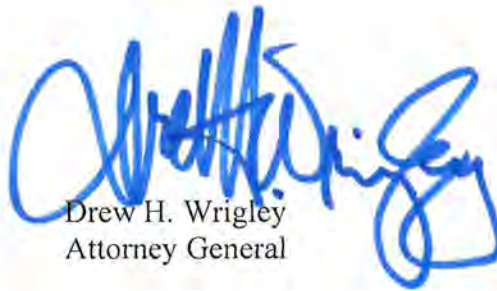
³⁵ N.D.A.G. 2014-O-18; *see also* N.D.A.G. 2011-O-12 (finding the open records law does not authorize a public entity to charge for time spent “‘transferring’ e-mails to a new folder”).

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twenty-five dollars per hour, minus the first hour, for locating the records and may charge twenty-five dollars per hour, minus the first hour, for excising closed or confidential information.

While I have every reason to believe that the Milnor Public School District No. 2 will fully comply with the directives of this opinion, failure to take the corrective measures described here within seven days of the date of this opinion 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. § 44-04-21.2.4.³⁶ Such inaction may also result in personal liability for the person or persons responsible for the noncompliance.³⁷



Drew H. Wrigley
Attorney General

AMR/AML/mjh

cc: Dr. Andrew Hennessey

³⁶ N.D.C.C. § 44-04-21.1(2).

³⁷ *Id.*