

**OPEN RECORDS AND MEETINGS OPINION
2008-O-14**

DATE ISSUED: June 24, 2008

ISSUED TO: Dickinson State University

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from James A. Woods asking whether Dickinson State University violated N.D.C.C. § 44-04-18 by charging an excessive fee for copies of requested records, by requesting payment in advance, and by failing to provide a copy of the records requested within a reasonable time.¹

FACTS PRESENTED

On February 11, 2008, Mr. Woods faxed a request for records to the Coordinator of Human Resources at Dickinson State University ("DSU or "University"), requesting his:

complete personnel file, which includes cause for dismissal, all documentation noting why my requests have been ignored throughout 2007, reasons for denial in positions of which I was wholly qualified etc. ... This will also include emails and correspondence between Marty Oderman, Anthony Willer, Roger Kilwein, Bruan, Pat Seaworth, Mike Hilman, Bill Goetz and Chris Heniger during the period of June 2007 to February 11, 2008.

DSU immediately contacted the Board of Higher Education's attorney who provided guidance on how the University should respond to Mr. Woods' request for records.²

¹ A request for an open records opinion must be filed within 30 days of an alleged violation of the open records law. N.D.C.C. § 44-04-21.1(1). Accordingly, this opinion will only address Mr. Woods' February 11, 2008, request for records but will not address his allegations that Dickinson State University had previously ignored his requests for records beyond the 30 days. Regardless, Dickinson State University asserts that it "did respond to each and every previous records request." Letter from Gail Ebeltoft, Coordinator of Human Resources, DSU, to Jim Woods (Feb. 19, 2008).

² Mr. Woods is presently in litigation with the University. These records could be withheld under the open records laws and Mr. Woods would be required to pursue access under civil discovery rules. N.D.C.C. § 44-04-18(6). A member of my staff contacted the counsel for the University System who advised that DSU waived its rights under this statute.

DSU officials then located and copied 213 pages of the records and prepared an estimate of the cost for a copy of the records. On February 19, 2008, DSU mailed a response to Mr. Woods via certified mail stating it would provide him with a copy of the requested records upon payment of a fee of \$95.35 based on: (1) a copying charge of \$53.25 for 213 pages of records at 25 cents per page; (2) a fee of \$37.50 for the time DSU employees spent locating the requested records, excluding the first hour; and (3) the cost of postage, estimated to be \$4.60.³

Because Mr. Woods did not pay the estimated fee for copies in advance, DSU has not mailed the records to him.

ISSUES

1. Whether Dickinson State University violated N.D.C.C. § 44-04-18(2) by charging a fee in excess of the reasonable fee for providing a copy of public records.
2. Whether Dickinson State University violated N.D.C.C. § 44-04-18(8) by failing to provide a copy of public records to a requester within a reasonable period of time.

ANALYSES

Issue One

A public entity must provide a copy of any specifically requested records, unless the information contained in the records is exempt or confidential.⁴ A public entity may charge up to 25 cents per impression for a paper copy of a record.⁵ A "paper copy" means a one-sided or two-sided duplicated copy of a size not more than 8½ X 14 inches.⁶ In addition, a public entity may charge for the actual cost of postage to mail a copy of records to the requester.⁷ An entity also may impose a fee not exceeding twenty-five dollars per hour per request, excluding the initial hour, for locating records, if locating the records requires more than one hour.⁸ If a request is made for a copy of an electronically stored record, in addition to the other authorized charges, the public entity may charge a reasonable fee for providing the copy, including costs attributable to the

³ In its response, DSU explained that the request for e-mails between eight named individuals was unclear, but the University assumed Mr. Woods was requesting e-mails from these individuals that mentioned him or related to his work at the University. DSU asked for clarification of this point, which Mr. Woods has not provided. Letter from Gail Ebeltoft, DSU, to Jim Woods (Feb. 19, 2008).

⁴ N.D.C.C. § 44-04-18(2).

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.

OPEN RECORDS AND MEETINGS OPINION 2008-O-14

June 24, 2008

Page 3

use of information technology resources.⁹ A "reasonable fee" (which applies to any copy of a record that is not a copy of a standard-sized paper record as defined above) means the actual cost of making the copy, including labor, materials, and equipment.¹⁰

An open records opinion must be based on the facts given by the public entity.¹¹ In this case, DSU located and copied 213 pages of records.¹² The University assessed a copying charge of \$53.25 (based on a fee of 25 cents per page), which is within the limit set for copying standard-sized paper records.¹³ The University estimated that the total time to locate the e-mail correspondence of eight individuals and other records was 2.5 hours. In addition, the fee of \$37.50, which reflects a billable time of 1.5 hours for searching for records, excluding the first hour of searching, is within the limit of \$25 per hour authorized under the open records law.¹⁴ Finally, the fee of \$4.60 for mailing the records to Mr. Woods is authorized because the open records law expressly permits a public entity to charge for the cost mailing records to the requester.¹⁵ Based on the foregoing, it is my opinion that DSU did not violate N.D.C.C. § 44-04-18(2) because the fees charged for locating, copying, and mailing a copy of requested public records to the requester were reasonable.

Issue Two

The open records law is violated when a public entity does not provide access to or copies of a record within reasonable time.¹⁶ "Whether a response has been provided within a reasonable time will depend on the facts of a given situation."¹⁷ Prior opinions have explained that delayed responses are closely scrutinized. One opinion concluded that a delay of 11 days (seven working days) was not unreasonable when the public entity was staffed with part-time employees.¹⁸ In another opinion, this office explained that a delay of 14 days (10 working days) was reasonable based upon a large number of factors including part-time staff working for the public entity.¹⁹ A third opinion

⁹ N.D.C.C. § 44-04-18(3). No "information technology resources," were required to locate and copy the e-mails requested by Mr. Woods, and, consequently, no fee was imposed for the use of any such resources.

¹⁰ N.D.C.C. § 44-04-18(2).

¹¹ N.D.C.C. § 44-04-21.1(1).

¹² In this case, it appears that the personnel records were paper records, and that the University asked the eight individuals from whom records were requested to locate and print copies of e-mails responsive to the request.

¹³ N.D.C.C. § 44-04-18(2).

¹⁴ Id.

¹⁵ Id.

¹⁶ N.D.C.C. § 44-04-18(8).

¹⁷ N.D.A.G. 2007-O-12; N.D.A.G. 2005-O-05; N.D.A.G. 2003-O-09.

¹⁸ N.D.A.G. 98-O-03.

¹⁹ N.D.A.G. 2004-O-05.

concluded that a delay of five working days was not unreasonable in light of the circumstances of that particular request.²⁰

According to DSU, upon receipt of Mr. Woods' request for records, the University promptly contacted the Board of Higher Education's attorney, who responded one day later with respect to how DSU should respond. It took DSU five working days (8 total, including a holiday) to prepare the copies of the e-mails of eight individuals and the personnel file requested by Mr. Woods. During the five days, the University copied Mr. Woods' personnel file and also asked eight individuals to locate and copy e-mails from an eight-month period. Immediately after preparing the copies, DSU notified Mr. Woods that the copies were ready and charged him \$95.35. Any delay that occurred after DSU notified him that the records were ready was due to Mr. Woods' refusal to pay the charges legally assessed for the copies. In light of the broad scope of Mr. Woods' request and the number of resulting copies, it is my opinion that DSU responded to the request within a reasonable amount of time.

CONCLUSION

1. Dickinson State University did not violate N.D.C.C. § 44-04-18(2) because the fees charged for locating, copying or mailing the records were reasonable.
2. Dickinson State University provided copies of 213 pages from the requester's personnel file and e-mail correspondence of eight named individuals over a period of eight months within five working days after receiving the request which was reasonable under N.D.C.C. § 44-04-18(8).

Wayne Stenehjem
Attorney General

Assisted by: Michael J. Mullen
Assistant Attorney General

vkk

²⁰ N.D.A.G. 2003-O-21 (a delay of five working days to produce a copy of records was not unreasonable in light of the time it took to obtain the documents from the custodian, the volume of documents that needed to be reviewed to find the requested record, and the need to review the contents of the document with legal counsel).