

**OPEN RECORDS AND MEETINGS OPINION
2011-O-12**

DATE ISSUED: August 30, 2011

ISSUED TO: North Dakota 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 Rob Port asking whether North Dakota State University violated N.D.C.C. § 44-04-18 by requesting payment of \$2,000 for records he requested.

FACTS PRESENTED

On March 10, 2011, Rob Port e-mailed North Dakota State University (NDSU) President Dean L. Bresciani and requested a copy of all e-mails sent to him during the previous 30 days. The next day President Bresciani's assistant e-mailed Mr. Port and indicated that it would take 80 hours of staff and legal counsel time to compile the e-mails and send them to him, at a cost of \$2,000.

NDSU explained in its response to this office, that President Bresciani receives and sends an average of 200 e-mails, per day (or 1,000 per week). In order to estimate the time it would take to provide the e-mails, NDSU did a test run of 50 e-mails. In the test run, 50 e-mails were moved to a folder and "scanned" for FERPA records. No redacting of confidential information was done. Based on the test, NDSU estimates that transferring and "scanning" 4,000 e-mails would take approximately 40 hours at \$25 an hour, which would not include any e-mails that would have to be printed and redacted. NDSU estimates it would take 60 hours of administrative time and 20 hours for the general counsel to review the e-mails.

ISSUE

Whether the estimate provided to the requester for the cost of electronic copies of public records was based upon legally allowable charges.

ANALYSIS

All records of a public entity are open and accessible to the public unless otherwise specifically provided by law.¹ Certain charges are authorized under the open records law when responding to a request for records. If it takes longer than an hour to locate the requested records, a public entity may charge up to \$25 per hour per request, excluding the initial hour.² Similarly, if excising confidential or closed information from the requested records takes longer than one hour, a charge up to \$25 per hour per request, excluding the initial hour, is authorized.³ These charges apply regardless of whether the request is for paper copies or electronic copies.⁴ However, while a public entity may charge up to 25 cents a page for a paper copy, there is no charge for a copy provided electronically unless use of information technology resources is necessary.⁵ An entity may require payment before making or mailing the copy.⁶

NDSU explains that the estimate is high due to the estimated 4,000 e-mails that need to be reviewed for confidential or exempt information.⁷ According to NDSU, “just the transferring of emails and quick scanning . . . of 4,000 emails would take approximately 40 hours x \$25/hour [and] would be \$1,000. That would not include any of the redacting/printing costs of e-mails that need the redacting process done.”⁸

Due to the large volume of records that are now exchanged electronically, a relatively simple request, such as this one, can result in a high number of records. NDSU, as any educational institution, is subject to the Federal Educational Rights and Privacy Act (FERPA); a federal law that protects the privacy of student education records.⁹ Thus, a review of the e-mails for FERPA protected information is necessary and the law allows NDSU to charge an hourly fee if excising confidential or closed information from the

¹ N.D.C.C. § 44-04-18(1); N.D. Const. art. XI, § 6.

² N.D.C.C. § 44-04-18(2).

³ N.D.C.C. § 44-04-18(2).

⁴ See N.D.C.C. § 44-04-18(2).

⁵ Mr. Port’s open records complaint was received by this office in March 2011, before the effective amendment date of N.D.C.C. § 44-04-18(3). The new law now provides that an “agency may charge no more than the actual cost incurred for the extensive use of information technology resources incurred by the public entity. ‘Extensive’ is defined as a request for copies of electronic records which take more than one hour of information technology resources to produce.”

⁶ N.D.C.C. § 44-04-18(2).

⁷ Letter from NDSU Admin. Assistant Mimi Monson to Assistant Attorney General Mary Kae Kelsch, (April 13, 2011).

⁸ *Id.*

⁹ 20 U.S.C. § 1232g; 34 CFR Part 99.

public records takes longer than one hour.¹⁰ However, in an effort to help Mr. Port narrow his request and save time for both parties, NDSU could have provided him with the “preview” screens from President Brescaini’s inbox, from which the requester could have selected relevant e-mails.

An 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.¹¹ In the past, NDSU has improperly charged requesters for the time taken to forward e-mails and count documents.¹² Likewise, here, NDSU’s estimate includes a cost for “transferring” the e-mails to a new folder even though the law does not authorize such a charge. It is my opinion that the charge NDSU has included for “transferring” e-mails to a new folder is not authorized by law.

CONCLUSION

The portion of the estimate provided to the requester for the cost of transferring electronic copies of public records from one file to another was not based upon legally allowable charges.

STEPS NEEDED TO REMEDY VIOLATION

NDSU must recalculate the estimate and include only the time for reviewing and redacting the records for confidential or exempt information.

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. § 44-04-21.2.¹³ It may also result in personal liability for the person or persons responsible for the noncompliance.¹⁴

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¹⁰ N.D.C.C. § 44-04-18(2).

¹¹ N.D.A.G. 2008-O-18; N.D.A.G. 2005-O-05.

¹² See N.D.A.G. 2005-O-05.

¹³ N.D.C.C. § 44-04-21.1(2).

¹⁴ Id.