

**OPEN RECORDS AND MEETINGS OPINION
2002-O-06**

DATE ISSUED: June 27, 2002

ISSUED TO: Fabian E. Noack, Secretary
Foster County Water Resource Board

CITIZEN'S REQUEST FOR OPINION

On April 26, 2002, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Richard Erickson regarding whether over a month's delay in furnishing copies of open records is a violation of N.D.C.C. § 44-04-18.

On May 8, 2002, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Richard Erickson asking whether the fee charged for copies of the records furnished violated N.D.C.C. § 44-04-18(2).

FACTS PRESENTED

On March 18, 2002, Mr. Erickson wrote to the Foster County Water Resource Board (Board), requesting Board meeting records from January 1988 through October 1988, and 1987 and 1988 construction records relating to a certain drain in Foster County.

Mr. Erickson also wrote the Board on April 23, 2002, regarding the delay in sending copies of the requested documents. The Board's secretary advised this office that the records had been sent May 2, 2002. They were received by Mr. Erickson on May 7, 2002.

In responding to Mr. Erickson's request the Board furnished 16 two-sided copies and 3 one-sided copies. The statement reflected a charge of \$42.00 for these copies. In response to a request from this office regarding how the fee charged was computed, the Board stated that the statement was based upon the time spent by the employee, including a review of documents to make sure the documents copied were the ones requested. The Board advised that the salary of the employee who prepared and mailed the copies was \$15.00 per hour plus "fringe benefits." It also advised that the Board has a customary charge for copies of public records based upon time spent by the employee who prepares the copies of 25¢ per sheet.

ISSUES

1. Whether the Board violated N.D.C.C. § 44-04-18 by failing to provide copies of requested public records within a reasonable time.

2. Whether the Board violated N.D.C.C. § 44-04-18 by charging \$42.00 for 19 copies of records.

ANALYSES

Issue One:

“Once a request for records is made to a public entity under N.D.C.C. § 44-04-18, the public entity must either provide the records or explain why the request is not being satisfied. N.D.C.C. § 44-04-18(6).” N.D.A.G. 98-O-20. A request for copies of open records may not be “unreasonably delayed.” N.D.C.C. § 44-04-18(7). Depending on the circumstances, a delay may be appropriate for a number of reasons, including excising closed or confidential information, consulting with an attorney when there is a reasonable doubt whether the records are open to the public, or balancing other responsibilities of the public entity that demand immediate attention. N.D.A.G. 98-O-20; N.D.A.G. 98-O-04. This office will generally measure permissible delays in providing copies of open public records in hours or a few days rather than several days or weeks. Id. See also N.D.A.G. 2001-O-12 (“Under most circumstances, a delay of a month in providing copies of requested records would be unreasonable.”); N.D.A.G. 98-O-20 (concluding that a nearly month and a half period of time the public entity took to advise that requested minutes did not exist was an unreasonable period of time).

The requested minutes should have been readily available. The amount of time that could reasonably pass before the Board was required to provide the requested copies of the minutes was relatively short. It is my opinion that the Board’s delay of approximately a month and a half in providing the requested copies of the minutes was unreasonable and violated N.D.C.C. § 44-04-18.

Issue Two:

The Board’s statement charged for 16 two-sided copies and 3 one-sided copies. The postage on the transmittal envelope was \$1.26. The usual and customary fee charged by the Board (25¢ per sheet), which includes labor in making the copies, would be \$4.75.

The public entity is permitted to charge a reasonable fee for making and mailing copies of open records. N.D.C.C. § 44-04-18(2). The definition of “reasonable fee” in N.D.C.C. § 44-04-18(2) limits a public entity to charging no more than its actual cost of making the copies, including labor, materials, postage and equipment. As was stated in N.D.A.G. 98-O-03, “the largest part of a public entity’s actual expense in making copies will usually be the labor charge” While the bill indicates the \$42.00 charge covers

labor, the only labor charge allowed by N.D.C.C. § 44-04-18(2) other than labor to make copies is if it takes the public entity longer than one hour to find the requested records. See N.D.A.G. 2000-O-11. The Board did not indicate any problem in locating the requested materials.

If the usual and customary charge of 25¢ per copy or \$4.75 is subtracted from \$42.00, that leaves a charge of \$37.25. While this office must issue opinions based on the facts given by the Board, N.D.C.C. § 44-04-04-21.1, the facts given by the Board are contradictory. On the one hand, the Board stated that the usual and customary charge of 25¢ includes the time spent by the employee who prepares the copies. On the other hand, the Board stated that the \$42.00 charged was based on time spent by the employee to prepare the copies. This means it would have taken the employee, at a salary of \$15.00 per hour, almost two and one-half hours to make 19 copies. The copies were of minutes from consecutive Board meetings from January 1988 through October 1988.¹ It is more reasonable to conclude that the 25¢ per sheet charge, rather than the \$42.00 charge, more accurately reflects the actual costs of making the copies. Even a flat fee of 25¢ per sheet may be too much, however, if it exceeds the Board's actual cost of making the copies. N.D.A.G. 2002-O-04. See also N.D.A.G. 98-O-22 (a fee of 25¢ per page was too high and violated N.D.C.C. § 44-04-18 when the public entity's actual cost of making the copies was \$0.0783 per page). It is my opinion that the fee charged by the Board exceeded its actual cost of making the copies and therefore violated N.D.C.C. § 44-04-18.

CONCLUSION

1. It is my opinion that the Board violated N.D.C.C. § 44-04-18 by failing to provide copies of the records requested by Mr. Erickson on March 18, 2002, until May 2, 2002. The time taken to respond to the request was unreasonable.
2. It is my opinion that the fee charged by the Foster County Water Resource Board exceeded its actual cost of making the copies and therefore violated N.D.C.C. § 44-04-18.

¹ Although the request also asked for records relating to the construction of a certain drain in Foster County, the Board did not provide any records relating to this request and the statement does not reflect that the Board spent any time trying to locate these records. According to Mr. Erickson, he obtained the drain construction records from the State Water Commission.

STEPS NEEDED TO REMEDY VIOLATION

Although untimely, the Board has remedied its violation by providing the requested documents it had available with the Board's May 2, 2002, transmittal letter to Mr. Erickson.

It is my understanding that Mr. Erickson has not yet paid the Board for the copies provided. The Board should cancel its first statement, calculate its actual cost of making the copies provided, and remit a new statement to Mr. Erickson. I am enclosing a copy of N.D.A.G. 2002-O-04 which may be helpful to the Board in calculating its actual cost of making copies. Failure to take the corrective measure described in this paragraph 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. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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Enclosure