

**OPEN RECORDS AND MEETINGS OPINION
2003-O-04**

DATE ISSUED: February 25, 2003

ISSUED TO: City of Fargo

CITIZEN'S REQUEST FOR OPINION

This office received a timely request for an opinion from John Grettum under N.D.C.C. § 44-04-21.1 asking whether the city of Fargo (the "City") violated N.D.C.C. § 44-04-18(2) by denying his request for copies of e-mails received by or sent to the Fargo mayor and each of the Fargo city commissioners. Mr. Grettum also asked about the fees Fargo can charge to provide him with access to the records requested.

FACTS PRESENTED

Mr. Grettum requested direct access to or copies, in electronic format if possible, of all e-mails received by or sent to the mayor and each of the city commissioners since January 1, 2002. The City denied the request on the grounds that it was too general and was not a request for a copy of a specific public record.

The City explained in its response the time and expense it would take to provide copies of the e-mails as follows:

The IS Director indicated that there is a daily backup kept for only a period of six weeks. There are other back-ups going back as far as fifteen months only. The IS Director stated that in order to obtain access to these email messages going back as long as fifteen months, a separate server would need to be set up – a process that would take approximately 12 hours. The back-ups would need to be restored – at a time cost of about 23 hours. In order to identify the emails for each of the four city commissioners, assuming there were 200 emails per month and 4 emails per day (for about 30 days - 6 weeks), this would be about 3,120 emails, or 52 hours of time, at an average of one email per minute. With four commissioners, this process would take approximately 208 hours. It is assumed that the mayor would have 400 emails in the monthly back-up and 100 emails per day, for a total of 9,000 emails, which would take

150 hours of staff time. Based on compensation at \$25.00 per hour, the total estimated staff cost for complying with such a request would be \$9,812.50. Assuming the emails printed out on a single page per email, there would be 21,480 pages copied, at \$.10 per copy, the cost would be \$2,148. Thus, the estimated cost of complying with such a request would be \$11,960.50. This estimated cost does not include any charge for the time involved by the City Attorney's office to scan the email messages to determine whether or not the email messages contain privileged information whether because it involves a protected personnel issue, a criminal justice matter, pending litigation, or attorney client information that is confidential.

Letter from Fargo Assistant City Attorney Erik Johnson (Aug. 27, 2002).

A subsequent response to this office from the assistant city attorney indicated that the estimate was mistakenly based on retrieving e-mails from January 1, 2001, but based upon the same methodology, the cost to retrieve the e-mails requested from January 1, 2002, would be about \$6,900. Letter from Fargo Assistant City Attorney Erik Johnson (Oct. 31, 2002). Mr. Grettum questioned the reasonableness of the estimated charges.

ISSUES

1. Whether a request for copies of e-mails received and sent by certain city officials over a period of time is a request for a copy of specific public records to which a requester is entitled under N.D.C.C. § 44-04-18(2).
2. What may the City charge to provide access to or copies of the requested e-mails?

ANALYSES

Issue One

All records of a public entity are open and accessible to the public unless otherwise specifically provided by law. N.D.C.C. § 44-04-18(1); N.D. Const. art. XI, § 6. A public entity is obligated to furnish the requester a copy of the "specific public records" requested. N.D.C.C. §44-04-18(2). In this case the City acknowledges that it has stored the e-mails requested in a backup electronic format. Letter from Fargo Assistant City Attorney Erik Johnson, (Aug. 27, 2002). As stated in the Facts Presented, after

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e-mails are deleted from a person's desktop they are stored on an electronic backup system for 15 months. Therefore, all the e-mails are records in their possession.¹

A record in any format is still a record. N.D.A.G. 98-O-22. This office has previously advised that a request for a large number of records is not by definition overbroad. N.D.A.G. 2001-O-12. The number of records requested may affect the length of time in which a public entity is required to respond, but does not bear on whether the request is sufficient under N.D.C.C. § 44-04-18(2). Id. The request for e-mails pertaining to specific identified individuals, the mayor and the other commissioners, for a specified period of time, is, in my opinion, a "request for a copy of specific public records." N.D.C.C. § 44-04-18(2). The City's denial of the electronically stored e-mails on grounds that the request was not specific and was overbroad violated N.D.C.C. § 44-04-18(2).

Issue Two

Mr. Grettum requested either direct access to the e-mails or an electronic copy. Access to an electronically stored record must be provided at the requester's option in either a printed document or through any other available medium. N.D.C.C. §44-04-18(3). While this section states that the City is not required "to provide a requestor with access to a computer terminal" the City should consider such an option rather than dismissing it out of hand. For example, after the e-mails of the mayor and commissioners are retrieved, and print outs made of e-mails with confidential information removed, Mr. Grettum could be allowed to review the remaining e-mails on a computer terminal if the City agreed.

In providing access to or copies of public records a public entity should do so in a manner that facilitates access to the records. Methods of providing access or copies that are unduly costly should be avoided because that can effectively deny access to public records. This office concluded in N.D.A.G. 89-7 that the right to access was placed in the proper perspective by Title Research Corp. v. Rausch, 450 So.2d 933, 936 (La. 1984) which held:

The right of the public to have access to the public records is a fundamental right, and is guaranteed by the constitution The provision of the constitution must be construed liberally in favor of free and unrestricted access to the records, and that access can be denied only when a law, specifically and unequivocally, provides otherwise.

¹ The number of e-mails in the possession of a public entity depends on how long the entity keeps e-mails on its electronic backup system in accordance with their record retention schedule. Once an e-mail is deleted from an electronic backup system, it is no longer in the possession of the public entity.

In N.D.A.G. 2002-O-04, this office explained that:

Unless it takes a public entity longer than one hour to find the requested records, N.D.C.C. § 44-04-18(2) effectively maintains free access to public records, but allows a public entity to offset its entire cost of making copies of those records upon request. [N.D.A.G. 98-O-03]. “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, and equipment.” [N.D.A.G. 98-O-22]. See also [N.D.A.G. 98-O-04]. “[T]he largest part of a public entity’s actual expense in making copies will usually be the labor charge” [N.D.A.G. 98-O-03].

(Emphasis in original)

If the City does not give Mr. Grettum direct access through use of a terminal, the City must provide Mr. Grettum with an electronic copy of the record, as requested. If confidential or closed information in an e-mail cannot be separated in the electronic record, the City must provide a printed copy of an e-mail with the confidential information removed. N.D.C.C. § 44-04-18(3); N.D.A.G. 98-O-22.

Mr. Grettum questions the cost estimate he was quoted by the City for making a copy of the records he requested. The City estimates the cost to be \$6,900. Letter from Fargo Assistant City Attorney Erik Johnson, (Oct. 31, 2002). The cost estimate is based on the time it would take to retrieve e-mails stored on the back-up system, locate the e-mails to and from the mayor and the city commissioners from among those of other city employees, and print the e-mails. In addition to the time required to set up a server to obtain access to the e-mails and restore them, the City estimated it would take 229 person-hours, or one person full time for 5¾ weeks to locate the city commissioners’ and mayor’s e-mails from among those of all other city employees on the system.² Id. As stated in the facts, the City explained the process necessary to obtain the e-mails requested by Mr. Grettum. An Information Technology Division consultant to my office reviewed the information provided by the City and confirmed that in order to provide an electronic copy of the e-mails to Mr. Grettum, the City would need

² It should be noted that much of the expense related to this request is due to the fact that the requested e-mails are no longer on the personal desktops of the mayor and commissioners but instead have already been transferred to an electronic backup system. If a member of the public requests an e-mail that is still on the desktop, the cost would be significantly lower because there would not be the cost associated with retrieving the e-mail from an electronic backup system and the labor associated with searching for the mayor’s and commissioners’ e-mails from among those of all other city employees..

to set up a separate exchange server, transfer all e-mails from the backup tapes to the server, and then transfer the e-mails from the server to a disc.

The open records laws allow public entities to charge for the cost of making, mailing, and locating copies. N.D.C.C. § 44-04-18(2). For making copies, a public entity may charge the entity's actual cost including labor, materials, and equipment. N.D.C.C. § 44-04-18(2). The costs of making a copy of all the electronic records in this case will consist of setting up a server, restoring the e-mails, and making an electronic or printed copy of the e-mails. For this, the City may charge its actual costs including labor, materials, and equipment. For locating the e-mails of the four city commissioners and the mayor, the City may charge \$25 per hour, after the first hour. N.D.C.C. § 44-04-18(2). Locating the e-mails will require the City to retrieve, from the restored e-mails of all other city employees with which they are intermingled, the e-mails of the four city commissioners and the mayor.

The cost estimate of \$6,900 includes the cost for making a printed copy of each e-mail. The City's estimate should be revised to reflect the cost of making an electronic copy, rather than the cost of making a printed copy of the e-mails, except where a printed copy of a specific e-mail is required in order to remove closed or confidential information.

CONCLUSION

1. The request for e-mails received and sent by the mayor and other city commissioners in an electronic format is a request for specific records that the City is required to provide the requester. N.D.C.C. § 44-04-18(2), (3). It is my opinion that the City's denial of the electronically stored e-mails in an electronic format on grounds the request was not specific and was overbroad violated N.D.C.C. § 44-04-18.
2. It is my opinion that the City may charge \$25 per hour, after the first hour, for locating the e-mails requested by Mr. Grettum after the e-mails on the backup tape are transferred to the server. In addition, the City may charge its actual costs for making a copy of the e-mails.³

³ Generally, a public entity may not charge for public records unless a statute specifically authorizes it. N.D.A.G. 89-7. The city indicated that its cost estimate did not include a charge for redacting closed or confidential information. Because there is no statute authorizing a fee for redacting, the city may not charge for it. See N.D.A.G. 98-O-04 (the definition of reasonable fee prohibits public entities passing on its expense of excising confidential information).

STEPS NEEDED TO REMEDY VIOLATION

The City's estimate to provide Mr. Grettum with copies of the records was based on \$25 per hour, after the first hour, for both making a copy of the record and locating the records. As explained in this opinion, the City should provide Mr. Grettum with a new estimate consistent with the amounts it may charge pursuant to N.D.C.C. § 44-04-18(2). The City indicated that its cost estimate did not include a charge for redacting closed or confidential information. Because there is no statute authorizing a fee for redacting, the city may not charge for it. See N.D.A.G. 98-O-04 (the definition of reasonable fee prohibits public entities passing on its expense of excising confidential information). The estimate should include the costs of making an electronic record rather than printed copies, unless a printed copy is necessary in order to remove closed or confidential information. If Mr. Grettum orders a copy of the records, the City should provide him with a copy within a reasonable time.⁴

Failure to begin 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. 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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⁴ The City has an option of requiring payment in advance of providing the records requested. See N.D.C.C. § 44-04-18(2) (entity may require payment before making or mailing the copy). An adjustment for the actual cost after furnishing the records can be made.