

**OPEN RECORDS AND MEETINGS OPINION
2004-O-07**

DATE ISSUED: April 6, 2004

ISSUED TO: Halliday Public School District No. 19

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Mr. Ron Borth asking whether Halliday Public School District No. 19 violated N.D.C.C. § 44-04-18 by failing to provide requested records within reasonable periods of time and by charging more than a "reasonable fee" for copies of records provided to Mr. Borth.

FACTS PRESENTED

On January 22, 2004, Mr. Borth requested information regarding a legal opinion provided to the Halliday Public School District (hereafter "School District") regarding rules for suspending a student for violating the School District's drug and alcohol possession policy. Specifically, Mr. Borth asked for information about the issues the School District's lawyer was instructed to research, the supporting documentation given to the law firm by the School District, all correspondence relating to the matter, the opinion received from the law firm, and the bill for these legal services.

At the School District's board meeting on January 21, 2004, he also asked for and was denied a copy of a written motion circulated among the board members at the meeting. Mr. Borth was not given a copy, apparently because the minutes were not yet completed. On January 27, 2004, Mr. Borth requested a written explanation of the reason he was denied a copy of the motion.

On February 3, 2004, Lynette Frafford, the president of the Halliday School Board, sent a letter to Mr. Borth indicating that when the minutes were prepared Mr. Borth would be sent a copy of the minutes, which would include the motion made at the meeting. Also on February 3, 2004, the School District provided Mr. Borth with copies of the following documents:

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1. Minutes of the special meeting of the Halliday Board of Education held on January 21, 2004, which included the motion made at the meeting (1 page);
2. Excerpt from the N.D. High School Activities Association (NDHSAA) Administrator's Handbook regarding the interpretation of the tobacco, alcohol and controlled substance rule (2 pages);
3. News for school board members from Merlin Dahl, Superintendent of Schools for the School District, November 14, 2003 (1 page);
4. Letter from Gary Thune to Superintendent Merlin Dahl, November 14, 2003, regarding the duration of an extracurricular suspension for violating the alcohol and drug possession rule (1 page printed on both sides);
5. Statement of the Pearce and Durick law firm for legal services provided to the School District during November 2003 (1 page);

A letter from the president of the Halliday Board of Education, which accompanied these documents, also referenced pages of the Student Handbook, School Board Policy, and the NDHSAA Administrator's Handbook, which were the background references for the legal opinion requested by the School District. Letter from Lynette Frafford, President, Halliday Board of Education, to Mr. Borth (February 3, 2004). The letter included a bill for \$1.50 for six pages of records; the fee charged was 25¢ per page. Subsequently, Mr. Borth requested an opinion as to whether the charge of \$1.50 for six pages of records was a "reasonable fee" under the open records law.

ISSUES

1. Whether the School District violated N.D.C.C. § 44-04-18 by not providing a copy of the motion considered at its January 21, 2004, special meeting of the Board of Education within a reasonable period of time.
2. Whether the School District violated N.D.C.C. § 44-04-18 by not providing copies of other requested documents within a reasonable period of time.
3. Whether the School District violated N.D.C.C. § 44-04-18 by charging a fee for copies of open records that exceeded the District's actual cost of making the copies of those records.

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 copy of a record must be provided upon request. N.D.C.C. § 44-04-18(2). Any delay in providing access to a record may not be unreasonable. N.D.C.C. § 44-04-18(7). "It . . . is not an unreasonable delay or a denial of access to withhold from the public a working paper or preliminary draft until a final draft is completed, the record is distributed to a member of a governing body or discussed by the body at an open meeting, or work is discontinued on the draft but no final version has been prepared, whichever occurs first." N.D.C.C. § 44-04-18(8).

In this case, the School District initially advised Mr. Borth he was not entitled to a copy of the motion considered at a meeting of the Halliday School Board until the motion was incorporated into the minutes of the meeting. Apparently, the school district believed it could withhold the motion as a "working paper" because it intended to attach a copy of it to the minutes of its meeting. A "working paper" is a record created and used by a drafter in the process of creating another record. N.D.A.G. 2001-O-04. This office has previously determined meeting notes compiled by staff of a public entity may be withheld as working papers while the notes were being used to prepare draft minutes. N.D.A.G. 2001-O-04, N.D.A.G. 98-O-04. Source documents, such as the motion distributed and discussed at the school board meeting, which are complete in themselves and obtained by a public entity, however, are not protected. N.D.A.G. 2001-O-04, N.D.A.G. 2001-O-02.

Under the facts here, the School District should have provided access to or a copy of the motion immediately at its meeting. Therefore, it is my opinion that the Halliday School District violated N.D.C.C. § 44-04-18 when it delayed providing a copy of the motion.

Issue Two

A public entity must respond to an open records request within a reasonable period of time. See N.D.C.C. § 44-04-18(7). Although N.D.C.C. § 44-04-18 does not usually require an immediate response, the delay permitted will usually be measured in a few hours or a few days rather than several days or weeks. N.D.A.G. 2002-O-06. Whether records have been provided within a reasonable time will depend on the facts of a given situation. N.D.A.G. 98-O-03.

Cases in which this office has determined there was an unreasonable delay have frequently involved situations in which the period between the date of the request and

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the disclosure of the requested information was one month or more. See, e.g., N.D.A.G. 2003-O-17 (89 days); N.D.A.G. 2002-O-03 (2 months); N.D.A.G. 98-O-20 (1.5 months), and N.D.A.G. 2002-O-06 (1.5 months); N.D.A.G. 2002-O-08 (37 days); N.D.A.G. 98-O-19 (1.5 months); and N.D.A.G. 98-O-04 (one month). "Under most circumstances, a delay of a month in providing copies of requested records would be unreasonable." N.D.A.G. 2001-O-12. Even seven working days may be an unreasonable delay when the only action is to inform an individual that a requested record does not exist. N.D.A.G. 2001-O-04. Two recent decisions of this office concluded that delays of twelve days (eight working days) and seven days (five working days), respectively, were not unreasonable in light of the particular circumstances of each of these requests.¹ N.D.A.G. 2004-O-5 and N.D.A.G. 2003-O-21.

Twelve days (eight working days) elapsed from the date the request for documents relating to the School District's drug and alcohol policy was submitted on January 22, 2004, until copies of some of the records were mailed to Mr. Borth. As noted above, whether records have been provided within a reasonable time will depend on the facts of a given situation, but this office will closely review a delay of seven working days. N.D.A.G. 98-O-03. "Depending on the circumstances, a delay may be appropriate for a number of reasons, including . . . balancing other responsibilities of the public entity that demand immediate attention." N.D.A.G. 2002-O-06. In this case the documents were all of recent origin, they all related to the same general subject matter, and the request required copying of only six pages of records. The School District has not identified any special circumstances that would justify a delay of eight working days in this case. These factors lead me to conclude that the delay of twelve days (eight working days) was unreasonable.

In addition to the records provided in twelve days, Mr. Borth had also asked for all records considered by the School District's attorney, Mr. Thune, in preparing a legal opinion provided to the School District. According to Mr. Thune, he received a six-page facsimile from the School District (a one-page message from the superintendent of schools and a five-page attachment). Facsimile from Merlin Dahl, Superintendent of Schools, to Gary Thune (November 14, 2003). This six-page document was not included in the records provided to Mr. Borth in response to his open records request, and several pages of it were omitted from a subsequent request for these documents. Although my office is advised that Mr. Borth has now received a copy of these records, a public entity is required by N.D.C.C. § 44-04-18 to make a diligent search for records

¹ Of course, if the information is ready at hand, it should be disclosed immediately (e.g., names of non-seriously injured accident victims, see N.D.A.G. 97-O-01) or within a few hours or days (generally no more than three working days), if there are no exceptional circumstances. And, if there are exceptional circumstances justifying further delay, "the public entity should give the requester some idea of when the requested access or copies will be provided." N.D.A.G. 98-O-04.

and to disclose all records relevant to the request. The time between Mr. Borth's original request for these records and the time they were mailed to him was over five weeks. Therefore, it is my opinion the School District also violated N.D.C.C. § 44-04-18 with regard to these additional records because the disclosure was not made within a reasonable time.

Issue Three

Section 44-04-18(2), N.D.C.C., specifies the fee a public entity may charge for a copy of an open record.

The entity may charge a reasonable fee for making or mailing the copy, or both. . . . As used in this subsection, "reasonable fee" means the actual cost to the public entity of making or mailing a copy of a record, or both, including labor, materials, postage, and equipment, but excluding any cost associated with excising confidential or closed material under section 44-04-18.10.

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, and equipment." N.D.A.G. 98-O-22; N.D.A.G. 2002-O-04. See also N.D.A.G. 98-O-03 ("[T]he largest part of a public entity's actual expense in making copies will usually be the labor charge. . .").

Mr. Borth received a bill for \$1.50 for six pages of records he received from the School District. According to the School District its actual costs for copying and mailing the records was \$1.30. Although the amount involved here is trivial, I nonetheless have no choice but to conclude that because the School District charged Mr. Borth more than \$1.30 for the six copies, its fee violated N.D.C.C. § 44-04-18(2).

CONCLUSIONS

1. The Halliday School District violated N.D.C.C. § 44-04-18 by failing to provide a copy of the motion within a reasonable time.
2. The Halliday School District violated N.D.C.C. § 44-04-18 by failing to provide copies of the records relating to the district's drug and alcohol policy within a reasonable time.

3. The fee of \$1.50 for six pages of records was unreasonable, and, therefore, violated N.D.C.C. § 44-04-18(2).

STEPS NEEDED TO REMEDY VIOLATIONS

Mr. Borth has now received the records he requested. The School District must refund to Mr. Borth the 20¢ overcharge for the copies.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion 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. § 44-04-21.1. 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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