

**OPEN RECORDS AND MEETINGS OPINION
2005-O-05**

DATE ISSUED: March 30, 2005

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 Suzanne Kelley (Kelley) asking whether North Dakota State University (NDSU) violated N.D.C.C. § 44-04-18 by failing to provide her with records she requested in the form she requested within a reasonable time, and overcharging her for the records.

FACTS PRESENTED

On September 7, 2004, Suzanne Kelley (Kelley) e-mailed Tom Moberg (Moberg), Vice Provost of NDSU Information and Technology Services, an open records request. The pertinent part of the request stated:

Please provide me copies (preferably digital) of all e-mail sent or received by the account of Dr. Claire Strom, Assistance Professor of History. . . This request extends as far back in time as such correspondence has been retained by the university.

. . . .

In case of need to communicate about the logistics of complying with my request, see my contact information below.

E-mail from Kelley to Moberg (Sept. 7, 2004).

That same day, Moberg forwarded the e-mail to Rick Johnson (Johnson), general counsel for NDSU. In an attempt to clarify her broad request, Johnson asked if Kelley was only asking for "e-mail which mentions you?" E-mail from Johnson to Kelley (Sept. 7, 2004). Kelley responded by saying "I'm not searching for particular documents. I want all sent and received e-mails for the time period January 1, 2003, to the present." E-mail from Kelley to Johnson (Sept. 7, 2004). On September 9 Johnson e-mailed Kelley stating "our plan is to initially get e-mails that mention you and give you copies of those. If you then want to go beyond that, we are going to determine a per

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hour charge for the time to search and go through records.” E-mail from Johnson to Kelley (Sept. 9, 2004). Kelley responded by saying “[m]y request stands as I made it, copied here at the end of this message.” E-mail from Kelley to Johnson (Sept. 9, 2004).

The NDSU’s information technology department (IT) gave Johnson an estimate of \$1,550 to retrieve information from the e-mail back-up tapes. NDSU only keeps e-mails on back-up for two weeks. Johnson was told that there was no guarantee that e-mail messages older than two weeks would be available. E-mail from Moberg to Johnson (Sept. 7, 2004). Johnson chose not to pursue searches by the IT department because Professor Claire Strom (Strom) informed him that she keeps all of her e-mails on her computer; therefore, it was very likely that more of the requested information was contained on Strom’s computer than on the University’s back-up system. Thus, according to Johnson, all e-mails were obtained from Strom’s computer.

On September 16, 2004, Johnson e-mailed Kelley with an estimate of \$400 and requested payment in order to start the process. Fifty-three days later, on November 8, 2004, Kelley sent a letter to Johnson containing a check for \$400. In the letter, she stated that her request was for all of Claire Strom’s e-mails sent to and received from 11 people she listed by name from September 1, 2003, through November 5, 2004.

In a November 16, 2004, letter, Johnson informed Kelley that “per your request of November 8, enclosed are the e-mails that either mention you by name or have the term, ‘Managing Editor’.” Letter from Johnson to Kelley (Nov. 16, 2004). A search for e-mails containing Kelley’s name and title along with any of the 11 listed people resulted in approximately 30 pages of e-mails costing \$51.81. The next day, Kelley responded, stating that NDSU did not comply with her request because “My letter [of November 8] specifically states that I seek all e-mails sent to and from named parties within a stated time period.” E-mail from Kelley to Johnson (Nov. 17, 2004). She also was concerned that the e-mails were all from Strom’s computer rather than directly off the University’s server. Id.

Strom was then told by Johnson to conduct a broader search. A search for any e-mail on Strom’s computer that contained one of the names of the 11 listed people, without the limitation of Kelley’s name or title, resulted in 688 pages of e-mails that Strom delivered by hand to Johnson’s office on November 30. On December 1, Johnson’s office informed Kelley that the documents were being reviewed for confidential information and estimated that the records would be ready Monday, December 6. On December 6, Johnson’s office gave Kelley a breakdown of the costs involved in the second search and asked if she agreed to pay \$164.03, in addition to the \$400 already provided. E-mail from Johnson to Kelley (Dec. 6, 2004). Before agreeing to pay additional charges, Kelley asked for a detailed explanation of the cost breakdown.

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Johnson's office responded, including an explanation of what each person did who was involved in the request. These labor charges were explained as follows:

Claire Strom – retrieving all e-mails requested – 8 hours x \$27.32

Jack Jackson- copying and counting documents - 1 hour x \$11.06

Lois Christianson – reviewing each document for private information not subject to open records and marking information to be redacted – 9.367 hours x \$21.49

Work study – redacting items marked – 2 hours x 6.25.

Kelley objected, alleging that the charges were not allowed by law. She stated she wanted her original September 7 request fulfilled in digital form immediately.

ISSUES

1. Whether NDSU charged the legally allowable amount for copies of electronic records and provided them in the form requested.
2. Whether NDSU provided the copies within a reasonable time.

ANALYSES

Issue One

An entity may charge a reasonable fee for providing a copy of a record. N.D.C.C. § 44-04-18(2). "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. . . ." Id. "An entity 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." Id. "An entity may require payment before making or mailing the copy, or both." N.D.C.C. § 44-04-18(2). Methods of providing access or copies that are unnecessarily costly should be avoided because that can effectively deny access to public records. N.D.A.G. 2003-O-04. A request for a large number of records is not by definition overbroad. N.D.A.G. 2001-O-12; N.D.A.G. 2003-O-04.

Locating the records. According to Johnson, a major portion of the estimate quoted to Kelley was for locating the requested e-mails. NDSU explains the charges for Strom's time as 8 hours of retrieving e-mails. However, in copies of e-mails provided to this office, Johnson tells Strom to conduct an e-mail search on September 14 at 8:21 a.m. and by 9:19, Strom e-mails approximately 250 attachments that mention "Suzanne." When Johnson is unable to open the attached e-mails, he tells Strom to forward each

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separately or print them out. He also asks Strom to estimate how long that will take. At 11:33 a.m., Strom e-mails Johnson, telling him that “[t]here are around 400 e-mails – 250 for the “Suzanne” search, 150 for the “managing editor” search. I would guess that this will take me at least six hours to print or e-mail them one at a time.” E-mails from Strom to Johnson, September 14, 2004.

The e-mails indicate that the majority of the estimate from Strom was for the time it would take to forward the e-mails to Johnson’s office. At most, it only took three hours for Strom to locate the e-mails. Under the law, only two of those hours would be chargeable for locating the records at a rate of not more than \$25 an hour. Any time spent attempting to forward the e-mails to Johnson is not a charge allowable by law.

Even with such an adjustment, the fact that NDSU based its estimate on time spent locating e-mails at all is problematic. The time spent by Strom locating e-mails was for locating e-mails containing the words “Suzanne” and “Managing Editor.” It was NDSU’s attorney who decided to narrow the original request of all e-mails to only e-mails that contained certain terms. The actual request was for all of Strom’s e-mails. Once it was discovered that Strom kept all her e-mails on her office computer the “locating” was complete. Kelley should not have to pay for charges that accrued based on a unilateral decision by NDSU’s attorney to narrow her request. Therefore, it is my opinion that any charge for locating the records was a violation of the law.

Review for closed or confidential information. Even if Kelley’s original request had been honored and all of Strom’s e-mails were obtained, the e-mails still would have to be reviewed to redact closed or confidential information. Time taken for such a review is not chargeable to a requestor. N.D.C.C. § 44-04-18(2). Johnson admits that he incorrectly estimated time of his legal assistant to review and redact confidential information in the estimate given to Kelley. It also appears that Strom’s time for reviewing e-mails for confidential information was included in the estimate. Part of the estimate was based on the time Strom estimated it would take to review the e-mails and eliminate any e-mails from a student which, she was advised by Johnson, would be confidential under the Family Educational Rights and Privacy Act (FERPA). Because charges for reviewing the records for confidential information cannot be included in the charges, it is my opinion that NDSU violated N.D.C.C. § 44-04-18 when it included those costs in the estimate given to Kelley.

Making copies. When a person requests a paper copy of an electronic record, the document printed from the computer is the copy for which the person may be charged. The person should not be charged for duplicate copies made thereafter by an employee even if it is necessary to make additional copies during the process of redacting closed or confidential information. Here, the estimated fee included time for the History

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Department's administrative assistant to make duplicate copies and count the copies. A requester may not be charged for time accrued counting documents.

The estimated fee also included time for Strom, which appears to be the total amount of time she spent on the project, including locating, trying to forward, printing, and reviewing the e-mails.¹ An entity may only charge for the specific charges allowed by law. NDSU added up the total hours it took for the people involved to complete every aspect of the request and multiplied that total by their respective hourly wages. It is legal for an entity to ask for estimated costs upfront, but the entity should make sure the estimate is based on legally allowable charges. Therefore, it is my opinion that NDSU violated N.D.C.C. § 44-04-18 when it required the requestor to provide money to cover the estimated cost of fulfilling the records request when the estimated cost was based on calculations not allowed by law.

Although the discussion in this part of the opinion (i.e., "Making copies") has so far focused on the proper charges for making paper copies of electronic records, here, Kelley requested that copies of the electronic records be provided to her in digital form, if possible.²

A copy of an electronically stored record must be provided at the requester's option in either a printed document or through any other available medium. See N.D.C.C. § 44-04-18(3). "A computer file is not an available medium if no means exist to separate or prevent the disclosure of any closed or confidential information contained in that file." Id.

¹ In one e-mail from Strom, she complains that printing the e-mails may take a long time because there is only one printer in her department and she couldn't monopolize it. It is unclear whether time waiting for a printer to become available was included in Strom's estimates. A requestor should not be penalized for the fact that more than one person uses a printer or copier. Only the time actually spent printing the record should be calculated rather than including time waiting between print jobs.

² Kelley was concerned that the records were taken from the professor's computer rather than the University's server. Johnson learned early on that more of the records that Kelley requested would be on Strom's computer rather than on back-up tapes. Had Johnson discussed this with Kelley, Kelley may have understood that she was likely to get more e-mails from Strom's computer. In addition, NDSU may have understood that Kelley's concern about getting the records from the server was ultimately about the impartiality of Strom providing records from her own computer. This concern could have been addressed by having a person, such as personnel from the information technology department copy the e-mails. It is important that the public entity discuss the records request with the requestor, especially when electronic records are involved.

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According to Johnson's office, the IT department was never consulted about making a digital copy of the e-mails on Strom's computer, but only about e-mail search issues. In a December 15 e-mail to Kelley, Johnson explains that an electronic copy was not possible because "we had to go through the records and redact certain information." E-mail from Johnson to Kelley (Dec. 15, 2004). Of the 688 records copied for Kelley, 34 had to be redacted for confidential information.

While there may not have been a means to separate the confidential information electronically, NDSU offered no persuasive reason that the e-mails could not have been reviewed electronically and then most of them provided to Kelley in digital form. The duty to redact confidential information from some records is not a reason to refuse to provide any of the records in electronic form. Therefore, it is my opinion that NDSU violated N.D.C.C. § 44-04-18(3) when it did not provide the records without confidential information in a digital form.

Issue Two

A response to a request for copies must not be unreasonably delayed. N.D.C.C. § 44-04-18(7). "Once a person makes a request for open records, it is the responsibility of the public entity to respond to the request within a reasonable time and the requester is not required to contact the entity again to find out when the records will be provided or made available." N.D.A.G. 2001-O-12; N.D.A.G. 98-O-04. "Whether a response has been provided within a reasonable time will depend on the facts of a given situation. N.D.A.G. 2003-O-09." The breadth of a request may affect the time within which a public entity is required to respond to a request. See N.D.A.G. 2001-O-12.

Although Kelley's request was for an unusually large number of records, the actions of NDSU contributed to the delay in providing the records more than the breadth of Kelley's request.

First, NDSU spent considerable time trying to limit Kelley's request and ultimately chose to limit it even over her protests. NDSU explains that Kelley's request was confusing. In fact, Kelley's initial request was very simple. She asked for all e-mails sent to and from Claire Strom from January 1, 2003, to the date of her request. It was NDSU that chose to narrow the scope of the request. The fact that a large request is made does warrant some latitude in determining whether a response was provided within a reasonable time; however, here, it appears NDSU spent more time trying to avoid accommodating the large request than determining how to comply with the request.

Second, NDSU failed to thoroughly consider its options in responding to a request for computer records. Initially, NDSU asked the IT department how long e-mails are kept on back-up tapes. Later, in November, after Kelley stated that she wanted the e-mails

to be taken off of the University servers,³ Johnson asked for a time and cost estimate to retrieve e-mails from the servers rather than from Strom's computer. NDSU never investigated whether it was possible to provide the e-mails on Strom's computer electronically or whether someone other than Strom could copy them from the computer.

Finally, NDSU greatly miscalculated the estimated cost to provide Kelley with the records. While an entity may require payment before making copies, the estimate given to a requestor must be based on legally chargeable fees. See N.D.C.C. § 44-04-18(2). The amount requested by NDSU was substantial. If NDSU had based the estimate on legally allowable charges, the amount would have been significantly lower. It is the public entity's responsibility to ensure that it responds to a request using an efficient means. Therefore, it is my opinion that NDSU did not comply with Kelley's open record request within a reasonable time and violated N.D.C.C. § 44-04-18.

CONCLUSIONS

1. It is my opinion that NDSU violated N.D.C.C. § 44-04-18 when it included in its estimate charges for copies of electronic records that are not allowed under the law and when it failed to provide the copies in digital form.
2. It is my opinion that NDSU violated N.D.C.C. § 44-04-18 when it failed to provide the requested copies of records within a reasonable time.

STEPS NEEDED TO REMEDY VIOLATIONS

NDSU must provide, in digital form, copies of all of Strom's e-mails from her computer from January 1, 2003, to the date of Kelley's request, except that e-mails that need to be redacted for closed or confidential information may be provided in paper form if the closed or confidential information cannot be redacted digitally.

Under the circumstances, NDSU should return the \$400 check to Kelley and provide her with the records she requested free of charge.

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

³ Kelley's original request did not limit the e-mails to those on the University's servers. She asked for all e-mails to and from Strom retained by the University. Her later request to obtain e-mails from the servers appears to be motivated by a desire to obtain the e-mails in an impartial manner and because she thought the servers would have more e-mails than Strom's computer.

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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.

Wayne Stenehjem
Attorney General

Assisted by: Mary Kae Kelsch
Assistant Attorney General

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