LETTER OPINION
2008-L-01

February 13, 2008

Mr. Ladd R. Erickson
McLean County State's Attorney
PO Box 1108
Washburn, ND 58577-1108

Dear Mr. Erickson:

Thank you for your September 6, 2007, letter inquiring about N.D.C.C. § 11-18-05. For the reasons indicated below, it is my opinion that duplicate records of the county recorder stored offsite as a security measure may not be duplicated by the public. It is my further opinion that a private entity does not retain ownership of records it gives to a public entity. It is my further opinion that the county recorder may limit the use of personal equipment to duplicate records in the recorder's office in certain circumstances. Finally, it is my opinion that county recorders are authorized by statute to charge a fee not to exceed one dollar per instrument page for noncertified copies of any recorded instrument regardless of the format of the copy.

ANALYSIS

Your first question is whether duplicate records of the county recorder that are stored offsite are accessible for reproduction by the public. North Dakota Century Code § 11-18-05(6) states that the "[d]uplicate recorders' records stored offsite as a security measure are not accessible for reproduction."[1] Although this subsection does not specifically state who is prohibited from accessing the offsite records for duplication, it is reasonable to infer that it is the public generally that is prohibited because the other subsections in N.D.C.C. § 11-18-05 are directed towards the fees that may be charged to the public for filing and duplicating records. Legislative history is also helpful. According to the 1999 testimony of the President of the Register of Deeds Association, Dwayne Oster, counties were providing the private sector with the backup records for duplication.[2] Mr. Oster explained that the 1997 Grand Forks flood, which destroyed many of the Grand

[1] N.D.C.C. § 11-18-05(6).
[2] Hearing on HB 1406 Before the House Comm. on Fin. and Taxation, 1999 N.D. Leg. (Jan. 26) (written testimony of Dwayne "Dewey" Oster).

Forks County records, clearly illustrated the need for backup preservation of records offsite.[3] Thus, the Register of Deeds Association sought the language of N.D.C.C. § 11-18-05(6) because it felt it was too risky to give up a county's only security rolls in order to make copies to satisfy the request of the user.[4] The legislative history confirms that, in order to protect the records, N.D.C.C. § 11-18-05(6) was added to prevent the public from using the back-up records for duplication. Therefore, it is my opinion that N.D.C.C. § 11-18-05(6) does not give county recorders the discretion to allow the public to duplicate offsite records kept as the backup to the county records.[5]

You next ask whether a private entity may assert control over records that are in the possession of a public entity. It is my understanding that private companies have wanted to make a complete electronic copy of certain county records in exchange for providing the county its own electronic copy. The company, however, wants to retain control over the electronic copy provided to the county by prohibiting the county from allowing others to use those electronic records. The private control over records in possession of a public entity has been addressed in past Attorney General's opinions.

In 1978, LaMoure County requested an opinion from this office relating to microfilming the register of deeds' public records. A local abstract firm had offered to pay for part of the cost to microfilm the records with the stipulation that access and use of the master film roll would be restricted to LaMoure County and the abstract firm.[6] The opinion stated that the microfilmed records were public records and as such were records belonging to the public and not to be used, destroyed, given away, or sold without the authority of state law.[7] "The very nature of a private interest in these records does violence to the concept of a 'public' ownership and benefit."[8] The opinion concluded that private ownership of public records was in contradiction to the open records law.[9]

The open records law defines "record" as any "recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity . . . for use in connection with public business."[10] Public records in the possession of the county, in whatever format, are accessible to the public except as otherwise specifically provided

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[3] Hearing on HB 1406 Before the House Comm. on Fin. and Taxation, 1999 N.D. Leg. (Jan. 26) (written testimony of Dwayne "Dewey" Oster).
[4] Id.
[5] A county, or a private entity hired by a county, can duplicate the offsite records in order to update the format of the records or maintain the records.
[6] N.D.A.G. Letter to Splitt (Sept. 7, 1978).
[7] Id.
[8] Id.
[9] Id. *Cf.* N.D.A.G. Letter to Purdy (July 16, 1979)
[10] N.D.C.C. § 44-04-17.1(15).

by law.[11] Therefore, a private entity may not exert control, contractually or otherwise, over an open, public record in the possession of the county recorder, even if the private entity provided the record to the county. It is my opinion that a county may not enter into a contract which allows a private entity to control records in the possession of the county recorder and further, that any arrangement that grants a private entity an ownership interest in an open, public record is contrary to the open records law.

Your letter also asks whether N.D.C.C. § 11-18-05(5) grants a county recorder the discretion to prohibit scanning, or other reproduction methods that cause wear and tear of the books that contain land records. You explain that it is common for private companies to ask to bring their own equipment into the recorder's office to copy records. And, of course, if the recorder allows one person to bring in equipment, others also may want to do the same. Recorder's offices in high traffic counties are faced with issues of physical space and electrical capabilities when numerous people want to set up their own copiers or scanners. In addition, the more congestion there is in the recorder's office, the more difficult it becomes for the recorder to monitor the handling of records.

N.D.C.C. § 11-18-05(5) states:

> The recorder may establish procedures for providing access for duplicating records under the recorder's control. Such records include paper, photostat, microfilm, microfiche, and electronic or computer-generated instruments created by governmental employees.

Subsection 5 of N.D.C.C. § 11-18-05 was added in 1999 along with the previously discussed subsection 6 of N.D.C.C. § 11-18-05. There are no published North Dakota Supreme Court cases or Attorney General's opinions that address subsection 5. The 1999 legislative history indicates that N.D.C.C. § 11-18-05(5) was intended to formalize procedures already followed by registers of deeds (now called county recorders). In his testimony, the President of the Register of Deeds Association stated "[a]nd in the area of access, the RODs have always had rules and guidelines on how the records are to be searched within their respective offices. Without some rules for access, I'd like to know how one could handle 25 land title people in an ROD office at one time searching the records."[12] It is reasonable to conclude, from this testimony and the plain language of the statute, that N.D.C.C. § 11-18-05(5) was intended to give county recorders the authority to develop procedures that promote the orderly duplication of the records. This may necessitate limiting equipment brought into the office if the limitation is reasonable under the circumstances of that particular office. Therefore, it is my opinion that the duplication procedures set forth in statute may include reasonable limits on the use of personal

[11] See N.D.C.C. § 44-04-18(1).
[12] Hearing on HB 1406 Before the House Comm. On Fin. and Taxation, 1999 N.D. Leg. (Jan. 26) (Statement of Dwayne "Dewey" Oster).

equipment in the recorder's office, including where such use would interfere with others duplicating the records, damage the records, or impede the recorder's ability to monitor how the records are handled.

Finally, you ask about the amount a county recorder may charge for non-certified copies of recorded instruments. The pertinent part of N.D.C.C. § 11-18-05(3) provides that "[f]or making a noncertified copy of any recorded instrument or filed non-central indexing system instrument, a fee of not more than one dollar per instrument page." You ask whether this statute permits a county recorder to charge up to one dollar per instrument page, even when the instrument page is not copied onto traditional paper, but onto microfiche, microfilm, or electronic format.

As with the previous subsections, the second sentence in N.D.C.C. § 11-18-05(3) was added in 1999 and no published North Dakota Supreme Court decisions or Attorney General's opinions have addressed the language. In his testimony, the President of the Recorders Association explained that the language dealt with "the fee a ROD can charge for a non-certified copy of a recorded instrument."[13] Neither the plain language of the statute nor the legislative history indicates that the copy had to be a paper copy. By comparison, in the fee section of the general open records law, the statute distinguishes between the fee allowed for a "paper copy" and a fee allowed for any copy that is not a paper copy.[14] Therefore, under the county recorder's statute, as long as it is a copy of an instrument page, the format of the copy, whether paper, microfiche, microfilm, or electronic medium is irrelevant. It is my opinion that county recorders are authorized by statute to charge a fee not to exceed one dollar per instrument page for noncertified copies of any recorded instrument regardless of the format of the copy.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.[15]

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[13] Id.
[14] See N.D.C.C. § 44-04-18(2).
[15] See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).