OPEN RECORDS AND MEETINGS OPINION
2008-O-17

DATE ISSUED: July 15, 2008

ISSUED TO: Adams County

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from First American CoreLogic asking whether Adams County violated N.D.C.C. § 44-04-18 by denying a request for a copy of records stored in an electronic database.

FACTS PRESENTED

On November 28, 2007, First American CoreLogic (CoreLogic) requested an electronic copy of the most current tax/assessment roll for Adams County. At a minimum, CoreLogic was seeking real property and tax information including the parcel number, owner name, site address and/or mailing address, tax amount and/or value of property and improvements on the property, and legal description of the property.[1]

In a December 7, 2007, letter, David Crane, the Assistant Adams County State's Attorney, refused to provide the requested records stating that "[n]othing in this section [N.D.C.C. § 44-04-18] requires a public entity to create or compile a record that does not exist."[2] He explained that "[i]n this case, the raw data exists but would have to be compiled by the software company into the report file you requested."[3] He also denied the request based on a section of the law that makes "[a]ny computer software program or component of a computer software program contracted, developed, or acquired by a public entity or state agency, . . . and for which the public entity or state agency. . . acquires a license, copyright, or patent," exempt from the open records law.[4]

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[1] November 28, 2007, letter from Brad R. Bohrer, Senior Counsel, First American CoreLogic, to Patricia Carroll, Adams County Treasurer.
[2] N.D.C.C. § 44-04-18(4).
[3] December 7, 2007, letter from David Crane to Brad R. Bohrer.
[4] Id.

Adams County had hired Software Innovations, a private company, to maintain a database that contains most of the records requested by CoreLogic. Software Innovations also created a computer program that allows Adams County to run certain reports from the database. Mr. Crane estimated that if Adams County were to provide the requested records, the estimated minimum cost to compile and reproduce a report would be $3,000.

CoreLogic contends that the denials and estimated costs violate the open records law.

ISSUES

1.   Whether Adams County properly denied the request for records by CoreLogic.

2.   Whether the estimate provided to CoreLogic for a copy of electronic records was based on charges allowed by N.D.C.C. § 44-04-18.

ANALYSIS

Issue One

"Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours."[5] "'Record' means 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."[6] This definition includes electronic records stored in computers.[7] Information in a database of a public entity is subject to the open records law and required to be accessible.[8] Access to, or a copy of, electronically stored records must be provided at the requester's option in either printed form or any other available medium.[9]

Adams County denied CoreLogic's request by contending it was not required under the open records law to create or compile a record that does not exist.[10] Although this may be a valid reason in the case of traditional paper records, there is an exception for electronically stored information.[11] The County's argument ignores the fact that the

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[5] N.D.C.C. § 44-04-18.
[6] N.D.C.C. § 44-04-17.1(15).
[7] N.D.A.G. 2007-O-01; N.D.A.G. Letter to Tracy (Sept. 10, 1992).
[8] N.D.A.G. 2007-O-01.
[9] N.D.C.C. § 44-04-18(4).
[10] See N.D.C.C. § 44-04-18(4).
[11] N.D.A.G. 98-O-22.

records in the database already exist, and as explained in a 2007 opinion, "data, maintained at public expense in the database, was as much a part of the public record as if it were written on paper property cards and organized and stored in a file cabinet."[12] Therefore, if public records are maintained in a database, there must be some meaningful way to access those records and make electronic copies.

According to Adams County, there are some records requested by CoreLogic that do not exist in the database. In that case, a reliance on N.D.C.C. § 44-04-18(4) is proper. Adams County is not required to add records to its database for CoreLogic. It is only responsible for providing meaningful access to the records that already exist in the database. However, the County might be asked to provide those documents in the form in which they are maintained, at an appropriate cost. Adams County is also not required to make the electronic copy in the exact electronic format requested by CoreLogic because "a public entity is not required to provide an electronically stored record in a different structure, format, or organization."[13] As long as Adams County is able to provide an electronic copy of the records in a format that reveals a copy of the requested records, it has provided meaningful access to the electronic records in its database.[14]

Information provided by Adams County reveals that it is able to provide requested records to CoreLogic electronically. In a letter from Software Innovations to Adams County, the software company explains, "[a]s with other such files we have created for third parties in the past, you may copy the file to a CD and distribute it to CoreLogic as you see fit."[15] The letter goes on to say that the records can be put in ASCII Text files or sent to a PDF file format.[16] Thus, not only are the records requested by CoreLogic available in electronic format, but Adams County had provided electronic records from the database in the past. It appears the County led CoreLogic to believe that it was nearly impossible and financially infeasible to provide an electronic copy of its tax assessment database. It is my opinion that Adams County improperly denied the records requested by CoreLogic under N.D.C.C. § 44-04-18.

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[12] N.D.A.G. 2007-O-01.

[13] N.D.C.C. § 44-04-18(4).

[14] Providing copies of electronically stored records is anticipated in the open records law. Section 44-04-18(4), provides that "[a]ccess to an electronically stored record under this section [44-04-18], or a copy thereof, must be provided at the requester's option in either a printed document or through any other available medium."

[15] January 24, 2008, Letter from Bonnell Aman, Software Innovations, to Pat Carroll, Adams County Auditor's Office.

[16] See Id.

Adams County also denied CoreLogic's request based upon N.D.C.C. § 44-04-18.5, which exempts computer programs that are licensed, copyrighted, or patented. This argument is misplaced because CoreLogic never requested a copy of the actual computer software program. The request, rather, was for copies of the source records that are contained in the database. Those records are public records and "[a]utomation of public records must not erode the right of access to those records."[17] When entering into contracts to convert public records from traditional paper records to electronic records, public entities must remember the obligation to maintain public access to those records.

Here, Adams County's agent, Software Innovations, explained to Adams County that the records could be provided in an electronic format that would not allow CoreLogic to reverse engineer the software created by Software Innovations.[18] Thus, Adams County is able to provide electronic copies of the database without violating its licensing agreement with Software Innovations. It is my opinion that Adams County violated the open records law when it incorrectly relied upon N.D.C.C. § 44-04-18.5 to deny a copy of public records maintained in a database.

Issue Two

"For any copy of a record that is not a paper copy as defined in this section [N.D.C.C. § 44-04-18], the public entity may charge a reasonable fee for making the copy. As used in this section, 'reasonable fee' means the actual cost to the public entity of making the copy, including labor, materials, and equipment."[19] If a request is made for a copy of an electronically stored record, in addition to the charge in this section, the public entity may charge a reasonable fee for providing the copies, including costs attributable to the use of information technology resources.[20]

Although Adams County denied CoreLogic's request, the County advised CoreLogic that the minimum cost of the records would be $3,000. Apparently, the $3,000 was the estimated cost to Adams County if it were to have Software Innovations create a custom program that would include data that is not currently in the County's database.[21] As I explained in "Issue One," the County has no obligation to provide copies of electronic records that do not exist.

[17] N.D.A.G. 2007-O-01 (citing Fla. Stat. § 119.01(2)(a)).
[18] See January 24, 2008, letter from Bonnell Aman, Software Innovations, to Pat Carroll, Adams County Auditor's Office.
[19] N.D.C.C. § 44-04-18(2).
[20] N.D.C.C. § 44-04-18(3) (emphasis added).
[21] January 31, 2008, letter from Assistant Adams County State's Attorney David M. Crane.

In response to questions from this office, Adams County explains that it does not have the ability to make the electronic copy of the records, so it would have to hire Software Innovations to make the copy. Software Innovations estimates it would charge Adams County approximately $260.[22] The amount Software Innovation charges would be the "costs attributable to the use of information technology resources" as allowed by N.D.C.C. § 44-04-18(3) and legally may be passed on to CoreLogic as the actual cost of making the copy.[23]

An entity may require payment before making copies but the estimate given to a requester must be based on legally chargeable fees.[24] Adams County misapplied the law and greatly miscalculated the estimated cost to provide CoreLogic with the records it requested. If Adams County had based the estimate on what CoreLogic was actually requesting the amount would have been significantly lower. Therefore, it is my opinion that Adams County's estimated costs violated N.D.C.C. § 44-04-18.

CONCLUSIONS

1. Adams County violated the open records law when it denied CoreLogic's request for an electronic copy of records by claiming it could not provide the records without creating a new record and by claiming that the County would violate its licensing agreement with its software provider by providing the records requested.

2. Adams County violated the open records law when it provided an estimate to CoreLogic for a copy of electronic records that was not allowed by statute.

STEPS NEEDED TO REMEDY VIOLATION

Adams County must provide the records to CoreLogic 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 reasonable attorney fees if the person requesting the opinion prevails in a civil action

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[22] Software Innovations charged $65 per hour and it took 4 hours to retrieve the records.
[23] N.D.C.C. § 44-04-18(2).
[24] N.D.A.G. 2005-O-05.

under N.D.C.C. § 44-04-21.2.[25] It may also result in personal liability for the person or persons responsible for the noncompliance.[26]

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[25] N.D.C.C. § 44-04-21.1(2).
[26] Id.