STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 89-7

Date issued: June 23, 1989

Requested by: Nancy Jo Bateman, Executive Director
North Dakota Beef Commission

- QUESTION PRESENTED -

Whether an agency subject to the public records law may assess a charge (other than copying costs) for access to public records.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that an agency subject to the public records law may not assess a charge (other than copying costs) for access to public records unless such a charge is statutorily provided.

- ANALYSIS -

North Dakota's public records law, as found at N.D.C.C. ' 44-04-18, provides that all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or those organizations or agencies supported in whole or in part by public funds or which expend public funds, shall be public records. As such, these records must be open and accessible for inspection during reasonable office hours. This statute does not expressly require agencies to furnish copies of public records, but this office has inferred such an obligation. Letter from First Assistant Attorney General Paul M. Sand to Richard Prouty (October 25, 1963); letter from Assistant Attorney General Adams to Richard Schnell (June 21, 1977).[1] This conclusion follows the general rule from other jurisdictions, which have held that the right to inspect public records commonly carries with it the right to make copies of those records. Whorton v. Gaspard, 239 Ark. 715, 393 S.W.2d 773 (1965); Direct Mail Service v. Registrar of Motor

Vehicles, 296 Mass. 353, 5 N.E.2d 545 (1937); Ortiz v. Jaramillo, 82 N.M. 445, 483 P.2d 500 (1971).

Although several courts have considered the subject of copies of open records

[1]These Attorney General letter opinions also acknowledge or approve of the assessment of charges reflecting the actual cost incurred in the copying of public records.

where a statute does not so provide, few courts have addressed the issue of permissible charges for access to public records. (The term "access" here refers to the opportunity to inspect public records. It does not refer to the ability to receive copies of public records.) The North Dakota Supreme Court has not addressed this issue nor has this office issued an opinion on this subject.

In cases in which courts have addressed this issue, the state involved usually has had a statute in effect allowing fees to be charged for obtaining copies of public records.

For example, Florida law allows the custodian of public records to charge a fee for furnishing copies of records; the fee must be based on the actual cost of duplication. Additionally, Florida law provides for a special service charge where the nature or volume of the public records to be inspected or copied is such as to require extensive use of information or technology resources, or extensive clerical or supervisory assistance, or both. Fla. Stat. " 119.07(1)(a)(b) (1987).

Based upon these statutes, the Florida Supreme Court has held that public information must be open for public inspection without charge unless otherwise expressly provided by law. State v. McMillan, 49 Fla. 243, 38 So. 666 (1905). Only those statutory fees specifically provided may be assessed for persons attempting to review or copy a public record in Florida. Id.

The Florida Attorney General has repeated this conclusion in several opinions. In a 1988 opinion, the Florida Attorney General concluded that only those fees that are authorized by statute may be imposed upon an individual seeking access to public records. 88 Fla. Op. Att'y Gen. 23 (1988). Similarly, in 1987 the Florida Attorney General found that in the absence of a statute specifying a fee to be charged, there is no authority for clerical staff to assess costs against persons seeking access to public records even where the custodian incurs costs in responding to the request for inspection. 87 Fla. Op. Att'y Gen. 1 (1987).

Although few courts have addressed this issue, the general rule appears to be that reasonable fees for the duplication of a public record may be charged, but that no other fees may be charged against persons seeking access to public records unless those fees are statutorily provided. See, e.g., Thornton v. Department of Public Safety, 536 So.2d 595 (La. Ct. App. 1988); Roberts v. Miss. Rep. Party State Exec. Comm., 465 So.2d 1050 (Miss. 1985); Moore v. Bd. of Chosen Freeholders of Mercer County, 39 N.J. 26, 186 A.2d 676 (1962); Annot. 80 A.L.R. 760 (1932).

There are cases from the state of Michigan that are contrary. Burton v. Reynolds, 102 Mich. 55, 60 N.W. 452 (1894); Alpena Title Inc. v. County of Alpena, 84 Mich. App. 308, 269 N.W.2d 578 (1978). However, these cases dealt strictly with abstract companies and circumstances under which a clerk provided to the companies extensive facilities and services beyond those

normally available to members of the public. Additionally, the case in Alpena involved a specific statute allowing the establishment of fees and charges for inspecting and duplicating public records. Thus, the Michigan decisions are not applicable to the issue at hand.

The Louisiana Supreme Court placed this issue of access to public records in a proper perspective in a 1984 decision. The court 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.

Title Research Corporation v. Rausch, 450 So.2d 933, 936 (La. 1984). To restrict access to a public record by the assessment of a charge unrelated to the actual cost incurred in reproducing that record without statutory authority results in the improper curtailment of the fundamental right to inspect public records.

Therefore, based upon the right of the public to have access to its own records and the public policy favoring the advancement of that right whenever possible, as well as the general rule of law which is available on this subject, I conclude that an agency that is subject to the public records law may not assess a charge for access to those public records (other than a copying charge) unless a statute specifically authorizes such a charge.

- EFFECT -

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.

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