

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 94-F-25

Date issued: August 5, 1994

Requested by: Rodney K. Feldner, Flasher City Attorney

- QUESTION PRESENTED -

What may be considered by a public agency when determining a reasonable fee to be charged for a copy of public records pursuant to N.D.C.C. ? 44-04-18(2).

- ATTORNEY GENERAL'S OPINION -

It is my opinion that when determining a reasonable fee to be charged for a copy of public records a public agency may consider the costs of the copying equipment and materials and other costs actually and necessarily incurred in making the copies as well as the labor expenses, excluding the labor expenses incurred in locating and reviewing the records.

- ANALYSIS -

In 1993, by passage of House Bill 1497, the Legislative Assembly amended N.D.C.C. ? 44-04-18 to provide that an agency subject to the public records law may charge "a reasonable fee" for making a copy of public records. 1993 Sess. Laws ch. 441. As amended N.D.C.C. ? 44-04-18 provides in pertinent part:

Upon request for a copy of specific public records, any entity subject to subsection 1 shall furnish the requester one copy of the public records requested. The entity may charge a reasonable fee for making the copy. Fees received under this subsection are public moneys and must be deposited as provided by law. An entity may require payment before making the copy. If the entity is not authorized to use the fees to cover the cost of providing the copy, the entity may make arrangements for the copy to be provided by another entity, public or private, and the requester shall pay the fee to that other entity.

N.D.C.C. ? 44-04-18(2).

"Reasonable fee" as used in N.D.C.C. ? 44-04-18(2) is not defined. When words used in a statute are not defined they are to be given

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their plain, ordinary, and commonly understood meaning. N.D.C.C. ? 1-02-02; Reed v. Hillsboro Pub. Sch. Dist. No. 9, 477 N.W.2d 237 (N.D. 1991); Kim-Go v. J.P. Furlong Enters., Inc., 460 N.W.2d 694 (N.D. 1990). Furthermore, a statute must be read as a whole when it is being interpreted. N.D.C.C. ? 1-02-01.

As commonly understood "reasonable" means "rational," "[g]overned by or in accordance with reason or sound thinking," "[w]ithin the bounds of common sense," and "[n]ot excessive or extreme." The American Heritage Dictionary 1031 (coll. ed. 1991). Based upon the generally understood meaning of "reasonable," a reasonable fee has an objective and rational basis, not being excessive or extreme. Because it would be logical for a public entity to include in the fee charged for copying public records the agency's actual costs, N.D.C.C. ? 44-04-18(2) does not necessarily limit the fee to the cost of the copying equipment and materials, e.g. chemicals, machine maintenance and purchase, paper, and other supplies. Actual costs for copying a public document include a component for labor expenses actually and necessarily incurred in connection with reproduction of the records, and it would be reasonable to consider such costs when determining a fee for copying public records.

That the fee charged a requester for a copy of public records can include a component for labor expenses is evidenced by other portions of N.D.C.C. ? 44-04-18(2). For example, section 44-04-18(2) provides that the purpose of the fee is "to cover the cost of providing the copy." The cost of providing the copy includes more than the equipment and materials; it includes the cost of the staff time expended in making the copy.

N.D.C.C. ? 44-04-18(2) further provides that the public agency "may make arrangements for the copy to be provided by another entity, public or private, and the requester shall pay the fee to that other entity." It is unlikely that a private entity would be willing to copy public records at a fee which would only cover its equipment and material costs. The fee charged by a private entity would most likely include the cost of the labor for copying the records. The fact that private entities can make the copy indicates the Legislature does not oppose the cost for copying the public records to include labor costs.

The conclusion that a "reasonable fee" for making a copy of public records can include the cost of labor is supported by attorney general opinions issued in other states. For example, in 1991 the attorney general of Washington issued an opinion addressing what constituted a reasonable charge for providing copies of public records. 1991 Wash. Op. Att'y Gen. 6. The Washington statute in question was similar to N.D.C.C. ? 44-04-18(2), providing that

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"[a]gencies may impose a reasonable charge for providing copies of public records." The opinion concluded that the reasonable charge "could include such items as the cost of the copying machine (including maintenance); paper and other supplies; and staff time devoted to the copying process. The agency must be able to justify its charges based on these and other direct costs." Id. at p. 7.

Similarly, in 1983 the attorney general of Wisconsin addressed what could be included in the fee for copying public records. 1983 Wis. Op. Att'y Gen. 40. The statute addressed in that opinion provided that the copying fee could "not exceed the actual, necessary and direct costs of reproduction." The opinion concluded "that labor expenses that are actually, necessarily and directly incurred in connection with reproduction of public records may be incorporated in the fee charged for reproduction of the documents." Id. See also XXI Kan. Op. Att'y Gen. 2 (1987) (fees are reasonable if they do not exceed the actual cost of furnishing copies; actual cost includes only those costs directly incurred in producing copies, such as staff time, paper, and machine costs).

However, there is a distinction between labor costs associated with the reproduction process and labor costs associated with searching for the records in the first instance. Under North Dakota law an agency subject to the open records law may not assess a charge for access to public records unless those fees are statutorily provided. 1989 N.D. Op. Att'y Gen. 7. This would include a fee for searching for or retrieving public records. "[I]t would be incongruous to impose search fees as 'incidental' copying, when inspection of those same records must be free." 1991 Wash. Op. Att'y Gen. 6. Furthermore, by not providing for "search fees," the Legislature has evidenced an intent to exclude such costs from being passed on to individuals requesting a copy of the record being inspected.¹ Accordingly, a reasonable fee for making copies of public records may not include labor costs incurred in locating and reviewing the records.

It is this office's responsibility to interpret N.D.C.C. ? 44-04-18 to provide guidance to public entities, not to address whether it constitutes good public policy. The latter is the role of the Legislature. The Legislature determined that a "reasonable fee" for making a copy of public records was appropriate. The use of this

¹The fact that a public entity can make arrangements to have copies provided by another public or private entity to whom payment is then made further supports the conclusion that a requester cannot be assessed the labor costs associated with searching for and reviewing the public records.

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language indicates a willingness by the Legislature to permit public entities to determine, within reason, what is an appropriate fee. Had the Legislature desired to limit the fee to a specific amount, such as ten cents per copy, it could have done so.² Had the Legislature intended to exclude from the fee the cost of labor, it also could have provided for such.³ The Legislature, however, did not choose to do so. Accordingly, N.D.C.C. ? 44-04-18(2) permits public entities to charge a reasonable fee for making copies of public records. Such a fee may include the cost of the copying equipment and materials as well as the labor expenses that are actually and necessarily incurred in the reproduction process, excluding the labor costs associated with searching for and reviewing the records. If there are other costs directly incurred in producing the copies, the public entity may also include those costs in determining the fee.⁴

- EFFECT -

²See Colo. Rev. Stat. ? 24-72-205 (copies of public records are to be provided at "a reasonable fee, to be set by the official custodian, not to exceed one dollar and twenty-five cents per page unless actual costs exceed that amount"); Conn. Gen. Stat. ? 1-15 (fee for any copy of public records "shall not exceed fifty cents per page"); Fla. Stat. Ann. ? 119.07 (limits fee to fifteen cents for duplicated copies of not more than fourteen inches by eight and a half inches); Ind. Code ? 5-14-3-8 ("The fee may not exceed the average cost of copying records by state agencies or ten cents (\$0.10) per page, whichever is greater."); R.I. Gen. Laws ? 38-2-4 ("The cost per copied page of written public documents shall not exceed fifteen cents (\$.15) per page for documents copyable on common business or legal size paper.").

³See Idaho Code ? 9-338 (provides that the fee may not exceed the actual cost and that the actual cost "shall not include any administrative or labor cost resulting from locating and providing a copy of the public record"); Ky. Rev. Stat. Ann. ? 61-874 ("The public agency may prescribe a reasonable fee for making copies of public records which shall not exceed the actual cost not including the cost of staff required.").

⁴Whether a particular fee is reasonable is a factual question that can only be addressed on a case-by-case basis.

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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.

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