



Advisory Opinion 10-024

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2010). It is based on the facts and information available to the Commissioner as described below.

Facts and Procedural History:

On September 14, 2010, the Information Policy Analysis (IPAD) received a letter from Patrick McCarthy. In his letter, Mr. McCarthy asked the Commissioner to issue an advisory opinion regarding copy charges assessed to him by the City of Wayzata.

IPAD, on behalf of the Commissioner, wrote to Allan Orsen, City Manager, in response to Mr. McCarthy's request. The purpose of this letter, dated September 27, 2010, was to inform him of Mr. McCarthy's request and to ask him to provide information or support for the City's position. On October 15, 2010, IPAD received a response from Robert Meller, attorney for the City.

A summary of the facts as Mr. McCarthy provided them is as follows. In a letter dated May 18, 2010, Mr. McCarthy requested certain data related to a school safety study:

- 1) any and all draft Study reports (including all text, exhibits, and figures) that were created sent or received);
- 2) any and all memoranda that were created, sent, or received
- 3) any and all communications, including electronic messages, that were created, sent or received; and
- 4) copies of all documents that were created, sent, or received that contain "sight-distance" measurements

Mr. McCarthy asked for copies but added, "If you believe there are charges associated [with] this request, please identify the manner in which each has been calculated and the specific data to which you believe each applies. I will promptly forward payment for all lawful charges."

In a letter dated May 24, 2010, Mr. Meller replied, "Please give me a call so that we may discuss your prepayment of the City's actual costs of retrieval of the government data you requested."

In a letter dated May 25, 2010, Mr. McCarthy asked Mr. Meller to provide him with an estimate of the total number of pages and an estimate of the charges.

Mr. Meller, on June 2, 2010, then wrote to inform Mr. McCarthy that the City had “completed compilation of all documents related [his request].” Mr. Meller stated, “It took [the City Engineer] 1.25 hours to compile copies of the documents requested which computes to 1.25 x \$48.70 per hour for a total owing of \$60.98.”

Mr. Meller also stated that the total number of pages was 240 and the fee was \$.40 per page so the total charge was \$156.99 (\$96 + \$60.98). (As discussed below, the City later increased the copy charge to approximately \$265.) He wrote, “Once I receive your check for \$156.99, I can have [the City Engineer] mail the documents directly, or we could make them available for you to pick up at an agreed upon time at City Hall.”

From this point forward, the parties exchanged correspondence about the copy charges, Mr. McCarthy seeking to clarify whether the City was requiring him to pay if he wanted to inspect the data.

In a June 8, 2010, letter, Mr. Meller wrote:

The documents that we have compiled for you are complete. I had apparently misunderstood that you wanted actual copies of the responsive documents ... If, however, you wish to inspect the documents, but receive no copies, there will be no charge. Please either send me the check and I will mail the copies or, if you prefer, we can arrange for a time for you to inspect, but not copy, the documents at a mutually agreed upon and convenient place and time. ...

Issue:

Based on Mr. McCarthy’s opinion request, the Commissioner agreed to address the following issue:

Did the City of Wayzata comply with Minnesota Statutes, Chapter 13, when it charged \$265 to copy approximately 61 pages from the approximately 473 pages that the requestor inspected?

Discussion:

Minnesota Statutes, section 13.03, subdivision 3, provides for situations in which a person who is not the data subject requests access to government data. If the person wants to inspect the data, the entity may not charge any fee (section 13.03, subdivision 3(a)).

If the person wants copies of the data, the entity can choose to charge a fee. (Section 13.03, subdivision 3(c).) If the requestor is asking for copies of anything other than paper documents, the entity’s fee is to be based on the actual costs of searching for and retrieving the data, and making the copies. If the requestor is asking for copies of paper documents, and the requested number of pages is 100 or fewer, the entity can charge no more than \$.25 per page. If the number of pages is more than 100, the entity can charge the actual costs of searching for and retrieving the data, and making the copies.

In his comments to the Commissioner, Mr. Meller wrote:

To summarize the City's position, the amount the City charged Mr. McCarthy was for the compilation and copying of the data he requested, though the city eventually waived the copying charges

Interpreting Mr. McCarthy's expansive requests for "any and all" reports ... was difficult and time consuming for the City. It required staff time to make the necessary topical and key word searches. Mr. McCarthy's requests included several items outside the scope of the Data Practices Act and/or items that necessarily required staff time to prepare, such as new inventories of the requested documents ... In addition ... certain professional and administrative staff of the City's consultant, SRF, who conducted the traffic study, were also used for the requests Mr. McCarthy made directly to them. ...

With respect to the charges for the copies requested by Mr. McCarthy, as a courtesy Mr. McCarthy and to save the time or arguing about the matter, the City lowered its standard copying charge on two occasions from .40 per page to .25 per page to .10 per page, and eventually waived that charge altogether. However, hundreds of copies were requested and made available to Mr. McCarthy at his request, even though ultimately he decided he only wanted 61 of these copies.

Before proceeding, it is important to discuss a couple of Mr. Meller's comments. First, he states that several of the items Mr. McCarthy requested are outside the scope of Chapter 13 or "required staff time to prepare, such as new inventories of the requested documents." The Commissioner does not agree that anything in the May 18 data request related to the school safety study (the subject of this opinion) is a request for the City to create additional data. (Previous advisory opinions have discussed that government entities are not required to create data to respond to requests.)

Second, there seems to be some confusion about data created, collected, and maintained by the City's contractor, SRF. Assuming the data Mr. McCarthy requested are related to the contract, they are government data, regardless of whether it is SRF or the City that maintains the data. As such, any fee the City/SRF assesses is dictated by section 13.03. It appears the City's final charge of \$265 incorporates a \$204.30 charge from SRF, comprised of one hour of staff time billed at \$134.05 + one hour of staff time billed at \$70.25. Mr. Meller did not explain to the Commissioner how this charge fits within the copy charge parameters set forth in Chapter 13.

The issue before the Commissioner is whether the City's charge of \$265 is appropriate. The answer depends on how the City maintains the data Mr. McCarthy wanted copied. If some of the data are electronically maintained, which appears to be the case, the City can charge the actual costs of searching for and retrieving the data, plus the actual cost of making the copies. If some of the data are maintained as paper documents, the City can charge 1) \$.25 if the number of pages is 100 or fewer or 2) the actual costs of searching for and retrieving, and the actual cost of making the copies, if the number of pages is over 100.

Here, regarding data the City maintains in electronic format, staff made copies of (printed) those data apparently before it was clear whether Mr. McCarthy wanted to inspect or get copies. At that point, the City was maintaining the data in paper form and the Commissioner's opinion is that the City can charge only \$.25 per page for those copies, not actual cost. To avoid this result, a government entity could adopt a policy to provide a requestor with an estimated cost for producing copies of electronic data and require pre-payment prior to preparing the copies. Also,

