



STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

JON BRUNING
ATTORNEY GENERAL

DALE A. COMER
ASSISTANT ATTORNEY GENERAL
CHIEF, LEGAL SERVICES BUREAU

August 17, 2011

Mr. Steve Grasz
Husch Blackwell
1620 Dodge Street, Suite 2100
Omaha, NE 68102

Re: File No. 11-R-129; University; Grasz

Dear Mr. Grasz:

This letter is in response to your correspondence dated August 1, 2011, regarding the University of Nebraska at Omaha ("UNO") and the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010). We received your correspondence on August 2, 2011, and we considered that correspondence to be a petition under § 84-712.03. Our response to your petition is set out below.

FACTS

Our understanding of the facts in this case is based upon your letter and the materials which you provided to us with it. We were provided additional information in correspondence dated August 12, 2011, from John Wiltse, Deputy General Counsel for the University of Nebraska (the "University"). Mr. Wiltse also provided us with access to various materials which were posted to a website.

On June 24, 2011, Steven Martin Aaron, a partner in your law firm, sent UNO Chancellor Dr. John Christensen and UNO Athletic Director Trev Alberts a written request for copies of various documents and public records under the Public Records Statutes. That records request sought copies of records in 25 different categories. For example, request No. 1 sought "[a]ll communications, including e-mails and text messages, by or between agents or representatives of the University of Nebraska at Omaha ('UNO') regarding the potential or actual elimination of the football or wrestling programs, from April 2009 to the present." In all, 15 of the 25 categories of records requested involved similar requests for "[a]ll communications, including e-mails and text messages" pertaining to specified topics. The remaining requests were generally for

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particular documents such as “[a]ll audits and financial reports of UNO’s athletic department from 2009 to the present.”

On June 30, 2011, Mr. Wiltse sent Mr. Aaron an initial reply to his records request. In that reply, Mr. Wiltse agreed to provide Mr. Aaron with public records responsive to 3 of the categories of records set out in his letter within 2 business days at a cost of \$247.50. Mr. Wiltse also agreed to provide responsive records for another 5 categories of records set out in Mr. Aaron’s letter within 14 calendar days at a cost of \$250.00. Mr. Wiltse indicated that he would provide cost estimates for responses to the remaining 17 categories of records by July 8, 2011.

Mr. Wiltse provided a further response to Mr. Aaron’s public records request on July 8. Mr. Wiltse first explained the scope of the search proposed for locating documents responsive to the remaining 17 categories of records set out in the original public records request. Mr. Wiltse then indicated that a search for those responsive records would require a deposit of \$9,000 and require 35 business days to complete.

Your law firm paid the University \$497.50 on July 21, 2011, for 980 pages of records produced with respect to the 8 categories of records listed in Mr. Wiltse’s letter of June 30. However, your firm took issue with the University’s request for a deposit of \$9,000 for a search of the remaining 17 categories of records at issue. Consequently, you wrote to us on August 1 and asked us to review the propriety of the proposed \$9,000 charge for records and the 35 day records production schedule. You also questioned the propriety of the charges of \$497.50 for the records already produced by the University.

In his correspondence of August 12, Mr. Wiltse provided us with a detailed response to your public records petition, and you were provided with a copy of those materials as well. From that response, it appears that the University did not believe that it had the internal staff needed for searching the large amounts of electronically stored information covered by the 17 remaining categories of records set out in Mr. Aaron’s records request, 15 of which sought “all communications, including emails and text messages.” That search potentially involved 19 different individuals with electronic and hard copy records, and more than 40 data sources in two locations. Therefore, the University approached a private vendor to determine the potential cost of such a search. The vendor involved, D4, advised the University that it would likely cost more than \$10,000 to conduct the electronic portion of the search.

At present, preliminary data collection efforts conducted in connection with the records request from Mr. Aaron have apparently gathered 2378.854 gigabytes of data for review, at a cost of \$10,917.50, exclusive of the time spent by University staff on the project.

ANALYSIS

The Nebraska Public Records Statutes generally allow interested persons in Nebraska the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts therefrom, and to obtain copies of records in certain circumstances. Under § 84-712.01 (1), public records subject to those statutes include hard copy records along with electronic data stored on computers. The right to obtain copies of public records in Nebraska was specifically added to the Public Records Statutes, for the first time, by 2000 Neb. Laws LB 628. LB 628 also provided that custodians of public records in Nebraska could charge a fee for providing copies of those records, not to exceed “the actual cost of making the copies available.”

We discussed the parameters of permissible charges for photocopies of public records in our Op. Att’y Gen. No. 01029 (August 2, 2001). In that opinion, we concluded, based upon the legislative history of LB 628, that the “actual cost” for photocopies of public records under the Public Records Statutes included the obvious costs of copy paper, toner, copy machine rental and so forth, *plus* the costs of staff time for public employees “to pull the records, separate out any portions of the records that may be kept confidential, copy the records and return them to the proper files.” *Id.* at 2. While our Opinion No. 01029 centers on the costs associated with providing photocopies of public records maintained in hard copy, we have generally applied the same principles in reviewing charges imposed for copies of public records stored electronically. That is, in responding to a public records request for copies of records maintained electronically, the custodian of those records can charge for searching for responsive records, separating portions that may be redacted, and preparing copies (in whatever medium) of the portions that remain. In that context, the charges imposed for copies of electronic data may not exceed the “actual cost” of such a process. We have determined the propriety of such charges on a case by case basis.

In the present instance, the public records request from Mr. Aaron involved 25 different categories of documents. Fifteen of those categories involved “[a]ll communications, including e-mails and text messages” pertaining to specified topics. A search for records responsive to those categories potentially involved 19 different individuals with electronic and hard copy records, and more than 40 data sources in two locations. Indeed, preliminary collection of data from those sources has resulted in collection of 2378.854 gigabytes of data for review. Under those circumstances, we cannot say that it was unreasonable for the University to seek assistance from an outside vendor in connection with the search process. Nor can we say, based upon the explanation from Mr. Wiltse, that a \$9,000 deposit is unreasonable in light of what appear to be the actual costs to the University for the search. For much the same

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reasons, we also cannot say that a 35 business day time frame for completion of the search is unreasonable.

You also questioned the propriety of the charges of \$497.50 for the 980 pages of records already produced by the University. The explanation provided by Mr. Wiltse indicates that the cost per page for copies of those records was approximately \$.20 per page plus the cost of time for the staff member who searched for the records and made copies. Again, we do not believe those charges are unreasonable.

For the reasons set out above, the University's request for a deposit does not appear to be excessive. Moreover, the charges already imposed for copies by the University appear reasonable, as does the University's time frame for completion of its record search. Therefore, we plan no further action with this petition, and we are closing this file.

In your most recent email, you note that there may be more simple ways to search the electronic database as issue in this case so as to produce most of the electronic records which you seek. You may wish to discuss such a simpler and less expensive approach with the University with the understanding that it may not yield all the records you seek, and the understanding that a charge may still be imposed for the staff time involved in the simplified search. You also may wish to limit the expense of the records search in question by narrowing the focus of your inquiry or the nature of the search terms which will be used to conduct the search.

Sincerely,

JON BRUNING
Attorney General



Dale A. Comer
Assistant Attorney General
Chief, Legal Services Bureau

cc: John C. Wiltse

05-295-30