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October 15, 2013

Shawn D. Renner
Cline Williams
Wright Johnson & Oldfather, L.L.P.
233 South 13th Street
1900 U.S. Bank Building
Lincoln, NE 68508-2095

Re: *File No. 12-R-116; Gage Co. Board of Supervisors; Beatrice Daily Sun.*

Dear Mr. Renner:

This letter is in response to your correspondence dated September 27, 2013, regarding access to records of the Gage County Board ("Board") under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2012). We received your correspondence on September 30, 2013, and we considered that correspondence to be a petition under § 84-712.03 on behalf of the *Beatrice Daily Sun* newspaper. Our response to the newspaper's petition is set out below.

FACTS

Our understanding of the facts in this case is based upon your letter along with the materials which you provided to us with it. We also received additional information along with correspondence from Gage County Attorney Roger Harris.

In May, 2013, the Board signed a Memorandum of Understanding with Koch Nitrogen, a subsidiary of Koch Industries, regarding movement of a portion of an asphalt county road running adjacent to Koch Nitrogen's plant to the west to accommodate an upcoming expansion of the plant. The Memorandum provided that Gage County would be reimbursed by Koch Nitrogen for any costs associated with the project. The work was expected to be completed by September 2, 2013.

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On August 15, 2013, reporter Chris Dunker of the *Beatrice Daily Sun* sent a letter to the Gage County Clerk's office requesting "copies of any email, letters or memos between the Gage County Board of Supervisors, the Gage County Highway Department and Koch Industries from April 2013 through July 2013." Mr. Dunker's letter stated further that "[t]he Daily Sun agrees to pay up to \$.25 per copy." Mr. Dunker asked to be contacted to discuss any charges for copies prior to printing.

Mr. Dunker did not receive a response to his public records request within four business days, and so he called the Gage County Clerk on September 12, 2013, to inquire regarding the status of his request. The Clerk indicated that no information had been provided to her to allow her to complete the request, and on September 13, 2013, Gage County Supervisor Matt Bauman called Mr. Dunker to apologize for the delay in responding to the request.

On September 17, 2013, Gage County Attorney Roger Harris wrote to Mr. Dunker by email and indicated that the Documents which he had requested were available at the county attorney's office and could be picked up at any time. Mr. Harris also stated in his letter that:

There are 742 pages at \$.50 per page for a total of \$371.00. There was also seven hours of time in finding the requested documents and making copies of them. Pursuant to recent changes in the law, four of those hours are deducted from the bill. The labor cost is therefore three hours at \$15.47, for a total of \$46.41. The total invoice for the requested documents is \$417.41.

In subsequent correspondence in response to an inquiry from this office, Mr. Harris stated further that the county's search for records responsive to Mr. Dunker's request involved "three months of intense negotiations" and "took a great deal of time and effort." The hours referenced in his initial letter to Mr. Dunker for searching and photocopying of records were apparently based on actual time expended by one of two secretaries in the Clerk's office in addition to time expended by the Chairman of the County Board. In addition, the initial cost quoted to Mr. Dunker did not include the search time expended by other county supervisors who located emails which were duplicates of those which had already been located.

In light of those facts, the *Beatrice Daily Sun* complains that Gage County officials did not comply with the Public Records Statutes, and that the charges for copies of public records proposed by the county are inappropriate under law.

ANALYSIS

At the outset, we would note two issues raised by the facts surrounding this petition which warrant some comment even though they do not, at this point, have a direct bearing on the matters raised by the newspaper.

First of all, as you noted in your correspondence, the Public Records Statutes were amended by 2013 Neb. Laws LB 363. However, that amended legislation took effect on September 6, 2013. Since Mr. Dunker's public records request was first presented to Gage County officials on August 15, 2013 (or even earlier, given the comment by Mr. Harris regarding extensive negotiations), we believe that there is a significant issue as to which version of the statute governs the Board's response to the newspaper's public records request. That said, the parties have apparently chosen to apply the revised version of the statute to the present situation, and we will as well.

In addition, Mr. Dunker sent his initial written public records request seeking records involving the Board and the Gage County Highway Department to the Gage County Clerk. Under the Public Records Statutes, the public official with an obligation to respond to a proper written public records request is the official who is the custodian of the public record at issue. In that regard, it is not entirely clear to us that the Gage County Clerk is the official custodian of records belonging to the Gage County Board or to other separate Gage County officials. However, once again, the parties have not raised this issue regarding the propriety of the newspaper's public records request, and we will simply note it before proceeding with our analysis.

1. Compliance with the Public Records Statutes

Neb. Rev. Stat. § 84-712 (4) requires public officials in Nebraska to respond to a proper written request for copies of public records within four business days. It seems apparent in this case that the Board did not respond to the newspaper's written public records request within four business days after its receipt, and therefore, the Board did not comply with the Public Records Statutes. For that reason, we would caution the Board, through a copy of this letter to its counsel, that upon receipt of a proper written public records request, it must provide an appropriate response to that request within the timelines contemplated by the statute. In his recent correspondence to us regarding this matter, Mr. Harris indicated that the Board has passed a resolution to establish a protocol for more timely responses to public records requests, and hopefully, this issue will not arise again in the future.

2. Appropriate charges for copies of the records at issue

Prior to 2000, the Public Records Statutes did not require public agencies in Nebraska to provide copies of public records, and charges for such copies were obviously not an issue. In 2000, the Public Records Statutes were amended to provide

that interested parties could obtain copies of public records, and that public agencies could recover the actual cost of providing those copies. 2000 Neb. Laws LB 628. In that regard, we concluded in our Op. Att'y Gen. No. 01029 (August 2, 2001) that actual cost for providing photocopies of public records included the costs of copy paper, toner, copy machine rental, etc. *plus* an appropriate amount for the staff time of public employees involved in locating the records, making copies and returning the records to the proper files, not to exceed the amount of time reasonably needed to perform those tasks in a particular case. We also concluded in that opinion that we would not look behind a charge for photocopies of public records of \$.10 per page in addition to the staff time needed for finding the records and making copies, and we gave the following example, "if half an hour were reasonably required to locate and copy 50 pages and the hourly rate of the person making the copies is \$10 per hour, then a maximum charge of \$10 (50 copies x \$.10 + \$5 for a half hour of time) would not be challenged by the Attorney General." Op. Att'y Gen. No 01029 at 2. We later took the position that we would not challenge per page charges of \$.25 per copy plus appropriate amounts for staff time when photocopies of public records were provided to interested persons by public agencies.

In 2013, LB 363 amended the provisions of the Public Records Statutes pertaining to charges for copies of records yet again. Under the current law, agencies can still charge interested persons the "actual added cost" of making copies of public records which may include the reasonably apportioned cost of supplies such as toner, paper, etc. However, agencies may now only charge for the time of staff in locating and copying public records to the extent that such time exceeds four cumulative hours.

In the present case, Gage County Attorney Harris responded to our inquiry letter involving the newspaper's public records petition by noting that the cost breakdown for the cost for photocopies for the Gage County Road Department was \$.24 per page. Accordingly, Mr. Harris indicated that the county would "adjust the bill" to the *Beatrice Daily Sun* for copies in this instance to reflect that per page copy charge in addition to the hours which were billed by the county for staff time in excess of four hours. Since the county's adjusted per copy charge is less than \$.25 per page, and since Mr. Dunker indicated initially that the newspaper was willing to pay \$.25 per page for copies, we will not challenge that per page charge. In addition, it appears to us that the county's additional charges for staff time of \$46.41 comply with the statute, given the fact that the county did not charge for the initial four hours of labor as mandated by LB 363. Moreover, the county apparently also did not charge for the additional time expended by some county supervisors in searching for responsive records because those searches yielded duplicate records.

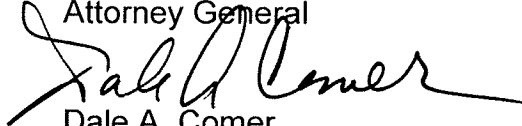
For the reasons set out above, we believe that the county's adjusted bill for copies of public records in response to the newspaper's public records request is in accordance with the Public Records Statutes, and we plan no further action regarding

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this file. If you disagree with our analysis, then you may wish to review the Public Records Statutes to determine what additional remedies, if any, remain available to your client.

Sincerely,

JON BRUNING
Attorney General

A handwritten signature in black ink, appearing to read "Dale A. Comer". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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

cc. Roger L. Harris
Gage County Attorney

05-479-30