



STATE OF NEBRASKA  
**Office of the Attorney General**

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ATTORNEY GENERAL

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June 2, 2015

Amy Frederick  
Publisher, Hitchcock County News  
Scoop Media LLC, Hitchcock County News  
PO Box 278  
Trenton, NE 69044

RE: *File No 15-R-123; Hitchcock County Assessor; Amy Frederick, Hitchcock County News, Petitioner*

Dear Ms. Frederick:

This letter is in response to your Public Records petition received by us on May 18, 2015. You seek our review of a response to a request made by you on behalf of the Hitchcock County News to the Hitchcock County Assessor ("Assessor") for certain records belonging to that county agency. As is our normal practice with such requests, we contacted the party against whom the complaint was made. In this case, we received a response from Marlene Bedore, Hitchcock County Assessor, on May 26, 2015. We have carefully reviewed your request, its supporting materials, and the response of the Assessor received by our office, under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2014). Our findings in this matter are set forth below.

### FACTS

Our understanding of the facts in this matter is based on your public records petition and its enclosures along with the response of the Assessor to your petition. On April 21, 2015, you made a public records request to the Assessor for a number of records. First, you requested copies of documents relating to the employment of Martha Keller with the Hitchcock County Assessor, including:

- (a) The written job descriptions for Ms. Keller's position,
- (b) Pay stubs for Ms. Keller,
- (c) Mileage records for Ms. Keller,
- (d) E-mails between Ms. Bedore and Ms. Keller regarding the position,
- (e) Text messages between Ms. Bedore and Ms. Keller regarding the

- position,
- (f) Voicemails between Mrs. Bedore and Ms. Keller regarding the position,
- (g) Advertisements related in any way to Ms. Keller's hiring,
- (h) A list of properties Ms. Keller has evaluated and the dates she evaluated them,
- (i) A list of properties Ms. Keller has been instructed to evaluate in the future, and
- (j) Any other documentation or correspondence regarding this position.

Additionally, you requested copies of other records of the County Assessor, as follows:

- (k) A listing of all properties on which Ms. Bedore helped file protests in 2014,
- (l) A list of all properties and owners names that have seen an increase in valuation since Ms. Bedore took office in January 2015, and
- (m) A list of all properties and owners names that have seen a decrease in valuation since Ms. Bedore took office in January 2015.

On April 29, 2015, the Assessor responded to your public records request and stated that the pay stubs you requested for Ms. Keller (request (b)) were being withheld under Neb. Rev. Stat. § 84-712.05(7). Additionally, your request (j) for "any other documentation or correspondence regarding this position" was denied under Neb. Rev. Stat. § 84-712.05(15). The Assessor stated that there were no records responsive to your requests (d), (e), and (f) for e-mails, text messages, and voicemails between Ms. Bedore and Ms. Keller. Additionally, the Assessor stated that there were "no properties" that Ms. Keller has evaluated or been instructed to evaluate in the future which would be responsive to your requests (h) and (i). The Assessor's response further stated that the estimate "for all other copies of the public records listed on your request" would be over 3,000 copies of documents.

You seek a review of the Assessor's response by this office. The Assessor responded to your petition in a letter to this office. The Assessor states that she has not denied access to any public records. As to your specific public records requests, the Assessor asserts that there are no documents responsive to requests (h) and (i), documents related to properties Ms. Keller has or will evaluate, as Ms. Keller's position "does not include any evaluation of properties within Hitchcock County." Additionally, the Assessor states that there are no "lists" that satisfy your requests (l) and (m), but that there are 3,137 individual notice of valuation changes for 2015, which taken together, would be all properties in the county which have seen an increase or decrease in valuation in 2015. The Assessor does not address the remainder of the items contained in your public records request in her response to this office.

We believe the Assessor's response to your request for copies of some documents to have been an adequate and complete response to your request. The Nebraska Public Records Statutes do not require a public body to produce documents that otherwise do not already exist. The Assessor has represented to you, and in part

to this office, that none of the documents requested in these categories exist; as a result, we will not address these requests further herein: (d) e-mails between Ms. Bedore and Ms. Keller regarding the position, (e) text messages between Ms. Bedore and Ms. Keller regarding the position, (f) voicemails between Mrs. Bedore and Ms. Keller regarding the position, (h) a list of properties Ms. Keller has evaluated and the dates she evaluated them, and (i) a list of properties Ms. Keller has been instructed to evaluate in the future.

## **ANALYSIS**

### **Adequacy of the denial letter from the Assessor**

You have complained that the Assessor has denied you access to the pay stubs of Ms. Keller and also “any other documents or correspondence regarding this position.” The Nebraska Public Records Statutes (“NPRS”) are found at Neb. Rev. Stat. §§ 84-712 through 84-712.09. Section 84-712 provides, in pertinent part:

(1) Except as otherwise expressly provided by statute, all citizens of this state and all other persons interested in the examination of the public records as defined in section 84-712.01 are hereby fully empowered and authorized to (a) examine such records, and make memoranda, copies using their own copying or photocopying equipment in accordance with subsection (2) of this section, and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business and (b) except if federal copyright law otherwise provides, obtain copies of public records in accordance with subsection (3) of this section during the hours the respective offices may be kept open for the ordinary transaction of business.

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(4) Upon receipt of a written request for access to or copies of a public record, the custodian of such record shall provide to the requester as soon as is practicable and without delay, but not more than four business days after actual receipt of the request, an estimate of the expected cost of the copies and either (a) access to or, if copying equipment is reasonably available, copies of the public record, (b) if there is a legal basis for denial of access or copies, a written denial of the request together with the information specified in section 84-712.04, or (c) if the entire request cannot with reasonable good faith efforts be fulfilled within four business days after actual receipt of the request due to the significant difficulty or the extensiveness of the request, a written explanation, including the earliest practicable date for fulfilling the request, an estimate of the expected cost of any copies, and an opportunity for the requester to modify or prioritize the items within the request. The requester shall have

ten business days to review the estimated costs, including any special service charge, and request the custodian to fulfill the original request, negotiate with the custodian to narrow or simplify the request, or withdraw the request. If the requester does not respond to the custodian within ten business days, the custodian shall not proceed to fulfill the request. The four business days shall be computed by excluding the day the request is received, after which the designated period of time begins to run. Business day does not include a Saturday, a Sunday, or a day during which the offices of the custodian of the public records are closed.

Neb. Rev. Stat. § 84-712 (2014) (emphasis added). Neb. Rev. Stat. § 84-712.04 (2014) governs denials of public records requests and provides:

- (1) Any person denied any rights granted by sections 84-712 to 84-712.03 shall receive in written form from the public body which denied the request for records at least the following information:
  - (a) A description of the contents of the records withheld and a statement of the specific reasons for the denial, correlating specific portions of the records to specific reasons for the denial, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial;
  - (b) The name of the public official or employee responsible for the decision to deny the request; and
  - (c) Notification to the requester of any administrative or judicial right of review under section 84-712.03.

- (2) Each public body shall maintain a file of all letters of denial of requests for records. This file shall be made available to any person on request.

Two of the requests you made to the Assessor, for pay stubs and “any other documentation or correspondence” related to the hiring of Ms. Keller were denied by the Assessor. In her denial, Ms. Bedore wrote:

Pay stubs

Personal information in records regarding personnel of public bodies other than salaries and routine directory information are not public. Annually, in August, the County Clerk is required to publish the salaries of specific employees and monthly the claims are available to the public in the County Clerk’s office. 84-712.05(7)

Any Other documentation or correspondence regarding this position:

84-712.05(15) Job application materials submitted by applicants, other than finalists, who have applied for employment by any public body as defined in section 84-1409.

The Assessor's denial of these two categories of documents was not procedurally correct under the NPRS. Neb. Rev. Stat. § 84-712(1)(b) requires that if there is a legal basis for denial of a request, the denial must set forth the information found in Neb. Rev. Stat. § 84-712.04. This section requires a description of the contents of the records withheld and the notification of the right to administrative or judicial review. The Assessor's letter did not contain either a description of the records withheld, or the notification of the right to review. Ordinarily, we would now require the Assessor to provide you with a list of the documents withheld under Neb. Rev. Stat. § 84-712.05 in order to ascertain whether documents have been properly withheld. However, in this circumstance, we do not believe that is necessary. It is clear to us from the face of the Assessor's response that documents have been improperly withheld as to both categories of your request, as will be more fully discussed herein. However, we will take this opportunity to remind the Assessor, through a copy of this letter, that all denial letters must contain all the information proscribed by the relevant statutes.

As to the response of the Assessor, we would also note that it was not provided in the time-frame required by the NPRS. Neb. Rev. Stat. § 84-712(4) requires the custodian of the records to reply within four business days of the receipt of a written request for records. Your public records request was hand-delivered, according to the Assessor, on April 21, 2015, the same day it is dated. Four business days following April 21 was April 27, 2015. However, the Assessor's letter is not dated until April 29, 2015. All public records requests must be responded to in writing within four business days and we will remind the Assessor of this requirement.

### **Propriety of the denial of your request for pay stubs**

You first complain that you have been denied access to the pay stubs you have requested for Ms. Keller. Generally speaking, the Nebraska Public Records Statutes allow interested persons the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts from those public records, and to obtain copies of public records in certain circumstances. However, while the Act provides for access to and copies of public records, it does not require public officials to answer questions, or to create records which do not otherwise exist. Additionally, even though the Nebraska Public Records Statutes do provide for access to public documents, they are not absolute, and they also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983).

Neb. Rev. Stat. § 84-712.05 is comprised of eighteen categories of documents which may be kept confidential from the public at the discretion of the agency involved. In particular, § 84-712.05 (7) provides, in relevant part:

The following records, unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity

pursuant to its duties, may be withheld from the public by the lawful custodian of the records:

\* \* \*

(7) Personal information in records regarding personnel of public bodies other than salaries and routine directory information;

In other words, a public body may lawfully withhold from public disclosure most of what is found on a pay stub, but not the entirety of that information. In denying your request for Ms. Keller's paystubs, the Assessor has cited Neb. Rev. Stat. § 84-712.05(7) and stated that the information must be published by the County Clerk in August and is available in the monthly claims summary in the County Clerk's Office. The inference is that you should obtain the information from the publications of the County Clerk. However, we believe that the Assessor has improperly denied you access to the records you seek.

Your request was for "pay stubs" of Ms. Keller. Directing you to the salaries published by the Clerk's office is not an appropriate response to this request. A custodian of records may not properly direct a requestor to another source for requested records; a custodian must produce or deny records pursuant to the requirements of the NPRS. As to payroll records, portions of that record may be withheld. However, the Assessor must provide the "reasonably segregable" public portions which it maintains that are responsive to your request, pursuant to Neb. Rev. Stat. § 84-712.06. While a public body may withhold much of what is found on an employee's pay stub under Neb. Rev. Stat. § 84-712.05(7), it may not withhold the entire document. The Assessor is required to produce the employee's "routine directory information," which this office has consistently stated in similar circumstances, includes the employee's name, job title, and any work address. A home address may be redacted. Additionally, the Assessor is required to produce the "salary" on the paystub, which we believe to be the gross wages for the pay period in question. The Assessor may redact all other information found on the paystub, including any deductions and net pay. We understand that most of what will be found on Ms. Keller's pay stubs will be redacted by the Assessor, but the NPRS entitle you to the remainder.

As to the pay stubs you requested, we believe the Assessor's denial was improper. As a result, we will require Ms. Bedore, by a copy of this record, to produce Ms. Keller's pay stubs to you, redacting all but the "routine directory information" and her gross pay.

### **Propriety of the denial of "any other documentation or correspondence"**

You also complain that the Assessor improperly withheld documents pursuant to your request for "any other documentation or correspondence regarding this position." The Assessor cited Neb. Rev. Stat. § 84-712.05(15) in withholding documents related to this portion of your request. Neb. Rev. Stat. § 84-712.05(15) provides that the custodian of records may withhold:

(15) Job application materials submitted by applicants, other than finalists who have applied for employment by any public body as defined in section 84-1409. For purposes of this subdivision, (a) job application materials means employment applications, resumes, reference letters, and school transcripts and (b) finalist means any applicant (i) who reaches the final pool of applicants, numbering four or more, from which the successful applicant is to be selected, (ii) who is an original applicant when the final pool of applicants numbers less than four, or (iii) who is an original applicant and there are four or fewer original applicants.

As to the response to your request for “any other documentation or correspondence,” the Assessor’s letter fails to provide any description of the contents of the records withheld, but simply cites to Neb. Rev. Stat. § 84-712.05(15), which allows a custodian to withhold job application materials submitted applicants, *other than finalists* for a position with a public body. The Assessor did not address her denial of these documents in her response to this office. However, given the language in the denial to you, we surmise that the Assessor maintains job application materials submitted by Ms. Keller, and possibly other documents surrounding her hiring. However, Neb. Rev. Stat. § 84-712.05(15) allows job application materials to be withheld for only those applicants who were not finalists. As Ms. Keller was the individual who was hired for the position, she meets the definition of “finalist” as found in Neb. Rev. Stat. § 84-712.05(15). Consequently, Ms. Keller’s employment application, resume, reference letters, and school transcripts, and those of any other person who meets the definition of “finalist,” if they are maintained by the Assessor’s office, are not properly withheld under Neb. Rev. Stat. § 84-712.05(15). Consequently, the Assessor should produce those records to you. Additionally, if the Assessor withheld any other documents under this section, and believes that those other documents may continue to be properly withheld, the Assessor must provide you with a description of those documents pursuant to Neb. Rev. Stat. § 84-712.04.

### **The Assessor’s response as to “all other copies”**

Finally, as to the remaining requests made by you for documents on April 21, the Assessor responded that “the estimate for all other copies of the public records listed on your request” would be over 3,100 pages. Based upon the Assessor’s April 29, 2015 response to your public records request, “all other copies” would include responses to requests (a) job description, (c) mileage records, (g) advertisements, (k) 2014 protests, (l) properties with an increase in 2015, and (m) properties with a decrease in 2015. From your conversations with the Assessor following your request, you believe that “all other copies” only includes requests (l) and (m), and from the Assessor’s response to this office, we agree. Accordingly, we believe that the assessor has not yet responded to your requests for the records requested in requests: (a) job description, (c) mileage records, (g) advertisements, or (k) 2014 protests. Therefore, it would appear that the Assessor must provide you with a response as to these four categories of documents.

We will instruct the Assessor, through a copy of this letter, that she must provide you with a response as to your request for:

- (a) The written job descriptions for Ms. Keller's position,
- (c) Mileage records for Ms. Keller,
- (g) Copies of all advertisements related in any way to Ms. Keller's hiring, and
- (k) A listing of all properties on which Ms. Bedore helped file protests in 2014.

As explained above, the Assessor's response letter as to these categories of documents must comply with Neb. Rev. Stat. § 84-712(4), and if any records are withheld, Neb. Rev. Stat. § 84-712.04. While the Assessor is not required to produce documents that do not exist, or create any new documents to satisfy a public records request, if the assessor maintains documents responsive to requests (a), (c), (g), and (k), we do not believe any of the categories of records which may be withheld from the public found in Neb. Rev. Stat. § 84-712.05 apply to these records.

As to your requests (l) and (m), for "a list of all properties and owners names that have seen an increase in valuation since Ms. Bedore took office in January 2015," and "a list of all properties and owners names that have seen a decrease in valuation since Ms. Bedore took office in January 2015," there are conflicting responses from the Assessor. On April 29, 2015, Ms. Bedore advised you that there were 3,137 documents responsive to your request, and provided an estimate for the cost it would take to produce those documents to you. However, in the Assessor's response to this office, she states that no such "lists" exist, and the estimate was for each of the individual properties' notice of valuation changes which saw either an increase or a decrease in property value in 2015.

It would appear to us that the Assessor's office does not maintain the records you seek in requests (l) and (m), "lists" of properties with valuation changes. The Assessor is not required to create records which do not otherwise exist in order to respond to a public records request. As a result, we do not believe you have been improperly denied access to public records with respect to this request. What the Assessor maintains is each individual property valuation, and notice of change in valuation. As to your two requests, the valuation appears to have changed in 3,137 properties, which would each generate a separate document. It appears that the Assessor is willing to provide you with the notice of valuation changes for each property, in response to your public records request. We do not believe the Assessor's estimate for costs is unreasonable, given the number of pages; our office has taken the position that \$.25 per page is a reasonable cost. It is our understanding that you have not yet moved forward with obtaining copies of the documents you requested. Neb. Rev. Stat. § 84-712(4) allows you to modify or prioritize the request, should you wish to receive copies of each of the individual notices of valuation. As to your request for the properties that have changed valuation in 2015, we do not believe you have been improperly denied access to public records and you will need to decide whether to move forward with obtaining the copies of the notices of valuation.



## CONCLUSION

For the reasons stated above, we do not believe the Assessor has complied with the provisions of the Nebraska Public Records Statutes in responding to portions of your public records request of April 21, 2015. We will direct the Assessor to take immediate action to rectify its deficiencies and provide you with either the documents indicated herein as to pay stubs and "other documentation", or a response which fulfills her obligations under the Nebraska Public Records Statutes where that response has not yet been provided as to the job description, mileage records, copies of advertisements related to Ms. Keller's hiring, and a list of properties related to 2014 protests. We trust the Assessor will undertake this in good faith. Thus, no further action will be taken by this office with respect to this complaint at this time.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General

A handwritten signature in black ink, appearing to read "Natalee J. Hart". The signature is fluid and cursive, with the first name being the most prominent.

Natalee J. Hart  
Assistant Attorney General

cc: Marlene Bedore

02-501-29