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Office of the Attorney General

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February 9, 2022

Via email at [REDACTED]
Fred Knapp
Nebraska Public Media News

RE: *File No. 22-R-102; Nebraska Department of Natural Resources; Fred Knapp, Petitioner*

Dear Mr. Knapp:

This letter is in response to your petition received by this office on January 21, 2022, in which you requested that the Attorney General determine the propriety of certain fees estimated by the Nebraska Department of Natural Resources ("Department") to fulfill your public records request. At our request, on January 24, 2022, you supplemented your petition by providing the undersigned copies of underlying requests and correspondence. On January 25, we forwarded a copy of your petition to Department legal counsel, Emily Rose, and on February 1, 2022, we received a response from the Department's director, Thomas E. Riley. We considered your petition and the Department's response in accordance with § 84-712.03(1)(b) of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Supp. 2021). Our findings in this matter are set forth below.

RELEVANT FACTS

This matter originated with your public records request emailed to the Department on December 9, 2021. Your request sought

[r]ecords including emails and correspondence, texts, phone logs, memos, feasibility studies, engineering studies, legal memoranda and other materials related to construction of a canal and reservoir system between the vicinity of Ovid, Colorado and Lake Maloney, Nebraska.

Following some modifications, you narrowed your request to “digitized records only” for the calendar year 2021.

By letter dated January 10, 2022, the Department estimated that the cost to provide you records responsive to your modified request would be \$498.98, which did not include legal counsel’s “time in reviewing the records for confidentiality and privilege as per Neb. Rev. Stat. § 84-712(3)(c).” At your request, on January 19, the Department provided you a breakdown of the estimate, as follows:

DNR’s estimated total actual cost of providing you with electronic documents as per Neb. Rev. Stat. §§ 84-712(3)(b)(iii) and (3)(c) is as follows:

IT Division Supervisor: 4 hrs @ \$59/hr (Searches of DNR’s electronic drives, coordination with OCIO and DNR staff) (We are not charging you for these hours as per Neb. Rev. Stat. § 84-712(3)(c))

IT Analyst: 1 hr @ \$28/hr (Production of the report of the electronic documents to be sent to you)

OCIO: 4 hrs @ \$83/hr (Email searches, computer run time, analysis, programming of third party information services technology company)

Assistant Director: 1 hr @ \$57/hr (Identifying records)

Director: 1 hr @ \$83/hr (Identifying records)

Total: \$500

Your Petition

You subsequently filed your petition with our office, challenging the reasonableness of the Department’s estimate on three grounds:

1. Why a search of this nature, “in the era of computerized records and Boolean search terms,” would take four hours to complete and “why a person earning \$59 per hour would be required to conduct that search.”
2. Why a lower-paid staff member could not respond to the request as opposed to a highly paid OCIO.
3. Why is it necessary to have both an assistant director and a director review the records when “one or the other would suffice.”

You further assert that “the estimate should have included an amount for any time the agency would spend reviewing the records for confidentiality and privilege, as any such costs are not exempt from the agency’s obligation to provide an estimate.”

The Department's Response with Revised Estimate

The Department's response to this office included a revised estimate to your request. Mr. Riley indicated that the Department again conferred with the Office of the Chief Information Officer (OCIO) regarding this matter. He explained that since the OCIO houses the Department's email backups, the OCIO would be conducting the search of those records. In this respect, the OCIO has reduced the number of hours to conduct the search from 4 hours to 2. Mr. Riley indicates that the Department has revised its estimate for the in-house database searches, and has included an amount for legal counsel's time to review responsive records for privilege. We have set out the revised estimate below:

IT Division Supervisor: 1 hr @ \$59/hr (Coordination with OCIO and DNR staff)

IT Analyst: 4 hrs @ \$28/hr (Conducting the in-house electronic database searches, production of the report of the electronic documents to be sent to you)

OCIO: 2 hrs @ \$83/hr (Email searches, computer run time, analysis, programming of third party information services technology company)

Assistant Director: 1 hr @ \$57/hr (Identifying records)

Director: 1 hr @ \$83/hr (Identifying records)

Legal Counsel: 3 hrs @ \$40/hr (Reviewing responsive records for privilege)

Subtotal: \$597

Minus first four cumulative hours as per Neb. Rev. Stat. § 84-712(3)(c) (IT Division Supervisor time and 3 hours of the IT Analyst time or \$143).

Total: \$454

DISCUSSION

In 2013, the Nebraska Legislature amended the fee provisions in § 84-712 to provide that fees for copies of public records shall not exceed the *actual added cost* of making the copies available. 2013 Neb. Laws LB 363, § 1. Neb. Rev. Stat. § 84-712(3)(b) defines "actual added costs" as follows:

For purposes of this subdivision, (i) for photocopies, the actual added cost of making the copies available shall not exceed the amount of the reasonably calculated actual added cost of the photocopies, which may include a reasonably apportioned cost of the supplies, such as paper, toner, and equipment, used in preparing the copies, as well as any additional payment obligation of the custodian

for time of contractors necessarily incurred to comply with the request for copies, (ii) for printouts of computerized data on paper, the actual added cost of making the copies available shall include the reasonably calculated actual added cost of computer run time and the cost of materials for making the copy, and (iii) for electronic data, the actual added cost of making the copies available shall include the reasonably calculated actual added cost of the computer run time, any necessary analysis and programming by the public body, public entity, public official, or third-party information technology services company contracted to provide computer services to the public body, public entity, or public official, and the production of the report in the form furnished to the requester.

(Emphasis added.) The Legislature also added new language to § 84-712, sanctioning the longstanding practice of charging for the labor costs associated with fulfilling a records request:

The actual added cost used as the basis for the calculation of a fee for records shall not include any charge for the existing salary or pay obligation to the public officers or employees with respect to the first four cumulative hours of searching, identifying, physically redacting, or copying. A special service charge reflecting the calculated labor cost may be included in the fee for time required in excess of four cumulative hours, since that large a request may cause some delay or disruption of the other responsibilities of the custodian's office, except that the fee for records shall not include any charge for the services of an attorney to review the requested public records seeking a legal basis to withhold the public records from the public.

Neb. Rev. Stat. § 84-712(3)(c).

With those statutory provisions in mind, we have carefully reviewed the revised estimate breakdown set out above in the context of the three concerns raised in your petition. As noted by Mr. Riley, the OCIO houses the Department's email backups and, as a result, the OCIO is responsible for conducting the search for responsive records. The stated hourly rate for that service is \$83/hour. Notably, this expense has been reduced by half in the revised estimate. Under § 84-712(3)(b)(iii), public bodies are expressly allowed to secure the services of third-party IT companies to produce electronic data in response to a request. Based on the items in your request, we find neither the two hours of search time nor the quoted rate to be unreasonable.

Also, it appears that in response to your second concern, the Department revised its estimate by shifting hours relating to its in-house IT personnel, resulting in a cost reduction to you. With respect to your third concern, while the one-hour search time for the assistant director and director did not change, we do not find these charges problematic. It is reasonable for department management to review records that will be disclosed, particularly records of this nature. This office is not in a position to determine

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which employees or officials may charge for their time under § 84-712(3)(c), so long as the four-hour reduction is applied. In this respect, one hour for each official to review and identify responsive records is not unreasonable.

Finally, with respect to the Department's failure to include costs for reviewing records for confidentiality and privilege, you are correct that "such costs are not exempt from the agency's obligation to provide an estimate." Section 84-712(4) requires a records custodian to provide "an estimate of the expected cost of the copies." There are no carve outs or exceptions. Consequently, we will direct the Department to provide, in the future, a complete estimate in response to future record requests in full compliance with § 84-712(4).

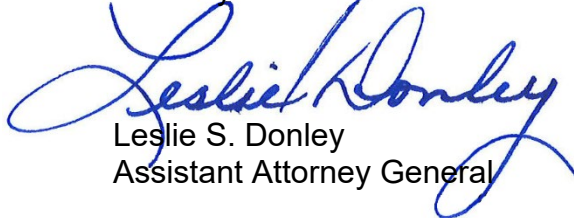
CONCLUSION

Based on the foregoing, we believe that the Department has provided you an estimate that reflects the actual added costs of making the requested records available. Consequently, you have not been denied access to public records on the basis of unreasonable or excessive costs. Since no further review by this office is necessary, we are closing this file.

If you disagree with the conclusion reached above, you may wish to review the other remedies available to you under Neb. Rev. Stat. § 84-712.03.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Thomas E. Riley (via email only)

49-2869-30