



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

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June 13, 2023

Via email to [REDACTED]  
Jacob Roth  
Dhillon Law Group Inc.

[REDACTED]  
[REDACTED]

RE: *File No. 23-R-117; Nebraska State Patrol; Jacob Roth, Petitioner*

Dear Mr. Roth:

This letter is in response to your petition dated and received by this office on May 19, 2023, in which you requested the Attorney General's review of the response to your February 10, 2023, public records request by the Nebraska State Patrol ("NSP"). We forwarded your petition to NSP legal counsel Jessica Forch on May 24, advising her of the opportunity to provide this office a response. On June 5, we wrote to you indicating that our response would be delayed pending receipt of the NSP's response. We have now completed our review. We considered your petition and the NSP's response in accordance with the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2022). Our findings in this matter are set forth below.

**YOUR PUBLIC RECORDS REQUEST AND NSP'S RESPONSE**

On February 10, 2023, you submitted a public records request to the NSP as follows:

. . . I am requesting the following records related to the private and public celebrations at the Omaha Marriot [sic] Downtown, 222 N 10th Street, Omaha, NE 68102 (the "Marriot"), on November 7, 2018 related to the re-election of Governor Pete Ricketts (the "Reelection Events"):

1. The identities of all State Patrol officers and other personnel working the Reelection Events at the Marriot, and the identities of the supervisors and second-level supervisors of those officers and personnel.
2. The identities of all other law enforcement agencies and assigned officers working the Reelection Events at the Marriot.
3. All records of electronic communications — including, but not limited to, text messages, emails, phone logs (of both personal phones used during work hours and government-issued phones), voicemails, letters, and other writings — that were sent or received by the individuals identified in Request No. 1 between 4 PM CST on November 7, 2018 and 10 PM CST November 8, 2018.
4. All records of communication or reports — including, but not limited to, incident reports, arrest reports, and suspicious activity reports — that occurred at or in relation to the Reelection Events at the Marriot.
5. All records of electronic communications — including, but not limited to, text messages, emails, phone logs (of both personal phones used during work hours and government-issued phones), voicemails, letters, and other writings — related to the Reelection Events sent or received between 4:00 PM CST on November 7, 2018 and 4:00 AM on November 8, 2018 by the individuals holding the following positions at the time of the Reelection Events: the State Patrol's Colonel, Lt. Colonel, Majors, Captains, and the Nebraska Governor.
6. All communications, documents, and other records related to planning and debriefing in connection with the Reelection Events, including but not limited to the following subjects:
  - a. Event security;
  - b. Event management;
  - c. Any reports made after the Reelection Events.
7. The identities of all officers and other personnel equipped with body-worn cameras working the Reelection Events and the full recordings of all such cameras taken between 4 PM CST November 7, 2018 and 4 AM CST November 8, 2018.
8. All records of dispatch calls, information requests, and calls for service related to the Reelection Events or made by officers/personnel assigned to the Reelection Events between 4 PM CST November 7, 2018 and 4 AM CST November 8, 2018.
9. All NCJIS queries and information requests to State Patrol dispatch made by the individuals identified in Request No. 1 on the date of the Reelection Events and in the 14 days following.

Additionally, I am requesting the following records related to the Douglas County Republican Party's 2019 Elephant Remembers Dinner (the "Event"), held on April 5, 2019:

1. All records reflecting seating arrangements for guests at the Event, including but not limited to seating charts or lists reflecting guests table and/or seat assignments.

The NSP acknowledged receipt of your request on February 10. On February 15, it advised that the earliest practicable date in which to fulfill your request would be March 18. On March 10, the NSP extended the fulfillment date to May 2. On April 11, you emailed a response to the February 15 email, asking the NSP to either provide the records or justify withholding them.

On April 20, Ms. Forch responded to your request. She denied you access to the records under [Marriott] No. 1, citing Neb. Rev. Stat. § 84-712.05(7)<sup>1</sup> (“[p]ersonal information in records regarding personnel of public bodies other than salaries and routine directory information”) as the basis for the denial. Ms. Forch informed you that the NSP had no responsive records relating to Marriott item numbers 2, 4, 6, 7, 8 and Event No. 1. With respect to the remaining items (i.e., numbers 3, 5 and 9), Ms. Forch indicated that a preliminary email search identified 3,168 items. She estimated the production of responsive records would cost \$8,000, encompassing approximately 160 hours of labor, and would take six months to complete.

## DISCUSSION

You have alleged that the NSP’s response did not comply with the NPRS. Each of the three challenges set out in your petition are addressed below:

### I. NSP’s Denial Under Neb. Rev. Stat. § 84-712.05(8) Is Improper.

Marriott request number 1 sought:

The identities of all State Patrol officers and other personnel working the Reelection Events at the Marriot, and the identities of the supervisors and second-level supervisors of those officers and personnel.

This office has taken the position that § 84-712 of the NPRS does not require a public agency to review documents and create abstracts or other lists, to answer questions or to create documents which do not otherwise exist. Op. Att’y Gen. No. 94092 (November 22, 1994); Op. Att’y Gen. No. 94035 (May 11, 1994); Op. Att’y Gen. No. 87104 (October 27, 1987). We view your request above as a request for information and not a request for specific records. Assuming that your request was proper, we have subsequently learned from the NSP that there are no discrete records responsive to this request. The NSP is not required to create a record by searching for information in other

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<sup>1</sup> Amended to subsection (8) with the enactment of 2022 Neb. Laws LB 1246, § 5.

records. Consequently, we will decline to determine whether the NSP's basis to withhold was improper.

## II. NSP's Failure to Locate Responsive Records Is Implausible.

You argue that since the NSP "ran security for the Re-election Events at the Marriott . . . [i]t strains credulity for the [NSP] to claim that it possesses no records" relating to communications, reports, planning or debriefing. You also argue that the NSP's claim that it has no records relating to seating charts at the April 2019 dinner is equally implausible.

Ms. Forch refutes your statement that the NSP "ran security" for the events at issue. She indicates that the NSP provided personal security for the governor when he attended the events. The NSP did not receive "advance information about security details" nor was it involved in preplanning security measures. Ms. Forch further represents that she spoke to one of the troopers assigned to the Executive Protection Division during the relevant time period. This trooper confirmed that the NSP received no records pertaining to: (1) other law enforcement agencies/officials working the Reelection Events; (2) seating arrangements or seat assignments; (3) debriefs or planning; and (4) event management/security. This trooper also confirmed that no NSP personnel working the events wore body-worn cameras. "Additionally, . . . there were no arrests made, nor were there any criminal investigations during the event, and therefore, there are no incident reports, arrest reports, or other activity reports from that event; nor would there be any dispatch calls, information requests, or calls for service documents."

When we receive petitions under § 84-712.03(1)(b), our normal practice is to forward the petition to the public body and request a response. With respect to Marriott item numbers 2, 4, 6, 7, 8 and Event No. 1, Ms. Forch represented to you in the April 20 response that the NSP had no responsive records, and confirmed this position in the response provided to this office. "[A]bsent contrary evidence, public officers are presumed to faithfully perform their official duties." *Thomas v. Peterson*, 307 Neb. 89, 98, 948 N.W.2d 698, 706 (2020). We presume that Ms. Forch's handling of these requests fully complied with the NPRS. If you have evidence to the contrary, please provide it for our review.

## III. The NSP's Cost Estimates for Producing Responsive Records Are Excessive.

You assert that "[e]very aspect of [the] estimates is grossly excessive," including the number of potentially responsive emails [3,168], the rate of \$50/hour for "clerk time," the number of hours of labor [160] and the proposed completion date [six months]. With respect to the review process, you state that "[f]rom personal experience and common sense, reviewing records for exemptions, privilege, or confidentiality is a fairly rapid process. It is normal, without more than standard effort, to review hundreds of emails or other communications in an hour." You further assert that "common sense dictates" that

the number of records, other than emails, that could be produced under request numbers 3 and 5 is limited. With respect to your request for NCJIS queries, you state that they “are not produced in tremendous volumes,” asserting there are likely only “dozens at the high end. Thus, it should take only a handful of hours, at most, to review any NCJIS queries or information requests produced in the 15-day timespan covered by the request.”

According to Ms. Forch, the NSP requested the Office of the Chief Information Officer (“OCIO”) to conduct a search for email which resulted in the identification of 3,168 items. The NSP estimated that it would take two minutes to physically redact each email, totaling 105.6 hours. Ms. Forch indicates that the estimate also includes staff time to search for NCJIS queries for nine individuals for a 14-day period. Based on the NSP’s experience with prior similar NCJIS queries, staff estimated approximately ten hours. She states that your request would require 27 individuals to search for text messages, voicemails, etc. in their personal possession, which was estimated at one hour per person, with an additional 20 hours to physically redact anything identified as responsive. These various estimates totaled 162.6 hours, which was reduced to 160 hours in the estimate provided to you on April 20.

With respect to the time estimated for redaction, Ms. Forch informs us that NSP email frequently contains information that must be withheld/redacted. She states that “nearly every day emails will be sent to command staff with intelligence updates, summaries of law enforcement actions taken that day, and other tactical information that is law enforcement sensitive. All of this information would have to be physically redacted.” Ms. Forch also informs us that the OCIO identified emails that were many pages long and/or included attachments. She indicates that at two minutes per email, the NSP attempted to estimate a time for the longer emails that would take more time to redact with shorter emails that would not require redaction. Ms. Forch further informs us that \$50 hourly rate is an average for all NSP employees, whose rates of pay range from \$13.702 to \$85.669.<sup>2</sup> It is not strictly for “clerk time” as referenced in the April 20 response.

In Nebraska, public bodies are authorized to charge a fee to produce public records. Those fees include the “actual added cost” to make the records available (e.g., a reasonably apportioned cost of supplies (paper, toner), computer run time, analysis, and programming, etc.). Neb. Rev. Stat. § 84-712(3)(b). With respect to allowable labor fees, Neb. Rev. Stat. § 84-712(3)(c) provides, in pertinent part, that

[t]he 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

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<sup>2</sup> See the *State of Nebraska, Classification & Pay Plan, July 1, 2022*, accessible at <https://das.nebraska.gov/personnel/classcomp/payplan/docs/2022%20SoN%20Pay%20Plan%20Effective%207-1-2022.pdf>.

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 . . . .

In addition, § 84-712(3)(f) allows public bodies to request a deposit prior to fulfilling a request if copies are estimated to cost more than \$50.

We have considered the propriety of the NSP's estimate based on § 84-712(3)(c)<sup>3</sup> We cannot say that the estimate is excessive considering the breakdown provided to us by Ms. Forch: An OCIO search using your parameters which resulted in over 3100 items; two minutes per email to physically redact; only one hour per person for 27 individuals to search for his or her own texts, voice mails, etc.; 20 hours to physically redact any responsive records as necessary; and a ten-hour NCJIS estimate based on NSP staff's previous experience in conducting such queries. Finally, the estimate of six months in order to fulfill your request is not excessive in light of the number of records to be reviewed. In the case of a voluminous records request, the legislative history of 2000 Neb. Laws LB 628 makes it clear that the custodian of the records may take whatever time is needed under the circumstances to produce copies of the records at issue.<sup>4</sup>

As provided in § 84-712(4) , and as indicated in Ms. Forch's April 20 response, you have the option to negotiate with the NSP to modify or prioritize the items in your request. Since the NSP has no responsive records relating to Marriott item numbers 2, 4, 6, 7, 8 and Event No. 1, it appears to us that there are likely no records responsive to the remaining items. However, we would urge you to take this opportunity to refine your requests so you might receive responsive records without incurring significant costs or delays.

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<sup>3</sup> We note that the NSP limited its estimate to labor costs allowable under § 84-712(3)(c) even though the NSP incurred IT costs that could be assessed to you pursuant to § 84-712(3)(b).

<sup>4</sup> As stated by Senator Bruning, one of the co-sponsors of LB 628:

Also in [§ 84-712(4)], there is the phrase "if the entire request cannot with reasonable good faith efforts be fulfilled within three business days" then the written explanation needs to be provided along with the earliest practicable date. My intention, as one of the cosponsors, as well, and for the legislative record is to mean that that amount of time again may be a very long time, meaning months or more. And the reason I say this, the reason I think it's important to establish a legislative record is just recently one of our state agencies received a request from a law firm that asks for any and all records in the custody of that state agency relating to issues of a lawsuit. Any and all records can be a huge request, and my intent in creating this legislative record is to make sure our state agencies are protected; that they can take as much time as necessary and without having to hire additional staff, without having to buy additional copy machines, without having to pay people for overtime to provide those records. It's my understanding and my intent that it could take an extremely long time if the requester is to ask for any and all records relating to such-and-such.

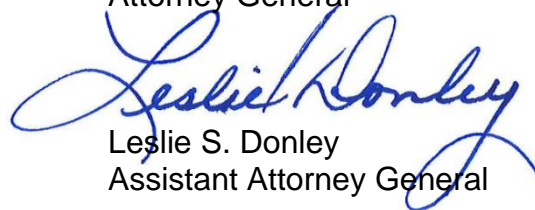
## CONCLUSION

Based on the foregoing, you have not been denied access to public records on the basis of excessive costs. We also do not find that the NSP violated the NPRS or acted in bad faith in handling your public records request. As a result, no further review by this office is necessary and 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,

MIKE HILGERS  
Attorney General



Leslie S. Donley  
Assistant Attorney General

c: Jessica Forch (via email only)