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Office of the Attorney General

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DOUGLAS J. PETERSON
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

February 18, 2016

Via email at chad.d.mohr@gmail.com
Mr. Chad Mohr

RE: *File No. 16-R-104; Kearney County Treasurer; Chad Mohr, Petitioner*

Dear Mr. Mohr:

We are writing in response to your email correspondence received by this office on February 3, 2016, in which you requested our assistance in obtaining certain public records belonging to the Kearney County Treasurer ("Treasurer"). As is our normal practice with such requests, we contacted the public body named in your correspondence. In this case, we contacted Barbara K. Lynn, the Kearney County Treasurer, and advised her of the opportunity to provide this office a response to your petition. Ms. Lynn declined to respond. However, after a number of telephone conversations today, Ms. Lynn advised the undersigned that her staff has directed MIPS¹ support staff to make available to you the records set out in your request. Our review of this matter was conducted in accordance with Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS"), and our findings are set forth below.

RELEVANT FACTS

Our understanding of the facts in this matter is based solely on your correspondence, our discussions with Ms. Lynn, and the emails she provided to this office.

On January 21, 2016, you emailed the following request for public records to the Treasurer at krnycotreas@gtmc.net:

¹ According to information on the Nebraska Association of County Officials (NACO) website, "MIPS" is "the Multi-County Information and Programming Services (MIPS), a computer services division created by NACO in 1991." See http://www.nacone.org/webpages/aboutnaco/exec_director.html.

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Please provide the Kearney County Tax Roll for the following years: 2011, 2012, 2013, 2014 and 2015. Please include the owners address and valuation for each property. Please provide each year in a separate excel or csv file. The files may be emailed to this address.

It appears that you received no response to your request. On February 2, 2016, you again contacted the Treasurer's office by email, stating in pertinent part:

It has been more than four business days since this request was made and I have not received 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.

Your email indicated that you were filing a petition with this office pursuant to § 84-712.03 requesting our determination as to whether the Treasurer "has otherwise failed to comply with the request."

Ms. Lynn responded to you by email on February 5, 2016, and indicated that her office was not intentionally ignoring your request. Ms. Lynn stated that with her small staff, and the size of your request, it took them some time to figure out how to fulfill it. Ms. Lynn represented that she believed your request had already been taken care of through the MIPS department, but has since learned that was not the case. She indicated that you would need to contact the MIPS support staff at gary@nacone.org, and he would be able to assist you in obtaining the requested files.

As indicated above, Ms. Lynn has now represented to the undersigned that her office has directed the MIPS support staff to provide you with the requested records. Upon our request, Ms. Lynn later provided to us the email that was sent to Gary Smith, the MIPS contact.

DISCUSSION

The NPRS generally allow Nebraska citizens and other 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 records, and to obtain copies of records in certain circumstances. Under those statutes, every record "of or belonging to" a public body is a public record which individuals may obtain a copy of

unless the custodian of the record can point to a specific statute which allows the record to be kept confidential. The NPRS do not require a public body to review documents and create abstracts or other lists, to answer questions or to create documents which do not otherwise exist.

Section 84-712(4) of the NPRS requires that, upon receipt of a written request for access to or copies of a public record, the custodian of that record must provide the requester an estimate of the expected cost of the copies and one of the following three things as soon as is practicable and without delay, but not more than *four business days* after actual receipt of the request:

(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.

Neb. Rev. Stat. § 84-712 (2014). Once that information is provided, the requester then has ten business days to review the estimated costs, including any special service charge, and request the custodian to (a) fulfill the original request, (b) negotiate with the custodian to narrow or simplify the request, or (c) withdraw the request. If the requester does not respond within the ten business days, the custodian of the public records is not required to fulfill the request.

It appears to us that the Treasurer failed to comply with these statutory requirements. Under § 84-712(4), Ms. Lynn was required to respond to your request no later than January 27, 2016—four business days after actual receipt of the request. We have considered the reasons set out in the February 5, 2016 email, and while we do not doubt that Ms. Lynn found your request to be overwhelming, this does not excuse her from fully complying with the NPRS. If Ms. Lynn believed that the request could not be fulfilled within the four business days because of the size of your request, she had the option under the statute to delay the process, and set a reasonable time in the future to produce any responsive records.

Notwithstanding the foregoing, since we now understand that Ms. Lynn has directed the MIPS staff to provide you the requested records, no further action by this office is necessary. We will, however, leave this file open pending complete resolution of this matter. Finally, we are attaching a copy of the current Nebraska Public Records Statutes to this disposition letter to assist Ms. Lynn and her staff in the proper handling of

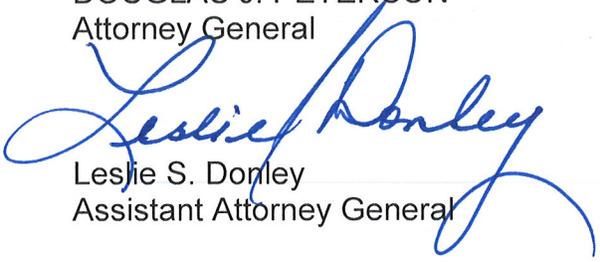
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requests for public records and to ensure their compliance with these statutes in the future.

If you disagree with the analysis and the conclusion we have set out above, you may wish to consider what additional remedies may be available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

Attachment

c: Barbara K. Lynn
Kearney County Treasurer

49-1525-29

84-712 Public records; free examination; memorandum and abstracts; copies; fees.

(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.

(2) Copies made by citizens or other persons using their own copying or photocopying equipment pursuant to subdivision (1)(a) of this section shall be made on the premises of the custodian of the public record or at a location mutually agreed to by the requester and the custodian.

(3)(a) Copies may be obtained pursuant to subdivision (1)(b) of this section only if the custodian has copying equipment reasonably available. Such copies may be obtained in any form designated by the requester in which the public record is maintained or produced, including, but not limited to, printouts, electronic data, discs, tapes, and photocopies. This section shall not be construed to require a custodian to copy any public record that is available to the requester on the custodian's web site on the Internet. The custodian of the public record is required to provide the location of the public record on the Internet to the requester. If the requester does not have reasonable access to the Internet due to lack of computer, lack of Internet availability, or inability to use a computer or the Internet, the custodian shall produce copies for the requester.

(b) Except as otherwise provided by statute, the public body, public entity, or public official which is the custodian of a public record may charge a fee for providing copies of such public record pursuant to subdivision (1)(b) of this section, which fee shall not exceed the actual added cost of making the copies available. 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.

(c) 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.

(d) State agencies which provide electronic access to public records through a portal established under section 84-1204 shall obtain approval of their proposed reasonable fees for such records pursuant to sections 84-1205.02 and 84-1205.03, if applicable, and the actual added cost of making the copies available may include the approved fee for the portal.

(e) This section shall not be construed to require a public body or custodian of a public record to produce or generate any public record in a new or different form or format modified from that of the original public record.

(f) If copies requested in accordance with subdivision (1)(b) of this section are estimated by the custodian of such public records to cost more than fifty dollars, the custodian may require the requester to furnish a deposit prior to fulfilling such request.

(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.

Source: R.S.1866, c. 44, § 1, p. 297; R.S.1913, § 5595; C.S.1922, § 4902; Laws 1925, c. 146, § 1, p. 381; Laws 1927, c. 193, § 1, p. 551; C.S.1929, § 84-712; R.S.1943, § 84-712; Laws 1961, c. 454, § 3, p. 1383; Laws 1979, LB 86, § 1; Laws 2000, LB 628, § 1; Laws 2012, LB719, § 6; Laws 2013, LB363, § 1.

A party seeking a writ of mandamus under section 84-712.03 has the burden to satisfy three elements: (1) The requesting party is a citizen of the state or the other person interested in the examination of the public records; (2) the document sought

is a public record as defined by section 84-712.01; and (3) the requesting party has been denied access to the public record as guaranteed by this section. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

Dockets of justice containing entry of judgments are public records. State ex rel. Newby v. Ellsworth, 61 Neb. 444, 85 N.W. 439 (1901).

Party was not entitled to inspection of certified copy of court reporter's record before same is offered in evidence. Spielman v. Flynn, 19 Neb. 342, 27 N.W. 224 (1886).

Any person interested may examine records without charge, and fee book of clerk of court is public record. State ex rel. Griggs v. Meeker, 19 Neb. 106, 26 N.W. 620 (1886).

Numerical indexes of instruments concerning title to real estate kept by county clerk are public records. State ex rel. Miller v. Sovereign, 17 Neb. 173, 22 N.W. 353 (1885).

The Nebraska Department of Correctional Services had no obligation to transport an inmate in its custody to an office where a particular record was located to examine the record. Russell v. Clarke, 15 Neb. App. 221, 724 N.W.2d 840 (2006).

84-712.01 Public records; right of citizens; full access; fee authorized.

(1) Except when any other statute expressly provides that particular information or records shall not be made public, public records shall include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form shall remain a public record when maintained in computer files.

(2) When a custodian of a public record of a county provides to a member of the public, upon request, a copy of the public record by transmitting it from a modem to an outside modem, a reasonable fee may be charged for such specialized service. Such fee may include a reasonable amount representing a portion of the amortization of the cost of computer equipment, including software, necessarily added in order to provide such specialized service. This subsection shall not be construed to require a governmental entity to acquire computer capability to generate public records in a new or different form when that new form would require additional computer equipment or software not already possessed by the governmental entity.

(3) Sections 84-712 to 84-712.03 shall be liberally construed whenever any state, county, or political subdivision fiscal records, audit, warrant, voucher, invoice, purchase order, requisition, payroll, check, receipt, or other record of receipt, cash, or expenditure involving public funds is involved in order that the citizens of this state shall have the full right to know of and have full access to information on the public finances of the government and the public bodies and entities created to serve them.

Source: Laws 1961, c. 454, § 2, p. 1383; Laws 1979, LB 86, § 2; Laws 1994, LB 1275, § 12; Laws 2000, LB 628, § 2.

A party seeking a writ of mandamus under section 84-712.03 has the burden to satisfy three elements: (1) The requesting party is a citizen of the state or other person interested in the examination of the public records; (2) the document sought is a public record as defined by this section; and (3) the requesting party has been denied access to the public record as guaranteed by section 84-712. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

Subsection (1) of this section does not require a citizen to show that a public body has actual possession of a requested record. Subsection (3) of this section requires that the "of or belonging to" language be construed liberally; this broad definition includes any documents or records that a public body is entitled to possess—regardless of whether the public body takes possession. The public's right of access should not depend on where the requested records are physically located. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

Under subsection (1) of this section, the reference to "data" in the last sentence shows that the Legislature intended public

records to include a public body's component information, not just its completed reports or documents. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

Under this section, requested materials in a private party's possession are public records if the following requirements are met: (1) The public body, through a delegation of its authority to perform a government function, contracted with a private party to carry out the government function; (2) the private party prepared the records under the public body's delegation of authority; (3) the public body was entitled to possess the materials to monitor the private party's performance; and (4) the records are used to make a decision affecting public interest. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

Records of deaths that occurred at a state-run mental institution, indicating the place of burial, are public records as defined by this section. State ex rel. Adams Cty. Historical Soc. v. Kinyoun, 277 Neb. 749, 765 N.W.2d 212 (2009).

84-712.02 Public records; claimants before United States Department of Veterans Affairs; certified copies free of charge.

When it is requested by any claimant before the United States Department of Veterans Affairs or his or her agent or attorney that certified copies of any public record be furnished for the proper and effective presentation of any such claim in such department, the officer in charge of such public records shall furnish or cause to be furnished to such claimant or his or her agent or attorney a certified copy thereof free of charge.

Source: Laws 1961, c. 454, § 4, p. 1384; Laws 1991, LB 2, § 30.

84-712.03 Public records; denial of rights; remedies.

(1) Any person denied any rights granted by sections 84-712 to 84-712.03 may elect to:

(a) File for speedy relief by a writ of mandamus in the district court within whose jurisdiction the state, county, or political subdivision officer who has custody of the public record can be served; or

(b) Petition the Attorney General to review the matter to determine whether a record may be withheld from public inspection or whether the public body that is custodian of such record has otherwise failed to comply with such sections, including whether the fees estimated or charged by the custodian are actual added costs or special service charges as provided under section 84-712. This determination shall be made within fifteen calendar days after the submission of the petition. If the Attorney General determines that the record may not be withheld or that the public body is otherwise not in compliance, the public body shall be ordered to disclose the record immediately or otherwise comply. If the public body continues to withhold the record or remain in noncompliance, the person seeking disclosure or compliance may (i) bring suit in the trial court of general jurisdiction or (ii) demand in writing that the Attorney General bring suit in the name of the state in the trial court of general jurisdiction for the same purpose. If such demand is made, the Attorney General shall bring suit within fifteen calendar days after its receipt. The requester shall have an absolute right to intervene as a full party in the suit at any time.

(2) In any suit filed under this section, the court has jurisdiction to enjoin the public body from withholding records, to order the disclosure, and to grant such other equitable relief as may be proper. The court shall determine the matter de novo and the burden is on the public body to sustain its action. The court may view the records in controversy in camera before reaching a decision, and in the discretion of the court other persons, including the requester, counsel, and necessary expert witnesses, may be permitted to view the records, subject to necessary protective orders.

(3) Proceedings arising under this section, except as to the cases the court considers of greater importance, shall take precedence on the docket over all other cases and shall be assigned for hearing, trial, or argument at the earliest practicable date and expedited in every way.

Source: Laws 1961, c. 454, § 5, p. 1384; Laws 1977, LB 39, § 316; Laws 1979, LB 86, § 3; Laws 2000, LB 628, § 3; Laws 2013, LB363, § 2.

A party seeking a writ of mandamus under this section has the burden to satisfy three elements: (1) The requesting party is a citizen of the state or other person interested in the examination of the public records; (2) the document sought is a public record as defined by section 84-712.01; and (3) the requesting party has been denied access to the public record as guaranteed by

section 84-712. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

If a requesting party satisfies its prima facie claim for release of public records under this section, the public body opposing disclosure must show by clear and convincing evidence that

section 84-712.05 or 84-712.08 exempts the records from disclosure. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

When a writ of mandamus is sought pursuant to this section, the party seeking the writ must first show (1) that the party is a citizen of the state or other person interested in the examination of the public records, (2) that the document sought by the party is a public record as defined by section 84-712.01, and (3) that

the party has been denied the access to the public record guaranteed by section 84-712; thereafter, if the public body holding the record wishes to oppose the issuance of a writ of mandamus, the public body must show, by clear and convincing evidence, that the public record at issue is exempt from the disclosure requirement under one of the exceptions provided by section 84-712.05 or section 84-712.08. *State ex rel. Neb. Health Care Assn. v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

84-712.04 Public records; denial of rights; public body; provide information.

(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.

Source: Laws 1979, LB 86, § 4; Laws 1983, LB 3, § 1.

84-712.05 Records which may be withheld from the public; enumerated.

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:

(1) Personal information in records regarding a student, prospective student, or former student of any educational institution or exempt school that has effectuated an election not to meet state approval or accreditation requirements pursuant to section 79-1601 when such records are maintained by and in the possession of a public entity, other than routine directory information specified and made public consistent with 20 U.S.C. 1232g, as such section existed on February 1, 2013, and regulations adopted thereunder;

(2) Medical records, other than records of births and deaths and except as provided in subdivision (5) of this section, in any form concerning any person; records of elections filed under section 44-2821; and patient safety work product under the Patient Safety Improvement Act;

(3) Trade secrets, academic and scientific research work which is in progress and unpublished, and other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose;

(4) Records which represent the work product of an attorney and the public body involved which are related to preparation for litigation, labor negotiations, or claims made by or against the public body or which are confidential communications as defined in section 27-503;

(5) Records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, when the records constitute a part of the examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training, except that this subdivision shall not apply to records so developed or received relating to the presence of and amount or concentration of alcohol or drugs in any body fluid of any person;

(6) Appraisals or appraisal information and negotiation records concerning the purchase or sale, by a public body, of any interest in real or personal property, prior to completion of the purchase or sale;

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

(8) Information solely pertaining to protection of the security of public property and persons on or within public property, such as specific, unique vulnerability assessments or specific, unique response plans, either of which is intended to prevent or mitigate criminal acts the public disclosure of which would create a substantial likelihood of endangering public safety or property; computer or communications network schema, passwords, and user identification names; guard schedules; lock combinations; or public utility infrastructure specifications or design drawings the public disclosure of which would create a substantial likelihood of endangering public safety or property, unless otherwise provided by state or federal law;

(9) The security standards, procedures, policies, plans, specifications, diagrams, access lists, and other security-related records of the Lottery Division of the Department of Revenue and those persons or entities with which the division has entered into contractual relationships. Nothing in this subdivision shall allow the division to withhold from the public any information relating to amounts paid persons or entities with which the division has entered into contractual relationships, amounts of prizes paid, the name of the prize winner, and the city, village, or county where the prize winner resides;

(10) With respect to public utilities and except as provided in sections 43-512.06 and 70-101, personally identified private citizen account payment and customer use information, credit information on others supplied in confidence, and customer lists;

(11) Records or portions of records kept by a publicly funded library which, when examined with or without other records, reveal the identity of any library patron using the library's materials or services;

(12) Correspondence, memoranda, and records of telephone calls related to the performance of duties by a member of the Legislature in whatever form. The lawful custodian of the correspondence, memoranda, and records of telephone calls, upon approval of the Executive Board of the Legislative Council, shall release the correspondence, memoranda, and records of telephone calls which are not designated as sensitive or confidential in nature to any person performing an audit of the Legislature. A member's correspondence, memoranda, and records of confidential telephone calls related to the performance of his or her legislative duties shall only be released to any other person with the explicit approval of the member;

(13) Records or portions of records kept by public bodies which would reveal the location, character, or ownership of any known archaeological, historical,

or paleontological site in Nebraska when necessary to protect the site from a reasonably held fear of theft, vandalism, or trespass. This section shall not apply to the release of information for the purpose of scholarly research, examination by other public bodies for the protection of the resource or by recognized tribes, the Unmarked Human Burial Sites and Skeletal Remains Protection Act, or the federal Native American Graves Protection and Repatriation Act;

(14) Records or portions of records kept by public bodies which maintain collections of archaeological, historical, or paleontological significance which reveal the names and addresses of donors of such articles of archaeological, historical, or paleontological significance unless the donor approves disclosure, except as the records or portions thereof may be needed to carry out the purposes of the Unmarked Human Burial Sites and Skeletal Remains Protection Act or the federal Native American Graves Protection and Repatriation Act;

(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;

(16) Records obtained by the Public Employees Retirement Board pursuant to section 84-1512;

(17) Social security numbers; credit card, charge card, or debit card numbers and expiration dates; and financial account numbers supplied to state and local governments by citizens; and

(18) Information exchanged between a jurisdictional utility and city pursuant to section 66-1867.

Source: Laws 1979, LB 86, § 5; Laws 1983, LB 108, § 1; Laws 1983, LB 565, § 1; Laws 1993, LB 579, § 6; Laws 1993, LB 590, § 6; Laws 1993, LB 719, § 2; Laws 1994, LB 1061, § 7; Laws 1994, LB 1224, § 88; Laws 1995, LB 343, § 7; Laws 1995, LB 509, § 6; Laws 1999, LB 137, § 1; Laws 2002, LB 276, § 7; Laws 2004, LB 236, § 1; Laws 2004, LB 868, § 3; Laws 2005, LB 361, § 37; Laws 2007, LB389, § 1; Laws 2009, LB188, § 8; Laws 2009, LB658, § 7; Laws 2011, LB230, § 1; Laws 2013, LB410, § 17.

Cross References

Patent Safety Improvement Act, see section 71-8701.

Unmarked Human Burial Sites and Skeletal Remains Protection Act, see section 12-1201.

Because the Legislature has expressed a strong public policy for disclosure, Nebraska courts must narrowly construe statutory exemptions shielding public records from disclosure. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

If a requesting party satisfies its prima facie claim for release of public records under section 84-712.03, the public body opposing disclosure must show by clear and convincing evidence that this section or section 84-712.08 exempts the records from disclosure. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

The investigatory record exception does not apply to protect material compiled ancillary to an agency's routine administra-

tive functions or oversight activities. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

Under subdivision (5) of this section, a public body can withhold from the public records of its investigation into an employee's conduct only if the investigation focuses on specifically alleged illegal acts. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

Under subdivision (5) of this section, a public record is an investigatory record where (1) the activity giving rise to the document sought is related to the duty of investigation or examination with which the public body is charged and (2) the relationship between the investigation or examination and that

public body's duty to investigate or examine supports a colorable claim of rationality. This two-part test provides a deferential burden-of-proof rule for a public body performing an investigation or examination with which it is charged. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

A public record is an investigatory record under this section where (1) the activity giving rise to the document sought is related to the duty of investigation or examination with which the public body is charged and (2) the relationship between the investigation or examination and that public body's duty to investigate or examine supports a colorable claim of rationality. When an inquiry by an administrative agency departs from the

routine and focuses with special intensity on a particular party, an investigation is underway for purposes of this section. Records that have been "disclosed" within the meaning of this section are only those records that a public body has, in its official capacity, already made available to the general public. *State ex rel. Neb. Health Care Assn. v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

Court upheld Attorney General's refusal to disclose requested documents pursuant to subsections (4) and (5) of this section. *State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993).

84-712.06 Public record; portion provided; when.

Any reasonably segregable public portion of a record shall be provided to the public as a public record upon request after deletion of the portions which may be withheld.

Source: Laws 1979, LB 86, § 6.

84-712.07 Public records; public access; equitable relief; attorney's fees; costs.

The provisions of sections 84-712, 84-712.01, 84-712.03 to 84-712.09, and 84-1413 pertaining to the rights of citizens to access to public records may be enforced by equitable relief, whether or not any other remedy is also available. In any case in which the complainant seeking access has substantially prevailed, the court may assess against the public body which had denied access to their records, reasonable attorney fees and other litigation costs reasonably incurred by the complainant.

Source: Laws 1979, LB 86, § 7.

84-712.08 Records; federal government; exception.

If it is determined by any federal department or agency or other federal source of funds, services, or essential information, that any provision of sections 84-712, 84-712.01, 84-712.03 to 84-712.09, and 84-1413 would cause the denial of any funds, services, or essential information from the United States Government which would otherwise definitely be available to an agency of this state, such provision shall be suspended as to such agency, but only to the extent necessary to prevent denial of such funds, services, or essential information.

Source: Laws 1979, LB 86, § 8.

Because the Legislature has expressed a strong public policy for disclosure, Nebraska courts must narrowly construe statutory exemptions shielding public records from disclosure. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

If a requesting party satisfies its prima facie claim for release of public records under section 84-712.03, the public body

opposing disclosure must show by clear and convincing evidence that section 84-712.05 or this section exempts the records from disclosure. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

84-712.09 Violation; penalty.

Any official who shall violate the provisions of sections 84-712, 84-712.01, and 84-712.03 to 84-712.08 shall be subject to removal or impeachment and in addition shall be deemed guilty of a Class III misdemeanor.

Source: Laws 1979, LB 86, § 10.

84-713 Settled claims; record required; contents; public record; certain settlement agreements; public agency; agenda item; applicability of section.



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DOUGLAS J. PETERSON
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

March 7, 2016

Via email at chad.d.mohr@gmail.com
Mr. Chad Mohr

RE: *File No. 16-R-104; Kearney County Treasurer; Chad Mohr, Petitioner*

Dear Mr. Mohr:

This letter is written in response to your petition filed with this office on February 19, 2016, in which you challenge the estimated cost submitted by the third-party information technology services contractor for the Kearney County Treasurer to produce records responsive to your public records request. Our review of this matter was conducted in accordance with Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS"), and our findings are set forth below.

BACKGROUND AND RELEVANT FACTS

On February 3, 2016, you filed a petition with our office under § 84-712.03 of the NPRS, seeking our assistance in obtaining certain records from the Kearney County Treasurer Barbara K. Lynn ("Treasurer"). Specifically, you requested

the Kearney County Tax Roll for the following years: 2011, 2012, 2013, 2014 and 2015. Please include the owners address and valuation for each property. Please provide each year in a separate excel or csv file. The files may be emailed to this address.

In our disposition letter dated February 18, 2016, we concluded that the Treasurer failed to comply with provisions of the NPRS in handling your request. However, since the Treasurer had represented to the undersigned that the requested records would be made available to you by its contractor, MIPS Inc. ("MIPS"), we determined that no further action from this office was necessary. In this instance, we decided to leave the file open, pending complete resolution of the matter.

Sometime early on February 19, 2016, MIPS provided you the "layout" of the file it could offer, and indicated that production of the records would cost "\$300.00 per year." Later that morning, you emailed the undersigned, stating:

I ask the Attorney General to determine the Kearney County Treasurer has not complied with my request and order the Kearney County Treasurer to comply with my request by providing the records for a reasonable fee that reflects the actual cost of producing the copies and not the fee charged by a third party.

It appears that on February 22, 2016, MIPS staff advised you by email that "[f]or pricing, MIPS INC. charge is for time spent in producing the files or at the most \$300.00." On February 23, 2016, MIPS staff emailed you an invoice relating to your request, which stated, in pertinent part:

Data request for copies of the Kearney County Treasurer's tax roll billing information in 5 separate files (one for each of the past 5 years). The detailed request also asks that the data be made available in the following format: CSV / Excel. The County Treasurer does not have a way to comply with Mr. Mohr's request because their Tax Collection / Distribution System resides on an IBM AS400 which utilizes data stored in EBCDIC (Extended Binary Coded Decimal Interchange Code) and not the PC equivalent ASCII (American Standard Code for Information Interchange).

EBCDIC is the same data format that is used by other Government agencies such as the Department of Motor Vehicles VTR System and the Courts Justice System. Personal Computers cannot read data in EBCDIC format.

The invoice then sets out six separate steps required to produce the requested tax rolls. It concludes with the following statement: "Although the above work request will take several hours to complete, we are willing to cap the invoice at 4 hours (\$300)."

In your correspondence to the undersigned, you challenge the \$300 cost on a number of grounds, including, but not limited to, that MIPS' fee is arbitrary and capricious, and that "MIPS . . . demonstrates a conflict of interest in carrying out the government function of providing copies of public records." You further indicate that the Treasurer's offer to allow you to physically examine records, or to receive certain information by telephone "still does not meet the statutory requirements of providing the record in any form designated by the requester in which the public record is maintained."

DISCUSSION

Neb. Rev. Stat. § 84-712(3)(b) is essential to your inquiry. That subsection provides, in pertinent part:

Except as otherwise provided by statute, the public body, public entity, or public official which is the custodian of a public record may charge a fee for providing copies of such public record pursuant to subdivision (1)(b) of this section, which fee shall not exceed the actual added cost of making the copies available. For purposes of this subdivision, . . . ***(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.) Section 84-712(3)(b) expressly authorizes a third-party contractor to charge its reasonably calculated actual added cost of making the electronic data available to the requester. In the present case, MIPS is the third-party information technology services company under contract with the Kearney County Treasurer. MIPS has indicated that in order to produce the requested records, in the format you have requested, the services of a computer programmer will be necessary. It has provided you with an invoice that details, step-by-step, the actions necessary to produce the records. MIPS further represents that although producing the records will likely take longer than four hours, it is willing to cap its costs at \$300.00 (four hours of labor at \$75.00/hour). Based on the foregoing, we believe any allegations that MIPS' charges are "arbitrary and capricious" and "demonstrate[] a conflict of interest" because MIPS produces public records on behalf of the county are without merit.

We will also point out to you that § 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 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

Here, the estimated cost for producing the requested tax rolls is based on the criteria in § 84-712(3)(b)(iii). The four hours referenced in the MIPS invoice relates to four hours of “computer run time, . . . necessary analysis and programming.” MIPS did not charge you a “special service charge” because it determined that no amount of time in excess of four hours would be spent “searching, identifying, physically redacting, or copying” records.

Finally, please be advised that Neb. Rev. Stat. § 84-712(3)(e) states that “[t]his section [84-712] shall not be construed to require a public body or custodian of a public record to produce or generate any public record in a new or different form or format modified from that of the original public record.” In this regard, you have requested a separate Excel or CSV file for each tax year produced. According to the MIPS invoice, and contrary to your assertions, the tax roll data does *not* currently exist in either an Excel or CSV format. And while MIPS has agreed to provide you the data as requested, it has no obligation to do so under the statute.

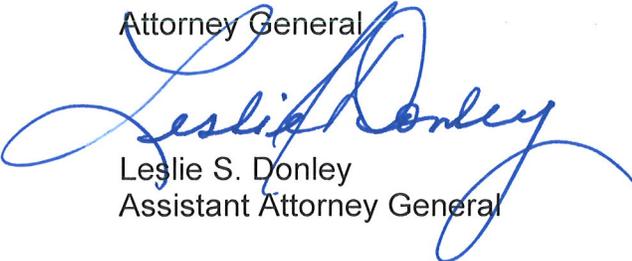
CONCLUSION

We conclude that the estimated amount to provide you the requested tax rolls from the Kearney County Treasurer is neither arbitrary nor capricious. Moreover, MIPS has provided sufficient detail to justify its estimated cost to produce the requested records. Since we conclude that the fee requested by MIPS represents the actual added cost of making the electronic data available to you in the format requested, no further action by this office is necessary and we are closing this file.

If you disagree with the analysis and the conclusion we have set out above, you may wish to consider what additional remedies may be available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Barbara K. Lynn
Kearney County Treasurer

Gary Smith/MIPS