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June 21, 2017

Alan Usher, CEO
GI Family Radio
3205 West North Front Street
Grand Island, NE 68803

RE: *File No.17-R-122; Grand Island Public Schools; Alan Usher, Petitioner*

Dear Mr. Usher:

This letter is in response to your correspondence received by this office on April 13, 2017, in which you sought our assistance in obtaining certain records from Grand Island Public Schools ("GIPS"). When we receive petitions of this nature, our normal practice is to contact the entity involved and advise it of the opportunity to provide a response to this office. In the present case, we contacted the legal counsel for GIPS, Roger Steele, and on April 26, 2017, we received Mr. Steele's response on behalf of the school district. On April 26, 2017, this office also received correspondence from attorney Scott Norby, of the law firm Norby & Wade, written on behalf of the Nebraska State Education Association and the Grand Island Education Association ("GIEA"). On May 1, 2017, we wrote to you indicating that we had conducted a preliminary investigation of your petition, and it appeared that GIPS had properly withheld the requested records. However, we indicated that our response would be delayed so that we could further analyze the issues. We have now completed that analysis. We have conducted our investigation under Neb. Rev. Stat. § 84-712.03 of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2016) ("NPRS"). Our findings in this matter are set forth below.

Before we begin, we wish to inform you that this office provides general advice to citizens, attorneys (both private and government), and other interested parties on a wide range of topics concerning public records. In this regard, and in the interest of full disclosure, Mr. Steele contacted our office on two occasions requesting general advice on how to respond to your requests, which we provided. The conclusions reached in this disposition are based on our analysis of the entire record presented, and any previous advice which we may have given to Mr. Steele had no impact on how we ultimately handled this file.

BACKGROUND

Our understanding of the facts in this matter is based solely on your petition and the response we received from Mr. Steele, as well as Mr. Norby's correspondence.

Your Petition

According to your petition, on March 16, 2017, you and Tyson Havranek, News Director of GI Family Radio, sent a public records request to GIPS superintendent, Dr. Tawana Grover.¹ Specifically, you requested copies of the following:

Any communication, which encompasses all forms of communication, regarding the subject matter concerning potential scheduling and curriculum changes and policy proposed for the upcoming school year that has been sent or received, texted or communicated in any form by or from or to all Administrative staff, elected officials, board members, and teachers in the district. The time frame that this request encompasses is May 1st, 2016 to the moment the request is fulfilled and provided to our news organization. This also includes any public response or input regarding subject matter to any and all Administrative staff, elected officials, board members and teachers in the district.

You indicate that the following morning Mr. Steele "came to my office and strongly requested that I limit my request." You declined to do so. However, in a letter dated March 17, 2017, addressed to you and Mr. Havranek, Mr. Steele states that

[t]his letter is to confirm that we met at your office on today's date to discuss GI Family Radio's request for public records. You agreed to simplify and narrow the scope of the request to those public records that are relevant to or tied to Mr. Josh McDowell's comments to the Board of Education made on Monday, March 13, 2017.

(Emphasis added.) Mr. Steele timely responded to your public records request (as purportedly amended) on March 22, 2017. Mr. Steele indicated that GIPS had completed a computer word search relating to your request and had identified approximately 5,900 documents and emails that could be responsive. He further indicated that those records would have to be reviewed by GIPS staff for responsiveness, and to identify any records

¹ Your petition contains information about certain changes (e.g., scheduling, curriculum) undertaken at GIPS, which prompted current and former employees to contact you with concerns as to how these decisions were made by the school district. However, Neb. Rev. Stat. § 84-712 of the Nebraska Public Records Statutes does not require any showing by a person requesting access to public records of the reason for his or her request. See *State ex rel. Sileven v. Spire*, 243 Neb. 451, 457, 500 N.W.2d 179, 183 (1993) ("[Section] 84-712 . . . applies equally to all persons without regard to the purpose for which the information is sought."). Consequently, we do not consider such information in our analysis.

that may be confidential or privileged. Mr. Steele estimated that, given the extensiveness of your request, it would take GIPS staff ten business days to produce any responsive records. Mr. Steele indicated that once the documents were identified, GIPS would invoice you ten cents a page for copies. However, Mr. Steele indicated that the school district decided to waive any labor costs associated with producing the records.

Your petition includes your undated response to Mr. Steel's March 22, 2017 letter, in which you state that Mr. Steele's "letter misrepresents our request." You state that the records you are seeking included the following:

Any communication, regarding the subjects of:

1. School day and class scheduling for the 2017-2018 school year;
2. Curriculum changes for the 2017-2018 school year; and
3. Proposed policies for the 2017-2018 school year

Sent or received by:

1. Any school board member;
2. Any teacher; or
3. Any administrative staff

In any form of communication, including, but not limited to:

1. Email;
2. Fax;
3. U.S. Mail;
4. Text message;
5. Internal or interoffice memorandum;
6. Social media posting or message;
7. Telephone message or other summary created of a telephone call

during the time frame of May 1, 2016 until the date this request is fulfilled.

In addition, you question how a computer word search would capture responsive records in faxes, U.S. mail, text messages, etc. You reiterate your "request that GIPS undertake to gather all records relevant to our request." You authorized the district to review the 5,900 documents which could be relevant to your request. Finally, you indicate that once the responsive records are identified, you would like to examine the records, make your own copies or alternatively provide a thumb drive to the district on which to save the records in lieu of receiving copies.

Your petition contains five more letters between you and Mr. Steele regarding your public records requests. Notably, in the letter dated April 5, 2017, Mr. Steele indicates that the costs for producing records from the initial 5,900 documents identified would be

\$1,324.99. As to the remainder of your requests, Mr. Steele estimated an amount of \$123,247.45, which is based on a review of 1,422,322 emails, 220,460 internal documents, and 100 social media postings or messages at an hourly rate of \$20.38. Also included in this amount is \$917.10 for computer programming/exporting.

On April 10, 2017, Mr. Steele hand delivered to you a letter with a flash drive containing 358 emails and 68 documents which the school district determined to be responsive to your request. However, he indicated that GIPS was denying you access to "28 letters written by teachers from Deb Gnuse, GIEA President." Mr. Steele states that the letters were being withheld because (1) the letters fell within the exception to disclosure in § 84-712.05(7); (2) the teacher letters were not records "of or belonging to" Grand Island Public Schools; and (3) GIPS' use of the letters "is limited and restricted to the use stated in Mrs. Gnuse's e-mail dated April 7, 2017."

You subsequently filed your petition with this office, specifically challenging GIPS' denial of the teacher letters, and the \$123,247.45 amount set out in Mr. Steele's April 5, 2017, letter discussed above. In this regard, you "ask that [we] review this estimation to determine if such fees are the actual added costs or special service charges under § 84-712."

GIPS' Response to This Office

Mr. Steele initially points out that Ms. Gnuse told Dr. Grover that the teacher letters were to be read by Dr. Grover and the members of the Board of Education only, and that "[t]he teachers did not want the contents or their names to be public knowledge." GIPS' Response at 1; Ex. 15 (email to Dr. Grover from Deborah Gnuse, April 7, 2017). Mr. Steele argues that the letters at issue could be withheld under the exception in § 84-712.05(7) ("[p]ersonal information in records regarding personnel of public bodies other than salaries and routine directory information[.]"). In light of the plain meaning of "personal information," Mr. Steele asks "[w]hat is more personal when one considers the meaning of 'personal information' than a letter written, hand delivered, and received with the understanding that the letter not be made public?" He argues that "[GIPS] was correct to assert this exception when withholding the letters from [petitioner]." GIPS' Response at 2.

In addition, Mr. Steele asserts that Neb. Rev. Stat. § 79-8,109 (2014), concerning the personnel files of teachers and administrators, applies to the present case. This statute provides, in pertinent part, that

[a]ny teacher . . . of any public school district shall, upon his or her request, have access to his or her personnel file maintained by the district and shall have the right to attach a written response to any item in such file. Such teacher . . . may in writing authorize any other person to have access to

such file, which authorization shall be honored by the district. . . . No other person except school officials while engaged in their professional duties shall be granted access to such file, and the contents thereof shall not be divulged in any manner to any unauthorized person.

He states that none of the teachers have authorized you to have access to the letters at issue.

To support the amount of the estimated costs of production, Mr. Steele provided this office with the affidavit of Cory Gearhart, the Executive Director of Information Technology for GIPS. Mr. Gearhart states that your public records request [see page 3, *supra*],

was not limited to any particular topic or school. [GIPS] has a preschool, fourteen elementary schools, three middle schools, Senior High School, and Success Academy and the Ombudsman program for high school students. The school district has approximately 10,000 students and approximately 1,400 staff members and administration.

Gearhart Affidavit at 1-2. Mr. Gearhart indicates that all records of the district are stored electronically, except for the students' "cumulative folders," which are paper-based. He states that a computer search of emails based on the topics in your request, i.e., "school day," "class scheduling," "curriculum changes," and "proposed policies," elicited approximately 1.5 million emails. Another 200,000 documents could also be responsive. Mr. Gearhart estimates that it would take him approximately 14 seconds to review each record to determine whether it was responsive to your request, and also to determine whether any portion of the records should be withheld or redacted.² The cost to review the records was based on an hourly rate of \$20.38, which is the rate for an IT technician knowledgeable of the privacy laws implicated here, and is less than Mr. Gearhart's rate of pay. He estimates that three temporary workers would be needed to review and redact records. Mr. Gearhart attests that "my estimate of 6,006.47 hours to complete the job at a cost of \$123,247.45 was my good faith attempt to quantify the estimated cost for Mr. Usher/GI Family Radio." *Id.* at 3.

GIEA's Response

Mr. Norby states that the letters at issue "were written to express professional concerns regarding the curriculum, educational environment and other issues involving their employment with GIPS." The letters were submitted with the understanding that they would be treated as "employee communications" and "confidential personnel file documents." Mr. Norby asserts that § 84-712.05(7) provides a basis to withhold the

² Mr. Gearhart cites to the Family Educational Rights and Privacy Act ("FERPA"), the Health Insurance Portability and Accountability Act ("HIPAA"), and Neb. Rev. Stat. § 79-2,104, relating to the confidentiality of student records, as reasons why certain records and information could not be disclosed.

letters, which contain personal information of employees of a public body. He also asserts that since the teachers submitted the letters to the administration in their capacity as certificated employees of the school district, such documents are not accessible pursuant to § 79-8,109, absent written authorization. Mr. Norby states that the records at issue may be further protected under the provisions of FERPA and HIPAA, as applicable.

DISCUSSION

We will begin our discussion by examining the basic rule for access to public records in Nebraska. Section 84-712 provides, in pertinent part:

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.

(Emphasis added.) "Public records" are defined as follows:

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.

Neb. Rev. Stat. § 84-712.01(1) (2014) (emphasis added). As illustrated by the highlighted provisions above, the right of access to governmental records is not absolute. There are numerous instances in the Nebraska Revised Statutes where a particular statute makes certain records confidential, not subject to the NPRS, not public records, or privileged.³

³ The Nebraska Legislature has employed various language when enacting legislation to make certain records nonpublic. See, e.g., Neb. Rev. Stat. § 77-3510 (Cum. Supp. 2016, 2017 Neb. Laws LB 217) ("The [homestead exemption] application and information contained on any attachments to the application shall be confidential and available to tax officials only."); Neb. Rev. Stat. § 47-912 (Cum. Supp. 2016, 2017 Neb. Laws LB 539) ("Reports of investigations conducted by the office [of Inspector General of the Nebraska Correctional System] are not public records for purposes of sections 84-712 to 84-712.09.");

In addition, § 84-712.05 contains twenty categories of records that may be withheld at the discretion of the public body involved so long as those records have not been “publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties”⁴ However, this “[s]tatute . . . applies only to materials which would otherwise be considered public records.” *State of Nebraska ex rel. Unger v. State of Nebraska*, 293 Neb. 549, 878 N.W.2d 540 (2016).

Teacher Letters

In the present case, GIPS has claimed the exception to disclosure set out in § 84-712.05(7) as one basis to deny you access to the requested teacher letters. GIPS also points to § 79-8,109 as another statutory basis to keep the letters confidential. That statute states, in pertinent part, that “[n]o other person except school officials while engaged in their professional duties shall be granted access to such [personnel] file, *and the contents thereof shall not be divulged in any manner to any unauthorized person.*” (Emphasis supplied.) As a result, it appears to us that GIPS is arguing that the teacher letters are public records that may be withheld under § 84-712.05(7) and, conversely, are not public records where access is limited only to school officials and authorized individuals. However, the teacher letters can be either public or nonpublic records; they cannot be both.

Ultimately, we believe that § 79-8,109 controls access to the requested letters. Our conclusion in this regard is supported by Mr. Norby’s representation that the teacher letters are being treated by GIPS as confidential personnel file documents. Consequently, we believe the contents of the teachers’ personnel files, which includes the letters at issue, are not public records and thus are not subject to requests made under § 84-712.⁵

Neb. Rev. Stat. § 29-2261 (Cum. Supp. 2016) (“Any presentence report, substance abuse evaluation, or psychiatric examination shall be privileged”); and Neb. Rev. Stat. § 71-503.01 (Cum. Supp. 2016) (Reports and resulting investigations from medical practitioners or other persons relating to certain communicable diseases “shall be confidential except as provided in this section, shall not be subject to subpoena, and shall be privileged”).

⁴ Section 84-712.08 provides another exception to disclosure in the NPRS, and permits the suspension of those provisions when a federal agency or other federal source of funds, services, or essential information determines that application of such provisions would cause a state agency to lose the funds, services or information.

⁵ In the event you receive written authorization from the teachers involved, § 79-8,109 requires GIPS to provide you access to their personnel files.

Estimated Cost of Production

The second allegation in your petition relates to the costs proposed by the district to produce the requested records. Under Neb. Rev. Stat. § 84-712.03(2), this office is required to determine “whether the fees estimated or charged by the custodian are actual added costs or special service charges as provided under section 84-712.” “Actual added costs” is defined, in the context of electronic data, as

the actual added cost of making the copies available . . . includ[ing] 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.

Neb. Rev. Stat. § 84-712(3)(b). A public body may assess a “special service charge” for labor costs incurred for searching, identifying, physically redacting, or copying records. This charge may only be included in the fee for time required in excess of four cumulative hours. Neb. Rev. Stat. § 84-712(3)(c).

In a disposition letter written in response to several petitions submitted to our office in 2006,⁶ we discussed whether cost estimates provided by Westside Public Schools (“Westside”) and the City of Omaha to produce certain records, which were considerably more than the estimate provided by GIPS, were excessive and contrary to the NPRS.⁷ For one of the requests, Westside had estimated an amount of \$861,140, which involved restoring 74 days of backup tapes of email, and then searching individual email accounts for 17 identified terms. We noted that the NPRS allowed public bodies to charge the actual cost of computer run time and any necessary analysis and programming and that based on the items in the request, and the precise nature of the estimate, “there [was] nothing in that estimate that seems outrageous or excessive.” Disposition letter at 6. With respect to the City of Omaha, where one of the records request resulted in a \$276,000 estimate, we stated:

⁶ See our disposition letter to *Public Records Requests; File Nos. 06-R-131, 06-R-132, 06-R-133, 06-R-134, 06-R-135, 06-R-136, 06-R-137, 06-R-138, 06-R-139, 06-R-140, 06-R-141*, dated November 13, 2006.

⁷ The Nebraska Legislature amended § 84-712 in 2013 to further define what constituted “actual added costs” for photocopies, printouts of computerized data on paper, and electronic data. Those amendments also placed in statute the longstanding practice of assessing the actual cost of staff time necessary to produce public records. See 2013 Neb. Laws LB 363, § 1.

As we noted in [Westside] above, charging for the actual costs of conducting computer searches is acceptable and allowable under state law. . . . Using the estimate provided to the City of Omaha, it appears that it would take approximately 91.5 forty-hour work weeks to conduct a search of the City of Omaha computers. Consequently, we do not believe the estimate quoted by the City of Omaha is improper or excessive.

In the present case, your request sought “any communication” regarding items including “school day,” “class scheduling,” “curriculum changes,” and “proposed policies.” You have requested communications from any school board member, teacher or administrative staff person. The scope of your request includes email, fax, U.S. Mail, text messages, internal memoranda, social media postings, and telephone messages. There is little question that your request presents a monumental task for the school district, which would require considerable computer time and human labor. According to Mr. Gearhart’s affidavit, a computer search for these particular items, limited to the 2017-2018 school year per your request, elicited approximately *1.5 million emails* alone. He estimated a very conservative amount of time, i.e., approximately fourteen seconds, to review each document for responsiveness and to determine what documents must be withheld or redacted. The special service charge is based on the hourly rate for a technician in the IT department with knowledge of state and federal privacy law. The computer programming cost is also assessed at \$20.38 an hour, which is less than Mr. Gearhart’s actual salary. Based on the foregoing, we believe that GIPS may charge you for the computer time necessary to search for the requested documents. We further believe that the labor costs in the estimate comport with the definition of special service charge set out in § 84-712(3)(c). Consequently, you have not been denied access to public records on the basis of excessive costs relating to producing records responsive to your records request. And certainly, you always have the option to modify or prioritize the items in your request.

CONCLUSION

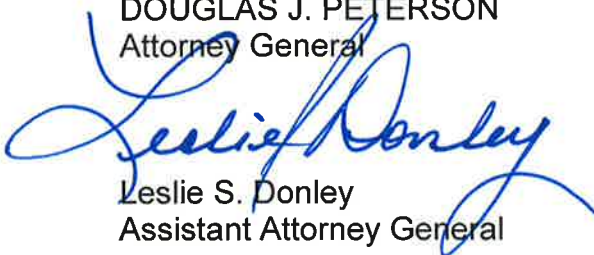
For the reasons explained above, we believe that access to the teacher letters you seek is governed by § 79-8,109, which would require the teachers involved in this matter to provide you written authorization to access their personnel files. We further believe that the estimated costs to produce the requested records do not appear to exceed the costs allowed to be charged under § 84-712. Since we conclude that Grand Island Public Schools did not unlawfully deny your records request, and that its estimated costs were neither improper nor excessive, no further action by this office is warranted. Accordingly, we are closing this file.

Alan Usher
June 21, 2017
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If you disagree with the analysis and the conclusion we have set out above, you may wish to consult with your private attorney to see what additional remedies, if any, may be available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Roger Steele
Scott Norby

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