

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

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September 10, 2021

Via email at [REDACTED]  
Kenneth R. Winn

RE: *File No. 21-R-130; School District 145–Waverly; Kenneth R. Winn, Petitioner*

Dear Mr. Winn:

This letter is in response to your petition received by this office on August 26, 2021, in which you requested that the Attorney General review the handling of a public records request you submitted to School District 145–Waverly (“District”) on August 23, 2021. In accordance with our normal practice, we forwarded a copy of your petition to the District superintendent, Dr. Cory Worrell, and requested a response. We specifically asked Dr. Worrell to provide our office a breakdown of the cost estimate, including the estimated number of hours required to fulfill the request and the salaries of personnel necessary to conduct a search and review the records. On September 2, we received a response from Justin J. Knight, Perry Law Firm, who responded on behalf of the District. We considered your petition and the District’s response in accordance with § 84-712.03(1)(b) of the Nebraska Public Records Statutes (“NPRS”), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020). Our findings in this matter are set forth below.

As an initial matter, we note that you indicate in your petition that you are no longer permitted to communicate with the District via email. You indicate that “this is an obvious attempt to exclude State AG oversight of my email traffic and to hinder recording of their message traffic.” You raise numerous other concerns relating to the District. For your information, to the extent this office has any authority over local governmental subdivisions, like a school district, it is through express statutory provisions requiring us to enforce the NPRS and the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2014, Cum. Supp. 2020, amended 2021 Neb. Laws LB 83, §§ 11-14). This office has no supervisory authority over the District and, therefore, is unable to address the various concerns raised in your email that do not involve the NPRS.

## RELEVANT FACTS

On August 23, 2021, you emailed the following public records request to District board members Andy Grosshans and Cheryl Landon:

Under the Nebraska Public Records Law § 84-712 et seq., I am requesting to obtain and review any, and all, Public Records, i.e. emails, phone records, texts, letters, video conference meeting records & recordings, etc., between all members of the Waverly School District 145 School Board, and the Waverly School District 145 Superintendent, Cory Worrell, as well as any School District 145 director, employee, administrator, or representative, on all matters pertaining to Covid 19 guidelines, protocols, legalities, strategies, courses of action, directions, masking guidance, vaccine roll out guidance, health mandates, community & District 145 infection rates and general discussions related to community Covid 19 health matters. This request also encompasses any communications, i.e. emails, phone records, texts, letters, video conference meeting records & recordings, etc., concerning the School District 145 School Board's decision to grant unilateral decision making authority to the District 145 Schools Superintendent, Cory Worrell, on all matters related to Covid 19 policies, mandates, timelines, scope of authority, legal precedence, approval processes, as well as coordination with the Lincoln Lancaster County Health Department on all Covid 19 related topics & matters.

This request is limited in scope and is focused on all internal & external correspondence between the District 145 School Board, Cory Worrell, District 145 employees and the LLCHD, between dates of January 1st, 2021, to August 27th, 2021. I request that all correspondence of this nature be compiled and provided to myself in its original form and presented via disc or other commonly accepted digital file transfer resources. Paper copies of records and data should be limited in order to avoid waste of resources and the time of District 145 personnel.

Dr. Worrell responded to this particular request<sup>1</sup> on August 24. He indicated that your request could not be fulfilled within four business days "due to the incredibly broad nature of your request involving over 310 District employees, the ongoing COVID-19 pandemic, limited staff availability, limited availability from the District's tech director, demands on all staff at the beginning of the school year, and the significant difficulty and extensiveness of the request." He further indicated that once compiled, the records would have to be

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<sup>1</sup> For the record, you copied the Attorney General's Office on two public records requests you emailed to the District on August 23—one directed to Dr. Worrell and the request at issue here. In this regard, Mr. Knight represents that the District timely fulfilled the request directed to Dr. Worrell, and despite the District expending more than four hours to respond, it declined to charge you. Mr. Knight states that he considered your two requests to be duplicative and overlapping, and should not have been treated as two separate requests. However, he states that "in the interest of transparency and to show that the District responds to records request in good faith, the District has elected to consider the requests as separate and distinct requests and is willing to provide Mr. Winn the first four hours of each request for free."

reviewed for purposes of redacting any student or staff identifying information. Dr. Worrell estimated that the cost for fulfilling your request would be \$17,625.96, and requested a deposit in this amount. He further advised that the earliest practicable date for fulfilling your request would be ten weeks after receiving the deposit.

### THE DISTRICT'S RESPONSE

Mr. Knight informs us that since August 5, Dr. Worrell himself has received over one hundred communications (e.g., emails, text messages, or letters) relating to the District's COVID-19 protocols, including its mask mandate. He states that voluminous records will have to be reviewed to identify responsive records, and then confidential student or staff information will have to be redacted in accordance with state and federal law. Mr. Knight states that

[o]n this point, the District estimates that, since January 1, 2021, there are hundreds of emails that directly relate to a student or staff member's individual medical or safety concerns related to COVID-19 (including their underlying health conditions, disabilities, exposure status, quarantine or isolation orders, etc.), which would require withholding or redaction under Neb. Rev. Stat. 84-712.05(1) & (7), other Nebraska state law (including Neb. Rev. Stat. §§ 79-2,104 & 79-8,109), the Family Educational Rights and Privacy Act, the Individuals with Disabilities Education Act, and similar laws and regulations.

Mr. Knight further states while not all of the District's 310 employees have received this volume of correspondence, other staff members and certain employee groups have received a large volume of correspondence over the past eight months regarding COVID-19. The District's school nurses, in particular, "have been inundated and overwhelmed trying to stay apprised of the latest COVID-19 guidance, contact tracing, student health, updates from the LLCHD, and more." Mr. Knight further represents:

. . . COVID-19 and facemasks have become a very divisive issue, especially in the District. Consequently, Board Members have received perhaps more correspondence regarding the District's mask mandate this year than on any other issue in recent memory—likely amounting to hundreds of responsive documents per Board Member.

All in all, the District expects that there are well over 10,000 emails responsive to the [request at issue], and roughly half that amount for other staff members, with an estimated 3,000-4,500 emails District-wide that will need to be reviewed and either withheld or redacted in some manner.

The District's response included the requested breakdown of costs, identifying the employees responsible for the record production, the tasks assigned to each employee,

their hourly rates, the estimated number of hours to perform the tasks, and the cost estimate calculated by number of hours multiplied by the hourly rates.

In your petition, you indicate that Dr. Worrell has informed you that your public records request will not be fulfilled. We have construed this statement to mean that the amount of the District's cost estimate constructively denies you access to public records.

## 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 public records in certain circumstances. Section 84-712.03(1)(b) requires the Attorney General to determine, among other things, "whether the fees estimated or charged by the custodian are actual added costs or special services charges as provided under section 84-712."

Under Neb. Rev. Stat. § 84-712(3), records custodians may assess a fee to produce copies of public records:

(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 . . . .

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

The District has provided this office sufficient detail to support the cost estimate for fulfilling your records request. There is no question that the estimate is a large sum of money. However, you have requested districtwide records impacting 310 employees relating to the COVID-19 pandemic for an eight-month period. We find that the estimated hours and the hourly rates are neither outrageous nor excessive. Accordingly, we believe the District may charge you the amount set out in Dr. Worrell's August 24, 2021, response to you, i.e., \$ 17,625.96.

Finally, as provided in § 84-712(4), and as indicated in Dr. Worrell's letter, you have the option to negotiate with the District to modify or prioritize the items in your request. We note that you have indicated in various correspondence your desire to narrow the scope of your request(s). However, it is unclear to us whether you conveyed any modifications to District officials. You are free to pursue this avenue so that you may obtain pertinent public records without incurring unnecessary costs or delays.

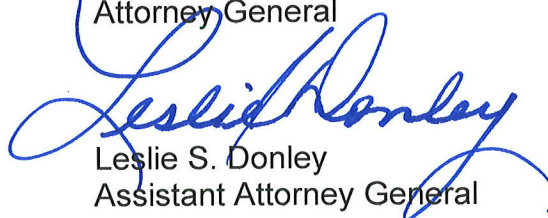
### CONCLUSION

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 District 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,

DOUGLAS J. PETERSON  
Attorney General



Leslie S. Donley  
Assistant Attorney General