

STATE OF NEBRASKA
Office of the Attorney General

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DOUGLAS J. PETERSON
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

April 24, 2018

Pamela S. Berendsen
[REDACTED]

RE: *File No. 18-R-110; City of Crofton Manager; Pamela S. Berendsen, Petitioner*

Dear Ms. Berendsen:

This letter is in response to your correspondence dated April 4, 2018, and received by this office on April 9, 2018, in which you sought our assistance in obtaining a certain document from the City of Crofton ("City"). You are also challenging the costs assessed by the City to produce public records. On April 12, 2018, we contacted Charlie G. Hendrix, Crofton City Manager, regarding your petition, and advised her of the opportunity to respond. We received Ms. Hendrix's response on April 16. We have construed your correspondence to be a petition for review 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.

RELEVANT FACTS

On March 19, 2018, you verbally requested a document entitled "Street Improvement District Resolution 2017-1" ("Resolution") from Ms. Hendrix. You indicate that this document was referenced in the "Notice of Special Meeting" published in the Crofton Journal on March 15.¹ Ms. Hendrix responded to you the next day, indicating that the Resolution

was prepared by the financing agent. The assessment attorney and I both felt that it was unlikely that the resolution had any legal significance, but we included it by incorporation in case it was important to the financing documents.

¹ According to the documentation you provided us, it appears that the notice was published in the Niobrara Tribune on March 15, 2018. The notice indicates that requested document "ha[s] been filed and with [sic] the City Clerk and [is] available for review."

If you would like us to research the bond transcript for that document, we are happy to do so. We anticipate that it will likely take an hour of additional research time, plus any copying fees. We request a deposit of \$22 in advance to cover the costs of research and copies. We will refund to you any portions of the deposit that are unused, once the project is complete.

Once we receive the deposit, we will schedule time to research the transcript, according to staff availability.

After conferring with the undersigned on March 23, you resubmitted your request for the Resolution to Ms. Hendrix *in writing* on March 27. You advised Ms. Hendrix that you were "entitled to this document free of charge for the first 4 cumulative hours including searching for, identifying, and copying public records in response to a particular request according to State Statute [84-712]." You indicate that Ms. Hendrix left you a voice mail on March 27 stating that you were still required to pay for the document. In that regard, Ms. Hendrix explained that she had conferred with this office and you could be charged for anything over four hours, and that you had exceeded your four-hour threshold. She further indicated that you had been advised of this requirement by letter sent to you in December 2017, and that "she was keeping track and [you] would have to pay."

You followed up by email on March 28, asking for a written reply to your public records request for the Resolution, and an explanation as to why you had to pay for the record. When you received no reply, you followed up by text message, asking when a written reply could be expected. Subsequently, Ms. Hendrix replied by text: "One way or the other it is a moot point. We spoke to the finance agent. There is not [*sic*] a 2017-1."

Your petition also describes your efforts to obtain a copy of the Resolution by contacting the city's "bonding agent" and the "assessment attorney." Those efforts will not be recounted here, other than to note that there appears to have been some disagreement as to whether the Resolution existed and who was the custodian of the document. You conclude by stating that "[a]fter all this I still do not have a copy of [the Resolution] and the City Administrator still insists your office has given her the authority to charge me because I along with other residents of Crofton have exceeded 4 hours accumulative time for our public records requests."

THE CITY'S RESPONSE

Ms. Hendrix informs us that you are the leader of a local political organization whose stated purpose is to "Save Crofton." She indicates that

members of [your] group have addressed the council, circulated petitions, held public meetings and appeared in the press. Several of them are now

running for public office. In other words, it is no secret who the members of Ms. Berendsen's group are. She is represented by legal counsel.

Ms. Hendrix indicates that the requests from your group, in addition to the one-on-one meetings with staff, became so disruptive that it required one full time staff person to deal with them. Ms. Hendrix states that she contacted our office to help deal with the situation, and that we shared that this "office sometimes combine[s] requests for information when it becomes apparent that those requests are in fact one information request."

Ms. Hendrix states her office has developed several policies to make records more accessible, e.g., uploading meeting packet materials to the Internet. She states that "[m]embers of the public can also submit a public information request for any documents that are not available online," and indicates that you submit "an additional request about once a month." She notes that many documents are provided to you free of charge. However,

[c]ertain documents still require staff to go back into the city archives to look for them. If an item is not readily available and it is deemed to be part of her political organization's information request to "Save Crofton" (and the four hour cumulative research hours have previously been provided) an estimate is given for future research time.

Ms. Hendrix states that she incorrectly believed a deposit could be requested for an estimate over \$20, but has recently read the statute and now knows the deposit amount is \$50. She states that "[w]e will no longer request deposits for research amounts for less than \$50." Ms. Hendrix further states:

After speaking with your office, we have joined many of Ms. Berendsen's group's requests into one large public records request, because her group is seeking the information with the same general intent, that is to be used as part of the political organization's effort to "Save Crofton."

To not do so, Ms. Hendrix explains, would result in your group continuing to have a disruptive effect on city operations. This effect was not only difficult for staff to manage, but resulted in complaints from other citizens, who "were concerned about increased loitering and the possible waste of public resources."

With respect to the Resolution, Ms. Hendrix states her office has had many conversations with you and group members over this item. She indicated that the financing agent noted in the 2017 file that no resolution was necessary since one had been passed in 2015. However, the reference to a 2017 resolution was "accidentally" included in "subsequent filing paperwork." Beyond the text message, Ms. Hendrix indicates that she addressed the issue in several other ways, including correcting the applicable paperwork, which was presented to the city council at its meeting on April 11,

2018. She states that “[a]s far as I knew, [you] had accepted the explanation that Street Improvement District 2017-1 did not exist.”

DISCUSSION

The Nebraska Public Records Statutes 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 of those records, and to obtain copies of records in certain circumstances. Under § 84-712(4), interested persons seeking access to or copies of a particular public record initiate that process by providing a “written request” to the custodian of that record for such access or copies. In connection with our enforcement authority under the NPRS, we have consistently taken the position for a number of years that those statutes do not require public agencies to answer questions or to create records which do not otherwise exist. Instead, those statutes focus on access to and copies of specific records.

We understand that there may have been some confusion with respect to obtaining the Resolution you seek in light of the published notice, which states that the document was filed with the city clerk and is available for review. It also appears that you may have received conflicting information about the document from the bonding agent and the assessment attorney. However, according to Ms. Hendrix, reference to a 2017 resolution was inadvertently included in “subsequent filing paperwork,” and she has represented to this office that the Resolution you seek *does not exist*. And, as noted above, there is nothing in the NPRS that requires a public body to create a document to fulfill a request made under § 84-712. As a result, you have not been denied access to public records and no violation of the NPRS occurred under these circumstances.

We will now address Ms. Hendrix’s policy to charge you (and your associates) for producing public records without first discounting costs associated with the first four hours of labor. As you know, Neb. Rev. Stat. § 84-712 of the NPRS authorizes public bodies to charge for producing public records. There are two components to this charge. The first is the “actual added cost” of making the record available.² The second component relates

² In this regard, Neb. Rev. Stat. § 84-712(3)(b) (2014) provides:

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

to the labor expended by public officials and employees to make public records available. The particular statute at issue, § 84-712(3)(c), provides in pertinent part:

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.

This subsection indicates that a special service charge may be assessed *only* after the public officers or employees responding to a public records request have exceeded four cumulative hours of labor (searching, identifying, redacting and copying). This subsection applies for *each* request received by a public body. There is nothing in § 84-712 or anywhere else in the NPRS that would allow a public body to begin charging a special service charge based on an individual's or group of individuals' *previous* records requests. This construction of the statute is erroneous.

Also, to the extent Ms. Hendrix believes this office sanctioned this policy, it may have been in the context of our suggesting it was acceptable to aggregate multiple requests received from a single requester in a single day. Our notes indicate that when the undersigned spoke to Ms. Hendrix on August 23, 2017, public records were explained *generally* and that we directed her to § 84-712 on the Nebraska Legislature's website. Any advice offered would not have included our approval to disregard state law based on the fact that certain requesters share a common purpose, e.g., "Save Crofton."

Consequently, we will direct Ms. Hendrix, by sending a copy of this disposition letter to her, that her current policy must cease immediately. We would also strongly suggest that Ms. Hendrix thoroughly review Neb. Rev. Stat. §§ 84-712 to 84-712.09 to ensure compliance with those statutes in the future.

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.

Pamela S. Berendsen
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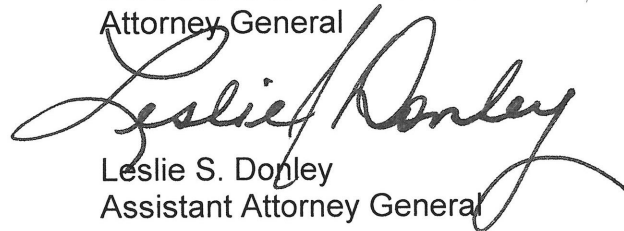
CONCLUSION

We conclude that you have not been denied access to public records by the City of Crofton because the record at issue does not exist, and there is no obligation on the part of the City to create a record for you. In addition, Ms. Hendrix is directed to cease charging a special service charge on every public records request that she handles unless at least four cumulative hours of labor is expended on producing the requested records.

If you disagree with the analysis we have set out above, you may wish to contact your private attorney to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

A handwritten signature in black ink, appearing to read "Leslie S. Donley", written over the typed name and title of the Assistant Attorney General.

Leslie S. Donley
Assistant Attorney General

c: Charlie G. Hendrix

49-2002-29