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May 23, 2022

Via email at [REDACTED]
Susan Bliss
18120 S. 228th Street
Gretna, NE 68028

RE: *File No. 22-R-121; Secretary of State; Susan Bliss, Petitioner*

Dear Ms. Bliss:

This letter is in response to your correspondence emailed to our office on May 6, 2022, in which you requested a review of a public records matter pending with the Secretary of State's Office. We construed your request to be a petition under Neb. Reb. Stat. § 84-712.03 of the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020, Supp. 2021). Upon receipt of your petition, we contacted Chief Deputy Colleen Byelick, the official handling your public records request, and requested all documentation pertaining to your request. Ms. Byelick provided us those materials on May 9. We have now concluded our review and our findings in this matter are set out below.

RELEVANT FACTS

On February 14, 2022, you emailed a public records request to officials at the Secretary of State's office, as well as a number of state senators, requesting the following:

A digital copy of all instructor training materials used to instruct county election officials in how to legally and efficiently conduct their election and how to use their ES&S election equipment in that process. Instruction materials should cover (but may not):

- How to verify voter eligibility
- What the process is if the voter is an alien and should not vote
- How to verify signatures
- How to process absentee/mail-in ballot requests (sending and receiving)

- What to do with multiple ballot requests from the same person (and how to preserve all requests).
- What happens with the above information when they are put on a list for multiple requested ballots
- how to process drop-box ballots and timeframes for collecting them by drop box and who picks them up and how they are locked after final pick up.
- how to process in-person ballots
- how to process provisional ballots
- how to process late ballots
- how to make sure a given ballot isn't a counterfeit ballot (printed illegally)
- how to prevent ballot stuffing/harvesting
- how to set up, test and operate the machines
- how to install software updates to the machines
- how to prevent hacking
- how to ensure the machines aren't connected to the internet
- how to run ballot test batches
- how to tabulate actual/live ballots
- how to provide checks and balances in tabulation (in order to avoid the accusation of feeding through some ballots more than once and others not at all)
- how to verify the final live machine count
- how to transmit results and how to verify accurate transmission
- how to adjudicate/resolve an unreadable/unfeedable ballot
- how to print a BOD ballot
- How to successfully terminate Election Day...that is, how to properly preserve all machine data, tabulation results, ballots, etc.
- Please include a digital copy all instructor presentation slides, all "student" handouts (including manuals) provided to officials to assist them in conducting a smooth operation on Election Day as well as a link to a video recording of a training session, if such a recording exists.

The list above is not exclusive. If anything else is covered in your training presentations that I did not list, please include that.

You indicated that the NPRS “allows four business days to respond.”

Ms. Byelick responded to your request on February 18. In accordance with § 84-712(4), she advised that the estimated cost to provide you responsive records would be, at a minimum, \$210.00 (six hours at \$35/hour), and that the earliest practicable date in which to fulfill your request would be April 18. She indicated that under § 84-712(3)(f), her office was requiring a deposit to fulfill your request. Ms. Byelick further advised you of the opportunity to modify or prioritize the items in your request.

Ms. Byelick subsequently emailed you on April 18, stating that “[d]ue to both the broad nature and extensiveness of your request and the current workload of our office, we are not able to fulfill your request by April 18, 2022. We now estimate that the earliest practicable date for fulfilling your request is May 16, 2022.” You responded on April 21, stating: “I am extremely disappointed and upset by your response and will be escalating this issue.”

You indicate in your petition that you are irritated to no end that the Secretary of State’s Office cashed your check on March 1, and that you “still have no goods or services for the money” sixty-six days later. You further indicate that you told Ms. Byelick on April 21 that you “would escalate this request” and “gave her time to respond appropriately.” You state that you heard nothing until you received an email from a friend that included a letter from this office denying another individual’s attempt to file a petition pertaining to your records request.

It is our understanding that Ms. Byelick mailed a CD containing responsive records to you on May 16.

ANALYSIS

Prior to 2000, there was no express right under the NPRS to obtain copies of public records. That situation changed with the passage of 2000 Neb. Laws LB 628. This bill added language to § 84-712, setting out, among other things, a new process to obtain copies of public records:

(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, 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.¹

¹ Section 84-712(4) was amended in 2013 to require the custodian to provide the requester with an estimate of the expected cost of the copies in addition to one of the three things enumerated, i.e., access to or copies of the requested records, denial of the request citing the legal basis to do so, or delay accompanied with written explanation. Once the custodian responds, the requester has ten business days to review the estimate 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

2000 Neb. Laws LB 628, § 1 (emphasis added).

As noted above, when a delay is necessary “due to the significant difficulty or the extensiveness of the request,” the explanation of delay must include the earliest practicable date for fulfilling the records request. In the case of a voluminous records request, the legislative history of LB 628 makes it clear that the custodian of the records may take whatever time is needed under the circumstances to prepare copies of the records at issue. As stated by Senator Bruning, one of the co-sponsors of LB 628:

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

Floor Debate on LB 628, 96th Neb. Leg., 2nd Sess. 11212-11213 (March 22, 2000) (Statement of Sen. Bruning). In this respect, Senator Brashear, the bill's other co-sponsor, stated:

Yes, I certainly concur in Senator Bruning's characterization and I would seek to explain the reasoning because I think it's the balance that has been built into the bill by all of the people who have participated and have made it a better bill by their participation. . . . By contemplating that the public record will be the public record and it will always be available to the public, but by saying that the production of the public record or the copies of the public record has to be in a reasonable and orderly way, you get the time that you need in order to do it, as the custodian of the record is then constituted, meaning in terms of facilities, in terms of equipment, in terms of personnel, that they are not going to abandon all of their other public works in order to accommodate this request, and that the custodian, under the

within ten business days, the custodian has no legal obligation to fulfill the request. 2013 Neb. Laws LB 363, § 1.

provisions of this bill, can have that adequate time to respond, we give the custodian of the public record leverage, as I call it.

Id. at 11213-11214 (Statement of Sen. Brashear).

You made your request on February 14. Ms. Byelick timely responded to your request on February 18, and estimated that April 18 would be the earliest practicable date in which to fulfill your request. This date was subsequently moved to May 16. Responsive records were mailed to you on this date.

Upon review, there is no question that your request was extensive, containing twenty-five subsets of requested records. In addition, this office is aware of the volume of public records requests being handled by the Secretary of State's Office during this time frame, and that your request was essentially the same request submitted to the Secretary of State's Office by four other individuals.² We further note that your request came at a time when the Secretary of State elections staff was busy preparing for the state primary election on May 10.

The legislative history set out above indicates that public bodies must be given adequate time to respond to a request for public records, taking into account available facilities, equipment, and personnel. Staff is not required to abandon their other public duties to respond to a request. Ms. Byelick responded to your public records request within four business days in compliance with § 84-712(4). The delay in fulfilling the request was due to the extensiveness of the request and the current workload of staff. There is nothing that prohibits a public official from extending the date in those instances when the "earliest practicable date" does not allow adequate time to produce the requested records. Thus, in our view, Ms. Byelick fully complied with the requirements of the NPRS in handling your request.


² See, e.g., Disposition in *File No. 22-R-107; Secretary of State; Robert J. Borer, Petitioner* (February 22, 2022), accessible at <https://ago.nebraska.gov/disposition-letters>.

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Since we have identified no violations of the NPRS with respect to this matter, no further action by this office is necessary and we are closing this file. If you disagree with our analysis, you may wish to discuss this matter with your private attorney to determine what, if any, additional remedies might be available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Colleen Byelick (via email only)

49-2946-30