



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

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**MIKE HILGERS**  
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November 7, 2023

Via email at [REDACTED]  
Robert J. Borer  
[REDACTED]  
[REDACTED]

RE: *Public Record Matter Involving the Lancaster County Election Commissioner*  
Our File No. 20231169

Dear Mr. Borer:

This letter is in response to the petition you emailed to our office on October 21, 2023, which we received on October 23.<sup>1</sup> You are challenging the estimates provided to you by Todd Wiltgen, Lancaster County Election Commissioner, relating to two public records requests submitted to his office on October 8 and 16, 2023. We considered your petition under the provisions of the Nebraska Public Records Statutes (NPRS), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2022). Our findings in this matter are set forth below.

### **RELEVANT FACTS**

On October 8, 2023, you emailed Mr. Wiltgen requesting the following records:

[A] digital copy of all email correspondence coming into and going out of the Lancaster County election office since the beginning of March of this year that contains the following words/phrases:

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<sup>1</sup> For your information, the Attorney General now has a Public Records Petition Form for use by Nebraska citizens and other interested persons on our Open Government webpage.

disinformation  
library  
libraries  
drop boxes

You amended your request the next day, adding “dropbox,” “drop box,” and “dropboxes” to the requested search terms. Mr. Wiltgen timely responded to your request on October 13, stating that “[a]ll communications, including email, are searched and identified through the City/County Information Services (IS) Department, which charges \$107 per hour.” Mr. Wiltgen indicated that the IS Department estimated the email search would take 12 hours for a total cost of \$1,284. He requested a deposit in this amount pursuant to § 84-712(3)(f) and advised you of your options under § 84-712(4).

Upon receipt of Mr. Wiltgen’s response, you requested that he “[p]lease inform Information Services that they are obligated to provide four free cumulative hours in response to my request, by law,” citing § 84-712(3)(c). You then revised your request as follows:

I am now asking for a digital copy of all email correspondence between you (TWiltgen@lancaster.ne.gov—or whatever county election office address you use to communicate with Bena by email from your end) and Wayne Bena (wayne.bena@nebraska.gov—or whatever official office address you use to communicate with him by email on his end), beginning with the date of July 17th, 2023 and ending with whatever date brings them to four cumulative hours of work responding to my request—leaving room, of course, for sending me digital copies of the correspondence found.

By letter dated October 20, Mr. Wiltgen informed you that the IS Department’s estimate to perform the email search was three hours for a total cost of \$321. He requested a deposit in this amount pursuant to § 84-712(3)(f) and advised you of your options under § 84-712(4).

In your petition, you indicate that you have requested a “simple email search” between Mr. Wiltgen and Mr. Bena. You allege that “Todd Wiltgen refuses to abide by the ‘first four cumulative hours’ provision of NRS 84-712(3)(c).”

## **DISCUSSION**

The basic rule for open public records in Nebraska is found at § 84-712. That statute provides:

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.

Neb. Rev. Stat. § 84-712(1) (2014) (emphasis added). The allowable costs of making copies available are set out in two separate provisions in § 84-712(3). Those provisions state:

(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.

Neb. Rev. Stat. § 84-712(3)(b) and (c) (2014).

Subsection (3)(b) generally provides that a records custodian cannot “exceed the actual added cost of making the copies available.” Under this subsection, tangible expenses like paper, toner, computer run time, and IT services may be assessed. Subsection (3)(c) authorizes a “special service charge” *only* after the public officers or employees responding to a public records request have exceeded “four cumulative hours of searching, identifying, physically redacting, or copying.” This subsection applies to the *labor* expended to make copies of records available, acknowledging that a request requiring over four hours of labor “may cause some delay or disruption of the other responsibilities of the custodian’s office . . . .”

In the present case, the estimates provided to you by Mr. Wiltgen are estimates from the IS Department to conduct email searches. These costs are expressly authorized under § 84-712(3)(b)(iii) pertaining to the production of electronic data. Contrary to your assertion, the four-hour threshold mandated in (3)(c) does not apply to the various allowable costs enumerated in (3)(b), including the time estimated by the IS Department to conduct an email search. Consequently, we conclude that the estimates provided to you in response to your requests are appropriate.

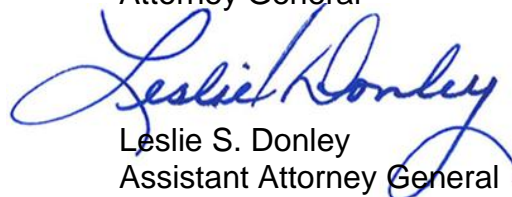
### CONCLUSION

Your petition contested whether the four-hour free provision in § 84-712(3)(c) was applicable to the email search estimates. For the reasons stated above, the provision does not apply, and we find that the cost estimates provided to you by Mr. Wiltgen comport with § 84-712(3)(b). Finally, since your petition only challenged the applicability of the four-hour free provision, we express no view on the reasonable of the charges.

If you disagree with our conclusion, 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 NPRS.

Sincerely,

MIKE HILGERS  
Attorney General



Leslie S. Donley  
Assistant Attorney General

c: Todd Wiltgen (via email only)