



STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

MIKE HILGERS
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

April 4, 2024

Via email at [REDACTED]
Jocelyn J. Brasher

RE: *Public Record Matters Involving the Dodge County Attorney and the Dodge County Board of Supervisors*
Consolidated File Nos. 20241057 and 20241058

Dear Ms. Brasher:

This letter is in response to the public records petitions you submitted to this office on March 20, 2024. You have requested our assistance in obtaining certain public records from the Dodge County Attorney, Pamela L. Hopkins (File No. 20241057), and the Dodge County Board of Supervisors (Board) and Ms. Hopkins (File No. 20241058). At our request, Ms. Hopkins provided us responses to your petitions on April 1 and April 3. We considered your petitions and Ms. Hopkins' responses in accordance with the Nebraska Public Records Statutes (NPRS), Neb. Rev. Stat. §§ 84-712 to 84-712.09 (2014, Cum. Supp. 2022), amended 2024 Neb. Laws LB 43. Our findings in this matter are set forth below.

BACKGROUND

Your petitions pertain to (1) a public record request you emailed to Ms. Hopkins on March 4, 2024, and (2) a public record request emailed to Ms. Hopkins and Bob Missel, Board chairperson, on March 17, 2024. Your requests, Ms. Hopkins' responses to your requests, and her responses to this office, are summarized below.

File No. 20241057

Your March 4 request sought the following records:

1. All record requests made to the Dodge County Attorney's Office *whether formal or informal* from January 1, 2023 through the date of this request (3.4.2024) -- please include the date of the request made to the the [sic] Dodge County

- Attorney's Office if it is not clear from the request itself (i.e. a dated email or letter).
2. All responses (including if additional time was need [*sic*] or the response was a denial) to any such record requests identified in request 1, above -- please include the date of the response by the Dodge County Attorney's Office if it is not clear from the response itself (i.e. a dated email or letter).
 3. If a record request identified in 1, above, was complied with but no "response" exists, please state the date the record request was fulfilled by the Dodge County Attorney's Office.¹

(Emphasis added.) Your request clarified that you were not seeking any records that may have been produced, only "the response itself – letter, email, etc."

Ms. Hopkins timely responded to your request on March 8. She indicated that, for a variety of reasons including the extensiveness of the request, "the earliest practicable date the Dodge County Attorney will be able to provide a time and cost estimate, if necessary, or a response to your request is 90 days." She gave you the option to modify or prioritize the items in your request, which you did on March 10. Your priority request sought all denial letters for the timeframe in the original request, and all public records requests and responses, and the dates of such correspondence, for the month of January 2023. Your March 10 email also challenged the ninety-day delay as excessive and noted Ms. Hopkins' failure to provide a cost estimate.

In her April 3 response to this office, Ms. Hopkins states that her office receives and responds to record requests in a variety of ways, including by email, telephone, in person, at the public window, by casual interactions with attorneys and staff, in motion practice, by court order, through the office's case management system, through a third-party portal link maintained by other agencies, and by the victim advocate. She indicates that "[r]ecords are routinely requested as part of the day-to-day prosecutorial and litigation functions of this office." Ms. Hopkins further states that "[f]ormal public records requests that are submitted in writing are currently maintained in a separate electronic file." Requests and responses for January 2023 "would be located in individual paper files" and "[i]t is unclear how many paper files were open in January 2023." Electronic records are "extremely limited" and there may be some email requests and responses prior to the office's transition to digital records in October 2023.

¹ We note that for each item in your request you asked Ms. Hopkins to provide the date of the request or response if not clear from the document or the date when a records request was fulfilled if no "response" existed. This office has taken the position that § 84-712 does not require a public agency to review documents and create abstracts or other lists, to answer questions or to create documents which do not otherwise exist. Op. Att'y Gen. No. 94092 (November 22, 1994); Op. Att'y Gen. No. 94035 (May 11, 1994); Op. Att'y Gen. No. 87104 (October 27, 1987). Thus, Ms. Hopkins is under no obligation under § 84-712 to provide dates as stated in your request.

Ms. Hopkins indicates that every email sent or received by her office and every paper file maintained will need to be reviewed to order to respond to your request. Once responsive records are identified, an analysis as to whether the request or response is a public record must be made. If the analysis indicates that the document is a public record, further review is necessary to determine whether it may be withheld under § 84-712.05 or another statute, or redacted in such a manner to allow disclosure.

Ms. Hopkins further indicates that her “office is making good faith efforts to comply with” your request, by engaging the third-party IT company and inquiring about hiring temporary staff since current staffing is inadequate to undertake such a review. With respect to an estimate, Ms. Hopkins indicates that one “cannot be determined until there is some estimate of the number of records required to be disclosed.” She states that limiting your request to letters of denial would require the same review discussed above, and that “[a]ll denials of record requests are not necessarily public records requiring disclosure to [you].” Your request to prioritize public records requests for January 2023 would also require the same review. Ms. Hopkins states that “[a]s the ‘prioritization’ of the request would not likely have a significant impact on analyzing time and costs associated with the original request, the office did not further respond.” Finally, Ms. Hopkins asserts that responding to a records request does not require an official to stop performing their regular duties, and that “any suggestion of an estimated time and cost at this time would be pure speculation.”

File No. 20241058

On March 17, you requested a copy of a letter sent to Board member(s) “by the Fremont Police Department, and/or its representatives, dated this year,” which was also sent to Ms. Hopkins, either directly or as a “cc.” Ms. Hopkins responded on behalf of the Board and her office on March 19, characterizing the request as seeking “correspondence shared between a county board member and the County Attorney’s office that may have been discussed during a meeting of the county attorney and her deputies.” She asserted that such discussion would be attorney work product. Ms. Hopkins denied your request “[w]ithout acknowledging the existence of the record you claim to describe” on behalf of both entities based on the following: (1) the requested record is not a public record; (2) § 7-105(4); (3) Nebraska Supreme Court rules governing attorneys and the practice of law; and (4) attorney-client privilege under “§ 27-509 et seq.”²

In her April 1 response to this office, Ms. Hopkins informs us that the record you requested does not exist. However, she believes you are referencing one email sent to various “Board members by a police officer from the officer’s personal email.” Ms. Hopkins represents that “the email is from a private citizen expressing his individual

² For the record, the privilege in § 27-509 pertains to state secrets, not attorney-client communications.

opinions about this office's handling of various cases" and "references specific information related to some ongoing investigations and pending prosecutions, as well as often inaccurate statements about evidence related to closed investigations." Based on the foregoing, Ms. Hopkins is withholding the email under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(5).

DISCUSSION

We will begin by stating basic concepts of the NPRS. Neb. Rev. Stat. § 84-712(1) grants Nebraska citizens and other interested persons access to public records "[e]xcept as otherwise expressly provided by statute" "Public records" are defined as "all records and documents, regardless of physical form, of or belonging to this state" and any other governmental entity "[e]xcept when any other statute expressly provides that particular information or records shall not be made public" Neb. Rev. Stat. § 84-712.01(1) (2014). Thus, every record of or belonging to a governmental body in Nebraska is a public record except when a statute provides otherwise. Public bodies, at their discretion, may withhold public records which fall within the categories listed in Neb. Rev. Stat. § 84-712.05 "unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties"

The process to obtain copies of public records is set out in Neb. Rev. Stat. § 84-712(4), which states, in part:

(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, an estimate of the expected cost of the copies and 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.

(Emphasis added.) 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. The statute also requires the custodian to provide an estimate of costs to provide the requested records.

Neb. Rev. Stat. § 84-712.04 (2014) governs the process when a public body denies a request for public records:

- (1) Any person denied any rights granted by sections 84-712 to 84-712.03 shall receive in written form from the public body which denied the request for records at least the following information:
 - (a) A description of the contents of the records withheld and a statement of the specific reasons for the denial, correlating specific portions of the records to specific reasons for the denial, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial;
 - (b) The name of the public official or employee responsible for the decision to deny the request; and
 - (c) Notification to the requester of any administrative or judicial right of review under section 84-712.03.
- (2) *Each public body shall maintain a file of all letters of denial of requests for records. This file shall be made available to any person on request.*

(Emphasis added.)

Upon review of the record in File No. 20241057, we find that Ms. Hopkins failed to comply with § 84-712(1) by not providing a cost estimate to you in her March 8 response. In addition, Ms. Hopkins failed to comply with § 84-712.04(2) by not having the letters of denial readily available for inspection. We take no issue with the ninety-day delay since public officials are not required to abandon their other public duties to respond to a request, and must be given adequate time to respond to a request for public records, taking into account available facilities, equipment, and personnel.³

Ms. Hopkins represents that her office maintains “[f]ormal public records requests” “in a separate electronic file.” We are unaware of any statute that would make a public record request or a public body’s denial letter confidential or any exception that would provide a basis to withhold such documentation. As discussed above, § 84-712.04(2)

³ See Floor Debate on LB 628, 96th Neb. Leg., 2nd Sess. 11213-11214 (March 22, 2000) (Statement of Sen. Brashear):

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

requires letters of denial be made available for public inspection. Thus, we see no reason why the contents of this file could not be produced to you immediately.

Less clear is the need to search thousands of emails and paper files to locate other public records requests. To us, there is no such thing as an “informal” request. Section 84-712(4) requires the requester to submit a request for public records in writing to the records custodian. To the extent the Dodge County Attorney’s Office is providing records based on verbal requests, such a request does not technically comply with the statute. Also, we do not believe that record requests and responses made “in motion practice” and “by court order” are records requests contemplated by the NPRS. Therefore, we will leave it up to you to decide whether you want the Dodge County Attorney’s Office to conduct a search as outlined above. If you do wish to proceed, we will ask that Ms. Hopkins provide you an estimate of costs pursuant to § 84-712(4). We will leave this file open pending receipt of your response and resolution of this matter.

The last issue to address is the withholding of an email purportedly responsive to your March 17 request under the exception in Neb. Rev. Stat. § 84-712.05(5).⁴ This exception generally pertains to

Records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, when the records constitute a part of the examination, investigation, intelligence information, complaints or inquiries from residents of this state or other interested persons, informant identification, or strategic or tactical information used in law enforcement training, except that this subdivision shall not apply to records so developed or received

According to Ms. Hopkins, this email was sent by a *private citizen*, and concerns the Dodge County Attorney’s “handling of various cases.” Ms. Hopkins further informs us that the email contains specific information about ongoing investigations and prosecutions and thus falls under § 84-712.05(5). It appears to us that the email is a complaint from a resident or other interested person and on that basis falls within the scope of the exception. It is not an investigatory record *per se*. Although § 84-712.03 creates enforcement responsibilities for this office, there is no statutory mechanism for an *in camera* review of records by the Attorney General. Under § 84-712.03(2), that procedure is left for the courts. Consequently, we will rely on Ms. Hopkins’ representations that the email is a *complaint* sent to Board members concerning the Dodge County Attorney’s Office handling of certain cases.

⁴ Amended 2024 Neb. Laws. LB 43, § 11.

CONCLUSION

Based on the foregoing review, we conclude that the Dodge County Attorney failed to comply with Neb. Rev. Stat. §§ 84-712(4) and 84-712.04(2). Since it appears that “formal” public records requests are readily available in an electronic file, we will request that Ms. Hopkins make those records available to you no later than ten (10) days from the date of this letter. We will leave it to up to you to decide whether you would like her office to conduct a search for records request that may have been processed “informally.” As to the record requested in your March 17, 2024, request, we believe that the identified email is a complaint that may be withheld under the exception in § 84-712.05(5). Consequently, we are closing File No. 20241058. File No. 20241057 will remain open pending resolution of you March 4, 2024, records request.

Finally, if you disagree with our analysis, you may wish to consider the other remedies available to you under the NPRS.

Sincerely,

MIKE HILGERS
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Pamela L Hopkins (via email)

49-3517-30