



STATE OF NEBRASKA
Office of the Attorney General

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MIKE HILGERS
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

August 14, 2024

Via email at [REDACTED]
Erin Riddle

RE: *Public Records Matter Involving Omaha Public Schools*
Our File No. 20241152

Dear Ms. Riddle:

This letter is in response to your email sent to the undersigned on July 30, 2024, in which you requested our assistance concerning a public records request you submitted to Omaha Public Schools (OPS) on July 24, 2024. You allege that "[OPS] has chosen to obstruct perfectly legitimate FOIA requests I have made recently" and you attached an email thread between you and OPS Board Secretary Anne MacFarland to support your position. We accepted your email and attachment as a petition under § 84-712.03(1)(b) of the Nebraska Public Records Statutes (NPRS), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2022), amended 2024 Neb. Laws LB 43. Our findings in this matter are set forth below.

RELEVANT FACTS

Your public records request stated, in part:

Pursuant to the Nebraska Public Records Law (Neb. Rev. Stat. §84-712 et seq.), I am requesting access to and make copies of the following records:

1. All invoices, receipts, and other records of payments made to outside law firms, attorneys, or consultants in connection with public records requests submitted by Justin Riddle from January 1, 2021 to the present. This should include a breakdown of the specific services rendered, hours billed, and rates charged.

2. All correspondence (including emails, letters, memos, and notes) between or among OPS staff, board members, and external parties regarding the processing of, response to, or billing for public records requests submitted by Justin Riddle from January 1, 2021 to the present.
3. All records (including policies, procedures, guidelines, and training materials) setting forth OPS's standards and practices for determining fee assessments and waivers for public records requests, as well as for reviewing and redacting responsive documents, for the time period of January 1, 2021 to the present.
4. All records of time spent by OPS staff processing public records requests submitted by Justin Riddle from January 1, 2021 to the present, including timesheets, logs, or other documentation of hours worked and tasks performed.
5. All correspondence (including emails, letters, memos, and notes) between OPS and reporter Joe Ott regarding public records requests submitted by Justin Riddle or documents provided to Ott in response to such requests, from January 1, 2021 to the present.

You asked that the requested records be provided “in electronic format to the extent possible.” You requested an estimate in the event costs exceeded \$50. You also requested that OPS waive all fees since the disclosure of the requested information would be in the public interest and was not sought for commercial purposes. You further indicated that you would “come inspect [records] myself to save time and resources.”

Dr. MacFarland timely responded to your request on July 29. She indicated that OPS had no responsive records for numbers 1, 4, and 5,¹ and provided responsive records for number 3. With respect to number 2, Dr. MacFarland indicated that OPS had already expended six hours searching, identifying, and reviewing records, and estimated that approximately thirty-five more hours of searching, identifying and reviewing records would be necessary “to determine whether there is anything responsive.” At an hourly rate of \$20, she calculated the estimated cost at \$700. She estimated that it would take approximately three weeks from the date of your response to “to compile and review the information you have requested.” She further stated:

You have ten business days to review the estimated costs, including any special service charges, and request that we 1) fulfill your original request; 2) narrow, simplify, or prioritize the request; or 3) withdraw the request. If you do not

¹ According to the email thread, you had mistakenly requested records pertaining to “reporter Joe Ott” when you meant “Lt. Charles Ott.” Dr. MacFarland confirmed to you that OPS had no responsive records pertaining to “Lt. Charles Ott” on July 31.

respond within 10 business days, the district will not proceed with your request. If you choose to move forward with your original request, we will require a 50% deposit (\$350.00) toward the estimated cost prior to continuing with our search and review.

You responded to Dr. MacFarland the same day, stating that you would “come and look at what you have so far, before deciding whether or not I want you to continue searching.” You continued to exchange emails with Dr. MacFarland, insisting on inspecting records at the district office or, alternatively, having your husband Justin inspect the records.

On August 6, you emailed the undersigned seeking to “follow up” on your husband’s “previous outreach regarding the Nebraska Attorney General’s Office’s investigation into our ongoing public records dispute with Omaha Public Schools.”² Attached to this email was a continuation of the email thread between you and Dr. MacFarland which you provided the undersigned on July 30. You also attached an email you sent to Dr. MacFarland on August 5, in which you again asked to be allowed “to review the information already discovered in your first six hours of efforts,” among other things.

DISCUSSION

We will begin by stating the basic concepts of the NPRS. Neb. Rev. Stat. § 84-712(1) provides that

[e]xcept as otherwise expressly provided by statute, all residents 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.

The procedure to obtain 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

² For the record, except for the present matter, this office had no pending public records investigation against OPS.

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. The requester shall have ten business days to review the estimated costs, including any special service charge, 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 within ten business days, the custodian shall not proceed to fulfill the request.

(Emphasis added.) To be clear, when a delay is necessary “due to the significant difficulty or the extensiveness of the request,” the explanation of delay must include an estimate of costs to provide the requested records and the earliest practicable date for fulfilling the records request. Once received, the requester has ten business days to decide whether they want to proceed with the original request, narrow or simplify the request, or withdraw the request. The records custodian has no legal obligation to proceed in fulfilling the request if no response is received from the requester within ten business days.

Neb. Rev. Stat. § 84-712(3)(b), (c) and (d) set out the allowable costs public bodies may charge for making copies available. For Nebraska residents, subsections (b) and (c) apply, as follows:

(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) For residents of Nebraska, 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 eight 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 eight cumulative hours, since that large of 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 or any other person to review the requested public records seeking a legal basis to withhold the public records from the public. No special service charge or fee shall be charged for copies of blank forms or pages that have all meaningful information redacted.

Finally, pursuant to Neb. Rev. Stat. § 84-712(3)(g), the records custodian may require the requester to furnish a deposit if copies are estimated to cost more than fifty dollars.

The crux of your petition is that OPS refused your repeated requests to inspect records the district has preliminarily determined might be responsive. As noted above, you requested that Dr. MacFarland provide you “access to and make copies” of certain records. You asked that the requested records be provided to you “in electronic format to the extent possible.” You asked Dr. MacFarland to provide you an estimate before proceeding if costs exceeded \$50. Finally, you asked for a waiver of fees since “disclosure of the requested information is in the public interest” All of these elements taken together demonstrate that you were seeking *copies* of records. Thus, the provisions in § 84-712 relating to access, process, allowable charges, costs estimates and deposits apply.

Dr. MacFarland provided you an estimate representing the time necessary to fulfill your request. She noted in her July 29 response that “[t]he Nebraska Supreme Court has held that, [t]o the extent review is needed to ensure that the public record is responsive to the request or that portions of the record are not exempt from disclosure, the review is part of the “actual added cost used as the basis for the calculation of a fee for records.””³

³ See *Nebraska Journalism Trust v. Nebraska Dept. of Env't and Energy*, 316 Neb. 174, 193, 3 N.W.3d 361, 374 (2024).

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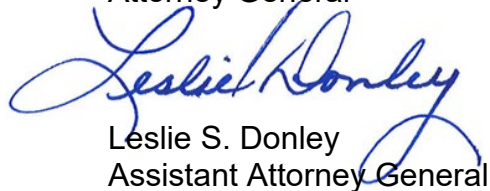
She further informed you the district would set up a time for you to review records in person once district officials “determined which documents are responsive to your request.”

Based on the foregoing, we believe that OPS’ handling of your records request, including the district’s request for a deposit, was appropriate. You have no right under the NPRS to see the results of the preliminary search. Neb. Rev. Stat. § 84-712(4) placed an obligation on you, upon receipt of the estimate, to inform the district how you would like to proceed, i.e., fulfill, modify or withdraw your request. You chose to file a petition with the Attorney General and continue your dispute with Dr. MacFarland while this matter was pending. Since your public records request technically expired on August 12, we will ask OPS, by sending a copy of this letter to OPS legal counsel David Kramer, to allow you an opportunity to respond to Dr. MacFarland’s estimate as set forth in her July 29 email.

Since no further action is necessary by this office, we are closing this file. If you disagree with the conclusion reached above, you are free to explore the other remedies available to you under the NPRS.

Sincerely,

MIKE HILGERS
Attorney General



Leslie S. Donley
Assistant Attorney General

c: David Kramer (via email only)

49-3605-31