



STATE OF NEBRASKA
Office of the Attorney General

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DOUGLAS J. PETERSON
ATTORNEY GENERAL

ELIZABETH O. GAU
ASSISTANT ATTORNEY GENERAL

February 28, 2022

Via email at [REDACTED]
Bob Heist

RE: *File No. 21-R-149; Nebraska Department of Correctional Services; Bob Heist, Petitioner*

Dear Mr. Heist:

This letter is in response to your petition received by this office on January 11, 2022, in which you requested that the Attorney General review the handling of a public records request you submitted to the Nebraska Department of Correctional Services ("NDCS") on December 6, 2021. In accordance with our normal procedure with respect to such complaints, we forwarded a copy of your complaint to NDCS for a response. We received a response from Public Records Manager, Kathleen Kokensparger, on behalf of NDCS on January 20, 2022. We have considered your petition and the response of NDCS in accordance with the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Supp. 2021). Our findings in this matter are set forth below.

FACTS

On December 6, 2021, you submitted the following records request to NDCS:

I would like to make a Public Records request for all memos that were sent out about the limiting of book orders, first to Amazon and then to H.R. Hamilton [sic]. I would like both memos to the incarcerated population and to staff.

NDCS responded on December 13, 2021 by providing two memos: one dated April 15, 2021 from Director Scott Frakes, which provided that "[i]nmates may only order books and receive books from Amazon," and another, also from Director Frakes, dated April 23, 2021, which provided that "[i]nmates may only order books and receive books from Edward R. Hamilton." The response from NDCS also stated:

It is possible that there are additional emailed documents responsive to this request. If you would like an email search conducted to determine if any such

records exist, there will be a cost to you in accordance with Neb. Rev. Stat. § 84-712(3)(b)(iii). The cost of running an email search is \$99.00/hour. We estimate that running this search would take up to 2 hours, for a cost to you of up to \$198.00. . . . If the email search returns results that NDCS staff cannot reasonably review in four hours or less, we will request your approval for the additional cost of staff time before we begin reviewing the results. The first four hours of review would be provided free of charge in accordance with Neb. Rev. Stat. § 84-712(3). Any additional NDCS staff hours would be charged at a rate of \$25.57/hour.

Believing that you had not previously received the memo related to Edward R. Hamilton, you responded on December 27, 2021 by limiting the scope of your request to “the memo or announcement where the policy was updated to just Edward R. Hamilton.” In your response, you also requested additional explanation of the estimated cost for running an email search. NDCS responded on December 28, 2021 and provided a second copy of the April 23, 2021 memo. NDCS explained that it “does not have the capabilities and resources within the agency to conduct searches of our email servers. As such, we rely on a third party to prepare the email search, run it, compile the results, and provide those results to us.”

You filed the instant complaint on January 11, 2022 to challenge the cost estimate provided by the NDCS for an email search. You allege that the NDCS has the capability to do the search. You write that “it appears they are merely attempting to obstruct and dissuade a legitimate Public Records request by claiming to need a contractor to do what any state employee could do in the allocated 4 hours.”

In its response to this office regarding your complaint, the NDCS explained that while it was not specifically aware of any additional responsive documents, it offered you the option to conduct an email search for the sake of completeness. The NDCS explained that, due to the distribution of staff resources, complex information technology tasks are conducted by the Office of the Chief Information Officer (“OCIO”). The OCIO is the centralized Nebraska agency that provides technology services to other state agencies. Over the last several years information technology personnel have been transferred from their individual state agencies to the OCIO in an effort to create efficiencies. State agencies that no longer employ their own information technology personnel send work requests to the OCIO and are billed accordingly. NDCS explained that, to complete a thorough search for responsive records, it would need to enlist the help of the OCIO to review all individual employee email accounts, including deleted emails and the accounts of former employees who were employed by NDCS during the relevant time period. The NDCS indicated that it made the cost estimate by consulting the OCIO rate schedule and applying its experience with the number of hours the OCIO has billed for similar searches in the past.

DISCUSSION

The NPRS 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 from those records, and to obtain copies of public records in certain circumstances. Pursuant to Neb. Rev. Stat. § 84-712(3)(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, . . . (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.

Section 84-712(3)(c) further provides:

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.

Section 84-712.03(1)(b) requires the Attorney General to determine, among other things, "whether the fees estimated or charged by the custodian are actual added costs or special service charges as provided under section 84-712."

In consultation with our office, the NDCS has agreed to conduct a less extensive, but more targeted, search for responsive documents. To conduct this search, the NDCS has agreed to identify those employees who are responsible for approving memos for distribution to the inmate population. The NDCS will ask this group of employees to provide any responsive documents which they possess. While not exhaustive, we believe that this modified search will efficiently identify whether responsive documents exist at a lower cost to you. The NDCS will apply the four free hours provided for in Neb. Rev. Stat. § 84-712(3)(c) toward these efforts. While it is not expected, should the search require

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more than four hours of personnel time, the NDCS will contact you with a new cost estimate. The NDCS has agreed to further respond regarding this search within 10 days of this letter. Accordingly, we will keep this file open until we have written confirmation from the parties that this matter has been fully resolved.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

A handwritten signature in blue ink that reads "Elizabeth Gau". The signature is written in a cursive, flowing style.

Elizabeth O. Gau
Assistant Attorney General

CC: Ryan Gilbride, Nebraska Department of Correctional Services