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**Office of the Attorney General**

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March 11, 2019

Via email at [cdunker@journalstar.com](mailto:cdunker@journalstar.com)

Chris Dunker

Lincoln Journal Star

926 P Street

Lincoln, NE 68508

RE: *File No. 19-R-109; University of Nebraska-Lincoln; Chris Dunker, Lincoln Journal Star, Petitioner*

Dear Mr. Dunker:

This letter is in response to your petition emailed to our office on February 22, 2019, in which you requested our determination as to “whether the University of Nebraska [“University”] properly assessed the actual added cost to search, collect, and review records for responsiveness as outlined in Neb. Rev. Stat. § 84-712(3)(c).” Upon receipt of your petition, we provided a copy to Erin E. Busch, Director University Records, and advised her of the opportunity to provide a response to this office. We received Ms. Busch’s response on March 1, 2019. We considered your petition and the University’s response in accordance with the provisions of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018) (“NPRS”). Our findings in this matter are set forth below.

## **BACKGROUND**

### Request and Responses

On February 4, 2019, you submitted a public records request to Ms. Busch seeking access to or copies of the following records:

1. Work schedule and calendar of activities for athletic director Bill Moos.
2. Time card or record of attendance for athletic director Bill Moos.
3. Pay stubs for athletic director Bill Moos.
4. Expense reports or receipts submitted by athletic director Bill Moos.
5. Emails sent or received by athletic director Bill Moos.

6. Emails sent or received by UNL Chancellor Ronnie Green, NU President Hank Bounds, or members of the NU Board of Regents referring to athletic director Bill Moos.

The time frame for your request was September 1, 2018 through February 4, 2019.

Ms. Busch timely responded to your request on February 8, indicating that the request could not be fulfilled within the four business days due to the extensiveness of your request. She stated that “[t]he University estimates that the cost to search, collect, review for responsiveness, make redactions, and produce the documents will be \$4,800 (100 hours X \$50 per hour; the first four hours free).” Ms. Busch further indicated that responsive records could be produced within 60-90 days upon receipt of the deposit amount.

You subsequently prioritized your request, seeking access to records pertaining to item numbers 1-4 in your request. Ms. Busch responded to your revised request on February 18, again indicating that, with respect to item numbers one and four, the University could not respond within the four business days because of the extensiveness of the request. Based on the revised request, Ms. Busch stated that the estimate “to search, collect, review for responsiveness, make redactions, and produce the documents will be \$1,205.21 (16 hours; the first four hours are free).” Ms. Busch also indicated that the University was denying you access to Mr. Moos’ leave records and pay stubs under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(7).

### Your Petition

Your petition challenges the estimated cost to process your records request. You state that a comparison of the two estimates, i.e., \$4,800 (96 hours @ \$50/hr.) and \$1,205.21 for 12 hours, “would mean the cost to complete the search had risen—without explanation—to \$100 per hour for 12 hours of work.” You state that “[i]t is reasonable to believe the University of Nebraska-Lincoln’s athletic department, a multi-million dollar enterprise, uses a software program to keep track of work schedules and activity calendars of its top leaders.” You contend that such programs often allow downloading and printing such records “with ease.” You further state that the University, as does the Journal Star, uses an expense reimbursement software that allows reports to be custom-generated for printing. You state that while it is unclear whether the University employed the “reasonably calculated actual added cost of the computer run time,” authorized in Neb. Rev. Stat. § 84-712(3)(b)(iii) in its calculation, you believe its application would “dramatically reduce the time required to complete the search for responsive records.”

With respect to copy fees, you refer us to Neb. Rev. Stat. § 84-712(3)(b), which allows the records custodian to “charge a fee for providing copies of such public record... which fee shall not exceed the actual added cost of making the copies available.” You also call our attention to Op. Att’y Gen. No. 01029 (August 2, 2001), in which the Attorney

General indicated that the fee for photocopies could “also include the actual cost of staff time of the public employees involved in that process . . . .” Op. at 1-2. However, the Attorney General also indicated “that the amount charged cannot exceed the amount of time reasonably needed to perform the task,” Op. at 2, and that in the event public officials wished to charge more than \$.10/page [the threshold amount for enforcement purposes at that time], officials may do so but must be able to justify the additional costs. Op. at 3. You argue that “[t]he doubling of the cost per hour without explanation raises doubts that the estimated costs reflect ‘a reasonable labor charge’ on the University’s behalf.”

### The University’s Response

According to Ms. Busch, the first estimate provided to you was made in error. Ms. Busch informs us that the estimate did not include the cost of staff time necessary to respond to item numbers one and four. She indicates that she needed to follow up with athletic department employees regarding these items and inadvertently did not include the costs for these items in the estimate. She clarifies that the first estimate related to producing email responsive to item numbers five and six of your request. With respect to the second estimate, Ms. Busch indicates that only a small percentage of that amount relates to searching and printing records. Rather, the majority of the time will be spent by several different athletic department officials reviewing and redacting records the University is permitted to withhold under the NPRS, i.e., personally identifiable student information and personal employee information (not relating to salary or routine directory information). Ms. Busch further indicates that “[t]he University allocated the four free hours to the individuals with the highest hourly rates,” which we note included Mr. Moos.

Finally, Ms. Busch informs us that after her office received your petition, a University official contacted you “and provided the hourly rates for the second cost estimate and an explanation regarding the mistake in the first cost estimate.” We understand that despite the University’s explanation for the discrepancy between the two estimates, you chose to pursue this matter with our office.

### **DISCUSSION**

Since it is clear that any “discrepancy” between the two estimates was the result of an error in the first estimate, we decline to discuss it further. Instead, we will focus only on whether the second estimate for records relating to the production of responsive records for item numbers one and four is appropriate under the fee provisions in Neb. Rev. Stat. § 84-712. These provisions were significantly amended with the enactment of LB 363 during the 2013 legislative session. 2013 Neb. Laws LB 363, § 1. Pursuant to LB 363, fees for copies of public records “shall not exceed the actual added cost of making the copies available.” Under § 84-712(3)(b), “actual added cost” is defined as follows:

[F]or 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.

Neb. Rev. Stat. § 84-712(3)(b) (2014). Further amendments to § 84-712(3) contained in LB 363 indicate that the actual added cost used as the basis for calculation of a fee for copies of public records cannot include any charge for the existing salary or pay obligation to public officers or public employees with respect to the first four cumulative hours of searching for, identifying, physically redacting, or copying public records responsive to a particular records request. A “special service charge” reflecting the labor cost for time required in excess of four cumulative hours to search for, identify, physically redact and copy records responsive to a particular records request can be imposed for providing copies of public records, since a large records request may delay or otherwise disrupt the operation of the custodian’s office. And in no event may the fee for copies of public records include any charge for the services of an attorney to review requested public records to determine if there is a legal basis to keep such records confidential. Neb. Rev. Stat. § 84-712(3)(c) (2014).

You have requested approximately five months of calendar entries and expense reports or receipts from the Nebraska athletic director. The estimate provided to you was based on sixteen hours, less four, of the labor cost of five employees in the athletic department to review and redact the records as permitted under the NPRS. The University discounted the highest paid employees (Mr. Moos and one other) in calculating the estimate. The estimate does not include any charge for the services of an attorney. And while the per-hour cost may appear high, it is the result of the records being sought and the individuals involved in the records search and production. For those reasons, we cannot say that the hourly rate is clearly excessive and we do not believe that the second estimate constitutes an improper charge under the NPRS.

Also, for your information, this office does not evaluate the software a public body or public official may possess or use in their records search. In this regard, this office has



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no authority to tell public officials in what matter public records must be searched and produced. Moreover, “[i]n the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed.” *Wolf v. Grubbs*, 17 Neb. App. 292, 309, 759 N.W.2d 499, 518 (Neb. Ct. App. 2009). You have presented no information that would cause us to believe that the second estimate, based on sixteen hours of labor, was anything other than appropriate based on the records sought.

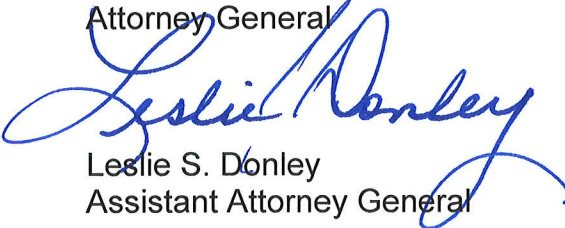
### CONCLUSION

Based on the foregoing, any discrepancy between the two estimates provided to you was the result of an error in the first estimate, which did not include any costs for the two items at issue in the second estimate. The second estimate appears, in all respects, to comport with the fee provisions in § 84-712. Since we believe that the University’s actions were appropriate under the circumstances presented, no further action is warranted and we are closing our file.

If you disagree with our analysis of this matter, you may wish to consult with your private attorney to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General



Leslie S. Donley  
Assistant Attorney General

c: Erin E. Busch (via email)

49-2171-29