

STATE OF NEBRASKA
Office of the Attorney General

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DOUGLAS J. PETERSON
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February 22, 2022

Via email at [REDACTED]
Robert J. Borer

RE: *File No. 22-R-107; Secretary of State; Robert J. Borer, Petitioner*

Dear Mr. Borer:

This letter is in response to your correspondence emailed to our office on February 7, 2022, in which you requested our opinion as to whether a response to a public records request provided to you by the Secretary of State's office constituted a "reasonable good faith effort." For your information, opinions of the Attorney General are prepared in response to a specific legal question from a state agency or official relating to the performance of official duties. The Attorney General may provide an opinion to state senators on a question relating to proposed or pending legislation, or when the opinion request "pertains directly to the performance of some function or duty by the Legislature itself." Op. Att'y Gen. No. 157 at 2 (Dec. 24, 1985). The Attorney General is also authorized to provide opinions to county attorneys when the question posed relates to "criminal matters and in matters relating to the public revenue." Neb. Rev. Stat. § 84-205(3) (2014). We have no statutory authority to provide legal opinions to private individuals or entities, and we do not do so. However, since this office has express enforcement authority over the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020, Supp. 2021), we considered the propriety of the response at issue. Our findings with respect to this matter are set forth below.

RELEVANT FACTS

On January 7, 2022, you emailed a public records request to officials at the Secretary of State's office, which stated as follows:

In the interests of holding public servants accountable, educating the public, and preserving our Constitutional Republic, We the People do hereby request, pursuant to Nebraska Public Records Law § 84-712 et seq., the following:

-A digital copy of all instructor training materials used to instruct county election officials in how to legally and efficiently conduct their election and how to use their ESS election equipment in that process. Instruction materials should cover:

- how to verify voter eligibility
- how to verify signatures
- how to process absentee ballot requests
- how to process mail-in ballots
- how to process drop-box ballots
- how to process in-person ballots
- how to process provisional ballots
- how to process late ballots
- how to prevent ballot stuffing/harvesting
- how to set up, test and operate the machines
- how to install software updates to the machines
- how to prevent hacking
- how to ensure the machines aren't connected to the internet
- how to run ballot test batches
- how to tabulate actual/live ballots
- how to verify the final live machine count
- how to transmit results
- how to adjudicate an unreadable/unfeedable ballot
- how to print a BOD ballot
- how to successfully terminate election day...that is, how to properly preserve all machine data, tabulation results, ballots, etc
- please include a digital copy all instructor presentation slides, all "student" handouts (including manuals) provided to officials to assist them in conducting a smooth operation on election day as well as a link to a video recording of a training session, if such a recording exists

The list above is not exclusive. If anything else is covered in your training presentations that I did not list, please include that.

Chief Deputy Colleen Byelick timely responded to your request on January 13. Ms. Byelick advised that your January 7 request was the twelfth request you had submitted to the Secretary of State's office since August 2021, and that many of your requests contained multiple items within a single email or submission. She indicated that her office had fulfilled your prior requests free of charge, but due to the number of requests her office was receiving, the extensiveness of your request, and the staffing and workload levels, her office was no longer able to provide you records "related to elections without assessing the statutorily allowable fees." Accordingly, she estimated that the cost to provide you responsive records would be, at a minimum, \$210.00 (six hours at \$35/hour). She clarified that this fee was a special service charge "for searching, identifying, redacting, or digitally copying records"; that the estimate did not include a cost for paper copies since records would be provided to you electronically; that the calculation did not include the first four cumulative hours of searching; and that it did "not include a charge for the services of an attorney to review the requested public records to determine if there is a legal basis to withhold the public records from the public." Ms. Byelick listed March 21, 2022, as the earliest practicable date in which to fulfill your request. She also advised you about the deposit requirement authorized in § 84-712(3)(f), and that under § 84-712(4), you had the opportunity to modify or prioritize the items in your request.

You question whether Ms. Byelick's response was a "reasonable good faith effort." You state that all you were asking for was "a copy of the set of training materials used by [an SOS official] in training election officials on how to use ES&S machines. The accompanying list was simply for rhetorical effect."

ANALYSIS

The NPRS govern access to and obtaining copies of public records in Nebraska. Generally, those statutes allow 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 records in certain circumstances. Under § 84-712(4), interested persons seeking access to or copies of a particular public record initiate that process by providing a written request to the custodian of that record. Once received, the custodian must provide the requester a written response no later than four business days after receipt. The response may take several forms, described in the statute as follows:

The custodian of such record shall provide to the requester . . . 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.

Neb. Rev. Stat. § 84-712(4) (2014). The fee provision applicable to your request is set out in § 84-712(3)(c), and provides that

[t]he 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)(c) (2014).

In her response, Ms. Byelick advised that due to the extensiveness of your request, it could not be completed within the four business days. She provided you an estimate of costs, the earliest practicable date to fulfill your request, and notification that you could modify or prioritize the items in your request. Ms. Byelick estimated that it would take six hours to complete your records request. The first four cumulative hours were not counted toward the estimate. No additional costs were assessed for paper copies since the records would be produced electronically. The estimate did not include a fee for the services of an attorney to find a legal basis to withhold the requested records. In our view, Ms. Byelick's response fully satisfied the requirements in § 84-712(4)(c), and the cost estimate to produce responsive records was neither excessive nor unreasonable in light of the items in your request.

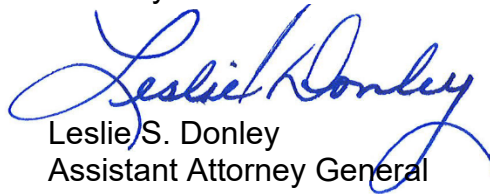
Your petition did not specify in what manner you found Ms. Byelick's response to be unreasonable or in bad faith. We assume you disagree with the fact that her office is now charging you to produce public records. As outlined above, public bodies in Nebraska are statutorily authorized to delay production of public records and to charge a fee to produce responsive records so long as the estimate does not exceed the actual added costs of making the records available. We find nothing in Ms. Byelick's response that would suggest that it was anything but a "reasonable good faith effort."

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Since no further action from this office is necessary, we are closing this file. If you disagree with the conclusion reached above, you may wish to review the other remedies available to you under Neb. Rev. Stat. § 84-712.03.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Colleen Byelick (via email only)

49-2880-30