



STATE OF NEBRASKA
Office of the Attorney General

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DOUGLAS J. PETERSON
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August 22, 2022

Via email at [REDACTED]
Paul Dietze

[REDACTED]

RE: *File No. 22-R-140; City of Hastings; Paul Dietze, Petitioner*

Dear Dr. Dietze:

This letter is in response to your petition received by this office on August 5, 2022, in which you requested the Attorney General's review of costs to produce certain public records estimated by the City of Hastings ("City"). In accordance with our normal practice, we forwarded a copy of your petition to City Attorney Clint Schukei and requested a response. We received Mr. Schukei's response on August 16. The undersigned also discussed this matter with Mr. Schukei on August 22. We considered your petition and the City's response in accordance with the provisions of the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020, Supp. 2021), amended 2022 Neb. Laws LB 876 and LB 1246. Our findings in this matter are set forth below.

FACTS

This matter concerns your three public records requests hand delivered to the City on June 23 and 30, 2022, summarized below:

June 23

1. "All email records with the name Paul Dietze, Dr. Dietze, PJ Dietze, Paul Dietz, Dietze, Dietz, Hastings Citizens with a Voice, within the email system of the City of Hastings," for the time period January 1, 2016 to June 23, 2022. This request was directed to "Administration/Info Tech."

2. "All emails between Joe Patterson and David Ptak¹ within the email system of the City of Hastings, Nebraska." The time frame for this request is January 1, 2018 to June 23, 2022. This request was also directed to "Administration/Info Tech."

June 30

3. "All Email records with the name Paul Dietze, Dr. Dietze, PJ Dietze, Dietz, Hastings Citizens with a Voice, within the email system of the City Hastings." The time frame for this request is January 1, 2016 to June 30, 2022. This request was directed to the "City Clerk/Info Technology." You included a USB thumb drive with this request "to load [records] on to minimize cost."

Mr. Schukei responded to your requests by letter dated June 29 and July 7, respectively. With respect to the June 23 requests, he informed you that preliminary results indicated that 9,062 emails may be responsive. Due to the extent of the search, he anticipated that costs would exceed \$1,000, and requested this amount prior to beginning the process. Mr. Schukei indicated that the City would document the time spent in fulfilling the requests and would either request additional funds once the costs exceeded \$1,000 or refund you any excess funds if costs were less than \$1,000. As to the June 30 request, Mr. Schukei indicated that 3,467 emails could be pertinent to your request. He requested the same amount with the same terms as your June 23 requests.

You state in your petition that "a charge of over \$1,000 for each request is excessive" and that you were not "asking for a paper copy."

By way of background, Mr. Schukei informs us that between March 2 and August 5, 2022, the City received forty-eight requests for public records, which was a significant increase compared to past experience. He states that a number of the requests were expansive in nature, resulting in tens of thousands of emails, many of which contained attachments. He further states that during this time frame, the City administrator, an administrative assistant, and the public information officer left City employment, and Mr. Schukei himself was unavailable to assist. A decision was made to retain a contractor (law firm) to assist with the larger requests to ensure a timely response to the public. The amounts cited in his correspondence were based on the firm's experience in reviewing an initial request involving 9,000 emails, many of which contained attachments. Mr. Schukei represents that City staff "have diligently sought to respond timely to the onslaught of public records requests that have been received. We believe that our response and actions have been compliant with both the spirit and directives of the public records laws in Nebraska."

¹ We understand that Joe Patterson was the former City administrator and David Ptak was the former City Attorney who succeeded Mr. Patterson.

DISCUSSION

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). With respect to the costs that may be charged to produce copies of public records, Neb. Rev. Stat. § 84-712(3) provides, in pertinent part:

(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) 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.

In addition, § 84-712(3)(f) allows public bodies to request a deposit prior to fulfilling a request if copies are estimated to be more than \$50.

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 services charges as provided under section 84-712." We have carefully considered the City's estimates provided to you in the context of the statutory provisions and the background set out above. The City argues that the retention of the law firm was necessary due to the number and extensiveness of the public records requests and the departure of City staff who would normally handle such requests. Mr. Schukei states emphatically that the City did not retain the firm for purposes of "seeking a legal basis to withhold the public records from the public." Rather, the firm's review was necessary "to ascertain that [documents] were pertinent to the request that was made and weren't prohibited from being disseminated to the public" While we recognize the distinction between seeking a legal basis to withhold records with identifying records that cannot be disseminated, we are concerned that the City's use of a law firm to fulfill records requests in this manner conflicts with § 84-712(3)(c).

Therefore, we have requested, and Mr. Schukei has agreed, to bring public records production back into the City's offices using only City staff. Accordingly, the City will be providing you revised estimates for your pending requests. These estimates will be based on the estimated number of hours it will take City employees, including Mr. Schukei, to search, identify, physically redact, and copy responsive records after the first four cumulative hours. The number of estimated hours may then be multiplied by the hourly rates plus benefits of the employees conducting the search and production. The estimate shall also include the earliest practicable date for fulfilling the requests. In this respect,

keep in mind that public bodies must be given adequate time to respond to a request for public records, taking into account available facilities, equipment, and personnel. Staff is not required to abandon their other public duties to respond to a request. There is also nothing that prohibits a public official from extending the date in those instances when the "earliest practicable date" does not allow adequate time to produce the requested records.²

Finally, as provided in § 84-712(4), and as indicated in Mr. Schukei's June 29 and July 7 letters, you always have the option to negotiate with the City to modify or prioritize the items in your request. Mr. Schukei represents to this office that the City is willing to work with you to provide you public records in a timely manner.

CONCLUSION

Since you will be receiving revised estimates from the City relating to your three requests, no further action by this office is warranted and we are closing this file. If you disagree with the resolution set out in this disposition, you may wish to consult with your private attorney to determine what, if any, additional remedies might be available to you under the NPRS.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Clint Schukei (via email only)

49-3015-30

² See File No. 22-R-121; Secretary of State; Susan Bliss, Petitioner, issued May 23, 2022.