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May 2, 2019

Stacy Heatherly
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RE: *File No. 19-MR-110; City of Fremont; Stacy Heatherly, Complainant*

This letter is in response to your correspondence in which you requested that this office investigate alleged violations by the City of Fremont ("City") and the Fremont City Council ("City Council") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2014, Cum. Supp. 2018) and the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2014, Cum. Supp. 2018) ("NPRS"). In accordance with our normal procedures, we requested a response from the City after we received your complaints. We subsequently received a response from Mayor Scott Getzschman and City Administrator Brian Newton. As an initial matter, upon receipt of your complaint, we reviewed that portion related to the NPRS and determined that your complaint concerned only the fee structure, that you had not been denied access to public records, and that in order to best respond to the entirety of your complaint, we would provide one response as to both your public record and open meeting complaints once our inquiry was complete. We have now had an opportunity to review your allegations and the response of the City in detail, and our conclusions are set out below.

FACTS

Our understanding of the facts in this matter is based upon your correspondence, along with the response from the City. You filed a number of complaints with this office, which we will consolidate in this disposition letter.

Open Meetings Act Complaint #1

Your first complaint is that members of the City Council were members of a committee formed to decide whether the City should sell property to the Dodge County Humane Society. The initial complaint made was that the Committee met without notice, agenda, and minutes. You also made an additional complaint that this Committee made decisions which were then voted upon by the City Council. We believe this complaint to be a duplicate of a complaint we previously disposed of in *File No. 18-M-139; City of*

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Fremont City Council and Fremont Planning Commission; Susan Jacobus, Complainant.
In its response to this office, the City confirmed the complaint was identical to the one filed by Ms. Jacobus.

Open Meetings Act Complaint #2

In your second complaint, you allege that the seating arrangements at City Council meetings violate the Open Meetings Act, as the city administrator sits next to the mayor and the two have conversations and pass notes during the meetings. The City asserts that it has not violated the Open Meetings Act as to this complaint, as there is no statute prohibiting such a seating arrangement.

Open Meetings Act Complaint #3

Your third Open Meetings Act complaint is that a Unified Development Code Committee (“Committee”) has been formed by the Mayor in violation of the Open Meetings Act. You allege that this committee “formed a quorum that included city council members and the Mayor . . . [and] a decision was made prior to bringing the item before city council and giving it an opportunity to be reviewed.”

The City has responded by informing us that the Committee was formed by the Mayor and consisted of the Mayor, the Planning Commission chair, the Assistant City Administrator, one member of the City Council and the Planning Director. The Committee met with City staff on several dates, but these meetings were not noticed to the public, no agendas were published, and no minutes were kept which are available to the public. The Committee reported its recommendations directly to the Mayor and the Planning Director. The proposed amendments to the Unified Development Code (“UDC”) were then placed on the agendas for the Planning Commission meetings for consideration. The Planning Commission considered and voted upon those proposed amendments, in open meetings, and forwarded any recommended amendments to the City Council for approval. The City Council then heard the proposed UDC amendments in public hearings and at three separate City Council meetings before approval.

Open Meetings Act Complaint #4

Your final Open Meetings Act complaint relates to the City’s fee structure related to requests for records under the NPRS. You allege that amendments to this fee structure were presented at a City Council meeting for which it was not on the agenda and that the fee structure was “decided before presented.”

The City has responded saying that the City staff reviewed a draft of the proposed amendments to the City’s Master Fee Schedule with the City Council during a study session held on July 31, 2018, without the fee schedule being on the agenda for that session. The City admits that this was a violation of the Open Meetings Act. However, the City continues by stating that the fee schedule was brought to the full City Council for

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consideration on three later dates: October 9, 2018, October 30, 2018, and November 13, 2018. This office also learned through a review of the minutes of these meetings that the fee schedule was also on the agenda for and discussed at the September 11, 2018 and September 25, 2018 City Council meetings. The City Council ultimately approved the fee schedule at its November 13, 2018 meeting.

NPRS Complaint

You have also filed a petition for review of the fee structure related to requests for public records under the NPRS. Despite several requests by us, you did not provide us with a copy of the public records request you made to the City. However, you did include a copy of the initial response of the City to your request, which included a quotation of a portion of your records request. It appears that on January 15, 2019, you requested records of the City for:

City Contract Date, Name, and internal Number for each HUD funded, sponsored, guaranteed or participated contract to which the City has been a party since January 1, 2013. Each HUD grant and grant approval since January 1, 2013.

The City responded on January 17, 2019 providing an estimate of the total charges for the records you requested of \$40.00 and stating that your request would be fulfilled within 17 business days, due to the extensiveness of the request. The City requested you make a deposit of the anticipated charge of \$40.00 before records would be provided to you, and informed you that if you instead wished to review the documents at the City offices, there would be no charge.

Following the City's initial response, on January 17, 2019, you then requested the records you sought be sent to you electronically. The City responded stating that the responsive documents totaled approximately 160 pages and that there would be a charge of \$.20 per page to provide records electronically, for a total of \$32.00. The City stated that there would not be additional staff time charged to you, as it would "take less than four cumulative hours to convert to pdf." You provided a copy of the City's "Public Records Fees" schedule which provided for a charge of \$.25 per page for copies of records and \$.20 per page for electronic records.

In relevant part, the City's Public Records Fee schedule as included in your petition, provided for the following fees:

Electronic records per page: \$.20
Records search fee minimum: \$5.00
Hourly charge after the first four (4) hours: Employee hourly plus 28%
After the first four (4) hours minimum: \$10.00
Facsimile transmission per page: \$1.00

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We requested the City explain its rationale for these fees in its response to this office. Our review of the remainder of the City's fees did not raise any questions under the NPRS as to the propriety of the fee. The City first informed us that it had updated the fee schedule since your public records request, and that some of the fees quoted above had changed. The fees related to the fulfillment of public records requests are currently listed as:

Electronic records per page: \$.25
Records Search (minimum) \$5.00
Records Search (more than 4 hrs.)(min \$10 per hour) or Hourly Rate + 28%
Facsimile transmission per page: \$1.00

The City states that that the fee for the electronic records, charged to you at \$.20 per page and now set at \$.25 per page "represents the City's actual cost [to] print the document so it can be reviewed by the City attorney for inclusion and/or redaction." As to the hourly charge of \$10 per hour after the first four hours, this "represent the actual hourly rate of the employee(s) conducting the search, after the first four hours, plus 28% for overheads (benefits and taxes). The minimum rate is \$10 per hour." The facsimile charge of \$1.00 per page "represents the cost of printing the document and the employee labor to send it." The City did not respond to our request as to the minimum \$5.00 fee for records search.

We will now address each of your complaints.

ANALYSIS

Open Meetings Act

Complaint #1

Your first complaint is that members of the City Council were members of a committee formed to decide whether the City should sell property to the Dodge County Humane Society. You complain that this committee failed to comply with the Open Meetings Act in several ways. As noted above, this complaint has previously been discussed at length by our office in *File No. 18-M-139; City of Fremont City Council and Fremont Planning Commission; Susan Jacobus, Complainant*, which can be found on our office's website at <https://ago.nebraska.gov/disposition-letters>. We determined that this committee was a subcommittee of the City Council and not subject to the Open Meetings Act. For our full analysis on this matter, please refer to our prior disposition letter.

Complaint #2

Your second complaint is that the City Council is violating the Open Meetings Act because the City Administrator and the Mayor sit next to each other at City Council meetings and converse and pass notes to each other during the meetings. You believe

this violates Neb. Rev. Stat. § 84-1408 which is the policy statement for the Open Meetings Act and states “the formation of public policy is public business and may not be conducted in secret.” The City Administrator is not a member of the City Council. The Mayor is an elected position, and while present at the City Council meetings, is not a member of the City Council. As neither of these individuals is a member of the public body, the Open Meetings Act does not apply to either. The Open Meetings Act also does not dictate seating arrangements at meetings of public bodies. There is no violation of the Open Meetings Act with respect to this complaint.

Complaint #3

Your third complaint is that the City’s UDC Committee violated the Open Meetings Act by not publicizing its meetings and holding open meetings. We must first determine whether this Committee is a public body which is subject to the Open Meetings Act.

Neb. Rev. Stat. § 84-1408 states that it is “the policy of this state that the formation of public policy is public business and may not be conducted in secret.” As a result, the Nebraska open meetings laws are a statutory commitment to openness in government. *Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002); *Steenblock v. Elkhorn Township Board*, 245 Neb. 722, 515 N.W.2d 128 (1994); *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984). Their purpose is to ensure that public policy is formulated at open meetings of the bodies to which the law is applicable. *Dossett v. First State Bank, Loomis, NE*, 261 Neb. 959, 627 N.W.2d 131 (2001); *Marks v. Judicial Nominating Commission for Judge of the County Court of the 20th Judicial District*, 236 Neb. 429, 461 N.W.2d 551 (1990); *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).

Neb. Rev. Stat. § 84-1409 (2014) defines “public body” for purposes for the Open Meetings Act. This definition, in relevant part, states:

(1)(a) Public body means (i) governing bodies of all political subdivisions of the State of Nebraska . . . (v) advisory committees of the bodies referred to in subdivisions (i), (ii), and (iii) of this subdivision . . . and

(b) Public body does not include (i) subcommittees of such bodies unless a quorum of the public body attends a subcommittee meeting or unless such subcommittees are holding hearings, making policy, or taking formal action on behalf of their parent body . . .

Thus, if the actions and organization of the Committee are consistent with any of these classifications, it is a public body, and the analysis moves to whether the Committee held meetings. If the Committee is not a public body, our analysis ends there, as meetings of a non-public body are not subject to the requirements of the Open Meetings Act.

The City Council and the Planning Commission here are the relevant bodies which each qualify as a "governing body of a political subdivision." The Committee cannot be a subcommittee, as it does not contain only members of the parent body, either the City Council or the Planning Commission. It is made up of members from various city departments and public bodies. Therefore, we must determine whether the Committee is an advisory committee of either of these bodies.

If the Committee is an advisory committee of the City Council or the Planning Commission, the Committee would be subject to the Open Meetings Act. Typically, advisory committees under this provision are made up, at least in part, of members who are not a part of the parent public body. The Committee here is made up of the Mayor, the Planning Commission chair, the Assistant City Administrator, one member of the City Council and the Planning Director. In addition, in order to be an advisory committee under this section of the Open Meetings Act, the Committee must have been formed in order to advise the parent body, here either the City Council or the Planning Commission. There is no evidence that the Committee advised the City Council or the Planning Commission. The City states that the Committee was formed to advise the Mayor and made its suggestions to the Mayor and the Planning Director. It was the Mayor who then made recommendations to the Planning Commission as to proposed amendments to the City's Unified Development Code.

This office has issued two opinions relating to advisory committees of public bodies which relate to the Committee here. The first, Op. Att'y Gen. No. 95014, dealt with a committee created by the mayor of Omaha. That committee did not contain any members of the city council, nor did it report to the city council; instead, the committee reported to the mayor. This office determined that the committee was not an "advisory committee" subject to the Open Meetings Act, but was serving in a management or administrative function. The second opinion, Op. Att'y Gen. No. 92020, analyzed whether a committee formed by the Chancellor of the University of Nebraska, which reported directly back to the Chancellor and the membership of which did not contain any of the Board of Regents, was an advisory committee. Again, that committee was determined to be an administrative body of the office of the Chancellor, and was not subject to the Open Meetings Act.

We believe these opinions to be directly relevant to the Committee at issue. The City states that the Committee was formed to advise the Mayor. We have no evidence that the Committee advised either the Planning Commission or the City Council. The Committee consisted of City staff and one member from two separate public bodies. Consequently, we believe this Committee to be an administrative body of the Mayor's office and not an advisory committee subject to the Open Meetings Act. There is no violation of the Open Meetings Act as to this complaint.

Complaint #4

Your final Open Meetings Act complaint concerns the City's Master Fee Schedule. You allege that proposed amendments to the fee structure were presented at a meeting without being on the agenda and were "decided before presented." The City admits that the proposed amendments to the fee schedule were initially presented during a "study session" held prior to the July 31, 2018 City Council meeting without properly being on the agenda. However, no action was taken at the July 31, 2018 meeting as to the fee schedule. Subsequently, the amendments to the fee schedule were discussed by the City Council at its meetings held on September 11, 2018, September 25, 2018, October 9, 2018, October 30, 2018 and November 13, 2018 after proper notice.

The Open Meetings Act provides:

Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the principal office of the public body during normal business hours. Agenda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting. Except for items of an emergency nature, the agenda shall not be altered later than (a) twenty-four hours before the scheduled commencement of the meeting or (b) forty-eight hours before the scheduled commencement of a meeting of a city council or village board scheduled outside the corporate limits of the municipality. The public body shall have the right to modify the agenda to include items of an emergency nature only at such public meeting.

Neb. Rev. Stat. § 84-1411(1). The City admits that the City Council violated the Open Meetings Act on July 31, 2018 by failing to list the fee schedule amendments on the agenda for the study session. However, while the Board violated the Open Meetings Act on that date, it subsequently held five open meetings in September, October, and November 2018 of the full City Council for which the Master Fee Schedule amendments were found on the agenda and were discussed in open session. The agendas and minutes of these meetings reflect that changes to the fee schedule were made during this time. At the fifth open meeting, a vote was taken in open session as to the amendments to the fee schedule. Thus, the City Council has cured its July 31, 2018 violation of the Open Meetings Act. *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979). Additionally, the City Council took no action which is void or voidable at its July 31, 2018 planning session. Consequently, this matter does not require further inquiry or action by this office.

You also allege that the Master Fee Schedule was “decided before presented” but have provided no evidence supporting this allegation. As the Master Fee Schedule was discussed at multiple open meetings before being voted upon by the City Council, the record does not support finding that a decision was made before it was presented for City Council approval. There is no Open Meetings Act violation as to this portion of your complaint.

Nebraska Public Records Statutes

Your public record petition relates to the costs charged by the City to produce records requested under the NPRS. Under Neb. Rev. Stat. § 84-712.03(2), this office is required to determine “whether the fees estimated or charged by the custodian are actual added costs or special service charges as provided under section 84-712.” Neb. Rev. Stat. § 84-712 provides what fees are appropriately charged by a custodian of public records.

(1) Except as otherwise expressly provided by statute, all citizens 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.

* * *

(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, (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.

Neb. Rev. Stat. § 84-712 (2014). This statute clearly states that fees for copies of public records “shall not exceed the actual added cost of making the copies available” and that labor may be charged at the “calculated labor cost” by the custodian. Our query to the City was how the costs for electronic records, records provided via facsimile, and the labor rates charged comported with these statutory requirements. We will address each of the fees in turn.

Electronic records

Your petition relates to the fees charged by the City for electronic records. At the time of your records request, the City charged you \$.20 per page for electronic records, for a total of \$32.00 for 160 pages. That rate is now \$.25 per page. You believe this to be impermissible under the NPRS and seek a refund from the City.

The City states that that the fee for the electronic records, charged to you at \$.20 per page and now set at \$.25 per page “represents the City’s actual cost [to] print the document so it can be reviewed by the City attorney for inclusion and/or redaction.” However, the NPRS clearly states that fees may not exceed the actual added costs of making them available. Had you sought printed copies of the documents, the City’s fee of \$.25 per page would be reasonable, as custodians are permitted to charge for the supplies necessary to produce those copies, including paper, toner, and equipment. Neb. Rev. Stat. § 84-712(3)(b)(i). However, the same is not true for electronic copies. When a member of the public requests electronic copies, there is no paper and toner associated with the production of the document.

The City stated justification for its per page electronic records charge, that it must print the document first so that it may be reviewed before production, is not a permissible charge as part of the actual added cost authorized by statute. Any cost associated with printing of a record which has been requested in electronic form by the requestor, during an internal review by the custodian, cannot be charged to the requestor. This would be

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analogous to charging the requestor \$.50 per page for a photocopied record: \$.25 for printing it internally for review and another \$.25 for printing it for production to the requestor.

If the custodian already has the document in electronic form, which does not appear to have been the case here, then the custodian may charge certain fees related to the production of the record, if any of those fees apply. The custodian may charge “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 requestor.” Neb. Rev. Stat. § 84-712(3)(b)(iii). These fees clearly do not include printing of the document for internal review.

For these reasons, we conclude the City’s \$.20 per page for providing you with electronic records, imposed to cover costs related to internal printing of the documents for review by City staff or attorneys, is not authorized by the NPRS. Similarly, the current \$.25 per page charge is also not in compliance with the NPRS.

Facsimile Transmission Fee

As part of our inquiry into your petition, we also asked the City to address how the charge of \$1.00 per page for providing records via facsimile represented the City’s actual costs for transmitting records in this manner. The City responded by stating that the \$1.00 per page charge “represents the cost of printing the document and the employee labor to send it.” However, employee labor charges may not be charged for the first four hours of “searching, identifying, physically redacting, or copying” records. Any inclusion of labor charges in a per-page charge for records is impermissible under the NPRS. It must be a separate charge made after the first four hours have been exhausted. Neb. Rev. Stat. § 84-712(3)(c). We understand that some documents, which are not already maintained in hard-copy form, may have to be printed in order to provide them via facsimile. However, the City has not demonstrated a need to charge more than what it charges for copies of records in order to do so. Additionally, records which are already maintained in hard-copy form can be directly faxed without having to change the form of the record from electronic to hard-copy. Therefore, absent further documentation from the City that its costs for providing records via facsimile include other actual costs, we believe that the \$1.00 per page charge by the City for providing records via facsimile is not authorized under NPRS.

Records Search Fees

Finally, we asked the City to provide our office with information on how its labor rates comply with the NPRS and its provision that, after the first four hours of staff time, a custodian may charge a “special service charge reflecting the calculated labor cost” for providing records. The City’s fee schedule lists a minimum records search fee of \$5.00,

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along with a record search fee of \$10 per hour minimum or the employee hourly rate plus a 28% upcharge. The City's response to our inquiry is that these fees "represent the actual hourly rate of the employee(s) conducting the search, after the first four hours, plus 28% for overheads (benefits and taxes). The minimum rate is \$10 per hour." However, we do not entirely agree with the City's method of imposing fees for employee time in excess of four cumulative hours.

The NPRS allow for a "calculated labor cost," which our office has construed to mean the hourly rate of the employee or employees actually searching for, identifying, physically redacting, or copying records pursuant to a public records request. The NPRS do not allow for a minimum records search fee (which the City has established as \$5.00), nor do they allow for a minimum hourly rate to be charged. Each of these fees is impermissible and the City must not charge any minimum labor or search fees. We believe record custodians must calculate the labor costs charged to the requestor based upon the hourly rate of the actual employee plus any costs and benefits, paid by the custodian related to employment, including taxes and benefits such as insurance, associated with that employee. The City may not impose one blanket rate or surcharge which applies regardless of which employee is performing the work. This will necessitate that the City's labor rate will change depending on the type and extensiveness of the records request; higher lever employees who must search their records will have a higher labor rate associated with their involvement in fulfilling a records request.

NPRS Fees Summary and Action

In summary, we are unconvinced by the City's explanation as to the fees charged in the categories discussed above. Consequently, we will require the City to immediately undertake a review of these fees consistent with this disposition letter. As we understand it will take time for the City Council to officially amend its fees consistent with our conclusions, we will direct the City, through a copy of this letter, to immediately cease charging the fee for electronic records and charge only the fees for searches and facsimile transmissions as allowed above. We trust the City Council will amend the relevant fees at its first opportunity. We also suggest that the City refund you the fees it charged for your public records request, in the amount of \$32.00, as those fees were impermissible under the NPRS. We would encourage the City to similarly refund any similarly situated person who paid fees for electronic copies, or who overpaid fees related to records searches and facsimile transmissions.

We would also note that the initial letter from the City dated January 17, 2018, estimated the costs for production of the records you sought at \$40.00, and required you to pay that cost up front as a deposit before the City searched for and copied the records. Under Neb. Rev. Stat. § 84-712(3)(f), the City may not charge a deposit for estimated charges which are less than \$50.00.

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CONCLUSION

For the reasons stated above, we do not believe the City has violated the Open Meetings Act as to the allegations in your complaints. However, we conclude that the fee structure for some fees and costs charged to members of the public related to requests under the NPRS do not comply with the NPRS. We are providing the City with an opportunity to comply with our findings, suggest it issue you a refund, and direct that it cease charging the impermissible fees. We trust the City will undertake immediate action amending the fee schedule, pending a final resolution by the City Council. At this time we will take no further action on this matter, as we trust the City to undertake the remedial action as described in this letter.

If you disagree with our analysis, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under the Act.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Mayor Scott Getzschman
City Administrator Brian Newton

02-718-29