

STATE OF NEBRASKA  
**Office of the Attorney General**

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**DOUGLAS J. PETERSON**  
ATTORNEY GENERAL

**LESLIE S. DONLEY**  
ASSISTANT ATTORNEY GENERAL

January 30, 2020

Via email at [REDACTED]  
Ken Anderson

RE: *File No. 20-R-101; NCORPE; Ken Anderson, Petitioner*

Dear Mr. Anderson:

This letter is in response to your correspondence submitted to our office on January 13 and 15, 2020, in which you requested our assistance in obtaining certain public records from the Nebraska Cooperative Republican Platte Enhancement Project (“NCORPE”). We considered your correspondence to be a petition for review under Neb. Rev. Stat. § 84-712.03(1)(b) of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018, Supp. 2019) (“NPRS”). Upon receipt of your petition, we contacted NCORPE general manager Kyle Shepherd, and advised him of the opportunity to provide a response to this office with respect to NCORPE’s denial of your request. On January 27, 2020, we received a response from attorney Donald G. Blankenau, on behalf of NCORPE. We have now fully considered your petition and NCORPE’s response in accordance with the provisions of the NPRS, and our findings in this matter are set forth below.

### **FACTS**

On December 30, 2019, you emailed a public records request to NCORPE chairman Terry Martin, seeking “payroll records pertaining to NCORPE employees from whomever may be in possession of them.” The specific items in your request included the following:

- NCORPE/URNRD [Upper Republican Natural Resources District] payroll records for time period of 7/1/2018—6/30/2019.
- Payroll records for NCORPE employees who may have been paid through the URNRD for the same time period.
- Payroll records for each individual employee who may have received compensation for employment at NCORPE for the same time period.

- Payroll records for all employees whose payment equaled \$374,870.62 as per your financials of 6/30/2019.
- Payroll records for all employees included in account #5100.11 and provided in 6/30/2019 financials.

Mr. Shepherd responded to your request on January 3, 2020. He provided you a list of NCORPE employees, their job titles, and annual salaries for the time frame listed in your request. However, he indicated that “[a]ll other employee information is considered confidential and exempt from disclosure pursuant to Neb. Rev. Stat. 84-712.05(7).”

In your petition, you state that you were provided “a written response with minimal information and certainly not a ‘payroll record’ as I requested.” You question whether the agency met its requirements under the law by providing you this select information. You asked the Attorney General to pursue this matter on your behalf and other taxpayers.<sup>1</sup>

Mr. Blankenau states that Mr. Shepherd provided you all salary and wage information for every NCORPE employee, including the number of hours worked by each part-time hourly employee. He states that it is “unclear” as to what additional records you seek, and that you provided “no further clarifying requests” to Mr. Shepherd following his response to you. Mr. Blankenau states that “NCORPE believes that any other information sought with respect to time-off, sick leave, and related ‘payroll records’ are personal and not subject to disclosure pursuant NEB. REV. STAT. § 84-712.05(7).” However, Mr. Blankenau indicates that “NCORPE is committed to full compliance with the [NPRS,] and is willing to revisit the matter if greater clarification of the actual information sought is provided.”

## ANALYSIS

The basic rule for access to public records in Nebraska is set out in Neb. Rev. Stat. § 84-712(1) (2014). That provision states that

*[e]xcept 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*

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<sup>1</sup> Your petition contains other statements relating to increases in NCORPE payroll expense from fiscal year 2018 to 2019, and you offered to provide this office with “a number of financials, budgets and meeting minutes” to support your assertions. However, the underlying reason for your public records request is not relevant in determining whether the public body has complied with the NPRS, and we do not consider it in our analysis. See *State ex rel. Sileven v. Spire*, 243 Neb. 451, 457, 500 N.W.2d 179, 183 (1993) (“The relator sought information pursuant to § 84-712, which applies equally to all persons without regard to the purpose for which the information is sought.”). Also, while the Attorney General has enforcement authority over the NPRS and the Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014, Cum. Supp. 2018, Supp. 2019), this office has no general supervisory authority over local political subdivisions, like natural resources districts or interlocal agencies.

(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.

(Emphasis added.) “Public records” in Nebraska “include all records and documents, regardless of physical form, of or belonging to” governmental entities in the state, “[e]xcept when any other statute expressly provides that particular information or records shall not be made public.” Neb. Rev. Stat. § 84-712.01(1) (2014). Thus, there is no absolute right to access public records in those instances where records are exempt from disclosure by statute. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009); *State ex rel. Nebraska Health Care Ass’n v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998). In addition, pursuant to Neb. Rev. Stat. § 84-712.01(3), the NPRS shall be liberally construed when the fiscal records of a public body, including payroll, are involved so that citizens shall have full access to information on the public finances of government.

In Op. Att’y Gen. No. 90015 (February 27, 1990), the Attorney General discussed a state agency’s duty under the NPRS to disclose information that would show whether a particular employee received a bonus, and the amount of the bonus, from information contained in the employee’s personnel file. The Attorney General concluded that a limited duty to disclose such records did exist, stating:

Apart from the requirements of good operating policy and courtesy, we are aware of no Nebraska statutes which require state agencies to respond generally to questions from the public or to create or prepare materials in response to such general public questions. Therefore, we do not believe that an agency must create a list of employees who received bonuses. However, the public has a right to review existing public documents under the provisions of [the NPRS]. Access to the bonus information in question therefore depends upon what particular documents are available, and whether those documents must be made public under the public records statutes.

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Neb. Rev. Stat. § 84-712.05 establishes several categories of public documents which may be withheld from the public by the lawful custodian of those records. Subsection (7) of § 84-712.05 lists “personal information

in records regarding personnel of public bodies other than salaries and routine directory information” as a category of information which may be kept confidential. We believe that subsection (7) would clearly allow a public agency to keep employee evaluations and bonus information in an employee's personnel file confidential. In addition, we believe that other materials or records reflecting such personal information may also generally be kept confidential. For example, a list prepared by the agency of those employees who received bonuses and the amount of each bonus could be kept confidential under subsection (7).

On the other hand, it is clear that the public is entitled to review salary records under subsection (7). Moreover, Neb. Rev. Stat. § 84-712.01(2)<sup>2</sup> provides that the public records statutes shall be liberally construed whenever warrants, payrolls, vouchers or other fiscal records are involved. Therefore, we believe that fiscal records reflecting salary information for public employees may not be withheld from the public simply because they might indicate who received a bonus. On this basis, members of the public have an absolute right to review payroll warrants and other payment documents of state agencies.

*Id.* at 1-2 (emphasis added).

Mr. Shepherd has a duty under § 84-712 to identify any records that are responsive to your request, and either make those records available to you, or withhold those records as allowed by law. It does not appear that Mr. Shepherd made that determination, opting instead to provide you a list of employees' names, salaries, number of hours worked, and hourly rates of pay for fiscal year 2018. And because records were withheld under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(7), Mr. Shepherd's response should have contained the information required in Neb. Rev. Stat. § 84-712.04.<sup>3</sup> It did

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<sup>2</sup> Provision amended to subsection (3) by 1994 Neb. Laws LB 1275, § 12.

<sup>3</sup> Neb. Rev. Stat. § 84-712.04 (2014) provides, in pertinent part, as follows:

(1) Any person denied any rights granted by sections 84-712 to 84-712.03 shall receive in written form from the public body which denied the request for records at least the following information:

(a) A description of the contents of the records withheld and a statement of the specific reasons for the denial, correlating specific portions of the records to specific reasons for the denial, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial;

(b) The name of the public official or employee responsible for the decision to deny the request; and

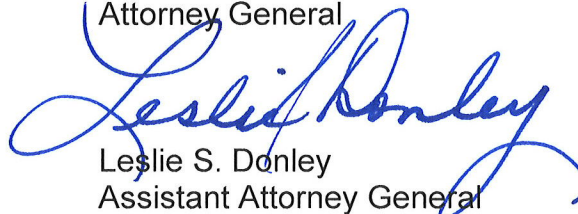
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not. Consequently, we will direct Mr. Shepherd to review your records request again and make a determination as to what records, if any, are responsive to your request. We would ask that this determination be made no later than February 7, 2020. If Mr. Shepherd finds that he needs additional time to produce any responsive records, he will so indicate by sending a letter to you that fully complies with the provisions of § 84-712(4). Since Mr. Blankenau indicates that there may have been some confusion as to the items in your request, we would also ask that you work cooperatively with NCORPE staff to clear up any perceived ambiguity.

Finally, this file will remain open until this matter is fully resolved in accordance with the NPRS and Op. Att'y Gen. No. 90015. If either party has any questions regarding the directives set out in this letter, please do not hesitate to contact the undersigned.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General



Leslie S. Donley  
Assistant Attorney General

c: Donald G. Blankenau (via email only)

49-2377