



STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 OR (402) 471-4725

DOUGLAS J. PETERSON
ATTORNEY GENERAL

ELIZABETH O. GAU
ASSISTANT ATTORNEY GENERAL

December 17, 2021

Via email at [REDACTED]
Amber Wells

RE: *File No. 21-R-145; Elkhorn Public School District; Amber Wells, Petitioner*

Dear Ms. Wells:

This letter is in response to your petition received by this office on December 2, 2021, in which you requested that the Attorney General review the handling of a public records request you submitted to the Elkhorn Public School District ("EPS") on November 23, 2021. In accordance with our normal procedure with respect to such complaints, we forwarded a copy of your complaint to EPS for a response. We received a response from Justin Knight of Perry Law Firm on behalf of EPS on December 8, 2021. We have considered your petition and the response of EPS in accordance with the Nebraska Public Records Statutes ("NPRS") Neb. Rev. Stat. § 84-712 through 84-712.09 (2014, Cum Supp. 2020, Supp. 2021). Our findings in this matter are set forth below.

FACTS

On November 16, 2021 you submitted the following records request to EPS:

Please provide copies of all communications between Bary Habrock and any member(s) of the Elkhorn Public Schools Board of Education in the last six months. Please note this request includes communications both to and from Dr. Habrock.

EPS responded on November 22, 2021 and provided an estimate of the time and cost required to fulfill the request. EPS estimated that it would take five weeks and cost \$5,008.26 to fulfill the records request. EPS required that a deposit of the full amount be made before it would begin to work to fulfill the request. EPS justified its time and cost estimates by explaining that it had identified hundreds of responsive emails and that each email would need to be reviewed and the identifying information of students and staff redacted.

On November 23, 2021 you limited the scope of your request to "copies of all emails between Bary Habrock and EPS Board President Amy Parks during August and

September 2021.” On December 1, 2021, EPS responded and reduced its time and cost estimate to fulfill the request to four weeks and \$3,321. In response you have filed the instant petition alleging that EPS’ responses are “part of a pattern of behavior in which [EPS] provides inflated time and costs estimates in an effort to contravene the express open access policy of the Open Records Act.” As additional evidence of this allegation, you state that EPS provided a cost estimate of \$55,395 to fulfill a previous records request made by you. You also state that, in response to a separate records request from you, EPS gave an “initial cost estimate of \$69 but later ‘revised’ it to \$1,086 after the work and services were performed and without notifying [you] of the significant increase.”

In its response to your complaint, EPS provided this office a more detailed explanation of these cost and time estimates. EPS identified 318 responsive records related to your November 16, 2021 request and 220 responsive records related to your more narrow November 23, 2021 request. EPS explained that there were so many responsive documents because both Mr. Habrock and Ms. Parks received hundreds of emails from parents during August and September related to EPS’s mask mandate. Mr. Habrock and Ms. Wells were in close contact during this time about this issue and often forwarded these emails to each other for discussion. Because many of these emails were lengthy and included attachments, EPS estimated that the 220 records it determined would be responsive to your latest request would equal 500 to 750 pages.

EPS identified the following steps that would need to be taken to fully respond to your request:

1. Download all emails into one location;
2. Review all emails to determine if any email includes any confidential information;
3. Redact any such confidential information;
4. Organize and save all redacted emails to one location; and
5. Print or send the redacted emails to [you] in a readable format.

EPS determined that it would take an average of five to eight minutes to complete these steps per responsive email. It further explained that these steps would be completed by the superintendent and the director of technology whose hourly rates are \$152.67 and \$53.52 respectively.

EPS provided the following chart to explain how it reached the estimated cost to fulfill your November 23, 2016 records request:

Employee	Task	Hourly Rate	Estimated Number of Hours	Total Estimate
Director of Technology	Searching, analyzing, and saving emails, redacting emails in PDF software, saving redacted emails, and compiling all redacted emails to send to Ms. Wells	\$53.52	9 hours	\$481.68
			Less First Four Hours, per Neb. Rev. Stat. §84-712(3)(c)	-\$214.08
Superintendent	Reviewing emails to determine what redactions need to be made, pursuant to FEPPA, state law, and under the Nebraska personnel confidentiality statutes	\$152.67	20 hours	\$3,053.40
Total			29 hours	\$3,321

DISCUSSION

The NPRS generally allow Nebraska citizens and other 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 public records in certain circumstances. Pursuant to Neb. Rev. Stat. § 84-712(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.

Section 84-712(3)(c) further provides:

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.

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 service charges as provided under section 84-712.”

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. This “calculated labor cost” is allowed for any time in excess of four cumulative hours. In this instance, EPS’s estimate indicates it excluded the cost of the first four hours of staff time. The estimate includes the hourly rates of the staff members who would be required to fulfill your request. This office has no reason to question those hourly rates. The estimate was calculated by estimating five to eight minutes for each of the 220 identified responsive records. This office finds this estimate to be reasonable considering the 220 records total 500 to 750 pages, some of which undoubtedly include information about students and staff that would need to be identified and redacted. Therefore, we find that the estimate provided by EPS represents “actual added costs or special service charges as provided under section 84-712.” Neb. Rev. Stat. § 84-712.03(1)(b).

We note that EPS provided a similar table and explanation for the cost estimate

for your original November 16, 2021 records request. That estimate was calculated in the same manner as described above and the total cost was proportionally larger based on the larger number of responsive records identified. We find that the costs included in this estimate are also permitted by the NPRS.

Your petition alleged that the cost estimates discussed above are “part of a pattern of behavior in which [EPS] provides inflated time and cost estimates in an effort to contravene the express open access policy of the Open Records Act.” The fee charged by EPS in this instance is specifically allowed by statute. The fee is reflective of the estimated time required to fulfill the request (after the first four cumulative hours) and the associated labor cost. While the amount is relatively high, it is supported by the hourly rates of the persons tasked with responding to the request. Similarly, we cannot say the estimated time is unreasonable. Because the fee is allowed by the NPRS, we necessarily find the charge is not part of a pattern of NPRS violations.

CONCLUSION

Based on the foregoing, we find that you have not been denied access to public records based on excessive costs. We also do not find that EPS violated the NPRS or acted in bad faith in handling your public records request. As a result, no further action by this office is required.

If you disagree with the conclusion reached above, you may wish to contact your private attorney to determine what additional remedies, if any, are available to you under Neb. Rev. Stat. § 84-712.03.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Elizabeth O. Gau
Assistant Attorney General

c: Bary Habrock, Superintendent
Justin Knight, Perry Law Firm