

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

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October 16, 2017

Travis L. Moore



RE: *File No. 17-R-142; Eagle-Alvo Rural Fire District No. 9; Travis L. Moore, Petitioner*

Dear Mr. Moore:

This letter is in response to your correspondence received by this office on September 29, 2017, in which you sought our assistance in obtaining certain public records belonging to the Eagle-Alvo Rural Fire District No. 9 Board of Directors (“Board”). When we receive petitions of this nature, our normal practice is to contact the entity involved and advise it of the opportunity to provide a response to this office. In the present case, we contacted the Board’s legal counsel, Robert J. Murray, Lamson Dugan & Murray, LLP, and advised him accordingly. On October 5, 2017, we received Mr. Murray’s response on behalf of the Board. We have construed your correspondence to be a petition for review under Neb. Rev. Stat. § 84-712.03 of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2016) (“NPRS”). Our findings in this matter are set forth below.

**RELEVANT FACTS**

On September 19, 2017, you submitted two separate public records requests to Marlan Johnson, the Board treasurer. In your first request, you sought the following records:

1. A copy of the minutes in which the method of meeting notification is recorded.
2. Minutes for all Rural Fire Board meetings held in 2016 and 2017.
3. A record for proof of publication of meeting notices, budget hearings, vacancy appointments, and officer elections—as required by the Nebraska Open Meetings Act—held in 2016 & 2017.

4. Treasure's [sic] report(s) or financial account record(s) for FY 2016-2017 showing account balances, incomes, expenditures, and budgeted capital expenditures.

Your second request sought

1. A copy of the minutes indicating the date of election or appointment of each of the current board members.
2. A copy of the minutes indicating the date of election or appointment for all board members serving from 2000 to 2013.

Mr. Murray responded for the Board on September 25, 2017. Mr. Murray indicated that while the Board fully intended to honor your request, it would take some time to do so. He indicated that the Board had no paid staff and that Mr. Johnson handled most of the Board's administrative work. Mr. Murray further explained that since Mr. Johnson is a "substantial farmer in Cass County" and had just recently started the fall harvest, "he [would] not be in a position to devote the time and effort necessary to provide you with a legitimate response to your request until the harvest is complete on or about November 1."

Mr. Murray also noted the difficulty associated with providing you an estimate of costs for the requested records, due in part to the fact that one of the requested items dates back more than fifteen years. He indicated that copying cost would be \$.25 per page. However, Mr. Murray states that "the Board is not presently in a position to provide you with a specific estimate of the overall charges. . . ." He indicated that an estimate would be conveyed to you once all of the records had been pulled and copied. The Board would then produce the requested copies upon receipt of the requested amount. Mr. Murray iterated that the timing of your request was unfortunate due to Mr. Johnson's "need[] to complete the fall harvest before winter sets in."

After discussing the aforementioned situation with Mr. Murray, as well as the undersigned, you opted to submit a modified request to the Board the evening of September 25. You limited your request to the following records:

Minutes indicating the date on which the following individuals were elected or appointed to their current or most recent four year term of public office:

- 1) Arnold Schroeder
- 2) Marlan Johnson
- 3) Ronnie Schwartman
- 4) Jay Wilkenson
- 5) Scott Cook

Mr. Murray acknowledged receipt of your modified request on September 27, essentially responding in the same fashion as in his September 25 letter. He noted that “[r]esponding to your modified request will take a similar amount of time as would be necessary to satisfy your original request” and that, as a result, “our client is not in a position to significantly shorten the time for making a response.” Mr. Murray indicated that you would be contacted once the Board has “had the opportunity to collect the requested records, no later than November 1<sup>st</sup>.”

In your petition, you state that during your telephone conversation with Mr. Murray, he asked you who you were representing, why you wanted the records, and whether your request was in fact urgent in nature. You responded that you were requesting the records on your own behalf, and that you were unwilling to discuss the reason for requesting the documents. You indicate that Mr. Murray told you “that unless I was willing to disclose to him my intentions, my request would be not completed until the first of November.” You state that at this juncture, you ended your telephone conversation with Mr. Murray and contacted our office.

In his response to this office, Mr. Murray asserts that the Board has not denied you access to public records and has, in fact, communicated to you in good faith “a continued willingness to comply with [your] request.” Mr. Murray essentially repeats the reasons given to you for the delay in producing any records, e.g., lack of paid staff, harvest time, etc. He further asserts that you mischaracterized the discussion you and he had on September 25 regarding the reason(s) underlying your requests. In this regard, Mr. Murray states:

I asked Mr. Moore if there was a common sense, compelling reason supporting the request being of such an urgent nature that a response is legitimately required prior to November 1<sup>st</sup>. Our question was an opportunity for Mr. Moore to articulate a compelling reason for the request to be satisfied immediately, rather than by November 1<sup>st</sup>, not an inquiry into the reason behind the request. However, no such reason was provided.

## **DISCUSSION**

Generally speaking, the Nebraska Public Records Statutes allow interested persons in Nebraska the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts from those public records, and to obtain copies of public records in certain circumstances. In that regard, Neb. Rev. Stat. § 84-712(4) provides, in pertinent part, that

[u]pon receipt of a written request for access to or copies of a public record, the custodian of such record shall provide to the requester as soon as is practicable and without delay, but not more than four business days after actual receipt of the request, 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.

(Emphasis added.)

We understand the challenges faced by small political subdivisions, like a rural fire district board, which are often required to operate with little to no staff and funding. In the present case, we have carefully considered the Board's reasons necessitating the delay, i.e., lack of paid staff, Mr. Johnson alone handles most of the administrative work of the Board, and the poor timing of the requests due to the fall harvest. However, it seems to us that during those times when Mr. Johnson is unavailable to handle any record request, large or small, or any administrative duty for that matter, the Board should have someone assigned who could fill in during his absence. It also seems implausible that the Board would need the same amount of time (five plus weeks) to produce five sets of meeting minutes which should be readily identifiable since they pertain to the election/appointments of the *current* Board members. Further, producing records responsive to the modified request should not have required the same amount of time necessary for the original two requests. We have considered too that the Board's earliest practicable date to fulfill your records requests was around six weeks, which is not necessarily unreasonable given the records sought. Finally, we have to consider Mr. Murray's representation that the Board has not denied you access to public records, and has every intention to provide you the requested records sometime on or around November 1. Considering all of the factors presented, we cannot definitively conclude that the Board's delay of your records requests to sometime on or around November 1 constitutes a clear violation of the NPRS.

There are, however, technical deficiencies in Mr. Murray's responses which we consider problematic. First, as noted in § 84-712(4) above, the custodian of the records must provide the requester an *estimate* of the expected cost of the copies to be produced. In his responses, Mr. Murray noted the difficulty in providing an estimate to you, and indicates that once the records are pulled and copied, you will then be provided the

amount, which must be paid prior to receiving any records. This scenario is at odds with the plain language of § 84-712(4), which gives the requester ten business days to review the estimated costs for copies and to request the custodian to fulfill the original request, negotiate with the custodian to narrow or simplify the request, or withdraw the request. The statute further provides that if the requester does not respond within the ten business days, the custodian is not required to fulfill the request.

In addition, any delay letter from the custodian of records must include “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.*” We have found no such language in Mr. Murray’s correspondence.

Finally, there appears to be some disagreement between you and Mr. Murray as to what information Mr. Murray may have been seeking with respect to your requests. However, § 84-712 of the Nebraska Public Records Statutes does not require any showing by a person requesting access to public records of the reason for his or her review of those records. *See State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993). Consequently, to the extent Mr. Murray made any inquiries as to the reason for the requested records or the necessity or urgency to receive certain records before November 1, those inquiries are improper under *Sileven*.

### CONCLUSION

Based on the foregoing, we do not believe that the Board’s delay of your public records requests for the reasons cited constitute a clear violation of the NPRS. However, we will remind the Board, by sending a copy of this letter to Mr. Murray, that it must fully comply with the requirements set out in Neb. Rev. Stat. § 84-712(4). Also, in light of our finding above, we would direct the Board to provide you an estimate of costs *prior* to any records search or production to give you the opportunity to accept the costs, negotiate with the Board to narrow or simplify your requests, or withdraw them.

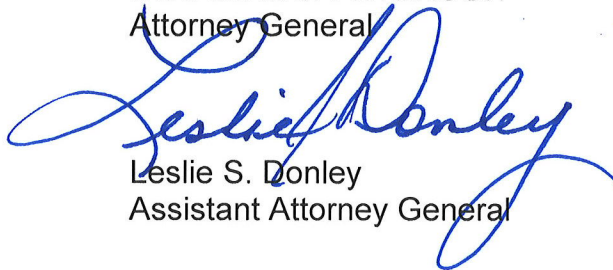


Travis L. Moore  
October 16, 2017  
Page 6

Since we have concluded that Board did not violate the Nebraska Public Records Statutes, no further action by this office is warranted. Accordingly, we are closing this file. If you disagree with the analysis we have set out above, you may wish to contact your private attorney to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General



Leslie S. Donley  
Assistant Attorney General

c: Robert J. Murray

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