



STATE OF NEBRASKA
Office of the Attorney General

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DOUGLAS J. PETERSON
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August 10, 2021

Via email at bobsullivan402@gmail.com
Robert Sullivan
Sullivan Law PC, LLO
807 N. Broadway
Wahoo, NE 68066

RE: *File No. 21-R-121; Omaha Public Power District; Robert Sullivan, Petitioner*

Dear Mr. Sullivan:

This letter is in response to your petition received by this office on July 26, 2021, in which you requested that the Attorney General review the handling of a public records request you submitted to the Omaha Public Power District ("OPPD") on June 11, 2021. In accordance with our normal practice, we forwarded a copy of your petition to OPPD, and subsequently discussed this matter with OPPD legal counsel Stephen M. Bruckner of the Fraser Stryker law firm. At our request, on August 6, 2021, Mr. Bruckner provided our office a breakdown of the hourly rate used as the basis for the cost estimate. We considered your petition and the OPPD response in accordance with § 84-712.03(1)(b) of the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020). Our findings in this matter are set forth below.

RELEVANT FACTS

On June 11, 2021, you submitted the following request to OPPD:

Please provide any and all documents including internal communications and communications to and from 3rd parties (emails, letters, texts, petitions, social media posts, etc.), internal memos, drafts of policies, talking points, training materials, meeting minutes, legal opinions, data, and all other information relied upon or relevant to the decision to fly rainbow flags and celebrate pride month in any way, including participation in any pride parades. I ask for all such documents and information from January 1, 2018 through today, June 11, 2021. This includes

communications of all board members, current and former. I make this request under the Freedom of Information Act (FOIA) Neb. Rev. St. §84-712 et seq.

It appears that OPPD timely responded to your public records request on June 17, indicating that more time was necessary to fully respond to your request. On June 24, OPPD supplemented its previous response, indicating that it had identified at least seventeen employees who may have records responsive to your request. It estimated approximately 114 hours to search and produce responsive records. In addition, OPPD estimated forty hours to search for responsive records on its social media platforms. Based on these time estimates, and applying an hourly rate of \$76.45 for the employees who would be responding to your request, OPPD calculated a total cost estimate of \$11,773.30. In accordance with OPPD policy, it requested a deposit of one-half of the estimate (\$5,886.65) before proceeding.

You modified your request by email on June 28. You indicated that you wished to narrow your request to the seventeen employees identified in the June 24 letter, limited “only to emails and the attachments to those emails, as well as SMS messages which are on phone or accounts held by OPPD.” You further requested “a breakdown as to the rate of pay for each employee involved and the estimated time that employee would expect to spend on this response,” in the event a deposit was required.

OPPD provided you a revised cost estimate on July 6, indicating that it would take approximately twenty-five hours to search for records based on the modified request. Using the same hourly rate set out in the June 24 letter, the cost estimate was now \$1,911.25. You were asked to deposit one-half of this amount (\$955.63) prior to OPPD proceeding with its search. Finally, OPPD indicated that it was not the custodian of SMS messages on OPPD phones or accounts “and therefore is unable to access such data.”

OPPD’S RESPONSE

Mr. Bruckner indicates that the amount used in the cost estimate calculation “was based on an average of the salaries of the individuals who will respond to the request, calculated into an hourly rate.” This amount includes the cost of benefits.¹ Mr. Bruckner further indicates that he asked OPPD to confirm the amount, which was subsequently decreased to \$71.48. A spreadsheet detailing the revised hourly rate was provided to this office, and is reproduced below:

¹ This office has taken the position that public bodies may include the cost of benefits when calculating the labor cost authorized under § 84-712(3)(c). *E.g., File No. 19-MR-110; City of Fremont; Stacy Heatherly, Complainant* (May 2, 2019). See also *Board of County Com’rs of Highland County v. Colby*, 976 So. 2d 31, 36 (Fla. 2008) (“[T]he statute at issue here employs the term ‘labor cost,’ the plain meaning of which is more inclusive than the words ‘wages’ or ‘salary.’ That benefits may be a significant component of labor costs is widely understood.”).

Resources Needed 2

	Annual Salary	Rate Per Hour	<i>includes benefits</i>	
			Total Comp	Rate Per Hour
Resource 1	\$ 116,899.00	\$ 56.20	\$ 136,930.00	\$ 65.83
Resource 2	\$ 135,795.00	\$ 65.29	\$ 160,417.00	\$ 77.12
Average	\$ 126,347.00	\$ 60.74	\$ 148,673.50	\$ 71.48

Calculations Used

Hours per year	2080
Hours per week	40
Weeks worked	52

Mr. Bruckner confirmed that the twenty-five hours used to calculate the estimate are in addition to the four “free” hours allowed under Neb. Rev. Stat. § 84-712(3)(c). He states that OPPD will request that the seventeen individuals involved in the records production review their phones for any SMS messages responsive to your request, and will produce those records subject to appropriate redactions allowed under the NPRS. Finally, Mr. Bruckner states that OPPD strongly disagrees with your allegation that it responded to your request “in such a way to maliciously frustrate the intent of the public records statute.” He represents that OPPD has responded to your “request promptly and in good faith.”

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. 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.” In the present case, you confirmed to the undersigned that you are contesting the hourly rate used as a basis to calculate the cost estimate.

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

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

Robert Sullivan
August 10, 2021
Page 4

four cumulative hours, since that large a request may cause some delay or disruption of the other responsibilities of the custodian's office

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.

OPPD has provided us sufficient detail with respect to the labor costs of the two employees who will be responding to your records request. There is nothing in the revised hourly rate that appears outrageous or excessive. And as the undersigned indicated to you on August 5, twenty-five hours does not seem unreasonable considering the number of individuals involved.

Accordingly, we believe that OPPD may charge you the amount based on its revised hourly rate of \$71.48 and the twenty-five hour search time. That amount now stands at \$1,787. Certainly, under § 84-712(4), you may choose to negotiate further with OPPD to narrow or simplify your request.

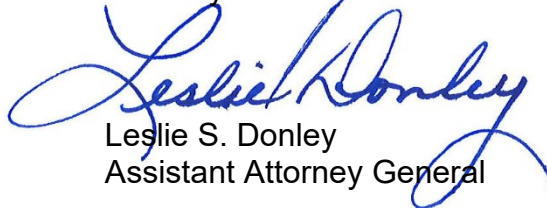
CONCLUSION

Based on the foregoing, you have not been denied access to public records on the basis of excessive costs. We also do not find that OPPD violated the NPRS or acted in bad faith in handling your public records request. As a result, no further review by this office is necessary and we are closing this file.

If you disagree with the conclusion reached above, you may wish to review the other remedies available to you under Neb. Rev. Stat. § 84-712.03.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Stephen M. Bruckner

49-2747-29