



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

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March 1, 2022

Via email at [REDACTED]  
David Hottell

RE: *File No. 22-R-111; Kimball County Clerk; David Hottell, Petitioner*

Dear Mr. Hottell:

This letter is in response to your petition received by this office on February 14, 2022, in which you requested that the Attorney General review the handling of a public records request you submitted to Cathleen Sibal, Kimball County Clerk ("Clerk"), on December 22, 2021. In accordance with our normal procedure with respect to such complaints, we forwarded a copy of your complaint to the Clerk for a response. We received a response from attorney Matthew Turman, on behalf of the Clerk on February 16, 2022. We have considered your petition and the response of the Clerk 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 December 22, 2021, you submitted a request for the following records to the Clerk:

Email along with any other communications that pertain to David Hottell starting January 28, 2021. This request [is] to include those emails and any other communications between Harry Gillway and staff of the Attorney General's Office and/or Nebraska State Patrol, having connection to the events that happened in May.

The Clerk responded on December 29, 2021 with a letter explaining that the requested records would be voluminous, and that the office would need an additional 45 days to identify and review the records for confidentiality. The Clerk inquired whether you would like to limit your request and you declined to do so.

The Clerk later notified you that your request would be fulfilled in part and denied in part. You were provided a privilege log that identified each record and the statutory reason it was withheld. You were notified that the Clerk would release 481 pages of responsive records. The Clerk explained that you would be charged 50 cents per page for paper copies or \$1.00 per page if the documents were saved to a flash drive. You emailed the Clerk on February 10, 2022 to request a “mutually agreed location where I could use my own copying equipment.” The Clerk responded by telling you that she would not allow you to use your own copying equipment.

After you questioned the cost per page, the Clerk responded as follows:

The fee for copying records in the County Clerk’s Office is 50 cents per page for all requests. The fee has been in effect since December 2016. If I download these 481 pages to a flash drive, the cost would be \$1.00 per page. With the amount of time given to preparing these documents by Attorney Turman, officials and staff, I believe 50 cents is more than fair.

In the end, you obtained paper copies of the records by paying the Clerk \$240.50.

You filed the instant complaint on February 14, 2022 to challenge the amount you were charged and ask for a reimbursement. You allege the following violations of the NPRS:

1. You did not receive a response to your request within four days.
2. You were denied your request to examine and make copies of records with your own copying equipment.
3. The cost you were charged per page exceed the amount allowed by the NPRS.

## **DISCUSSION**

### **1. Response Time**

You allege that the Clerk violated the NPRS by failing to respond to your records request within four days. The NPRS provide that, upon receiving a request for records, the custodian of the public records must provide a timely response. Specifically, Neb. Rev. Stat. § 84-712(4) provides:

Upon receipt of 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 four business days shall be computed by excluding the day the request is received, after which the designated period of time begins to run. Business day does not include a Saturday, a Sunday, or a day during which the offices of the custodian of the public records are closed.

Following the calculation method outlined in Neb. Rev. Stat. § 84-712(4), we find that you received a response four business days after you submitted your public records request. You hand delivered your request on December 22, 2021. The day the request is submitted is excluded from the day count. December 23 counts as day 1. December 24<sup>th</sup> is excluded from the day count because it was a state holiday and offices were closed. December 25 and 26 are excluded from the count as weekend days. December 27 and 28 are days two and three. You received a response on day four, December 29. We find that the Clerk's response was timely.

## 2. Denial of Request to Use Own Copying Equipment

You allege that the Kimball County Clerk violated the NPRS by denying your request to use your own copying equipment to make copies of the requested documents. In response to your request for the Clerk to identify a location where you could copy records using your own equipment<sup>1</sup>, the Clerk wrote in an email, "No, I do not allow any persons to bring in their own copier." This denial is in conflict with the provisions of the NPRS. Specifically, Neb. Rev. Stat. § 84-712 provides:

(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

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<sup>1</sup> We note that, while your request to the Clerk mentioned only copying equipment, your petition stated that you wished to use your own printer to produce documents. A printer is not considered copying equipment under NPRS. Copying equipment includes equipment that can be used to reproduce paper documents. A printer, on the other hand, would need to be plugged into the custodian's computer network to produce documents. The records custodian is not required to allow an individual to plug equipment into its computer network.

transaction of business . . . .

(2) Copies made by citizens or other persons using their own copying or photocopying equipment pursuant to subdivision (1)(a) of this section shall be made on the premises of the custodian of the public record or at a location mutually agreed to by the requester and the custodian.

We find that the Clerk improperly denied your request to use your own copying equipment. The Clerk is advised that such requests must be granted in the future.

### 3. Cost

You allege that the amount you were charged by the Clerk for copies of the requested documents was more than is permitted under the NPRS. You were charged \$240.50, or 50 cents per page. You were also given the option of having the documents downloaded to a flash drive at the cost of \$1.00 per downloaded page. 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.” After reviewing the Clerk’s response to your petition, we find that the amount charged by the her office was improperly calculated under Neb. Rev. Stat. § 84-712(3). However, we also find that the total amount you were charged does not exceed the special service charge the Clerk was entitled to receive.

NPRS permits the custodian of records to charge a fee for the production of records. Specifically, Neb. Rev. Stat. § 84-712(3)(b) permits the following items to be included in the fee:

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.

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.

It is clear that the 50 cents per page you were charged is more than the actual added cost incurred by the Clerk for providing copies and printouts of the responsive records. The Clerk's statement that the fee is fair, in part, due to the time Attorney Turman spent preparing the documents is an indication that the fee included more than the actual added cost of producing the records. Her statement is also an indication that the fee improperly included a charge for the services of an attorney in violation of Neb. Rev. Stat. § 84-712(3)(c).

Although you did not pay to receive the electronic files on a flash drive, we find it important to note that the \$1.00 per downloaded page was also improperly calculated. The actual added cost for electronic data may include only those items listed in Neb. Rev. Stat. § 84-712 (b)(iii). One dollar per page seems to us to far exceed the usual cost of computer run time and a flash drive.

While we note that the Clerk incorrectly calculated the actual added costs of making records available to you in this case, we find that the amount you were charged is permitted as a special service charge pursuant to Neb. Rev. Stat. § 84-712(3)(c). That section permits the custodian to include in the fee, as a special service charge, the calculated labor cost to include the cost of employee hours used to fulfill the request in excess of the first four cumulative hours. In response to your petition, the Clerk provided the following explanation of the employee time expended to fulfill your request:

<b>Employee</b>	<b>Hours</b>	<b>Rate</b>	<b>Total</b>
HR Administrator	2	\$22.80	\$45.60
County Clerk Staff	2	\$16.50	\$33.00
County Sheriff	6	\$33.02	\$198.12
Chief Deputy Sheriff	3	\$23.69	\$71.07
County Clerk	2	\$29.57	\$59.14
Deputy Clerk	1	\$22.67	\$22.67
<u>Jail Administrator</u>	<u>2</u>	<u>\$23.00</u>	<u>\$46.00</u>
<b>Total</b>			<b>\$475.60</b>

The Clerk further explained that once the first four cumulative hours were satisfied, the charges for HR Administrator and the County Clerk Staff were deducted. Thus, the special services charge incurred by the custodian of records was \$397.00. While the Clerk chose not to separately charge you a special service fee, her office was entitled to do so. We find that the special service fee the Clerk was entitled to receive exceeds the amount you were actually charged to obtain the records you requested. For this reason, you are not entitled to a refund.

### **CONCLUSION**

For the reasons stated above, we conclude that the Kimball County Clerk improperly calculated the fee it charged to fulfill your records request. However, we find that the amount you were charged is less than the total special service charge permitted by the NPRS. For this reason, you are not entitled to a refund. We direct the Clerk to strictly follow Neb. Rev. Stat. §84-712(3) to determine the fee for future public records requests. Specifically, we advise that the standard per page fee may not be used for public records requests. Instead, the Clerk is directed to specifically calculate the actual added cost and special service charge required for each individual request.

We also find that the Clerk violated the NPRS when she refused to permit you to use your own copying equipment. The Clerk is directed to accommodate future requests by individuals to use their own copying equipment as permitted by the NPRS.

David Hottell  
March 1, 2022  
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We do not believe that further action by this office is appropriate and we are closing this file. If you disagree with our analysis, you may discuss this matter with a private attorney to determine what additional remedies, if any, are available under the NPRS.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General



Elizabeth O. Gau  
Assistant Attorney General

CC: Matt Turman  
03-019-30