



STATE OF NEBRASKA
Office of the Attorney General

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DOUGLAS J. PETERSON
ATTORNEY GENERAL

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December 14, 2021

Via email at [REDACTED]
Paul D. Higgins
[REDACTED]

RE: *File No. 21-R-147; City of Benkelman; Paul D. Higgins, Petitioner*

Dear Mr. Higgins:

This letter is in response to your petition filed against the City of Benkelman ("City"), which we received on November 29, 2021. You are challenging the City's compliance with § 84-712 of the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020, Supp. 2021), with respect to its handling of your November 18, 2021, records request. On December 8, 2021, we discussed this matter with the City Clerk/Treasurer, Diane Rosenfelt, and the City Attorney, Jon Schroeder. At our request, Ms. Rosenfelt provided this office emails she exchanged with you between November 29 and December 1. We have considered your petition and the correspondence we received from Ms. Rosenfelt in accordance with the provisions of the NPRS, and our response to your petition is set out below.

RELEVANT FACTS

On November 18, 2021, you emailed the Benkelman City Council a letter requesting, among other things, the following records:

[A]ll fiscal year-end (FY 2021) financial statements of the City of Benkelman including, but not limited to, those proper and necessary evaluations and analyses that these financial statements intend. This is also to include all notes, handwritten ledgers, City Council members emails relating to this FOIA request, City Council Minutes, and any and all other discussions of the City Council members relating to this proposed fee increase which is contemplated under this specific FOIA request.

Those Financial Statements being requested are:

- Balance Sheet
- Income Statement
- Cash Flow Statement

* * *

Please also supply me with your justification¹ for your proposed taxation (fee rates) increases in all city utilities, and those related analyses and studies.

Furthermore, I find it quite obtuse that you justify your proposed action because some unknown CPA told you that you can. I also request a copy of this advice, suggestion, and analysis.

You further indicate that you are “also open to reasonably reconsider the ‘Response Time’ noted” in § 84-712.

Ms. Rosenfelt responded to your request by email on November 22, indicating that she and Mr. Schroeder were reviewing and conducting research on your request to ensure compliance with the law. She asked “for more time in getting this information together for you as it is a short week because of the Holiday, and we will have Auditors in the office early Monday morning for the day.”

You responded on November 23, stating in part that

[a]lthough the Statutes do not contemplate this, and as I noted in the FOIA request, I am more than happy to waive this requirement to some reasonable date so as to accommodate the City Council. What date do you have in mind?

You subsequently filed your petition with this office, which consisted of a letter you emailed to Ms. Rosenfelt on November 29. You assert in this letter that “the City . . . is in non-compliance with § 84-712, and remains so as of this date. The City . . . hence denies me of my lawful rights.” According to the emails provided by Ms. Rosenfelt, she emailed you all records responsive to your request on November 29 and 30, at no cost.

¹ As stated in Op. Att’y Gen. No. 90015 (February 27, 1990), “[a]part 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.” *Id.* at 1. The same is true for all governmental entities in the state, like the City of Benkelman. While § 84-712 governs your right to access existing public records, it does not require a public agency to review documents and create abstracts or other lists, to answer questions or to create documents which do not otherwise exist. See Op. Att’y Gen. No. 94092 (November 22, 1994); Op. Att’y Gen. No. 94035 (May 11, 1994); Op. Att’y Gen. No. 87104 (October 27, 1987).

DISCUSSION

Procedural provisions relating to requesting and responding to requests for public records are set out in § 84-712(4), which states, in pertinent part:

Upon 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.

Neb. Rev. Stat. § 84-712 (2014). This provision allows record custodians to delay production of a records request beyond the four business days when the request is significantly difficult or extensive. In those instances, the record custodian must provide the requester a written explanation for the delay, including (1) the earliest practicable date to fulfill the request, (2) an estimate of the cost to produce the records, and (3) notice that the requester may modify or prioritize the items in the request in some fashion. There is nothing in § 84-712(4) that requires the requester to waive the four business day deadline or approve the date estimated by the records custodian to fulfill the request.

In the present case, Ms. Rosenfelt responded in writing to your public records request on November 22, well within the four business day deadline. She indicated in her response that she needed more time to fulfill your request. However, she failed to provide you a date, a cost estimate, and the required notice. As indicated above, the undersigned has spoken to Ms. Rosenfelt and Mr. Schroeder about the defective response. Each has provided assurance that the City will strictly comply with the requirements in § 84-712(4) when handling public record requests in the future.

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Since there is no basis for further review by this office, we are closing this file. If you disagree with our determination set out above, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, may be available to you under the NPRS.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Diane Rosenfelt
Jon Schroeder

49-2835-30