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To: John Winkler, General Manager
Papio-Missouri River Natural Resources District

Date: March 28, 2008

Subject: Request for opinions concerning cost of copying public records

Yesterday you referred to a citizen's request for numerous records and you asked: (1) how much the NRD can charge for copying the documents requested, (2) whether the Board should adopt a policy governing such copying services, and (3) how much time the NRD has to respond to the citizen's request.

The Nebraska statutes governing citizens' requests for records (Secs. 84-712.02 through 84-712.04, R.R.S., Neb.) are set out in endnotes to this memo.ⁱ

The text of an opinion of the Nebraska Attorney General dated August 21, 2001 (Op. Atty. Gen. No. 01029) also is set out in an endnote to this memo.ⁱⁱ

(1)

Section 84-712(3)(b) RRS Neb. would allow the NRD to charge a citizen for the "actual cost of making the copies available." Op. Atty. Gen. No. 01029 states:

"Within that definition, the actual cost of making photocopies would clearly include such items as the cost of copying paper, copying machine rental, etc. However, the legislative history of LB 628, the bill which became § 84-712 (3) (b), indicates that the actual cost charged by public bodies for making photocopies of public records available may also include the actual cost of the staff time of the public employees involved in that process, including the time necessary to pull the records, separate out any portions of the records that may be kept confidential, copy the records and return them to the proper files."

(2)

A permissible Board policy could provide as follows:

"Xerox copies of public records. The cost charged by the District for copies of public records provided to members of the public under Section 84-712(3)(b) R.R.S., Neb. shall be determined from time to time by the General Manager in a manner consistent with Op. Atty. Gen. No. 01029 dated August 2, 2001, and should include (1) an amount representing the costs of the copies, considering such things as the capital or rental cost of the copier and the costs of power, toner, paper and other supplies; and (2) an amount representing the compensation paid to the District's employee(s) for the time reasonably required to produce the copies, considering, without limitation, such things as the time reasonably required to retrieve the

Manager in a manner consistent with Op. Atty. Gen. No. 01029 dated August 2, 2001, and should include (1) an amount representing the costs of the copies, considering such things as the capital or rental cost of the copier and the costs of power, toner, paper and other supplies; and (2) an amount representing the compensation paid to the District's employee(s) for the time reasonably required to produce the copies, considering, without limitation, such things as the time reasonably required to retrieve the records from the District's files, separate any portions that may be confidential, copy the records and return them to the District's files; provided, however, the total charged by the District for such copies shall not in any case exceed ____ cents per page."

(3)

The time limits on NRD compliance with the citizen's request are set out in Section 84-712(4) as follows:

"(4) 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, 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."

Please advise if there is any further information that I can provide on this subject.

i 84-712 Public records; free examination; memorandum and abstracts; copies; fees. (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 the same, 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 transaction of business and (b) except if federal copyright law otherwise provides, obtain copies of public records in accordance with subsection (3) of this section during the hours the respective offices may be kept open for the ordinary 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.

(3)(a) Copies may be obtained pursuant to subdivision (1)(b) of this section only if the custodian has copying equipment reasonably available. Such copies may be obtained in any form designated by the requester in which the public record is maintained or produced, including, but not limited to, printouts, electronic data, discs, tapes, and photocopies.

(b) Except as otherwise provided by statute, 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 cost of making the copies available. For purposes of this subdivision, (i) for photocopies, the actual cost of making the copies available shall not exceed the amount of the reasonably calculated actual cost of the photocopies, (ii) for printouts of computerized data on paper, the actual cost of making the copies available shall include the reasonably calculated actual cost of computer run time and the cost of materials for making the copy, and (iii) for electronic data, the actual cost of making the copies available shall include the reasonably calculated actual cost of the computer run time, any necessary analysis and programming, and the production of the report in the form furnished to the requester. State agencies which provide electronic access to public records through a gateway service shall obtain approval of their proposed reasonable fees for such records pursuant to sections 84-1205.02 and 84-1205.03, if applicable, and the actual cost of making the copies available may include the approved fee for the gateway service.

(c) This section shall not be construed to require a public body or custodian of a public record to produce or generate any public record in a new or different form or format modified from that of the original public record.

(d) If copies requested in accordance with subdivision (1)(b) of this section are estimated by the custodian of such public records to cost more than fifty dollars, the custodian may require the requester to furnish a deposit prior to fulfilling such request.

(4) 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, 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.

Source: R.S.1866, c. 44, § 1, p. 297; R.S.1913, § 5595; C.S.1922, § 4902; Laws 1925, c. 146, § 1, p. 381; Laws 1927, c. 193, § 1, p. 551; C.S.1929, § 84-712; R.S.1943, § 84-712; Laws 1961, c. 454, § 3, p. 1383; Laws 1979, LB 86, § 1; Laws 2000, LB 628, § 1

84-712.01 Public records; right of citizens; full access; fee authorized. (1) Except when any other statute expressly provides that particular information or records shall not be made public, public records shall include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form shall remain a public record when maintained in computer files.

(2) When a custodian of a public record of a county provides to a member of the public, upon request, a copy of the public record by transmitting it from a modem to an outside modem, a reasonable fee may be charged for such specialized service. Such fee may include a reasonable amount representing a portion of the amortization of the cost of computer equipment, including software, necessarily added in order to provide such specialized service. This subsection shall not be construed to require a governmental entity to acquire computer capability to generate public records in a new or different form when that new form would require additional computer equipment or software not already possessed by the governmental entity.

(3) Sections 84-712 to 84-712.03 shall be liberally construed whenever any state, county, or political subdivision fiscal records, audit, warrant, voucher, invoice, purchase order, requisition, payroll, check, receipt, or other record of receipt, cash, or expenditure involving public funds is involved in order that the citizens of this state shall have the full right to know of and have full access to information on the public finances of the government and the public bodies and entities created to serve them.

Source: Laws 1961, c. 454, § 2, p. 1383; Laws 1979, LB 86, § 2; Laws 1994, LB 1275, § 12; Laws 2000, LB 628, § 2

84-712.02 Public records; claimants before United States Department of Veterans Affairs; certified copies free of charge. When it is requested by any claimant before the United States Department of Veterans Affairs or his or her agent or attorney that certified copies of any public record be furnished for the proper and effective presentation of any such claim in such department, the officer in charge of such public records shall furnish or cause to be furnished to such claimant or his or her agent or attorney a certified copy thereof free of charge.

Source: Laws 1961, c. 454, § 4, p. 1384; Laws 1991, LB 2, § 30

84-712.03 Public records; denial of rights; remedies. Any person denied any rights granted by sections 84-712 to 84-712.03 may elect to:

(1) File for speedy relief by a writ of mandamus in the district court within whose jurisdiction the state, county, or political subdivision officer who has custody of the public record can be served; or

(2) Petition the Attorney General to review the matter to determine whether a record may be withheld from public inspection or whether the public body that is custodian of such record has otherwise failed to comply with such

sections. This determination shall be made within fifteen calendar days of the submission of the petition. If the Attorney General determines that the record may not be withheld or that the public body is otherwise not in compliance, the public body shall be ordered to disclose the record immediately or otherwise comply. If the public body continues to withhold the record or remain in noncompliance, the person seeking disclosure or compliance may (a) bring suit in the trial court of general jurisdiction or (b) demand in writing that the Attorney General bring suit in the name of the state in the trial court of general jurisdiction for the same purpose. If such demand is made, the Attorney General shall bring suit within fifteen calendar days of its receipt. The requester shall have an absolute right to intervene as a full party in the suit at any time.

In any suit filed under this section, the court has jurisdiction to enjoin the public body from withholding records, to order the disclosure, and to grant such other equitable relief as may be proper. The court shall determine the matter de novo and the burden is on the public body to sustain its action. The court may view the records in controversy in camera before reaching a decision, and in the discretion of the court other persons, including the requester, counsel, and necessary expert witnesses may be permitted to view the records, subject to necessary protective orders.

Proceedings arising under this section, except as to the cases the court considers of greater importance, shall take precedence on the docket over all other cases and shall be assigned for hearing, trial, or argument at the earliest practicable date and expedited in every way.

Source: Laws 1961, c. 454, § 5, p. 1384; Laws 1977, LB 39, § 316; Laws 1979, LB 86, § 3; Laws 2000, LB 628, § 3.

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Nebraska Attorney General Opinions: NO. 01029

DATE: August 2, 2001

SUBJECT: Photocopying Charges Under Nebraska Public Records Statutes

TO: All Nebraska State Agencies

WRITTEN BY: Don Stenberg, Attorney General

The Attorney General's Office has been contacted several times in the last few months concerning what amount may be charged for providing photocopies of documents to the public under Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (1999, Cum. Supp. 2000). In order to assist state agencies, as well as political subdivisions, we take this opportunity to set forth our views on the requirements of the law as well as the enforcement policy of the Attorney General concerning this issue.

Section 84-712 (3) (b) allows the custodian of a public record in Nebraska to charge a fee for providing copies of public records to members of the public, "which fee shall not exceed the actual cost of making the copies available." That same statute provides that,

for photocopies, "the actual cost of making the copies available shall not exceed the amount of the reasonably calculated actual cost of the photocopies." Within that definition, the actual cost of making photocopies would clearly include such items as the cost of copying paper, copying machine rental, etc. However, the legislative history of LB 628, the bill which became § 84-712 (3) (b), indicates that the actual cost charged by public bodies for making photocopies of public records available may also include the actual cost of the staff time of the public employees involved in that process, including the time necessary to pull the records, separate out any portions of the records that may be kept confidential, copy the records and return them to the proper files. Floor Debate on LB 628, 96th Neb. Leg., 2nd Sess. 10051-10053 (Mar. 8, 2000)(Statement of Sen. Coordsen). In that regard, the Legislature also deleted portions of the original LB 628 which specifically provided that the actual cost of making copies of public records could not include the cost of salaries of public employees. Legislative Journal, 96th Neb. Leg., 2nd Sess. 757-758 (Feb. 22, 2000) and 836 (Feb. 28, 2000); Floor Debate on LB 628, 96th Neb. Leg., 2nd Sess. 10050 (March 8, 2000). As a result, we believe that public bodies may charge an appropriate amount for the time of public employees involved in making photocopies of public records in determining the amount that those bodies will charge for photocopies.

The amount of time involved in making photocopies of public records will necessarily vary from case to case. However, we are of the opinion that the amount charged cannot exceed the amount of time reasonably needed to perform the task. For example, if it took a public official 40 work hours to locate a document that should reasonably have been found in 10 minutes, then the charge must be based on 10 minutes.

As another example, assume a member of the public is given a file containing 1000 pages of documents and then selects 10 pages and hands them to the public official and asks for a copy of those 10 pages. In that case, the time charged cannot exceed the amount of time reasonably needed to make those 10 copies.

We also note that for-profit copy centers and coin operated machines in libraries typically charge between 5 cents and 10 cents per copy at this time.

Considering the statutory language, the legislative history of the law, the principles stated above, and current copy charges, it is the enforcement policy of the Attorney General's office that we will not question any per copy charge in the range of 5 to 10 cents or less. We also note that a public official may generally make copies available for free if he or she chooses to do so. Finally, in those cases where a state statute sets a specific fee for copies of a certain type of document, then that specific fee is the amount which must be charged, rather than actual cost calculated under the Public Records Statutes.

Above these amounts, under the Public Records Statutes a public official will need to be able to demonstrate that a specific amount of time was reasonably devoted to making the copies in order to justify an additional labor charge in a particular case.

For example, if half an hour were reasonably required to locate and copy 50 pages and the hourly pay of the person making the copies is \$10 per hour, then a maximum charge of \$10 (50 copies x \$0.10 + \$5 for a half hour of time) would not be challenged by the Attorney General. In this example this works out to 20 cents per page.

On the other hand, if a member of the public searches a file and finds 50 documents which are handed to a public employee to be copied and which are or reasonably could

be completed in 5 minutes, the member of the public could only be charged for 5 minutes of time.

In sum, it is our view that the law is clear that the public may not be charged in excess of the actual cost of providing photocopies of documents under Nebraska Public Records Statutes. Actual cost includes the cost of copy paper, toner, copy machine rental, etc. In addition, when copies are requested a charge may be made for the staff time of public employees involved in locating the records, making copies and returning them to the proper files. As an administrative matter, it will be the enforcement policy of the Attorney General's Office not to question charges up to 10 cents per page for making photocopies of public records for a member of the public. If a public official wishes to charge more than that amount in responding to a particular request, he or she may do so, but must be able to demonstrate that the actual cost, including a reasonable labor charge, equals or is greater than the fee being charged for the copies.

Finally, it should be remembered that the purpose of the Nebraska Public Records Statutes is to make public documents readily available to Nebraskans. In keeping with the spirit of the public records laws, it is altogether appropriate and desirable for public officials to respond to requests for copies of public documents without charging a fee or by charging a nominal fee.

Sincerely,

DON STENBERG
Attorney General

22.2 – Miscellaneous - Public Record Availability

1. Any person may examine public records maintained by the District during the District's business hours, make memoranda or abstracts from such records, or make copies of such records, upon written request to the General Manager of the District for an appointment to view such records at its Omaha office.
 - a. A request letter and its envelope should be addressed to the District's Omaha office, marked "Records Request," and include the requester's name, mailing address and day time telephone number in the event the District needs to contact the person.
 - b. The request should reasonably describe the records being sought and, whenever possible, include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. The District does not conduct research to determine what records to provide.
 - c. If the request does not sufficiently describe the records to allow the District to locate them, the District may require additional information to be provided.
 - d. A written request for the District to provide copies of records shall be considered an agreement that the person requesting the copies will pay 25 cents per copy made by the District on a standard 8½ x 11 inch sheet of paper. Original records shall not be removed from the District's premises.
 - e. The District will not provide copies of materials that are subject to copyright law.
2. Upon receipt of a written request for access to or copies of a public record, the District will provide the requested record(s) for examination, or the copies requested, as soon as practicable but no later than four (4) business days after the written request is received; except that, if the entire request cannot reasonably be fulfilled within four business days due to significant difficulty or extensiveness of the request, the District will notify the requester in writing as to the reasons for the delay, including the earliest practicable date for fulfilling the request, and provide an estimate of the expected cost of any copies and an opportunity for the requester to modify or prioritize the items within the request.
3. Any person requesting photographic or other copies of public records must pay for the cost of reproduction in the amount of 25 cents per copy made on standard 8 ½ x 11 inch paper. Any person requesting maps, aerial photographs, digital disks or audio copies must pay the cost of reproduction in an amount determined by the District to cover the actual costs of making the records available. Charges for sales tax, and postage if necessary, shall be assessed on all requests.
4. The District may withhold records in accordance with Neb. Rev. Stat. 84-712.05. Any reasonably segregable public portion of such record shall be provided upon request after deletion of the portions which may be withheld.

5. Any person denied a request for public records by the General Manager or his or her designee shall receive a written response in accordance with Neb. Rev. Stat. 84-712.04. Any person denied a request for public records may seek review in accordance with Neb. Rev. Stat 84-712.03.

[April 10, 2008]