



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

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**DOUGLAS J. PETERSON**  
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June 20, 2019

Via email at [al13fe@gmail.com](mailto:al13fe@gmail.com)  
Alec Ferretti  
242 E. 38<sup>th</sup> St., Apt. 2F  
New York, NY 10016

RE: *File No. 19-R-117; Department of Health and Human Services; Alec Ferretti, Petitioner*

Dear Mr. Ferretti:

This letter is in response to your petition received by this office on June 5, 2019, in which you sought our review of the denial of your public records request by the Nebraska Department of Health and Human Services ("DHHS"). In accordance with our normal practice, we forwarded a copy of your petition to DHHS upon receipt, and subsequently discussed this matter with DHHS attorney Jaime Hegr. On June 19, 2019, the undersigned received a copy of Ms. Hegr's amended response to you, in which were presented various cost estimates to obtain the requested records. We considered your petition and DHHS' responses in accordance with § 84-712.03(1)(b) of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018) ("NPRS"). Our findings in this matter are set forth below.

#### **RELEVANT FACTS**

In a letter addressed to the DHHS Freedom of Information Officer dated May 30, 2019, you requested "a copy of the Nebraska Death Index and/or finding aid to deaths, from its onset (which I believe is in 1904) to 1968." On June 5, DHHS denied your request, indicating that "DHHS does not have an index for death records." In its amended response, DHHS now represents that indexes of death records do exist. In this regard, Ms. Hegr has laid out four options with cost estimates to obtain responsive records, which we have briefly summarized below:

1. Photocopies of 1904-1955 death index records  
from paper ledger.....\$ 11,294.83
2. Scanned copy of 1904-1955 death index records  
from paper ledger.....\$ 5,794.83
3. Electronic copy of 1956-1968 death index records  
from computer database (without verification) .....\$ 32.64
4. Electronic copy of 1956-1968 death index records  
from computer database (with verification) .....\$193,923.25

### **DISCUSSION**

Upon receipt of a petition submitted under Neb. Rev. Stat. § 84-712.03(1)(b), the Attorney General must “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 subsection also requires the Attorney General to determine whether the cost estimates provided to the requester are consistent with the “actual added costs” and “special services charges” described in Neb. Rev. Stat. § 84-712(3)(b) and (c), respectively. Since DHHS has now represented to you that it has responsive records, and will produce those records upon payment of the fees enumerated above, we will focus only on the appropriateness of the estimates presented.

With respect to the fees which may be charged to produce copies of public records, Neb. Rev. Stat. § 84-712(3) provides, in pertinent part, as follows:

(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 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.

(c) 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 . . . .

We have carefully considered the costs estimated by DHHS, and make the following observations. First, we note that with respect to the computer database records, the number of IT staff hours was reduced by four hours in purported compliance with Neb. Rev. Stat. § 84-712(3)(c) (2014). As noted above, this subsection allows the custodian of records to assess labor costs for “searching, identifying, physically redacting, or copying” public records when the time spent to perform those tasks exceeds four cumulative hours. However, the four-hour threshold does not apply to the amount allowed to be charged by the custodian of the records to produce electronic data under Neb. Rev. Stat. § 84-712(3)(b)(iii). As a result, the correct amount should be stated as \$163.20 (5 hours x \$32.64).

Second, this office has taken the position that public bodies and officials are not required to create a public record that does not otherwise already exist in response to a request made under Neb. Rev. Stat. § 84-712 of the NPRS. See, e.g., Disposition Letter in *File No. 18-R-122; Nebraska State Patrol, Annita Lucchesi, Petitioner*, issued July 25, 2018. In this situation, the Attorney General concluded that the Nebraska State Patrol (“NSP”) was not required to compile data on criminal cases involving Alaska Native and American Indian women and girls since the data would have to be culled from individual files to create a new record. In addition, the information sought was not stored in a NSP database which could be retrieved, compiled and produced under Neb. Rev. Stat. § 84-712(3)(b)(iii). With that principle in mind, it appears to us that DHHS is under no obligation to engage in a “verification” process to supplement the record currently existing in its database.

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Overall, we believe that DHHS' amended response contains sufficient detail about its records and the manner in which those records are maintained, e.g., ledger books and computer system, to justify the estimates presented. 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: Jaime Hegr

49-2209-29