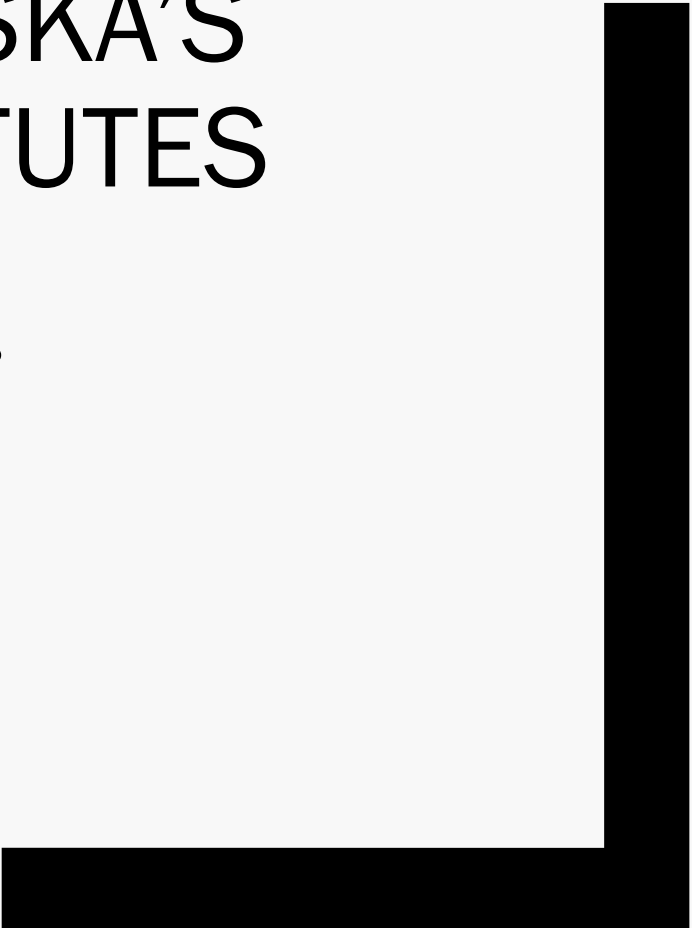




OVERVIEW OF NEBRASKA'S PUBLIC RECORDS STATUTES

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Nebraska Public Records Statutes

The Nebraska Public Records Statutes (“NPRS”) are found at Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2016).

Neb. Rev. Stat. § 84-712.05 was amended by three bills during the 2016 legislative session (2016 Neb. Laws LB 447, § 45; 2016 Neb. Laws LB 471, § 3; 2016 Neb. Laws LB 1109, § 1).

Basic Provision of § 84-712

“Except as otherwise expressly provided by statute, all citizens of this state, and all other persons interested in the examination of the public records . . . are hereby fully empowered and authorized to (a) examine the same, and make memoranda, copies using their own copying or photocopying equipment . . ., 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 . . . during the hours the respective offices may be kept open for the ordinary transaction of business.”

Purpose

- The purpose of § 84-712 is “to guarantee that public government records are public.” Introducer's Statement of Purpose for LB 505, 72nd Nebraska Legislature (1961).
- It was intended that all public records of the state, its counties, and its other political subdivisions should be open to inspection, except where the Legislature has otherwise provided that the record shall be confidential.

Public Records Defined--§ 84-712.01

“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.*” (Emphasis added.)

Definition of Public Record

- The "of or belonging to" language must be construed liberally to include any documents or records that a public body is entitled to possess, regardless of whether the public body takes possession. The public's right of access should not depend on where the requested records are physically located. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

Liberal Construction for Fiscal Records

- Section 84-712.01 provides that the Public Records Statutes shall be *liberally construed* when the fiscal records of a public body are involved so that citizens shall have full access to information on the public finances of government.

What Is *Not* Required Under § 84-712

- Section 84-712 does not require a **PUBLIC BODY**:
 - *To review documents and create abstracts of those documents*
 - *To answer questions or create lists*
 - *To create documents which do not otherwise exist*

What Is *Not* Required Under § 84-712

- Section 84-712 does not require the **REQUESTER**:
 - *To provide a reason for his or her request*
 - *To sign a form which purports to restrict his or her use of the public records*
 - *To be a Nebraska resident*

Copies of Public Records

- Under § 84-712(3)(a), a custodian of public records is required to make copies only if the custodian has copying equipment reasonably available.
- This subsection also provides that copies of public records may be obtained in any form designated by the requester in which the public record is **maintained or produced**, including printouts, **electronic data**, discs, tapes and photocopies.

Copies of Public Records

- Section 84-712(3)(a) does not require a custodian to copy any public record that is available on the custodian's website.
- The custodian is required to provide the location of the public record on the Internet to the requester. If the requester does not have reasonable access to the Internet, the custodian shall produce copies for the requester.

Fees for Copies of Public Records

- Section 84-712(3)(b) authorizes the custodian of a public record to charge a fee for providing copies of the records, which shall not exceed the ***ACTUAL ADDED COST*** of making the copies available.

Fees for Copies of Public Records

- For Photocopies:

- *The actual added cost shall not exceed the amount of the reasonably calculated actual added cost of the photocopies, which may include reasonably apportioned cost of supplies (paper, toner), as well as payments to contractors necessarily incurred to comply with the request.*

Fees for Copies of Public Records

- For Printouts of Computerized Data on Paper:
 - *The actual added cost shall include the reasonably calculated actual added cost of computer run time and the cost of materials for making the copy.*

Fees for Copies of Public Records

- For Electronic Data:

- *The actual added cost 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 IT company contracted to provide computer services to the public body, etc., and the production of the report in the form furnished to the requester.*

Fees for Copies of Public Records

- The actual added cost shall not include any labor costs 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.
- The fee shall not include any charge for the services of an attorney to review the public records seeking a legal basis to withhold the records from the public.

Copies of Public Records

- Section 84-712(3)(e) provides that a public body or the custodian of a public record is not required to produce or generate any public record in a new or different form or format modified from that of the original public record.

Fees for Copies of Public Records

- Under § 84-712(3)(f), if records requested under the NPRS are estimated by the custodian of those records to cost more than \$50, the custodian may require the requester to furnish a deposit *prior* to fulfilling the copy request.

Exceptions to Disclosure

- Section 84-712.05 describes records which may be withheld from the public by their lawful custodian unless publicly disclosed:
 - *in open court*
 - *in an open administrative proceeding*
 - *in an open meeting, or*
 - *pursuant to the duties of the public body.*

Exceptions to Disclosure

- Records have been “disclosed” in that context only when the public body has, in its official capacity, already made them available to the public. *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

Exceptions to Disclosure

- The Attorney General has concluded that the provisions of § 84-712.05 do not create “exemptions” to the NPRS, i.e., the various categories of records are still “public records.” However, even though they are public records, they may be kept confidential at the discretion of their custodial agency.

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (1) Personal information in student records, except routine directory information under the federal Family Educational and Privacy Rights Act.

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (2) Medical records, other than records of births and deaths, and certain investigatory records, in any form concerning any person; records of elections not to be bound by the Nebraska Hospital-Medical Liability Act under § 44-2821; and patient safety work product under the Patient Safety improvement Act.

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (3) Trade secrets, academic and scientific research work in progress and unpublished, and other proprietary or commercial information which would give advantage to business competitors and serve no public purpose if released.

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (4) Records which represent attorney work product or which are subject to the attorney/client evidentiary privilege as defined in Neb. Rev. Stat. § 27-503.

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (5) Records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination when the records are part of the examination, investigation, intelligence information, citizen complaints, informant identification, or information used in law enforcement training.

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (6) Appraisals and appraisal information and negotiation records concerning the purchase or sale by a public body of real or personal property prior to the completion of the purchase or sale.

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (7) Personal information in records regarding personnel of public bodies other than salaries and routine directory information. In this context, routine directory information includes employee's or former employee's name, position, gross salary, and dates of hire and separation.

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (8) Information solely pertaining to protection of the security of public property and persons on or within public property, such as specific, unique vulnerability assessments or response plans, either of which is intended to prevent or mitigate criminal acts the public disclosure of which would create a substantial likelihood of endangering public safety or property; computer or communications network schema, passwords, user IDs; guard schedules; lock combinations; and public utility infrastructure specifications or designs.

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (9) The security-related records of the Lottery Division of the Nebraska Department of Revenue and those persons or entities with which the division has entered into contractual relationships. Information regarding prize winners and payments to lottery contractors may not be withheld.

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (10) Information from public utilities including personally identified private citizen account payment information, credit information, and customer lists.

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (11) Records of publicly funded libraries which reveal the identities of patrons using the library's services.

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (12) Correspondence, memoranda, and records of telephone calls, related to the performance of duties by a member of the Legislature in whatever form.

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (13) Records which would reveal the location, character, or ownership of any known archaeological, historical, or paleontological site in Nebraska when necessary to protect such site from a reasonably held fear of theft, vandalism or trespass. This section does not apply to release of information for scholarly research, examination by other public bodies for the protection of the resource or by recognized tribes, the Unmarked Human Burial Sites and Skeletal Remains Protection Act, or the federal Native American Graves Protection and Repatriation Act.

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (14) Records kept by public bodies which maintain collections of archaeological, historical, or paleontological significance which would reveal the names and addresses of donors of such articles unless the donor approves disclosure. This section does not apply to records needed to carry out the purposes of the Unmarked Human Burial Sites and Skeletal Remains Protection Act, or the federal Native American Graves Protection and Repatriation Act.

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (15) Job application materials submitted by applicants, other than finalists or a priority candidate for a position described in § 85-106.06, who have applied for employment by any public body as that term is defined in the Open Meetings Act [§ 84-1409]. “Job application materials” in this context means “employment applications, resumes, reference letters, and school transcripts.”

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (16) Records obtained by the Public Employees Retirement Board pursuant to § 84-1512. Section 84-1512 allows the Retirement Board to receive, for purposes of administering the various retirement systems under its jurisdiction, such information from the state Department of Administrative Services and other employers as is necessary for the efficient and accurate administration of those systems.

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (17) Social security numbers; credit card, charge card or debit card numbers and expiration dates; and financial account numbers supplied to state and local governments by citizens.

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (18) Information exchanged between a jurisdictional utility and city pursuant to the State Natural Gas Regulation Act, Neb. Rev. Stat. §§ 66-1801 to 66-1868.

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (19) Draft records obtained by the Legislature's Retirement Committee and the Governor from the Nebraska Public Employees Retirement Systems pursuant to § 84-1503(4).

Categories of Documents Which May Be Kept Confidential Under § 84-712.05

- (20) All prescription drug information submitted pursuant to § 71-2454, all data contained in the prescription drug monitoring system, and any report obtained from data contained in the prescription drug monitoring system.

Other Statutory Exception

- Under § 84-712.08, provisions of the NPRS shall be suspended when it is determined by a federal agency or other federal source of funds, services, or essential information that application of such provisions would cause the denial of the federal funds, etc. which would otherwise definitely be available to state agency.

Requests for Access to or Copies of Public Records

- Section 84-712(4) provides that, upon written request for access to or copies of a public record, the custodian of that record must provide the requester with **an estimate of the expected cost of the copies** and one of the following three things to the requester as soon as is practicable and without delay, **BUT NOT MORE THAN FOUR (4) BUSINESS DAYS AFTER ACTUAL RECEIPT OF THE WRITTEN REQUEST:**

Requests for Access to or Copies of Public Records

- First, the custodian may provide the requester with access to the record or copies of the records, if copying equipment is reasonably available.

Requests for Access to or Copies of Public Records

- Second, if there is a legal basis for denial of access to or copies of the record, the custodian may provide the requester with a written denial of the records request together with the information specified in § 84-712.04.

Requests for Access to or Copies of Public Records

- Third, the custodian may provide the requester with a written explanation of delay if the entire records request cannot, with reasonable good faith efforts, be fulfilled within four business days after actual receipt of the written request due to the significant difficulty or the extensiveness of the request.

Requests for Access to or Copies of Public Records

- The written explanation of delay must include:
 - *(i) the earliest practicable date for fulfilling the records request;*
 - *(ii) an estimate of the expected cost of any copies; and*
 - *(iii) an opportunity for the requester to modify or prioritize the items within the request.*

Requests for Access to or Copies of Public Records

- The **requester** has **10 business days** to review the estimated costs for copies 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 10 business days**, the custodian shall not proceed to fulfill the request.

Requests for Access to or Copies of Public Records

- Of course, the public body may simply respond that there are no records in the possession of the public body responsive to the request.

Requests for Access to or Copies of Public Records

- With respect to voluminous requests, the legislative history of LB 628 [2000] makes it clear that the custodian of the records may take whatever time is needed under the circumstances to prepare copies of the records at issue. Such a response time, for records requests such as “any and all records pertaining to” may be an “*extremely long time.*”
- Such a voluminous records request also does not require the custodian to abandon all other public duties in order to accommodate the request.

Denial of Access to Public Records; Explanation

- Section 84-712.04 provides that if a requester is denied access to a public record, he or she should receive the following information from the public body:

Denial of Access to Public Records; Explanation

- First, a description of the contents of the records withheld and a statement of the specific reasons for the denial, including citations to particular statutes and subsections relied upon as authority for the denial correlated to specific portions of the records at issue.

Denial of Access to Public Records; Explanation

- Second, the name of the public employee or official who made the decision to deny the request.
- Third, notification to the requester of any administrative or judicial right of review under § 84-712.03.

Denial of Access to Public Records; Recordkeeping

- Every public body shall maintain a file of all letters of denial of requests for records, and this file shall be made available to any person on request.

Denial of Rights Relating to Public Records; Remedies

- Section 84-712.03 sets out several remedies available to a person denied rights with respect to public records:
 - *A person can file a mandamus action against the public officer who has custody of the record in the district court within whose jurisdiction that public officer can be served.*

Denial of Rights Relating to Public Records; Remedies

- When a writ of mandamus is sought pursuant to § 84-712.03, the party seeking the writ must first show: (1) that the party is a citizen of the state or other person interested in the examination of the public records, (2) that the document sought by the party is a public record as defined by § 84-712.01, and (3) that the party has been denied access to the public record guaranteed by § 84-712.

Denial of Rights Relating to Public Records; Remedies

- Thereafter, if the public body holding the record wishes to oppose the issuance of a writ of mandamus, the public body must show, by clear and conclusive evidence, that the public record at issue is exempt from the disclosure requirement under one of the exceptions set out in § 84-712.05 or § 84-712.08.

Denial of Rights Relating to Public Records; Remedies

- An individual may 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 the record has otherwise failed to comply with the NPRS.
- The Attorney General has fifteen (15) calendar days after submission of the petition to make this determination.

Denial of Rights Relating to Public Records; Remedies

- If the Attorney General determines that the record cannot be withheld or that the public body is otherwise not in compliance with the NPRS, then the Attorney General shall order the public body to disclose the record or otherwise comply. Neb. Rev. Stat. § 84-712.03(1)(b) (2014).

Denial of Rights Relating to Public Records; Remedies

- If the public body continues to withhold the record or remains in noncompliance, the individual seeking disclosure may:
 - *Bring suit in the trial court of general jurisdiction, or*
 - *Demand in writing that the Attorney General bring suit in the name of the state for the same purpose. If a demand is made, the Attorney General must bring suit within 15 calendar days of its receipt.*

Denial of Rights Relating to Public Records; Remedies

- In a suit filed under § 84-712.03, the court has jurisdiction to:
 - *Enjoin the public body from withholding records,*
 - *Order the disclosure, and*
 - *Grant such other equitable relief as may be proper.*

Denial of Rights Relating to Public Records; Remedies

- The court shall determine the matter *de novo*, and the burden is on the public body to sustain its action.
- The court can review the records in controversy in camera before reaching a decision, and the court may call on other persons, including the requester, counsel, and necessary experts to review the records, subject to necessary protective orders.

Denial of Rights Relating to Public Records; Remedies

- Section 84-712.07 also provides that the provisions of the NPRS [and § 84-1413 of the Open Meetings Act] may be enforced by equitable relief, whether or not any other remedy is also available. In any case where the complainant seeking access has **substantially prevailed**, the court may assess *reasonable attorney's fees and other litigation costs* reasonably incurred by the complainant against the public body which denied access to its records.

Violations of the NPRS; Penalties

- Any official who violates the provisions of the NPRS shall be subject to removal or impeachment and shall be guilty of a Class III misdemeanor.

Miscellaneous Provisions

- Section 84-712.02 requires public bodies to provide to claimants before the U.S. Department of Veterans Affairs, upon request, certified copies of pertinent records free of charge.

Miscellaneous Provisions

- Section 84-712.06 provides that, when portions of a public record may be properly withheld, segregable portions of the public record in question shall be provided to the public upon request after deletions of the portions which may remain confidential.

BEST PRACTICES

- Establish a process for fulfilling requests
- Be organized; have template letters drafted and ready for use
- Remember, you are operating on a short timeframe
- Get estimates (time/cost) from individuals who may be affected by requests
- Ask for and get a deposit before beginning any search
- It is up to the *requester* to respond to the public body after receiving the estimated costs for production
- Keep a copy of what you produce in response to a public records request

