

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA EX.
REL., NEBRASKA
JOURNALISM TRUST, d/b/a
The Flatwater Free Press,

Relator,

v.

NEBRASKA DEPARTMENT OF
ENVIRONMENT AND
ENERGY; ANE MCBRIDE, in
her official capacity as Records
Manager for the Nebraska
Department of Environment and
Energy,

Respondents.

CASE NO. _____

**VERIFIED PETITION FOR
WRIT OF MANDAMUS
PURSUANT TO NEB. REV.
STAT. § 84-712.03**

Nebraska Journalism Trust, d/b/a The Flatwater Free Press (“Relator”), files this Verified Petition for Writ of Mandamus pursuant to Neb. Rev. Stat. § 84-712.03. Relator alleges as follows:

1. The Flatwater Free Press is a Nebraska non-profit organization focused on investigations and feature stories.
2. Matt Wynn and Yanqi Xu are employees of the Flatwater Free Press.
3. Respondent Nebraska Department of Environment and Energy (“NDEE”) is an entity of the State subject to the Nebraska Public Records Act.
4. Respondent Ane McBride is the Records Manager for NDEE. Ms. McBride is the custodian of records belonging to the NDEE for purposes of the Nebraska Public Records Act.

5. Relator is an interested person in examination of public records for purposes of Neb. Rev. Stat. § 84-712.

6. On June 16, 2022, Relator issued a public records request to NDEE seeking:

“[E]mails sent or received by any NDEE staffer under the Drinking Water & Groundwater Division, Waste Permit, Water Planning, Wastewater & Drinking Water Engineering & Technical Assistance, Livestock Compliance, and Agriculture sections that contain any of the keywords ‘nitrate,’ ‘nutrient,’ ‘fertilizer’ or ‘nitrogen’ between Jan. 1, 2017 to June 15, 2022. The keywords may appear in any field, i.e. to, cc, bcc, subject, from, sender, or body of the message. I would also request that attachments be included in those emails.”

7. A true and accurate copy of Relator’s public records request is attached hereto as Exhibit “A.”

8. NDEE responded to Relator’s public records request on June 30, 2022. NDEE informed Relator that it would not begin its search for the requested records until it received a pre-paid deposit of \$44,103.11, which is NDEE’s estimated cost of fulfilling the request (“Cost Estimate”). A true and accurate copy of NDEE’s Cost Estimate is attached hereto as Exhibit “B.”

9. NDEE’s Cost Estimate includes thousands of dollars in time for a legal review—that is, a review of responsive documents to determine if the documents **(a)** are the subject of ongoing litigation, and **(b)** can be withheld from disclosure under the exceptions to the Public Records Act.

10. NDEE explained this cost in written correspondence to Relator as “review of each email to be sure it is not part of litigation case [sic] or whether there is any basis or requirement to keep it confidential under the appropriate Nebraska statutes.” A true and accurate copy of this correspondence is attached hereto as Exhibit “C.”

11. The Public Records Act prohibits state agencies from charging requesting parties for costs associated with legal reviews. The Act specifically provides: “[T]he 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.” Neb. Rev. Stat. § 84-712(3)(c).

12. NDEE attempts to improperly circumvent this provision by assigning its legal review to rank-and-file employees. According to NDEE, administrative staff and engineers—not legal counsel—will review each responsive record to determine if it is the subject of ongoing litigation or can otherwise be withheld under the Public Records Act.

13. Upon information and belief, non-attorney staff at NDEE have no formal training in Nebraska’s Public Records Act and are not otherwise qualified to determine whether a particular document is the subject of ongoing litigation. Further, in Nebraska, a person who provides legal services, who is not a licensed lawyer, or who is not otherwise authorized by law to provide legal services, may be engaging in the unauthorized practice of law.

14. Regardless of who performs the legal review, NDEE’s Cost Estimate does not comply with the Public Records Act. Specifically, NDEE is not authorized by law to charge Relator for any costs associated with either (a) determining if a document is the subject of ongoing litigation, or (b) determining if the document falls within statutory exceptions to the Public Records Act.

15. Relator is entitled by law to a fair and accurate estimate of costs associated with its public records request.

16. NDEE violated Relator’s rights under the Public Records Act by providing a legally insufficient and invalid estimate. NDEE’s current Cost Estimate of \$44,103.11 is an effective denial of Relator’s public records request.

17. Relator further alleges that all documents responsive to its request are “public records” under Nebraska’s Public Records Act.

18. Relator requests that the Court issue a peremptory writ of mandamus to Respondents commanding them to provide a legally accurate cost estimate in response to Relator’s June 16, 2022 public records request.

19. Alternatively, if the Court declines to issue a peremptory writ mandamus, Relator requests that the Court issue an alternative writ of mandamus compelling Respondent either to immediately provide the records requested by Relator, including a legally sufficient cost estimate, or show cause by a date certain why they decline to provide a legally sufficient cost estimate by promptly answering the allegations in the mandamus petition and this Complaint, and upon the filing of such Answer, to set a date for the trial of this case at the earliest practicable date.

20. Relator requests that this matter “take precedence on the trial docket over all other cases . . . be assigned for hearing, trial, or argument at the earliest practicable date and [be] expedited in every way” pursuant to Neb. Rev. Stat. § 84-712.03(3).

21. Relator requests that the Court assess against Respondents reasonable attorney fees and other litigation costs reasonably incurred by Relator under Neb. Rev. Stat. § 84-712.07.

WHEREFORE, Relator request that the Court issue a preemptory writ of mandamus compelling Respondent to provide a legally accurate cost estimate to Relator; alternatively, Relator requests that the Court issue an alternative writ of mandamus as described above; that this matter be promptly set for trial; and that the Court assess against Respondent reasonable attorney fees and litigation costs reasonably incurred by Relator.

DATED this 17th day of November, 2022.

FLATWATER FREE PRESS,

/s/ Daniel J. Gutman

Daniel J. Gutman, #26039

Law Office of Daniel Gutman

4338 Shirley Street

Omaha, NE 68105

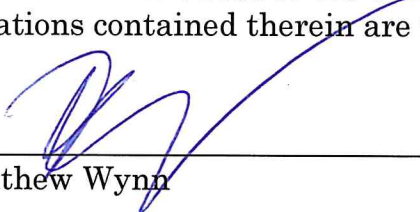
(402) 319-8897

daniel@gutmanllc.com

VERIFICATION

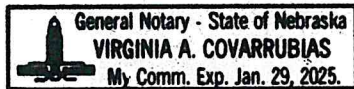
STATE OF Nebraska)
) ss.
COUNTY OF Douglas)

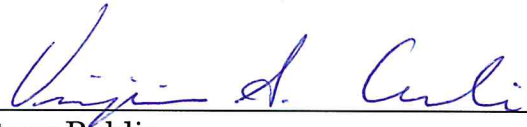
Mathew Wynn, being first duly sworn upon oath, deposes and states that he is employed by Relator as a reporter for The Flatwater Free Press; that he has read the Verified Petition for Writ of Mandamus Pursuant to Neb. Rev. Stat. § 84-712.03 and knows the contents thereof; that he has conducted sufficient investigation into the facts alleged in the Verified Petition for Writ of Mandamus Pursuant to Neb. Rev. Stat. § 84-712.03, to enable him to swear to the truth of such allegations; and that the allegations contained therein are true.



Mathew Wynn

SUBSCRIBED AND SWORN to before me on this 17th day of November, 2022.





Notary Public

June 16, 2022

Dear NDEE records custodian,

I hope you're well. This is Yanqi Xu, reporter with the Flatwater Free Press. I would like to make a public records request as follows, pursuant to Nebraska Public Records Statutes or Neb. Rev. Stat. § 84-712.

I would like to request emails sent or received by any NDEE staffer under the Drinking Water & Groundwater Division, Waste Permit, Water Planning, Wastewater & Drinking Water Engineering & Technical Assistance, Livestock Compliance, and Agriculture [sections](#) that contain any of the keywords **"nitrate", "nutrient", "fertilizer" or "nitrogen"** between Jan 1, 2017 to June 15, 2022. The keywords may appear in any field, i.e. to, cc, bcc, subject, from, sender, or body of the message. I would also request that attachments be included in those emails.

I ask that you provide the parole records in a native data format that's machine readable. I agree to pay any reasonable copying and postage fees of not more than \$300. If the cost would be greater than this amount, please notify me. Please provide a receipt indicating the charges for each document.

As provided by the open records law, I will expect your response within four (4) business days. See Neb. Rev. Stat. Sec. 84-712(4).

If you choose to deny this request, please provide a written explanation for the denial including a reference to the specific statutory exemption(s) upon which you rely. Also, please provide all segregable portions of otherwise exempt material.

In addition, please know that I am amenable to altering this request in the interest of obtaining information in a timely manner. If there are ways I can get similar information without creating an undue burden, please feel free to reach out and we can discuss making those changes. Same goes for if our time frames are unnecessarily burdensome. We would be willing to alter our request to accommodate receiving data covering only that period of time.

Sincerely,

Yanqi Xu
Reporter, Flatwater Free Press
yxu@flatwaterfreepress.org
402-726-1832

NEBRASKA

Good Life. Great Resources.

DEPT. OF ENVIRONMENT AND ENERGY



Pete Ricketts, Governor

June 30, 2022

Yanqi Xu
Flatwater Free Press
1111 N 13th Street, Suite 145
Omaha, NE 68102

Re: Public Records Request

Dear Ms. Xu,

This letter is in response to your email dated June 16, 2022, in which you requested certain records from the Nebraska Department of Environment and Energy under the Nebraska Public Records Statutes, Neb. Rev. Stat. 84-712 through 84-712.09 (2014, Cum. Supp. 2020). Specifically, you requested email, and attachments, sent or received by NDEE staff in the Drinking Water and Groundwater Division, Waste Permit, Water Planning, Wastewater and Drinking Water, Engineering and Technical Assistance, and Livestock/Agriculture sections that contain the keywords "nitrate", "nutrient", "fertilizer" or "nitrogen" between January 1, 2017, to June 15, 2022.

This office will need to conduct a search of numerous records to identify those records which are responsive to your request. We must then determine whether there is any basis or requirement to keep certain records, or portions of records, confidential under the appropriate Nebraska statutes. As a result, your records request cannot be fulfilled within the four business days prescribed in Neb Rev Stat 84-712(4) (2014).

We estimate that the total actual cost of providing the copies you requested will be \$44,103.11. Under Neb. Rev. Stat. 84-712(3)(f), the custodian of public records in Nebraska may require the requester of copies of public records to furnish a deposit prior to fulfilling a records request if it is anticipated that the costs of providing copies of public records will exceed \$50. Consequently, when we receive a check in the amount of \$44,103.11, we will begin our search for the requested records. You may make your check payable to the State of Nebraska. Pursuant to Neb. Rev. Stat. 84-712(4), you have ten business days to review the estimated costs set out above and request that we fulfill the original request, negotiate with us to narrow, or simplify your request, or withdraw your request. If we do not receive a response from you within ten business days from the date of this letter, we will not proceed further to fulfill your records request.

The earliest practicable date for fulfilling your records request is 60 business days after we receive your response and begin our search. However, as with the cost of fulfilling your records request, this time frame may change as we go forward with the search process. Under Neb. Rev. Stat. 84-712(4), you may choose to modify or prioritize the items within your request in some fashion.

Sincerely,

Ane C. McBride
Records Manager

Department of Environment and Energy

P.O. Box 98922
Lincoln, Nebraska 68509-8922

Jim Macy, Director

OFFICE 402-471-2186 FAX 402-471-2909
ndee.moreinfo@nebraska.gov

From: Matt Wynn <mwynn@flatwaterfreepress.org>
Sent: Monday, October 17, 2022 4:39 PM
To: McBride, Ane <Ane.Mcbride@nebraska.gov>
Cc: Yanqi Xu <yxu@flatwaterfreepress.org>
Subject: Clarification on records request

Hi Ane,

Greetings from the back half of the year! Our outstanding request is once again on my radar screen and I just wanted to circle back and make sure I understand everything that's proposed.

- First, I want to make sure I've got a handle on all these divisions. Most of them make sense to me and seem germane to the request. However, what is the Engineering and Technical Assistance division? I wonder if we could just eliminate them entirely.

The Engineering and Technical Assistance division is engineers who review plans for public drinking water facilities, wastewater facilities, swimming pools, mobile home parks and camps.

- On Table A in your email from June 30 (the good ol' days), you say the cost would cover time for employees to search, analyze and save the emails. Does "search" refer to a keyword search in an email client? What about "analyze?"

I intended "analyze" as review of each email to be sure it is not part of litigation case or whether there is any basis or requirement to keep it confidential under the appropriate Nebraska statutes.

- On the same email, in the specific tasks to be completed to fulfill the request, what does the term "pertinent" mean? Is that just all emails with the terms requested or is there something else at play?

I meant "pertinent" to mean all the email with the terms requested that are not kept confidential under statute.

[Quoted text hidden]