

# The Inbox Trap: Best Practices for Public Records and your Cell Phone/Emails

2025 NACO Annual Conference

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# Questions?

# Public Records

Background

# Public Records Laws



# Federal Public Records Law

- FOIA (foy-yah) → Freedom of Information Act
  - Federal law, applicable to federal government
  - FOIA not applicable to state governments, or their political subdivisions

# Nebraska Public Records Laws

- Neb. Rev. Stat. §§ 84-712 et seq.
- Nebraska legislature:
  - <https://nebraskalegislature.gov/laws/browse-statutes.php>
- Nebraska Attorney General:
  - <https://ago.nebraska.gov/open-government>

# Laws Change

- E.g. Neb. Rev. Stat. § 84-712.05

- Laws 2011, LB230, § 1;
- Laws 2013, LB410, § 17;
- Laws 2016, LB447, § 45;
- Laws 2016, LB471, § 3;
- Laws 2016, LB1109, § 1;
- Laws 2018, LB859, § 1;
- Laws 2018, LB902, § 1;
- Laws 2019, LB16, § 1;
- Laws 2019, LB33, § 6;
- Laws 2019, LB375, § 1;
- Laws 2021, LB147, § 44;
- Laws 2022, LB876, § 25;
- Laws 2022, LB1246, § 5;
- Laws 2024, LB43, § 11;
- Laws 2024, LB1074, § 98;
- Laws 2024, LB1204, § 37.

# Nebraska

- [A]ll ~~citizens~~ residents\* of this state and all other persons interested in the examination of the **public records** . . . are hereby fully empowered and authorized to—
  - (a) examine such [public] records and make . . . copies using their own copying or photocopying equipment . . . ; and
  - (b) except if federal copyright law otherwise provides, obtain copies of public records . . . .

\* Modified 2024 LB 43

# 2024 LB 43

- Former law → “All citizens ... are empowered to ... examine records”
- Current law → “All residents ... are empowered to ... examine records”

# 2024 LB 43

- Who is a resident?
  - Person domiciled in this state
  - News media without regard to domicile
- Does this include corporations?
- Who determines domicile?
- All news media, regardless of location (NY Times, Al Jazerra?)

# “Residents and all other Persons”?

- Only Nebraska residents are allowed to make Public Records Requests?
- NPRL “applies equally to all persons without regard to the purpose for which the information is sought”

# Valid Reason?

- Public Records Request can only be made for valid reasons?
- NPRL “applies equally to all persons without regard to the purpose for which the information is sought”

# Public Records

- What are Public records?
- “[A]ll records and documents, regardless of physical form, of or **belonging to** this state, any county, city, village, political subdivision . . .”

# “Of or Belonging To”

- “[T]his broad definition includes 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* (S/C 2009)

# “Of or Belonging To”

- *Evertson v. City of Kimball (Neb. S/C 2009)*
- “Functional Equivalency” test
- Used to determine when records not in the possession of the governmental entity are nonetheless “public records”
- Typ—when governmental entity pays to outsource some function to a private 3<sup>rd</sup> party

# Public Records

## Exceptions to Disclosure

# Public Records Not Subject to Disclosure

- Twenty-Nine (29) categories of Public Records which may be withheld
- At the discretion of the records custodian
- But, not if already publicly disclosed in
  - open court,
  - open administrative proceeding
  - open meeting, or
  - disclosed by a public entity pursuant to its duties

# Withholding Permissible

- (2) Medical records (other than some enumerated exceptions)
- (3) Trade secrets and “other proprietary or commercial information which if released would give advantage to business competitors  
*and serve no public purpose”*

# Confidential: Shush!

- *Aksamit v. Nebraska Public Power District* (Neb S. Ct., 2018)
  - Aksamit had argued that the “advantage to business competitors” clause could not apply to the government’s own documents. Rejected.
  - S/C focused on “serve no public purpose” clause
  - NPPD had the burden to show there was “no public purpose”

# Withholding Permissible

- (4) Attorney work-product related to litigation, labor relations or claims
- (5) Law enforcement records that are part of an examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information (with some enumerated exceptions)

# Withholding Permissible

(7) Appraisals of real estate and personal property to be purchased or sold (*prior to* completion of the purchase or sale)

(8) Personnel records, but not salaries and routine directory information

(9) Public security information relating to public property and persons

# Withholding Permissible

- (10) Physical and cyber assets of energy/electric infrastructure  
(includes production, generation and distribution)
- (18) Job application materials (except not for “finalists” as defined)
- (19) Records of the Public Employees Retirement Board

# Withholding Permissible

(20) Social security numbers; credit card, charge card, or debit card numbers and expiration dates; and financial account numbers supplied to state and local governments

(26) Cybersecurity information

# Public Records

Process

# NPRL Process

- Requester must make request in writing.
  - Letter, OK
  - Email, OK
  - Text message, .....ok
- Telephone call?
- Walk-up / verbal?

# NPRL Process

- Records custodian has not more than 4 business days after actual receipt of a written request, to provide—
  - (1) Access to the public records; or
  - (2) Copies of the public records; or
  - (3) A written denial, with the legal basis and other information; or

# NPRL Process

(4) A written explanation – if the entire request cannot, with reasonable good faith efforts, be fulfilled within four business days due to the significant difficulty or the extensiveness of the request

# NPRL Process

- Explanation of delay must contain:
  - 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

# Delays

- According to legislative history, the records custodian 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

# Requestor Response

- The Records Requester then has 10 business days to review the estimated costs for copies
- Records Requestor can:
  - request to fulfill the original request
  - negotiate to narrow or simplify the request, or
  - withdraw the request
- If no response within 10 days, records custodian shall not fulfill the request

# Form or Format of Records?

- NPRL does not require records custodian to:
  - produce or generate any public record in a new or different form or format modified from that of the original public record
  - review documents and create abstracts of those documents
  - answer questions or create lists
  - create new documents which do not otherwise exist

# Records on Website?

- NPRL does not require a records custodian to produce a copy any public record that is available on the custodian's website
- But the records custodian does need to provide the location of the public record on the Internet
- (If the requester does not have reasonable access to the Internet, the custodian shall produce copies for the requester)

# Public Records

Charges and Deposits

# Copy Charges

- Costs for making copies
  - Not exceeding actual cost to make copies
  - Costs include paper, toner, equipment
  - Costs include computer run time and materials to make the copy (i.e. USB drive)
- AG will not question copying charges of up to \$0.25/page

# Personnel Costs

- Includes searching, identifying, physically redacting, or copying
- Residents vs. Nonresidents
- (“all residents of this state and all other persons”)

# Personnel Costs

- For Nebraska “residents” (including the press):
  - First 8 hours of searching, identifying, physically redacting or copying are free
  - After 8 hours, can charge BUT
  - No charge for review time – whether by an attorney or “any other person”
  - No charge for pages that are blank or “all meaningful” information redacted

# Personnel Costs

- For nonresidents of Nebraska
  - For all time spent searching, identifying, physically redacting, copying, or reviewing
  - Including attorney time to review
  - The charge based on the “proportion of the existing salary or pay obligation for public officers or employees”

# Costs: Charging vs. Waiving

- The custodian may waive or reduce any fee if the waiver or reduction of the fee would be in the public interest.
  - Waiver or reduction of the fee is in the public interest if disclosure of the public record at issue is likely to contribute to the understanding of the operations or activities of government and is not primarily in the commercial interest of the person requesting such records.
- So does “may” really mean “shall”
- Unclear who decides “public interest”

# Cost Deposit

- Cost estimates > \$50
  - May require requester to furnish a deposit
    - In full amount of estimate
    - Before agency starts to fulfill the records request

# Enforcement

- Neb Attorney General enforces the NPRL
  - Persons may file alleged complaints with AG's office
  - AG's determination shall be made within fifteen calendar days after the submission of the petition

# Public Records

Typical Complaints

# Typical Complaints

- Information requests
- Records withholdings
- Excessive fee
- Untimely response

# Electronic Database

- 2022 PRR → to University of Nebraska
  - Request for “[a]ny documents for FY2019-FY2021 [within] the institutional general ledger.”
- University response – the general ledger is part of the University’s financial system (i.e., an information system database)
  - University not required to create a new record
  - Security reasons to protect University financial system

# Electronic Database

- Per the PRL—
  - “public records shall include all records and documents, regardless of physical form”
  - “Data which is a public record in its original form shall remain a public record when maintained in computer files”
  - The PRL “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”

# Electronic Database

- Neb. AG –
  - The University did not have a valid basis to withhold the records
  - “Public bodies are required to produce public records in whatever form those records may be maintained by the public body.”
- Moral → Records in electronic databases likely public records

# Information Requests

- Remember..... records requests should be for *actual* records, not information
- You are not required to answer questions
- You are not required to create a document that does not already exist

# Records Withholdings

- Typically, two issues:
  - Whether the documents are actually Public Records?
  - Whether Public Records may be withheld under one of the 29 exceptions?

# Emails

- Are government emails public records?
- Emails hosted on Google / Microsoft server?
- “Of or belonging to” the governmental agency?
- In personal email account vs. government email account?

# Emails

- Neb. AG → “[I]t has been the longstanding position of this office that email in **a public official’s personal email account** is a public record subject to disclosure under the Nebraska Public Records Statutes **when that email at issue relates to public business.”**

# Emails

- Best practices
- Don't mix the chocolate and the peanut butter
- Only do government business on government email

# Email

- Nebraska Political Accountability and Disclosure Act
- “[A] public official or public employee may use a telecommunication system, a cellular telephone, an electronic handheld device, or a computer under the control of a government body for email, text messaging, a local call, or a long-distance call to a child at home, a teacher, a doctor, a day care center, a baby-sitter, a family member, or any other person to inform any such person of an unexpected schedule change or for other essential personal business. Any such communication shall be kept to a minimum and shall not interfere with the conduct of public business.”

# Email on Personal Cell Phone

- Separate email accounts: government vs. personal
- Should not be anything special about the government email on your personal cell phone vs your government-issued desktop computer
- Email search can be performed on government-owned equipment

# Text Messages

- 2015 PRR → Omaha Mayor text messages
  - Request limited to text messages in conducting city business
- City claimed text messages were not public records
  - Used for convenience and not for major city business
  - More like a phone call rather than an email
- AG → “text messages made in the course of public business by governmental officials are public records”

# Text Messages & Personal Cell Phones

- Yikes!
- If text message for government business, will be considered a public record
- How do you manage the public record text messages on personal cell phones?



# 3rd Party Documents

- 2025 PRR → Request for documents developed as part of a blight study created by 3rd party contractor
- City response –
  - The city does not possess, nor is it entitled to possess, work product belonging to the 3rd party contractor

# 3rd Party Documents

- “Of or belonging to”
- Functional Equivalent test
  - Government cannot claim records are not public records by merely saying it is not in possession of the records
  - If the government paid to have the records created or if the records could be considered a contracted deliverable, they are records the government is entitled to possess

# 3rd Party Documents

- AG found that 3 elements of the 4 prong Functional Equivalent test had been met.
- But “nothing to support a finding that the City ‘was entitled to possess the materials to monitor the private party’s performance.’”
- And “nothing in the agreement that required [contractor] to turn over its work product when it delivered the blight study and redevelopment plan to the City.”
- Not “of or belonging to” – Not a public record

# 3rd Party Documents

- 2020 PRR → to University
  - University refused to provide PowerPoint produced by Big Ten Conference
  - PowerPoint not “of or belonging to” the University
  - University had not delegated authority to Big Ten to carry out a University government function
  - University had PowerPoint for informational purposes and to provide feedback, not to make a decision affecting the University

# Drafts

- 2020 PRR → to University
  - University refused to provide “playbook” prepared by Big Ten Task Force for Emerging Infectious Diseases
  - Playbooks are “drafts”, not subject to disclosure
  - Playbooks not “of or belonging to” University
  - University had not delegated authority to Task Force to carry out a University government function
  - Playbooks provided for University’s consideration and input

# Drafts

- AG's opinion on "draft" or work-in-progress records:
  - Tension between a governmental agency's legitimate need to operate internally without interruption and intrusion on the one hand, and a legitimate concern that public documents might be hidden from view behind a "draft" label on the other.
  - Determined on an individual, case-by-case basis.

# Drafts

- Certain materials may be “so embryonic” that they do not constitute "records" or "documents" under the Act.
  - Notes or drafts of documents prepared by lower-level personnel within an agency which still remain subject to approval by upper management and which have not been issued by the agency.

# Drafts

- Materials which have been through the formation process within the agency and which have left the agency are more obviously "records" or "documents"
  - Even though procedures may require further approval before formal issuance.

# Records Withholding

- 2020 PRR → to University
  - University refused to provide “performance metrics” from Scott Frost’s amended coaching contract
  - University claimed “personal information” of personnel exception
  - AG agreed
- BUT, District Court did not
  - *USA Today v. Klintoe* (Lancaster County District Court, Oct. 18, 2022)

# Excessive Fee

- 2021 PRR
  - Request for “emails, phone records, texts, letters, video conference meeting records & recordings, etc., between all members of the ... School Board and the ... Superintendent ... as well as any School District ... director, employee, administrator, or representative, on all matters pertaining to Covid 19 guidelines, protocols, legalities, strategies, courses of action, directions, masking guidance, vaccine roll out guidance, health mandates, community and District ... infection rates and general discussions related to community Covid 19 health matters.”

# Excessive Fee

- “This request is limited in scope and is focused on all internal & external correspondence between the ... School Board, [superintendent], employees, and the [county health department], between dates of January 1st, 2021, to August 27th, 2021.”

# Excessive Fee

- Public Body permitted actions:
  1. 1st 8 of search time at no charge to Nebraska resident requester
    - This time includes efforts to search, identify, physically redact or copy records
  2. All hours of search time *by agency employees* above 8 hours may be charged as a fee

# Excessive Fee

- Response –
  - “[R]equest involve[ed] over 310 employees, the ongoing COVID-19 pandemic, limited staff availability, limited availability from the tech director, demands on all staff at the beginning of the school year, and the significant difficulty and extensiveness of the request.”

# Excessive Fee

- Cost estimate = \$17,625.96
- NOTE—AG was provided a cost estimate detail

# Excessive Fee

- According to the AG:
  - “The [public body] has provided this office sufficient detail to support the cost estimate for fulfilling your records request. There is no question that the estimate is a large sum of money. However, you have requested records impacting 310 employees relating to the COVID-19 pandemic for an eight-month period. We find that the estimated hours and the hourly rates are neither outrageous nor excessive. Accordingly, we believe the [public body] may charge you the amount set out in response to you, i.e., \$ 17,625.96.”

# Excessive Fee

- 2021 PRR
  - Cost estimates of \$5,008.26, revised to \$3,321.00
  - Based on stated employee hourly rates and time estimates
  - “This office [AG] has no reason to question those hourly rates.”

# Excessive Fee

- 2022 PRR
  - Cost estimate of \$3,321.26
  - Based on stated employee hourly rates and time estimates
  - “While we [AG] agree that \$3,321.36 is a significant amount of money, it does not appear excessive considering the scope of your request.”

# Untimely Response

- 2021 PRR
- Person emailed each board member with PRR
- Emails date-stamped Thursday, September 2
- Person filed complaint with AG on Friday, September 10
  - Claims to have not received any response to those emails
  - Asked the AG not only to assist with the records request, but also investigate and prosecute officials in light of “the clear violation of the Section 84-712(4).”

# Untimely Response

- What are the REAL facts?
- Time stamp on emails to board members are from between 7:57 p.m. and 8:12 p.m. on Thursday, September 2
- E.G. after 5:00 pm
- AG says: “The actual receipt of your request was subsequently made on the following business day—Friday, September 3.”

# Untimely Response

- Per the PRL—
- “The four business days shall be computed by excluding the day the request is received, after which the designated period of time begins to run.”
  - i.e., Receipt Day = “Day 0”
- “Business day does not include a Saturday, a Sunday, or a day during which the offices of the custodian of the public records are closed.”

# Untimely Response

- Saturday, September 4 was a weekend day
- Sunday, September 5 was a weekend day
- Monday, September 6 was a federal holiday
  
- Don't count these days

# Untimely Response

- Day 1 (first business day after the receipt day) was Tuesday, September 7
- Day 2 was Wednesday, September 8
- Day 3 was Thursday, September 9
- Day 4 – the day a response was due – was Friday, September 10
- District actually emailed a response on September 9

# Questions?

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