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 and SHAWNNA LARA, in her official capacity as Records Manager for the Nebraska Department of Environment and Energy,

Respondents.

Case No. CI 22-3926

ORDER

This matter came on for trial on February 2, 2023, on Relator's Verified Petition for Writ of Mandamus and Respondent's Answer to Alternative Writ of Mandamus. Relator was represented by Daniel Gutman. Respondents were represented by Jennifer Huxoll and Christopher Felts. Briefs were submitted, evidence was adduced, and the matter was taken under advisement.

Nebraska law allows public officials to charge a fee for making records available in certain circumstances. But other than for time spent "physically redacting," Nebraska law does not allow public officials to charge fees for time spent determining whether to make records unavailable. For the reasons that follow, the Court finds the Relator has a clear right to a cost estimate in compliance with the statute, the custodian has a clear duty to provide such estimate, and no other plain and adequate remedy is available to the Relator to demand the custodian do so.

I. FACTUAL FINDINGS

Relator, through its employee Yanqi Xu, made a public records request to the Nebraska Department of Environment and Energy on April 28, 2022, seeking "emails between any NDEE staffer and any staffer with all natural resources districts that contain any of the keywords 'nitrate', 'nutrient,' or 'fertilizer' or 'nitrogen' between Jan 1, 2010 and April 28, 2022." On May 3, 2022, NDEE records custodian Ane McBride responded: "Your request is quite broad and may be costly. Is there something specific you are looking for to help narrow down the request." On May 4, 2022, Relator agreed to "shorten the timeframe for emails [to] Jan. 1, 2017 to present."

On May 19, 2022, Ms. McBride provided a formal cost estimate of $2,000.00 for the modified request and included in this estimate employee time to "determine whether there is any basis or requirement to keep certain records, or portions of records, confidential under the appropriate Nebraska statutes." After further discussion between the parties, on June 16, 2022, Relator modified the request again to only request records from the following divisions within NDEE: Drinking Water and Groundwater, Waste Permit, Water Planning, Wastewater and Drinking Water, Engineering and Technical Assistance, and Livestock/Agriculture. On June 30, 2022, Ms. McBride responded to this narrowed request with a cost estimate of $44,103.11. Again, the cost estimate included employee time to "determine whether there is any basis or requirement to keep certain records, or portions of records, confidential under the appropriate Nebraska statutes."

The next day, Relator timely contacted NDEE to negotiate the cost estimate and request yet again. Following that discussion, on July 8, 2022, Ms. McBride confirmed the Office of the Chief Information Officer has "the ability to search and provide the emails to the agency to review and subsequently provide to you." Then on July 14, 2022, Ms. McBride reconfirmed the "OCIO can search through agency staff email for specific terms and download the messages to a restricted file" but the cost estimate would remain unchanged.

Relator's legal counsel next attempted to negotiate the cost estimate but was met with a similar response. Ms. McBride reiterated "NDEE is not seeking the services of their attorney to find a basis to withhold the information. The review is being performed by agency staff."

Relator then pursued this mandamus action seeking a writ requiring the Respondents to provide a cost estimate in compliance with Neb. Rev. Stat. § 84-712. The Court issued an alternative writ of mandamus on November 29, 2022, and Respondents timely answered the writ on December 23, 2022.

The testimony at trial generally tracked the exhibits received. Matt Wynn, the Executive Director of the Flatwater Free Press, described the Relator's interest in the records requested and the timeline of the request, modifications, and negotiations. He further testified Relator still wants the records requested and seeks a cost estimate in compliance with Nebraska law.

Ms. McBride also testified to the request, modifications, and negotiations with the Relator. She discussed her process in formulating the response to the request, the

cost estimate, and the communications with the OCIO. She explained that in formulating the cost estimate, "putting in the search terms isn't what would take time. It was actually reviewing the documents." And that when presented with the choice of requesting the lower or higher fee from the Relator, the agency chose the higher fee that included a second layer of review "at a higher level" that was included in "Table B" of the response. "Table A," the bulk of the costs estimate, included substantial time to "analyze" the records, meaning "to review each document and make sure that it didn't have complainant information, wasn't part of a trade secret, wasn't attorney-client privilege." Ms. McBride did not identify that any portion of the cost estimate included time for physically redacting any documents.

II. STANDARD

Mandamus is a law action, and it is an extraordinary remedy, not a writ of right. *State ex rel. BH Media Grp., Inc. v. Frakes*, 305 Neb. 780, 787, 943 N.W.2d 231, 239 (2020). "Any person denied any rights granted by sections 84-712 to 84-712.03 may elect to" file for speedy relief by a writ of mandamus under Neb. Rev. Stat. § 84-712.03.

A person denied access to a public record may file for speedy relief by a writ of mandamus under § 84-712.03 and has the burden to satisfy three elements: (1) The requesting party is a citizen of the state or other person interested in the examination of the public records, (2) the document sought is a public record as defined by § 84-712.01, and (3) the requesting party has been denied access to the public record as guaranteed by § 84-712. *Frakes,* 305 Neb. At 788, 943 N.W.2d at 240.

"A writ of mandamus is issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person." *Mid Am. Agri Prods./Horizon, LLC v. Rowlands*, 286 Neb. 305, 311, 835 N.W.2d 720, 725 (2013). "A court issues a writ of mandamus only when (1) the relator has a clear right to the relief sought, (2) a corresponding clear duty exists for the respondent to perform the act, and (3) no other plain and adequate remedy is available in the ordinary course of law." *Id.* "The party seeking mandamus has the burden of proof and must show clearly and conclusively that such party is entitled to the particular thing the relator asks and that the respondent is legally obligated to act." *Id.*

The Nebraska Supreme Court has made clear "the public records statutes encourage open and transparent government." *Frakes,* 305 Neb. at 793, 943 N.W.2d at 243. And "the Legislature has expressed a strong public policy for disclosure." *Id.* at 788, 943 N.W.2d at 240.

III. ANALYSIS

A. Sovereign Immunity

Before trial, Respondent Nebraska Department of Environment and Energy filed a motion to quash arguing it is shielded by sovereign immunity because "nothing in the statutes governing mandamus, Neb. Rev. Stat. §§ 25-2156 through 25-2169, indicates a legislative intent to waive sovereign immunity for mandamus actions against a state agency." *Henderson v. Dep't of Corr. Servs.*, 256 Neb. 314, 317, 589 N.W.2d 520, 522 (1999). And "a waiver of sovereign immunity is found only where

stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction." *State ex rel. Rhiley v. Neb. State Patrol*, 301 Neb. 241, 248, 917 N.W.2d 903, 909 (2018).

Relator contends Neb. Rev. Stat. § 84-712.03 has an express waiver of sovereign immunity. That section sets forth that "[i]n 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." Neb. Rev. Stat. § 84-712.03(2). Further, Relator argues that the jurisdiction to enjoin the public body, combined with the references to the public body in § 84-712 and the authorization for attorney fees "against the public body" in § 84-712.07, indicates a legislative intent to waive sovereign immunity.

The Court disagrees with the Relator that repeated references to "public body" within the public records statutes constitute an express waiver of immunity or shows such waiver by overwhelming implication. "Public body" is not defined in the public records statutes and could include any number of entities that are not shielded by sovereign immunity like a state agency. *See* Neb. Rev. Stat. § 84-1409. Indeed, the mandamus statutes in Chapter 25 reference directing a writ to a "public body" and the Supreme Court found no waiver for mandamus actions against a state agency in *Henderson*. *See* Neb. Rev. Stat. § 25-2167. And in *Rhiley*, where the statute referenced both a "state agency" and bringing an "action, including but not limited to an action for mandamus," the Supreme Court found the statute "simply does not address the issue of sovereign immunity either expressly or by necessary implication . . ." 301

Neb. at 253-54, 917 N.W.2d at 912.

Relator is correct that in prior mandamus actions under § 84-712.03, an agency was named as a respondent, immunity was not raised, and relief was denied on the merits, not immunity. But "[w]hen a jurisdictional defect is neither noted nor discussed in an opinion, it does not stand for the proposition that no defect existed." *Tyrrell v. Frakes*, 309 Neb. 85, 95, 958 N.W.2d 673, 682 (2021). Relator has not cited any mandamus actions against a state agency under § 84-712.03 finding a waiver of immunity or granting relief against a state agency. Moreover, in the Court's review of those actions against a state agency, an individual official or employee is often named as a respondent as well because "the better practice is to name as respondents and direct the writ against the individuals holding the office in their official capacity," just as the Relator did here. *Cooperrider v. State,* 46 Neb. 84, 87, 64 N.W. 372, 373 (1895).

Accordingly, the Court finds the Nebraska Department of Environment and Energy is shielded by sovereign immunity, the motion to quash is sustained, and the Relator's request for a writ as to the agency will be denied.

B. No Other Plain and Adequate Remedy

This case requests different relief than most public records cases. Can a person alleging a denial of rights under the public records statutes other than a denial of a request for records pursue a writ of mandamus? The statute provides the answer: "Any person denied *any rights* granted by sections 84-712 to 84-712.03 may elect to: File for speedy relief by a writ of mandamus in the district court . . ." Neb. Rev. Stat.

§ 84-712.03(1)(a) (emphasis added).[1]

Despite this statutory remedy, Respondents contend that "mandamus is only proper if there is no other remedy available." Resp. Supp. Br. at 1. However, "a decision by a public official contrary to law or based on a mistaken view of the law is not within the exercise of discretion lying outside the remedy of mandamus, and by mandamus, a court can correct such mistake of law and compel the proper application of law, thereby converting an otherwise discretionary act into a purely ministerial duty." *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 665, 642 N.W.2d 132, 142 (2002).

The Supreme Court has repeatedly "held that where a specific duty is provided by statute, mandamus may be invoked to enforce it if denied; and the party entitled to such relief will not be forced to pursue his remedy by *circuitous and dilatory action at law*." *State ex rel. Simpson v. Vondrasek*, 203 Neb. 693, 701-02, 279 N.W.2d 860, 866 (1979) (emphasis added); *see also State ex rel. Agric. Extension Serv. v. Miller,* 182 Neb. 285, 289, 154 N.W.2d 469, 472 (1967); *State ex rel. Luben v. Chi. & N. W. R. Co.*, 83 Neb. 524, 526, 120 N.W. 163, 165 (1909); *State ex rel. Grable v. Roderick*, 23 Neb. 505, 508, 37 N.W. 77, 79 (1888). To bar mandamus,

> the law remedy must afford all relief to which the plaintiff is entitled; it is not fully adequate unless it conforms to the necessities and rights of the complaining party under all the circumstances of the case, reaches the end intended, and actually compels performance of the duty in question.

[1] For completeness, the Court notes that recently in *Jacob v. Nebraska Bd. of Parole,* the Supreme Court stated: "Section 84-712.07 provides that such a person who has been denied access to a public record may file for a writ of mandamus under § 84-712.03 whether or not any other remedy is also available." 313 Neb. 109, 123 (2022). But the text of statute provides "the rights of citizens to access to public records may be enforced by equitable relief, whether or not any other remedy is also available." Neb. Rev. Stat. § 84-712.07. Regardless of this discrepancy, the Court finds Neb. Rev. Stat. § 84-712.03(1)(a) answers the question here.

> Furthermore, the remedy which will preclude mandamus must be equally as convenient, complete, beneficial, and effective as would be mandamus, and be sufficiently speedy to prevent material injury. The existence of a tedious and ill-adapted remedy will not prevent resort to mandamus.

Dozler v. Conrad, 3 Neb. App. 735, 743, 532 N.W.2d 42, 48 (1995) (*quoting* 52 Am. Jur. 2d Mandamus § 49 at 374 (1970)).

Even if a declaratory judgment is a possible remedy at law available to Relator, requiring the pursuit of a declaratory judgment in this situation would undermine the public records statutes that are designed for expedited relief. *See* Neb. Rev. Stat. § 84-712.03(3). In a declaratory judgment, the Respondents would have had 30 days after service to answer, *see* Neb. Ct. R. § 6-1112, discovery could have been conducted, *see* Neb. Ct. R. Disc. § 6-326, and the case would have then been set for trial. Often after many months or years. And during this time the Relator would effectively be denied a cost estimate it should receive in a matter of 4 business days. *See* Neb. Rev. Stat. § 84-712(4). For these reasons, a declaratory judgment action could not remedy Relator's injury in the speedy fashion afforded by a writ of mandamus. Instead, because this is a mandamus action under § 84-712.03, it took precedence on the trial docket and was tried 65 days after the Verified Petition was filed.

True, a person denied these same rights may elect to petition the Attorney General to have him determine if the cost estimate complies with § 84-712 prior to filing suit. Neb. Rev. Stat. § 84-712.03(1)(b). But the availability of that relief does not preclude the Relator from electing to file for speedy relief by a writ of mandamus under § 84-712.03(1)(a). And for a person alleging a state records custodian is mistaken on the law, the existence of an ill-adapted remedy to first petition the

custodian's attorney does not prevent them from invoking mandamus.

C. Estimate of the Expected Cost of the Copies

The Nebraska public records statutes require that "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, . . . an estimate of the expected cost of the copies . . ." Neb. Rev. Stat. § 84-712(4). In reviewing the evidence presented on the cost estimate provided by the custodian here, the Court finds that the Relator has met its burden to show that it has a clear right to a cost estimate in compliance with the statute, the custodian has a clear duty to provide such estimate, and no other plain and adequate remedy is available to the Relator to demand the custodian do so.

"The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts." *Cain v. Lymber,* 306 Neb. 820, 829, 947 N.W.2d 541, 548 (2020). The Respondents do not dispute that the Relator has a right to a cost estimate or that the custodian has a clear duty to provide one.

The primary disagreement here is over what charges may be included in the cost estimate. Relator argues the "fee shall not exceed the actual added cost of making the copies available" and is expressly limited by § 84-712. Respondents counter that it is within their discretion to charge fees for any labor unless prohibited by statute.

Respondents are correct that § 84-712 allows for a "fee for providing copies," prohibits the fee from exceeding the "actual added cost of making the copies

available," and prohibits the fee from including "any charge for the services of an attorney to review." So, Respondents piece together these two prohibitions and contend they may charge a fee for reviewing whether to withhold records as part of their "fee for providing copies." The Court is not persuaded that a combination of prohibitions is a grant of permission. Especially when the Legislature has prescribed the "fee shall not exceed the actual added cost of making the copies available." Neb. Rev. Stat. § 84-712.

Statutory language is to be given its plain and ordinary meaning, and a court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Frakes*, 305 Neb. at 792, 943 N.W.2d at 243. In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Id.* It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *Id.* Here, the Legislature has specified the fee shall not exceed the actual added cost of making the copies available and with painstaking detail has described what that means for photocopies, printouts of computerized data on paper, and electronic data.

When a special service charge for labor may be included in the fee, the statute specifies it may include time spent, in excess of four cumulative hours, "searching, identifying, physically redacting, or copying." Neb. Rev. Stat. § 84-712(3)(c). And that is all. "Reviewing" is not included and it is "not for the Court to supply missing words"

to the statute. *State v. Jones*, 264 Neb. 812, 817, 652 N.W.2d 288, 292 (2002).

Respondents' addition of a missing word would also defeat the purpose of the statute. "When construing a statute, [a court] looks to the statute's purpose and gives to the statute a reasonable construction that best achieves that purpose, rather than a construction that would defeat it." *Porter v. Knife River, Inc.*, 310 Neb. 946, 953 (2022). The purpose of the statute is to "empower and authorize" citizens to gain access to public records while recognizing the government may charge a fee for "the actual added cost of making the copies available." Neb. Rev. Stat. § 84-712. That purpose is achieved by the statute's text and would be undermined by reading in an absent word.

The evidence at trial provides a clear example of why. Here, the records custodian testified that the requested records could be searched, identified, and copied for a substantially lower fee than the estimate and did not mention any need for redaction. But when the costs of review were included, the estimate skyrocketed. As explained by Ms. McBride, "putting in the search terms isn't what would take time. It was actually reviewing the documents." Then, when presented with the choice of requesting the lower or higher fee from the Relator, the agency chose the higher fee that included a second layer of review "at a higher level."

This case shows that under Respondents' proffered interpretation, there would be few limits on what may be included in the fee. The custodian could always choose the higher fee, or charge for a second or third layer of review, unless expressly barred by statute. Then, to forbid such behavior, Respondents claim the Legislature must

proactively identify every possible surcharge to prohibit. The Court disagrees. The text of the statute is clear, the "fee shall not exceed the actual added cost of making the copies available." Neb. Rev. Stat. § 84-712(3)(b).

Switching midstream, Respondents argue their cost estimate could fit within the allowable charge for "physically redacting" because a document must be reviewed before determining what to physically redact. But the problem with that argument is the evidence at trial did not include any estimated fees for "physically redacting." So the Court need not decide whether redaction circumstances may exist that warrant broadening § 84-712(3)(c) beyond its text. As argued by the Respondents, some requests for records may require a review for responsiveness, such as a request for all documents on a topic. But others, such as the one here, request electronic documents containing a keyword that can easily be searched and identified without any additional review. There may be reasons to withhold or redact a particular document, but that does not mean a document containing a requested keyword is not responsive to the request. Once the documents have been searched for and identified, those steps are complete. Any additional layer of review is up to the government, but not part of the statutorily allowed fee.

Omitting "reviewing" from "searching, identifying, physically redacting, or copying" also does not render the attorney fee prohibition in § 84-712(3)(c) meaningless. Of course, a court "will attempt to reconcile different provisions so they are consistent, harmonious, and sensible, and will avoid rejecting as superfluous or meaningless any word, clause, or sentence." *Porter*, 310 Neb. at 953. But as described

by the Relator, it is not uncommon for an attorney to review documents, determine a redaction is necessary, and direct non-attorneys to physically redact such documents. And as Respondents argued at trial, there may be scenarios where in order to provide voluminous records, non-attorney employees may need to spend substantial time physically redacting information such as social security numbers. In those scenarios, the fee may include time spent "physically redacting," but exclude the attorney review. Neb. Rev. Stat. § 84-712(3)(c). Nowhere does the statute permit a fee for non-attorney employees to review to "determine whether there is any basis or requirement to keep certain records, or portions of records, confidential." *See* Exhibit 1.

Lastly, the Court recognizes the Respondents can cite to portions of the legislative history that may support their position. But, as the Supreme Court often says, "it is the function of the Legislature, through the enactment of statutes, to declare what is the law and public policy of this state." *Rogers v. Jack's Supper Club*, 304 Neb. 605, 614, 935 N.W.2d 754, 762 (2019). And "it is a court's duty to discover, if possible, legislative intent from the statute itself." *Knapp v. Beaver City*, 273 Neb. 156, 160, 728 N.W.2d 96, 99 (2007). "In order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous." *Bridgeport Ethanol, LLC v. Neb. Dep't of Revenue*, 284 Neb. 291, 298, 818 N.W.2d 600, 606 (2012). Seeing no ambiguity, the Court asked counsel for Respondents at trial if they considered the statute ambiguous. They responded it is not.

Summarized, Nebraska law requires the custodian shall provide an estimate of the expected cost of the copies and the fee shall not exceed the actual added cost of making the copies available. The duty is clear, and the statute is unambiguous. It is not for the Court to micromanage the details of a cost estimate in a mandamus action. But the evidence here showed the custodian did not perform her ministerial duty, and the request for writ of mandamus as to the custodian will be granted.

D. Attorney Fees

In the Verified Petition, the Relator requested attorney fees and costs, as provided for in Neb. Rev. Stat. § 84-712.07. The Court finds that the Relator has substantially prevailed. To the extent Respondent Lara argues § 84-712.07 only authorizes an assessment of fees and costs "against the public body," the Court notes that Neb. Rev. Stat. § 25-2165 provides that in a mandamus action "[t]he costs and attorney's fees shall be paid by the governmental body represented by the public official or employee." *See also State ex rel. BH Media Grp., Inc. v. Frakes*, 305 Neb. 780, 943 N.W.2d 231 (2020).

A hearing on reasonable attorney fees and costs reasonably incurred by the Relator is set for February 23, 2023, at 11:00 a.m. by Zoom.

IT IS THEREFORE ORDERED that the Relator's request for a writ of mandamus for the custodian to provide an estimate of the expected cost of the copies under Neb. Rev. Stat. § 84-712 is granted.

IT IS FURTHER ORDERED that the motion to quash is sustained and the Relator's request for a writ of mandamus for the Nebraska Department of

Environment and Energy to provide an estimate of the expected cost of the copies under Neb. Rev. Stat. § 84-712 is denied.

IT IS FURTHER ORDERED that Relator has substantially prevailed in this case under Neb. Rev. Stat. § 84-712.07 and the Court may assess reasonable attorney fees and costs reasonably incurred by the Relator.

Dated this 14th day of February, 2023.

BY THE COURT:

Ryan Post

Ryan S. Post
District Court Judge