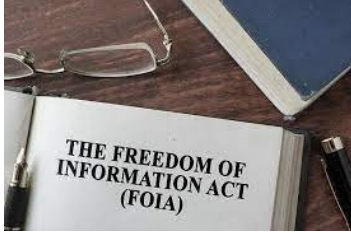


NEBRASKA TAXPAYERS FOR FREEDOM ISSUE PAPER: REFUSAL TO COMPLY WITH FREEDOM OF INFORMATION ACT REQUESTS.

BACKGROUND. In 1966, Congress enacted the first federal law with the one stated purpose of facilitating greater government transparency. Codified at 5 USC §552, this legislation commonly called the Freedom of Information Act (FOIA) and basically mandates public disclosure of various documents maintained by government entities and requested by individuals or groups. Inquiring taxpayers increasingly are using the federal and NE statutes to make FOIA requests of local government subdivisions. Notwithstanding that some requesters are not overly familiar with the process of making



such requests, an increasing number of local taxing authorities are using tricky legal maneuvers and outrageous financial demands to obstruct releases of information due the public. Localities misuse the law to avoid transparency and hide documents that might expose internal problems. Subdivisions and agencies stretch FOIA exemptions to inappropriately cover records that may reveal mistakes, illegalities, and embarrassing information. Their obvious intent is to prevent inquiring taxpayers from gaining information and materials that would demonstrate inappropriate conduct by elected

officials. If there is nothing to hide, officials should release records. Rapidly decreasing public accountability is rampant at the state and local level. Some officials simply deny that requested documents exist. Complete, repeated, and willful non-compliance with the FOIA is against the law and intended to prevent a party requesting the information from access to it, and, by noncomplying, conceal requested public records.

PICKING YOUR POCKET. One ruse used by taxing authorities is to ask for huge sums of money to comply with a request. The Forest Halls School District in Michigan asked for \$400,000 to comply with a FOIA request by a parent group but later reduced the bill to \$2,197 and refused to waive the fee. Individuals who wish to inspect and make copies with their own equipment may do so at no additional cost. NE citizens and anyone else interested in the examination of public records lawfully can examine public records and copy them using their own copying or photocopying equipment, free of charge, during the hours the respective offices are open for the ordinary transaction of business, except if federal copyright law prohibits such activity. NE agencies can charge fees, but they must not exceed the actual costs to provide the record and cost for maintenance of equipment. Fees cannot exceed the actual cost of making copies available, materials used like paper, and employee time to comply with request. An entity cannot charge for the first 4 hours of staff time; after that time, a special service fee possibly charged, but it may not include the cost of an attorney to review the materials- [NRS 84-712.03\(c\)](#). The NE law does not address fee waivers, but you can ask for one.

IF REQUEST DENIED. If your valid request denied, several options present themselves. First, you can attempt to resolve the dispute informally by discussing the request with an official. Officials may ask you to revise or restrict the scope of your request, which would help their employees otherwise engaged in full-time work. Be certain that your revised request not considered a new request, or you may have to start the process again. They must tell you why a portion or pages redacted or withheld. If elements pegged exempt, authorities must still provide non-exempt parts. If the subdivision claims that the records you want do not exist, ask it to verify its search methodology. Some localities use the pandemic as an excuse to avoid meeting FOIA requests, stating that employees have no time to deal with requests or claim insufficient employees. Note: Keep all records of all contacts with a subdivision. If informal resolution fails, appeal the denial within the relevant government subdivision. A denial letter should include an appeal procedure. Note the time limit for appeals. You can use appeal letters to challenge the failure to respond in a timely fashion, a decision not to release records in whole or in part, the adequacy of the search used to locate records, or the refusal to grant a fee waiver. Appeal letters should include the following: citation of state statute and grounds for appeal, copies of original request letter and denial letter, reasons for reconsideration request, and expectation of a final ruling on your appeal within 20 working days, as required by state law. Examine FOIA exemptions to rebut phony exemption claims. If this appeal unsuccessful, because the subdivision claims classified information, you can request it become declassified. Failing these procedures, you can file a complaint with the NE Att.-General. The law provides for judicial relief by filing a writ of mandamus in the district court. However, obtaining records through a lawsuit is costly and lengthy, lasting up to 1 yr. or more.¹ There is no administrative appeal. Officials can face criminal penalties if found guilty. If a court finds that a denial improperly issued and violated the law, the official at fault faces a Class III misdemeanor charge and the potential loss of employment or impeachment - [Neb. Rev. Stat. §84-712.09](#). In a case in which the complainant seeking access has substantially prevailed, the court may assess against the locality which had denied access to its records reasonable attorney fees and other litigation costs reasonably incurred by the complainant. There is no specific time limit imposed for appealing a denial in court. - [Neb. Rev. Stat. §84-712.07](#).

¹ Digital Media Law Project, 9-10-21.

NE PUBLIC RECORDS LAW. This series of statutes guarantees that the public has access to public records of government entities at all levels. Records include all documents in any form belonging to such entities. A Nebraska resident or non-resident may request records and copy them during office hours. Government subdivisions cannot ask the reason for your request. The law places no restrictions on use of records. Individuals should allow 4 business days for completion of records requests and costs involved. The 4 business days computed by excluding the day the request



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received, after which the designated period of time begins. Business day does not include a Saturday, a Sunday, or a day during which the office closed. If a legal basis for denial of access or copies, a written denial of the request necessary.² However, permitted extensions if the dept. or subdivision submits a written statement of justification and declaration of the soonest the records can become available to requester and costs. The requester has 10 business days to review the estimated costs, including a special service

charge, and request an official to fulfill the original request, negotiate with the official to narrow or simplify the request, or withdraw the request. If the requester does not respond to the official within 10 business days, the official will not fulfill the request. Individuals can obtain records in the form and media in which maintained, such as electronic data, tapes, etc. An employee need not provide a copy, if he provides the location of the public record on the Internet, e.g., school board minutes. Our FOIA statutes do not require a public agency to review documents, create documents or lists, or answer questions. For a full explanation of the NE FOIA statutes, see <https://ago.nebraska.gov/public-records>.

EXEMPTIONS. No government agency specifically exempted. In addition to the usual governmental entities, the executive, legislative, and judicial branches, the act includes the records of the “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”- **NE.R.S. 84-712.01**. The following records lawfully withheld from the public:

- (1) Personal information in records regarding a student, prospective student, or former student of an educational institution or exempt school who has chosen not to meet state approval or accreditation requirements pursuant to section 79-1601 when such records are maintained by and in the possession of a public entity, other than routine directory information specified and made public;
- (2) Medical records, other than records of births and deaths, in any form concerning any person;
- (3) Trade secrets, academic and scientific research work which is in progress and unpublished, and other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose;
- 4) Records which represent the work product of an attorney and the public body involved which are related to preparation for litigation, labor negotiations, or claims made by or against the public body or which are confidential communications;
- (5) Records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, when the records constitute a part of the examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training, except
 - (a) Relating to the presence of and amount or concentration of alcohol or drugs in any body fluid of any person; or
 - (b) Relating to the cause of or circumstances surrounding the death of an employee arising from or related to his or her employment if, after an investigation is concluded, a family member of the deceased employee makes a request for access to or copies of such records. This subdivision does not require access to or copies of informant identification, the names or identifying information of citizens making complaints or inquiries, other information which would compromise an ongoing criminal investigation, or information which may be withheld from the public under another provision of law. For purposes of this subdivision, family member means a spouse, child, parent, sibling, grandchild, or grandparent by blood, marriage, or adoption;
- (6) Appraisals or appraisal information and negotiation records concerning the purchase or sale, by a public body, of any interest in real or personal property, prior to completion of the purchase or sale;
- (7) Personal information in records regarding personnel of public bodies other than salaries and routine directory information;
- (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 specific, unique 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, and user identification names; guard schedules; lock combinations; or public utility infrastructure specifications or design

² Public Records Law Nebraska Statutes §84-712.01 et seq.

drawings the public disclosure of which would create a substantial likelihood of endangering public safety or property, unless otherwise provided by state or federal law;

(9) Information that relates details of physical and cyber assets of critical energy infrastructure or critical electric infrastructure, including (a) specific engineering, vulnerability, or detailed design information about proposed or existing critical energy infrastructure or critical electric infrastructure that (i) relates details about the production, generation, transportation, transmission, or distribution of energy, (ii) could be useful to a person in planning an attack on such critical infrastructure, and (iii) does not simply give the general location of the critical



infrastructure and (b) the identity of personnel whose primary job function makes such personnel responsible for (i) providing or granting individuals access to physical or cyber assets or (ii) operating and maintaining physical or cyber assets, if a reasonable person, knowledgeable of the electric utility or energy industry, would conclude that

the public disclosure of such identity could create a substantial likelihood of risk to such physical or cyber assets. Subdivision (9)(b) of this section shall not apply to the identity of a chief executive officer, general manager, vice president, or board member of a public entity that manages critical energy infrastructure or critical electric infrastructure. The lawful custodian of the records must provide a detailed job description for any personnel whose identity is withheld pursuant to subdivision (9)(b) of this section. For purposes of subdivision (9) of this section, critical energy infrastructure and critical electric infrastructure mean existing and proposed systems and assets, including a system or asset of the bulk-power system, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of such matters;

(10) The security standards, procedures, policies, plans, specifications, diagrams, access lists, and other security-related records of the Lottery Division of the Department of Revenue and those persons or entities with which the division has entered into contractual relationships. Nothing in this subdivision shall allow the division to withhold from the public any information relating to amounts paid persons or entities with which the division has entered into contractual relationships, amounts of prizes paid, the name of the prize winner, and the city, village, or county where the prize winner resides;

(11) With respect to public utilities and except as provided in sections 43-512.06 and 70-101, personally identified private citizen account payment and customer use information, credit information on others supplied in confidence, and customer lists;

(12) Records or portions of records kept by a publicly funded library which, when examined with or without other records, reveal the identity of any library patron using the library's materials or services;

(13) Correspondence, memoranda, and records of telephone calls related to the performance of duties by a member of the Legislature in whatever form. The lawful custodian of the correspondence, memoranda, and records of telephone calls, upon approval of the Executive Board of the Legislative Council, shall release the correspondence, memoranda, and records of telephone calls which are not designated as sensitive or confidential in nature to any person performing an audit of the Legislature. A member's correspondence, memoranda, and records of confidential telephone calls related to the performance of his or her legislative duties shall only be released to any other person with the explicit approval of the member;

(14) Records or portions of records kept by public bodies which would reveal the location, character, or ownership of any known archaeological, historical, or paleontological site in Nebraska when necessary to protect the site from a reasonably held fear of theft, vandalism, or trespass. This section shall not apply to the release of information for the purpose of 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;

(15) Records or portions of records kept by public bodies which maintain collections of archaeological, historical, or paleontological significance which reveal the names and addresses of donors of such articles of archaeological, historical, or paleontological significance unless the donor approves disclosure, except as the records or portions thereof may be 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;

(16) Library, archive, and museum materials acquired from nongovernmental entities and preserved solely for reference, research, or exhibition purposes, for the duration specified in subdivision (16)(b) of this section, if:

(a) Such materials are received by the public custodian as a gift, purchase, bequest, or transfer; and

(b) The donor, seller, testator, or transferor conditions such gift, purchase, bequest, or transfer on the materials being kept confidential for a specified period of time;

(17) Job application materials submitted by applicants, other than finalists or a priority candidate for a position described in section 85-106.06 selected using the enhanced public scrutiny process in section 85-106.06, who have applied for employment by any public body as defined in section 84-1409. For purposes of this subdivision, (a) job application materials means employment applications, resumes, reference letters, and school transcripts and (b) finalist means any applicant who is not an applicant for a position described in section 85-106.06 and (i) who reaches the final pool of applicants, numbering four or more, from which the successful applicant is to be selected, (ii) who is an original applicant when the final pool of applicants numbers less than four, or (iii) who is an original applicant and there are four or fewer original applicants

(18)(a) Records obtained by the Public Employees Retirement Board pursuant to section 84-1512 and (b) records maintained by the board of education of a Class V school district and obtained by the board of trustees for the administration of a retirement system provided for under the Class V School Employees Retirement Act pursuant to section 79-989;



(19) 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;

(20) Information exchanged between a jurisdictional utility and city pursuant to section 66-1867;

(21) Draft records obtained by the Nebraska Retirement Systems Committee of the Legislature and the Governor from Nebraska Public Employees Retirement Systems pursuant to subsection (4) of section 84-

1503;

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

(23) Information obtained by any government entity, whether federal, state, county, or local, regarding firearm registration, possession, sale, or use that is obtained for purposes of an application permitted or required by law or contained in a permit or license issued by such entity.

In addition, the Postal Reorganization Act of 1970 exempts the U.S. Postal Service (USPS) from mandatory public disclosure of commercial information, including trade secrets, regardless of whether the original source is a person outside the USPS, if public disclosure considered not prudent business practice. However, the 1996 Electronic FOIA Amendments (E-FOIA) mandate all federal agencies make specific records publicly accessible via electronic media.

EXEMPTION MISUSE. The exemptions are reasonable and, if applied properly, protect sensitive information while leaving large portions available to the public upon request. However, some government entities frivolously expand application of the exemptions to withhold records that do not deserve protection. The most common excuse involves shielding from release draft government documents, records of sensitive deliberations before decisions made, and government attorney-client deliberations. These kinds of documents deserve limited protection, but officials stretch these exemptions to inappropriately cover other information, such as records that may portray officials negatively, that reveal problems, and that contain embarrassing information.

FOIA TIPS. One may access a form to submit a NE FOIA request at <https://www.nfoic.org/nebraska-sample-foia-request>. An individual may submit a request in English in person or in writing by letter or email, the second option preferable.

- You may alternatively wish to request information with a simple email rather than use a FOIA.
- Do not fear making a request; it is your constitutional right and privilege. Typically requested records include meeting notes, financial statements, contracts, email and other communications, assessments or legal analyses, policy directives or memos, and complaints.
- Be clear and specific. Your FOIA request must reasonably describe the records you seek, so your request must allow an employee to find a record(s) with a reasonable amount of effort. Assume the designated official is not familiar with your topic. Many agencies search for documents electronically so, if you know them, you should list the relevant keywords and phrases. Know the name of a document you seek or a specific form on which information kept by a taxing authority. By this means, officials can comply with your request quicker and with a lower fee.
- Officials can ignore or refuse a request if too broad in nature. Make a request reasonable in scope, because officials not required to process unreasonably massive requests or create documents for you.

- Give a date range for records or date of event to help officials narrow the scope of a request and find documents you want. Failing to do this will require officials to search all records, generating thousands of pages that cause long delays. Officials would ask you to narrow your request.
- Submit only a short request, with no long narratives or bundles of supporting materials.
- Specify if you want the information in hard copy paper or electronic form. Officials must release records in electronic form, if they can reasonably accommodate a request.
- Do not make frequent requests of a government subdivision, because its employees have regular duties to perform.
- You cannot ask an agency to explain the information contained in its records.
- If a respondent states that he cannot fulfill the request in 4 business days but soon after, agree to wait a few days longer.
- Identify the names of public officials whose communications or records you seek.
- Identify the person that might hold records you seek.
- Provide keywords or search terms for officials to use, so that the search produces the most relevant results. Set date ranges.
- Do not request a fee waiver, but inability to pay is not a legal basis for granting a fee waiver.
- Actually, several government entities on their websites will tell the public how to submit FOIA requests.
- Expect an acknowledgement of your request within a reasonable time period.
- At the conclusion of your request, include a phone number and email by which officials can contact you with questions.
- Provide a permanent return address, because most responses arrive by mail.



TAKE ACTION NOW. Nebraska taxpayers must ensure FOIA enforcement and full legal compliance. Interesting that every reported NE case of stubborn denial of a valid FOIA request involves material potentially damaging to government bureaucrats, which is precisely why we must retrieve such data for public view. Make sure that your FOIA request submitted properly and timely and pertains to materials to which you are entitled. If you discover wrongdoing, publicize your findings to the community, especially if the wrongdoing official has a hostile record to taxpayers. Email netaxpayers@gmail.com to join one of our NTF watchdog projects.

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