

No. A-23-000155

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IN THE NEBRASKA COURT OF APPEALS

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NEBRASKA JOURNALISM TRUST,  
*Appellee,*

v.

NEBRASKA DEPARTMENT OF ENVIRONMENT & ENERGY, ET AL.,  
*Appellants.*

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On Appeal from the District Court of Lancaster County  
The Honorable Ryan S. Post

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN  
SUPPORT OF APPELLEE

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Pursuant to § 2-106(B)(1) and § 2-109(4)(b) of the Nebraska Court Rules of Appellate Practice, the prospective *amicus curiae* The Goldwater Institute respectfully moves for leave to file an *amicus curiae* brief in the above-referenced case. In support of its motion, The Goldwater Institute states as follows:

1. The Goldwater Institute (“Goldwater”) was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research papers, editorials, policy briefings, and forums. Among Goldwater’s mission areas is defending the fundamental principle of our constitutional republic that government should be open and transparent.

2. Goldwater wishes to file an *amicus curiae* brief seeking affirmance of the district court’s decision. Specifically, Goldwater seeks an order from this Court ordering a new cost estimate that does not include time spent on employee legal review, consistent with the public records statute.

3. Goldwater has an interest in this case because it frequently files public records requests to shine a light on government activities and represents clients in state and federal courts who have been denied access to public information, in furtherance of its mission. Goldwater believes its policy expertise and litigation expertise will assist this Court in its consideration of the merits.

4. The issues involved in this appeal concern not only the parties, but are also of considerable public interest, and it is therefore important that the Court hear from parties potentially impacted by the Court’s decision, including Goldwater.

5. Attached to this motion as Exhibit A is the *amicus curiae* brief Goldwater proposes to file.

6. This Motion is unopposed by the Parties.

WHEREFORE, The Goldwater Institute respectfully requests that its motion for leave to file an *amicus curiae* brief be granted.

Respectfully submitted,

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THE GOLDWATER INSTITUTE

# **EXHIBIT A**

No. A-23-000155

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On Appeal from the District Court of Lancaster County  
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PROPOSED *AMICUS CURIAE* BRIEF IN SUPPORT OF  
APPELLEE

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## Identity and Interest of Amicus Curiae

The Goldwater Institute (“Goldwater”) was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research papers, editorials, policy briefings, and forums. Through its Scharf-Norton Center for Constitutional Litigation, Goldwater litigates and occasionally files *amicus* briefs when its or its clients’ objectives are implicated.

Among Goldwater’s mission areas is defending the fundamental principle of our constitutional republic that government should be open and transparent. Toward that goal, Goldwater frequently files public records requests to shine a light on government activities, and represents clients in state and federal courts who have been denied access to public information. *See, e.g., Goldwater Inst. v. U.S. Dep’t of Health & Hum. Servs.*, 804 F. App’x 661 (9th Cir. 2020) (federal FOIA); *ACLU of Ariz. v. Ariz. Dep’t of Child Safety*, 493 P.3d 885 (Ariz. 2021) (State public records law); *Footo v. Ludlow School Comm’ee*, No. 23-1609 (1st Cir, pending) (school policy of concealing policies from parents). Goldwater experts have also published extensively about open and transparent government, including creating a public information guide for citizens seeking access to public information.<sup>1</sup> Goldwater believes its policy expertise and litigation expertise will assist this Court in its consideration of the merits.

## Summary of the Argument

This case is about whether a government entity can avoid its duty under the Nebraska Public Records Act (“NPRA”) by using prohibitive fees (purportedly for “legal review”) to keep public

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<sup>1</sup> *A Citizen’s Guide to Public Records Requests*, Open My Government, <https://www.openmygovernment.org/template/OPEN%20MY%20GOVERNMENT.DIGITAL.pdf> (last visited Jan. 2, 2024).

information out of the public's hands. On February 14, the District Court rightfully ruled that the state had inappropriately applied the open records law by charging Nebraska Journalism Trust for "legal review" of public records. A decision overturning the District Court would give government agencies a tool to circumvent the NPRA whenever they want to deny access to public information that would be inconvenient, or otherwise negative to the agency, if revealed.

Supreme Court Justice William O. Douglas, describing the philosophy of the federal FOIA statute, stated: "a democracy cannot function unless the people are permitted to know what their government is up to." *U.S. Dept. of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 742–43 (1989). And the United States Supreme Court has explained that FOIA's "basic purpose...is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1976).

State public records laws follow the same philosophy: to ensure open and transparent government to increase democratic accountability and prevent abuses of government power. The purpose of the NPRA is "to guarantee that public government records are public" and "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. Neb. Op. Atty. Gen. No. 15016 (Neb.A.G.), 2015 WL 6679650 (citing Introducer's Statement of Purpose for L.B. 505, 72nd Neb. Legisl. (1961); Judiciary Committee Statement on L.B. 505, 72nd Neb. Legisl. (1961)). Cases construing the Act have elaborated on this, explaining that "the welfare of the people is best served through liberal public disclosure of the records of the three branches of government." *State ex rel. BH Media Grp., Inc. v. Frakes*, 305 Neb. 780, 787 (2020). The Legislature passed the Act so "that the citizens of this state shall have the full

right to know of and have full access to information on the public finances of ... the public bodies and entities created to serve them.” *Id.*

This case offers a prime example of needing a “check against corruption” and serving “the welfare of the people.” *Flatwater Free Press* (Flatwater) reporter Yanqi Xu sought emails from NDEE staffers “that contain any of the keywords ‘nitrate,’ ‘nutrient,’ or ‘fertilizer’ or ‘nitrogen.’” When the agency expressed concerns with the duration and scope of the initial request, Flatwater narrowed the request twice, shortening the time period from 12 years to five, and then amended its request to seek records from six specific divisions within NDEE. The agency responded with a formal cost estimate of **\$44,103.11**, with the majority of labor fees attributable to “analyzing” records. This exorbitant amount is more than half of the entire amount that the Nebraska Journalism Trust spends on *all* of its freelance journalists.<sup>2</sup>

The purpose of Flatwater’s public records requests was to verify a tip that regulators weren’t really regulating to keep citizens safe. This verification process is necessary for ethical journalism to ensure that tips are accurate. Matt Wynn, *Why We’re Suing the Nebraska Department of Environment and Energy*, Flatwater Free Press, Nov. 18, 2022. And as Xu’s reporting revealed, the water pollution seemed to be related to the state’s high rates of pediatric cancer. Yanqi Xu, *Quick Hit: Nebraska’s Water is Laced with Nitrate. It’s Likely Harming Our Kids*, Flatwater Free Press, Nov. 2, 2022. This is vital information that should reach the public in a timely manner.

Nebraska law allows public officials to charge a fee for making records available. They may include time spent “searching, identifying, physically redacting, or copying” in the fee, but the NPRA does not

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<sup>2</sup> See *Policies & Documents: 2023 Board-Approved Budget*, Nebraska Journalism Trust (Dec. 13, 2022), <https://nebraskajournalismtrust.org/wp-content/uploads/2022/12/Nebraska-Journalism-Trust-budget-2023.pdf>.

allow public officials to charge fees for time spent determining whether to make records available outside of “physically redacting” as written in the statute. And to permit the government to charge such outlandishly high fees risks nullifying the NPRA entirely and giving government a powerful tool for evading the requirement of transparency.

## **Argument**

### **I. State and local governments often engage in abusive practices surrounding public records requests.**

If government agencies are given another tool to keep records from the public, they will use it to the detriment of the public—even when the information sought is easy to produce. Goldwater’s experience in litigation provides many examples of this anti-transparency behavior.

#### **A. Joshua Independent School District**

Terrie Chumchal is a parent whose son attends school in the Joshua Independent School District (“JISD”) in Texas. After her son endured two years of bullying in school—much of it due to his Korean-American heritage—and after other parents had expressed concerns about bullying, Terrie made a simple records request. She sought records over a seven-year period regarding the number of incidents of: a) bullying, b) assaults, c) police reports, d) incident reports, and e) grievances. She specified that she was only seeking the aggregate number of reports, not the content which would require redaction.

JISD responded with a demand for **\$7,111.12** to produce the records. The district recognized that Terrie was only seeking the number of reports and not the content in them, but Joshua ISD stated that the information requested would have to go through a redaction process, increasing the cost. Terrie was then forced to seek legal help

and go through the process of appealing to the Texas Attorney General's Office<sup>3</sup> until, months later, the appeal and further negotiations led Joshua ISD to reduce the charges to *only* \$109.

## **B. Fort Worth Independent School District**

Fort Worth Independent School District ("FWISD") used the same tactic. Kristina West requested "[c]opies of lists of required reading books assigned to students in each grade level within" FWISD, as well as books the teachers are "recommended" or "authorized" to assign. She and other parents simply wanted to know what books their children might read for class. This is information that should be easy to obtain. FWISD, however, demanded **\$1,267.50** to produce the district's reading list, citing the need for approximately 85.5 hours of labor for their staff to compile the data and create a spreadsheet of the books. See Sean Salai, *Texas Mom Says Public School District Wanted \$1,267,50 to See K-12 Book Lists*, Wash. Times, Sep. 1, 2022.<sup>4</sup>

Common sense dictated that a district should have easy access to a list of approved books for their teachers, and so West, like Chumchal, filed a complaint with the Attorney General's Office, Open Records Division.<sup>5</sup> The Open Records Division issued a letter to FWISD requesting a response with a further explanation of the

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<sup>3</sup> *Open Records Complaint: Joshua Independent School District*, Goldwater Institute, <https://www.goldwaterinstitute.org/wp-content/uploads/2022/12/2022-12-02-Submitted-Attorney-General-Complaint.pdf> (last visited Jan. 2, 2024).

<sup>4</sup> Sean Salai, *Texas Mom Says Public School District Wanted \$1,267.50 to see K-12 Book Lists*, The Washington Times (Sept. 1, 2022), <https://www.washingtontimes.com/news/2022/sep/1/texas-mom-says-public-school-district-wanted-12675/>.

<sup>5</sup> *Open Records Complaint: Fort Worth Independent School District*, Goldwater Institute, <https://www.goldwaterinstitute.org/wp-content/uploads/2022/08/2022.08.25-Final-Texas-AG-Complaint-FWISD-KWest.pdf> (last visited Jan. 2, 2024).

charges. Faced with this request, the district then contacted its vendors and posted the book lists to its website, *free of charge*.

### C. South Kingstown School District

Rhode Island mom Nicole Solas was curious about what her daughter would be learning as she entered the South Kingstown School District. She asked school administrators basic questions about the curriculum and lessons. Instead of answering her questions, the district instructed Nicole to submit formal public records requests. When she did, not only did the district ignore vast portions of her requests, but it threatened to sue her for submitting too many.<sup>6</sup>

The district estimated that it would require 4,954 hours to retrieve the information on school curriculum, leading to a charge of **\$74,310**. When the Goldwater Institute engaged to represent her, and made a request for lesson plans, the district quoted the same price.<sup>7</sup> The records requested were plainly described and should have been readily available, yet this case provided another example of a government entity using a prohibitive charge to hide information that the public is entitled to view—and that public officials preferred not to share.

The public should not be given the runaround and intimidated by excessive fees to obtain records, but that is precisely what will happen if the law is unclear regarding the fees that may be charged.

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<sup>6</sup> In Defense of Liberty Blog, *NEA Sues Mom for Asking Questions about Curriculum*, Goldwater Institute (Aug. 5, 2021), <https://www.goldwaterinstitute.org/nea-sues-mom-for-asking-questions-about-curriculum/>.

<sup>7</sup> Jon Riches, *\$74,000 to Find out What Your Child is Learning?!?*, Goldwater Institute (Jul. 19, 2021), <https://www.goldwaterinstitute.org/74000-to-find-out-what-your-child-is-learning/>.

Fortunately, the Nebraska statute is clear that such fees may not be charged.

**II. Nebraska governmental entities should not be free to use “employee review” as a transparency-evading scheme to price the public out of obtaining public records.**

As Flatwater noted, the charges for this single request would be enough for the publication to hire a junior reporter for a year. Wynn, *supra*.

A fee this high would be even more prohibitive for members of the general public. The \$44,103.11 fee is approximately two-thirds of the median annual income in Nebraska.<sup>8</sup>

As evidenced in the examples from the Texas and Rhode Island school districts, public entities will use every tool at their disposal to keep potentially inconvenient information from being revealed. Those examples involved cases in which production would have been simple—indeed, in some cases, the districts backed down and drastically reduced their fee estimates when confronted by possible legal action, effectively admitting that the initial estimates were baseless. Yet, the districts waited until concerned parents took on the burden of seeking legal help before capitulating. Not every member of the public will be able to secure a pro bono attorney for such requests.

Citizens should not have to decide between paying their mortgage and exercising their legal rights, but that is a choice many public institutions nationwide are forcing upon citizens who make

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<sup>8</sup> *QuickFacts Nebraska*, United States Census Bureau, <https://www.census.gov/quickfacts/fact/table/NE/AGE295222> (last visited Jan. 2, 2024).

public records requests. The reason is obvious: exorbitant fees deter citizens from asking questions they have a right to ask.

And of course, no taxpayer will put themselves in financial jeopardy to obtain records, no matter how important they may be. Affirming the District Court's decision will be an important step towards protecting the Nebraska law's purpose of bringing transparency to government.

**III. When interpreting § 84-712, the state may look to the federal government's protections of the public's right to know.**

The federal Freedom of Information Act ("FOIA"), similar to Nebraska's public records law, sets out rules for agencies to make records readily available to the public and it shares the goal of ensuring open and transparent government. 5 U.S.C. § 552. FOIA and cases describing acceptable charges for public records can be informative and persuasive in the instant case.

Prior to 1986, FOIA "required requesters to pay the costs of searching for and duplicating documents" while allowing agencies to waive or reduce fees if the information would "be considered as primarily benefitting the general public." *Electronic Privacy Information Center v. Department of Defense*, 241 F.Supp.2d at 6 (D.C. Cir. 2003) (citing 5 U.S.C. § 552(a)(4)(A) (1982)). Congress amended FOIA's fee provisions in the Freedom of Information Reform Act of 1986 (FIRA) as an effort to "keep fees from being an unnecessary barrier to disclosure" and required government agencies to adopt fee regulations waiving or reducing search and duplication fees depending on the requester's status and on whether the requests were for commercial or non-commercial purposes. 132 Cong. Rec. H9464 (daily ed. Oct. 8, 1986); *Nat'l Sec. Archive v. DOD*, 880 F.2d at 1382 (D.C. Cir. 1989).



Now under FOIA, “when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution...or a representative of the news media,” fees are limited to document duplication costs. 5 U.S.C. § 552 (a)(4)(A)(ii)(II). Requesters falling under one of these subcategories enjoy a complete exemption of search and review fees, so long as they “reasonably describe” the records sought in order to not impose upon an agency “an unreasonably burdensome search.” See 132 Cong. Rec. S14,298 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy); *AFGE v. United States Dep’t of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990).

Congress amended FOIA because it understood the importance of allowing the news media to do its job to inform the public, while maintaining protections against unreasonably burdensome requests. Here, Flatwater made a good faith effort to “reasonably describe” and narrow its request for NDEE communications to inform Nebraskans about dangerous pollutants in their drinking water. They were met with unreasonable fees that only serve to keep the public in the dark about the government’s regulatory failures.

### **Conclusion**

This Court should affirm the decision below and order a new cost estimate that does not include time spent on employee legal review, consistent with the clear language of the public records statute.

Respectfully submitted,

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ATTORNEYS FOR AMICUS CURIAE  
THE GOLDWATER INSTITUTE

### **CERTIFICATE OF COMPLIANCE**

I, Marnie A. Jensen, pursuant to Neb. Ct. R. § 6-1505(A) and Neb. Ct. R. § 2-103(C)(4), hereby certify that the foregoing document complies with the word limit rule set forth in General Formatting and Service Rules of the Supreme Court/Court of Appeals of the State of Nebraska, Neb. Ct. R. § 2-103(C)(3). This certification relies on the word-count function of my word-processing software – Microsoft Word for Office 365. The word-count function, which included all text, including the caption, headings, footnotes, and quotations but excluding this Word Count Certificate, calculated that the foregoing document contains 2,848 words.

*/s/Marnie A. Jensen*

# Certificate of Service

I hereby certify that on Thursday, January 04, 2024 I provided a true and correct copy of this *Motion Leave to File Amicus Brief* to the following:

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