



STATE OF NEBRASKA
Office of the Attorney General

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July 17, 2018

Mark Welsch, President
GASP of NE, Inc.
Group to Alleviate Smoking Pollution
5611 Howard Street
Omaha, NE 68106

RE: *File No. 18-R-121; Blair Housing Authority; Petitioner Mark Welsch, GASP*

Dear Mr. Welsch:

This letter is in response to your petition submitted to us on July 2, 2018 under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2016) ("NPRS"), in which you sought our assistance in obtaining certain public records belonging to the Blair Housing Authority ("BHA"). As is our normal practice with such requests, we contacted the public body named in the correspondence and asked for a response to that petition. In this case, we provided the petition and supplement to BHA and a response was provided to us on July 9, 2018 by George Achola, attorney for BHA. We have now completed our analysis of this matter and our findings are set forth below.

RELEVANT FACTS

Our understanding of the facts in this matter is based on your petition. On or about June 21, 2018, you made a request for "copies of all of the documents George Achola sent to Blair Housing Authority asking for payment for his services in 2018 and 2017." On June 25, 2018, BHA denied access to the documents sought by you, stating that BHA had retained Mr. Achola as outside counsel and that his billing records were being withheld under Neb. Rev. Stat. § 84-712.05(4), the attorney work product doctrine, and attorney-client privilege. Specifically, BHA stated that the documents requested by you "are covered by the attorney-client privilege or so inextricably intertwined with the privileged materials, as to also be exempt from disclosure." Your petition to his office followed. In that petition, you appear to modify or clarify your request for documents, stating that you are "only wanting to learn what [Mr. Achola] charged for his services, and how much time he spent each day that he worked for them."

DISCUSSION

The NPRS generally allow interested persons the right to examine public records in the possession of public agencies in Nebraska during normal agency business hours, to make memoranda and abstracts from those records, and to obtain copies of records in certain circumstances. Except when any other statute expressly provides that particular information or records shall not be made public, public records shall include all records and documents, regardless of physical form, of or belonging to this 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. Data which is a public record in its original form shall remain a public record when maintained in computer files. Neb. Rev. Stat. § 84-712.01(1). Under those statutes, every record “of or belonging to” a public body is a public record which individuals may obtain a copy of unless the custodian of the record can point to a specific statute which allows the record to be kept confidential.

Although the NPRS provide for access to public documents, they are not absolute and also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

Neb. Rev. Stat. § 84-712.05 is comprised of twenty categories of documents which may be kept confidential from the public at the discretion of the agency involved. In the present case, BHA has claimed Neb. Rev. Stat. § 84-712.05(4) as its basis for denying you access to the requested records. This provision allows the custodian of records to withhold “[r]ecords 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 as defined in section 27-503¹.” Your original request for “all documents” sent from Mr. Achola to BHA in billing for his services was denied under this provision. However, the revised request in your petition to this office makes a more limited request for only Mr. Achola’s hours and charges.

Our office has previously examined whether attorney fee statements could be properly withheld under the exception set out in § 84-712.05(4). In a 2008 disposition letter involving this issue, we wrote:

From our research concerning previous public records matters, it appears that there is case authority which generally supports the notion that itemized fee statements can constitute attorney work product and/or

¹ Neb. Rev. Stat. § 27-503 (2008) codifies the attorney-client privilege.

communications subject to the attorney/client privilege under certain circumstances. For example, with respect to attorney work product, some courts have indicated that itemized descriptions of the work which an attorney has performed for a client can offer insight into the attorney's thought processes or legal theories for a particular case. On the other hand, we do not believe that a simple designation of hours worked along with a general description of the time spent such as "review of discovery" or "preparation of trial brief" normally offers insights into an attorney's thought processes or implicates a privileged communication with the attorney's client. Disposition Letter, File No. 07-R-154 (May 22, 2008).

Our initial contact with BHA and Mr. Achola contained a copy of this previous disposition letter. In light of this, and the revised request for records in your petition, Mr. Achola has agreed to review his billing statements for the time period at issue and provide you with documents which indicate the number of hours he has worked, and the amount billed to BHA. These statements will contain the information you seek without presenting an itemization which Mr. Achola believes would breach the attorney/client privilege and/or reveal attorney work product. Mr. Achola has indicated to us that you would be receiving these redacted billing statements this week.

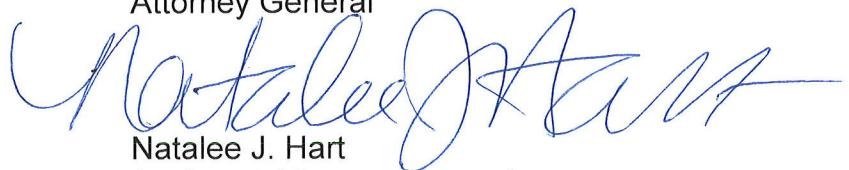
We are satisfied with the resolution proposed by Mr. Achola. Therefore, on the assumption that Mr. Achola will provide you with the redacted billing information, we believe this complaint has been resolved, and there is no need for further action by this office.

CONCLUSION

For the reasons explained above, we conclude that upon disclosure of the redacted billing records to you, BHA will be in compliance with the NPRS with respect to your request for records, and that no further action by this office is warranted. Accordingly, we are closing this file. If you disagree with the analysis we have set out above, you may wish to determine what additional remedies may be available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: George Achola