

STATE OF NEBRASKA  
**Office of the Attorney General**

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**DOUGLAS J. PETERSON**  
ATTORNEY GENERAL

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May 29, 2019

Via email at [RUGGLES@owh.com](mailto:RUGGLES@owh.com)  
Rick Ruggles  
Omaha World-Herald  
1314 Douglas Street  
Omaha, NE 68102

RE: *File No. 19-R-115; University of Nebraska; Rick Ruggles, Omaha World-Herald, Petitioner*

Dear Mr. Ruggles:

We are writing in response to your email correspondence received by this office on May 14, 2019, in which you sought our review of the denial of your public records request by the University of Nebraska ("University"). When we receive correspondence of this nature, our normal practice is to forward a copy to the public entity involved. In this case, we forwarded a copy to Erin E. Busch, Director University Records/Associate General Counsel, and requested a response to the allegations raised. Ms. Busch provided us a response on May 23, 2019. We construed your correspondence to be a petition for review under Neb. Rev. Stat. § 84-712.03(1)(b) of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018) ("NPRS"). Our findings in this matter are set forth below.

### FACTS

On May 7, 2019, you emailed a public records request to Ms. Busch and Melissa Lee, University Director of Communications, requesting "to see the questions about the presidential search posed to NU attorneys by the regents on March 29 and thereafter. I also would like to see the answers provided by NU attorneys and anyone else who participated in answering." Ms. Busch denied your request by email on May 13, indicating that "[t]he University is withholding emails and an attached memorandum responsive to your request, because such records are attorney-client privileged. See Neb. Rev. Stat. Sec. 84-712.05(4)."

You state in your petition that during the March 29 meeting, members of the Board of Regents posed a series of questions relating to the presidential search to NU attorneys

in closed session, and that the University “denied [your] request on the basis of attorney-client privilege.” You have asked us whether the privilege provides “a reason to withhold information of considerable interest and important to the public. And, if there is such a provision, I would like to ask if this particular case falls under it.”

In her response to this office, Ms. Busch confirmed that the records at issue, i.e., emails and an attached memorandum, consisted of requests for legal advice from members of the Board of Regents and certain legal advice prepared by the General Counsel in response. She advises that these records “are protected by attorney-client privilege and were properly withheld pursuant to Neb. Rev. Stat. § [84-]712.05(4) . . . .” Ms. Busch notes that Neb. Rev. Stat. § 27-503, a statute referenced in § 84-712.05(4), “states that communications between an attorney and the client for the purpose of the rendition of legal services are confidential and may be withheld from disclosure.” Due to the privileged nature of the records at issue, Ms. Busch believes the University’s actions with respect to the disposition of your records request was proper.

## DISCUSSION

The basic rule for access to public records in Nebraska is set out in Neb. Rev. Stat. § 84-712(1) (2014). That provision states that

[e]xcept as otherwise expressly provided by statute, all citizens of this state and all other persons interested in the examination of the public records as defined in section 84-712.01 are hereby fully empowered and authorized to (a) examine such records, and make memoranda, copies using their own copying or photocopying equipment in accordance with subsection (2) of this section, and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business and (b) except if federal copyright law otherwise provides, obtain copies of public records in accordance with subsection (3) of this section during the hours the respective offices may be kept open for the ordinary transaction of business.

The purpose of this statute is “to guarantee that public government records are public.” Introducer’s Statement of Purpose for LB 505, 72<sup>nd</sup> Nebraska Legislature (1961). Under § 84-712, 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*. Judiciary Committee Statement on LB 505, 72<sup>nd</sup> Nebraska Legislature (1961) (emphasis added).

Neb. Rev. Stat. § 84-712.05 (Cum. Supp. 2018) currently contains twenty-one categories of records that may be withheld at the discretion of the records custodian “unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties . . . .” The University is

relying on the exception in subsection (4) as its basis to deny you access to the records at issue, which applies to

[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 27-503.*

(Emphasis added.) Neb. Rev. Stat. § 27-503, which is part of the Nebraska Evidence Rules, provides in pertinent part that “[a] communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” Neb. Rev. Stat. § 27-503(1)(d) (2016).

You have asked whether the “attorney-client privilege” provides a reason to withhold information you consider to be of considerable public interest and importance. As described above, governmental records are intended to be public except where the Legislature has provided that certain records shall be confidential. Here, the Legislature has incorporated § 27-503, an evidentiary rule, into § 84-712.05(4) to allow public officials to keep confidential attorney-client confidential communications. The exception exists regardless of the level of public interest or importance those records may possess.<sup>1</sup>

In addition, in a recent mandamus case in Lancaster County District Court, Judge Colborn considered whether certain records belonging to the University could be withheld on the basis of a number of exceptions, including § 84-712.05(4). In *State ex rel. Lambda Nu Assoc. of Phi Gamma Delta, Inc. v. Office of Fraternity and Sorority Life of the University of Nebraska-Lincoln, et al.*, Case No. CI 18-2752, the court noted the exception in § 84-712.05(4), stating:

“[A] client is a person who is rendered professional legal services by a lawyer or who consults a lawyer with a view to obtaining professional legal services from the lawyer.” *State ex rel. Stivrins v. Flowers*, 273 Neb. 336, 341, 729 N.W.2d 311, 316 (2007) (citing Neb. Rev. Stat. § 27-503(1)). “A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.” *Id.* at 341, 729 N.W.2d at 317 (citing Neb. Rev. Stat. § 27-503(1)(b)). “An attorney-client relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney’s professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.” *Id.* at 341-42, 729 N.W.2d at 317. “To be protected from disclosure, ‘a

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<sup>1</sup> Also, ethical rules require, with limited exceptions, that “lawyer[s] shall not reveal information relating to the representation of a client . . . .” Neb. Ct. R. of Prof. Cond. § 3-501.6. Confidentiality of information.

communication must be one which is essentially confidential in character and which relates to the subject matter upon which advice was given or sought.” *Id.* at 342, 729 N.W.2d at 317. “A communication is confidential if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* (citing Neb. Rev. Stat. § 27-503(1)(d)).

Order on Writ of Mandamus, January 30, 2019, at 12-13. Following an *in camera* review of the records at issue, the court found the exception applicable to all of the documents claimed by the University to be attorney work product or subject to the attorney-client privilege. *Id.* at 13.

Finally, keep in mind that while a court may review records and documents *in camera* to determine whether they are excepted from disclosure, see Neb. Rev. Stat. § 84-712.03(2), there is no statutory mechanism for an *in camera* review by the Attorney General. Thus, we do not have access to the records you seek. Consequently, we will rely on representations from Ms. Busch that the records fall within the exception in § 84-712.05(4), and are in fact communications containing legal advice conveyed to members of the Board of Regents by its legal counsel.<sup>2</sup>

## CONCLUSION

The records at issue are communications between client and lawyer, i.e., the Board of Regents and General Counsel. The “attached memorandum” referred to by Ms. Busch in her denial email contains the legal advice provided to the board. There is no indication that any of this information has been disclosed to third parties. Since the communications between the parties is subject to the attorney-client privilege, those records fall squarely within the exception in § 84-712.05(4). Consequently, the University’s reliance on § 84-712.05(4) to withhold the requested records was appropriate in all respects.

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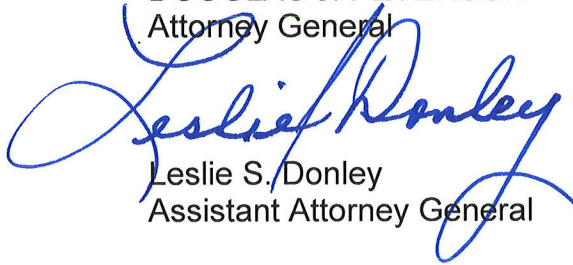
<sup>2</sup> In *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009), a case involving alleged violations of the Open Meetings Act by members of a county board, there was no evidence in the record which established that the board had published notice of its meetings anywhere. The Court of Appeals held that in the absence of contrary evidence, it may be presumed that public officers faithfully performed their official duties. *Id.* In addition, absent evidence showing misconduct or disregard for the law, the regularity of official acts is also presumed. *Id.*

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If you disagree with the conclusion reached in this disposition letter, you are free to pursue the other legal remedies available to you under Neb. Rev. Stat. § 84-712.03 of the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General



Leslie S. Donley  
Assistant Attorney General

c: Erin E. Busch (via email)

49-2199-29