



STATE OF NEBRASKA
Office of the Attorney General

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MIKE HILGERS
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

March 23, 2023

Via email at [REDACTED]
Jane Andrew

RE: *File No. 23-R-110; City of Auburn Board of Public Works; Jane Andrew, Petitioner*

Dear Ms. Andrew:

This letter is in response to your public records petition submitted to our office on February 22, 2023, in which you requested our assistance in obtaining certain records from the City of Auburn Board of Public Works ("BPW"). On February 23, we wrote to you requesting additional documentation to support your petition. We received those materials on March 8. On March 14, 2023, we discussed this matter with BPW legal counsel Vanessa A. Silke. At our request, Ms. Silke provided us all of BPW's documentation pertaining to your requests. We considered your petition and the materials we received from BPW in accordance with the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2022). Our findings in this matter are set forth below.

RELEVANT FACTS

Your petition involves three public records requests, dated February 6, 7 and 9. Each request, and the BPW's handling of the request, have been summarized below:

I. February 6 Request

The items in this request included the following:

1. 2022 End of the year Financial statement
2. 2019–2022 Storm water test results

3. All Wellhead Protection Area Permits and approval and denied correspondence
4. Agreement and correspondence with the Auburn County Club pertaining to furnishing the club with waste water for irrigation
5. 2019–2022 Auburn County Club BPW Water Bills
6. 2019–2022 Auburn’s BPW wells water test results

Ms. Silke timely responded to your request on February 10. She estimated the cost of producing the requested records at \$200. Ms. Silke also indicated that the BPW would be able to fulfill your request within ten business days after receiving your check. She also advised you of the opportunity to modify or prioritize the items in your request. According to the documentation, you paid the requested \$200 (date unknown). On February 21, you sent an email to Ms. Silke “requesting the Explanation of Denial as set forth in the [state statutes],” to which you attached a “Denial list of request.docx.” This document amended item numbers 2, 5 and 6 in your request to just records for 2022.

Ms. Silke produced responsive records by letter dated February 28. Other responsive records were withheld and redacted under the exceptions in (i) Neb. Rev. Stat. §§ 84-712.05(4) and 27-503 (attorney-client privileged communications or attorney work product); (ii) § 84-712.05(7)¹ (personal information regarding BPW personnel); and (iii) § 84-712.05(12) (personally identifiable private citizen information). Ms. Silke’s response contained the information required to be provided to you in accordance with § 84-712.04(1).

II. February 7 Request

The items in this request included “Clean Water State Revolving Loan Fund appliance” [*sic*] and “Clean Water Revolving Loan Funds acceptance Document.”

Based on the actual receipt of your request, Ms. Silke timely responded on February 14. She requested clarification as to what you were seeking with respect to the first item (i.e., *appliance*), and requested date ranges for both items. You responded to Ms. Silke’s request for clarification on February 15. Also, according to your February 21 email (see above), you indicated that the NDEE (Nebraska Department of Environment and Energy) would be providing you the requested documents.

Ms. Silke emailed her final response to this request on February 22. She construed your statement about the NDEE providing the documents as a withdrawal of your request to the BPW and considered the matter closed. However, she advised you to submit a new request if you wished to reopen it. Ms. Silke also stated: “Your February 21, 2023, email also repeats certain requests that you made on February 9, 2023. As per my letter

¹ Renumbered subsection (8) as a result of 2022 Neb. Laws LB 1246, § 5.

dated February 15, 2023, the BPW already responded to that request and considers it closed.”

III. February 9 Request

Your last request sought copies of the following:

1. Contract or agreement with Peru to provide Peru city water.
2. Budget for project to provide water to the city of Peru.
3. Projected cost per gallon of water for Peru residents.
4. Auburn’s projected income from water provided to Peru.

Ms. Silke timely responded to this request on February 15. She provided you responsive records pertaining to item numbers 1 and 4. She indicated that BPW had no records responsive to item numbers 2 and 3, and that no records were withheld.

ANALYSIS

Section 84-712 of the NPRS generally allows Nebraska citizens and other interested persons the right to examine public records in the possession of public agencies during normal agency business hours and to obtain copies of records in certain circumstances. “Public records” are defined as “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.” Neb. Rev. Stat. § 84-712.01(1). This office has concluded that § 84-712 does not require a public body review documents and create abstracts or other lists, to answer questions or to create documents which do not otherwise exist. Op. Att’y Gen. No. 94092 (November 22, 1994); Op. Att’y Gen. No. 94035 (May 11, 1994); Op. Att’y Gen. No. 87104 (October 27, 1987).

Access to public records is not absolute, however. Section 84-712 “provide[s] that exceptions may be created by express and special provisions.” *Orr v. Knowles*, 215 Neb. 49, 55, 337 N.W.2d 699, 703 (1983). In addition, Neb. Rev. Stat. § 84-712.05 contains twenty-five categories of public records that may be withheld at the discretion of the public body so long as those records have not been “disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties” The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 788, 943 N.W.2d 231, 240 (2020). With respect to the February 6 request, the BPW relied on the exceptions in § 84-712.05(4), (8) and (12) to withhold and redact certain records responsive to your requests.

We have carefully reviewed each of your requests, the letters and emails exchanged between you and Ms. Silke, the records produced and the exceptions relied

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on by the BPW to withhold and redact records and information. We have identified nothing to suggest that you were denied access to public records or that the BPW failed to comply with the NPRS. As noted above, public bodies have the discretion to withhold/redact public records that fall within the categories of public records listed in Neb. Rev. Stat. § 84-712.05. Since there is no statutory mechanism for an *in camera* review of those documents by the Attorney General,² we will rely on the representations from BPW's attorney that the records fall within the exceptions cited. Also, the fact that there are no responsive records available, see February 9 Request item numbers 2 and 3, does not equate to a denial of public records.

CONCLUSION

For the reasons discussed above, we conclude that the BPW complied with the provisions of the NPRS, and may continue to withhold records/information which fall within the exceptions to disclosure in Neb. Rev. Stat. § 84-712.05(4), (8) and (12). In addition, the BPW has no obligation under the NPRS to create records which do not otherwise exist. Since we have concluded that you were not improperly denied access to public records and no violation of the NPRS occurred, no further action by this office is necessary and we are closing this file. Finally, if you disagree with our analysis, you may wish to discuss this matter with your private attorney to determine what, if any, additional remedies might be available to you under the Nebraska Public Records Statutes.

Sincerely,

MIKE HILGERS
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Vanessa A. Silke (via email only)

49-3181-30

² In a civil suit seeking access to public records, “[t]he court may view the records in controversy in camera before reaching a decision, and in the discretion of the court other persons, including the requester, counsel, and necessary expert witnesses, may be permitted to view the records, subject to necessary protective orders.” Neb. Rev. Stat. § 84-712.03(2).