

STATE OF NEBRASKA
Office of the Attorney General

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DOUGLAS J. PETERSON
ATTORNEY GENERAL

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November 21, 2018

Chris Chappellear
[REDACTED]

RE: *File No. 18-R-133; Douglas County, Douglas County Attorney; Chris Chappellear, Petitioner*

Dear Mr. Chappellear:

We are writing in response to your public records petition received by this office on October 26, 2018, in which you requested our assistance in obtaining certain public records belonging to Douglas County ("County"). Upon receipt of your petition, we advised Deputy County Attorney Jimmie L. Pinkham III about the petition and the opportunity to provide this office a response to the issues raised. We received Mr. Pinkham's response on behalf of the County on November 5, 2018. On November 13, 2013, we wrote to you indicating that we had conducted a preliminary investigation of your petition, and it appeared to us that the County's handling of your public records request was appropriate. However, we indicated that our response would be delayed so that we could further analyze the issues. We have now completed our analysis. We considered your petition, your supplemental documentation, and the County's response in accordance with the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2016¹) ("NPRS"). Our findings in this matter are set forth below.

REQUESTS AND RESPONSES

On August 22, 2018, you emailed a public records request to Douglas County Attorney Donald Kleine, seeking public records from the County pertaining to the Douglas County Unified Justice Center Development Corporation ("DCUJC") and the proposed juvenile justice center project, for the timeframe August 1, 2017 to the "current day." On August 28, 2018, Mr. Pinkham responded to your request, indicating that a delay was necessary due to the extensiveness and difficulty of the request. Mr. Pinkham advised that he would follow up with you on or by September 10. He described the search terms

¹ See also 2018 Neb. Laws LB 193; 2018 Neb. Laws LB 859; and 2018 Neb. Laws LB 902.

Chris Chappelle
November 21, 2018
Page 2

to be employed, and sought clarification as to which County Board staff members were implicated in your request.

On August 29, you amended your request to the following records:

Any and all email communications sent, received or drafted by County Commissioners Mary Ann Borgeson, PJ Morgan or Clare Duda, County Attorney Don Kleine or Deputy County Administrator Diane Carlson related in any way to the Douglas County Unified Justice Center Development Corporation that occurred between August 1, 2017 and July 1, 2018.

Mr. Pinkham responded to your amended request on September 5, indicating that he would respond to your request on or before September 19.² On September 19, Mr. Pinkham provided you eight emails which were deemed responsive to your request. However, Mr. Pinkham advised that

a number of the records produced through the email search fall under one or several permissive exemptions, and are being withheld from disclosure. The records being withheld are protected under attorney-client privilege or the attorney-work product doctrine.

On September 24, you emailed Mr. Pinkham requesting that the County produce withheld email, with only those parts falling under the exemption redacted. You asked for "emails even if only the metadata or header data (i.e., sender, recipient(s), date/time, etc.) are visible." In a response dated October 12, 2018, Mr. Pinkham provided you additional records which his office identified as being reasonably segregable.³ He indicated that "[t]he remainder of the emails withheld from you are not reasonably segregable so as to not reveal privileged communications under Neb. Rev. Stat. §§ 27-503, 84-712.01, 84-712.05(4), and Neb. Ct. R. of Prof. Cond. § 3-501.6 and are therefore being withheld."

In a October 22 email to Mr. Pinkham, you challenged the County's October 12 response as "wholly inadequate, and contrary to the spirit and letter of Neb. Rev. Stat. 84-712.04(1)(a) and (b)" You requested that the County prepare a "privilege log . . . for the email communications and attachments that have been withheld" On October 25, Mr. Pinkham denied your request based on the following reasons:

(1) Creating a privilege log is neither appropriate nor necessary under public records statutes. The Office of Attorney General has, on several

² It appears that you exchanged emails with Mr. Pinkham on September 6 in an effort to get certain items in your request prioritized.

³ Pursuant to Neb. Rev. Stat. § 84-712.06 of the NPRS, "[a]ny reasonably segregable public portion of a record shall be provided to the public as a public record upon request after deletion of the portions which may be withheld."

occasions, opined that “Neb. Rev. Stat. § 84-712 does not require a public agency to create lists or documents which do not otherwise exist or to answer questions for the public.” Op. Att’y Gen. No. 04018; see *also*, Op. Att’y Gen. No. 94092. Thus, Douglas County will not provide a privilege log of the previously withheld records.

(2) Although reasonably segregable public portions of records are to be disclosed to the public upon request, it is not always possible to reasonably segregate portions of records. In the case of attorney-client communications, lawyers are not to reveal information relating to the representation of a client. This prohibition “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” Neb. Ct. R. of Prof. Cond. § 3-501.6, cmt. 3. “This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.” *Id.* at cmt. 4. Thus, Douglas County has determined that there are no reasonably segregable portions of the privileged communications and attorney-work product.

YOUR PETITION

You allege that Douglas County failed to comply with Neb. Rev. Stat. § 84-712.04(1)(a), which “clearly provides that a description of the contents of the records, correlated to the specific reasons for denial (with citations to specific statutes) be provided” You sought this information in order to assess whether “to bring a challenge against [*sic*] any exemption claimed before [our] office or the District Court.” You note that the City of Lincoln prepared a document entitled “Privilege Log” in response to a public records request for Lincoln City Councilwoman Jane Raybould’s communications. You indicate that without a log, or any indication as to how many emails have been withheld, “Douglas County is stonewalling and potentially blocking access to email communications that might rightfully be publicly disclosed.”

You also take issue with the fact that Deputy County Administrator Diane Carlson is listed as the public official responsible for the decision to deny you access to the withheld records. You indicate that Ms. Carlson is integrally involved—not only as the subject of your request, but as an officer of the DCUJC. You indicate that the DCUJC is the reason for your request, and your “desire to see how or if the elected county board members and county administrative staff being on the board of the DCUJC affected the decision of the Douglas County Board to grant DCUJC the rights to issue no-bid construction contracts for the proposed courthouse expansion in Douglas County.” You assert that having Ms. Carlson deny your public records request “appears to be improper.”

THE COUNTY'S RESPONSE

Mr. Pinkham states that his office fully complied with the requirements of § 84-712.04(1)(a), providing “a detailed description of the basis for withholding the records, including specific statute citations.” He asserts that “Neb. Ct. R. of Prof. Cond. § 3-501.6, cmt. 3, prohibits attorneys from revealing information relating to the representation of a client, including when the information could reasonably lead to the discovery of protected information” Mr. Pinkham states that he informed you on October 12 that there were no reasonably segregable portions of email or attachments that could be provided, noting that such disclosure could potentially waive the attorney-client privilege and disregard the court rule. Mr. Pinkham indicates that the City of Lincoln’s creation of a privilege log does not impose a duty on Ms. Carlson or any other public body or official when it is not supported by existing law. Mr. Pinkham cites to previous opinions of this office in which we stated that § 84-712 of the NPRS does not requires public bodies to create new records that do not otherwise already exist.

With respect to Ms. Carlson’s participation in this process, Mr. Pinkham asserts that you essentially wish to limit the ability of elected officials, county administration and staff to review their own records requested by the public and have someone completely unrelated to the records at issue approve or deny any request. Such an arrangement would negate the references in the NPRS relating to the “lawful custodian” or “custodian” of the records. Mr. Pinkham represents to this office that Ms. Carlson, as a licensed attorney, is well versed in the laws and rules pertaining to attorney-client confidentiality and privilege as well as the NPRS, and states that her involvement in this process “was appropriate and necessary.” Mr. Pinkham further represents that he also reviewed the records at issue for attorney-client privilege and work product doctrine, and informs us that a total of 42 emails and documents were properly withheld under the exception set out in Neb. Rev. Stat. § 84-712.05(4).

DISCUSSION

The statute pertinent to your petition, Neb. Rev. Stat. § 84-712.04, states, in pertinent part:

(1) Any person denied any rights granted by sections 84-712 to 84-712.03 shall receive in written form from the public body which denied the request for records at least the following information:

(a) A description of the contents of the records withheld and a statement of the specific reasons for the denial, correlating specific portions of the records to specific reasons for the denial, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial;

- (b) The name of the public official or employee responsible for the decision to deny the request; and
- (c) Notification to the requester of any administrative or judicial right of review under section 84-712.03.

Your petition is based on the presumption that § 84-712.04 requires a public body (1) to prepare and provide the requester a “privilege log” when it denies access to certain public records and (2) employ a person with no known nexus to the records at issue to determine whether the records may be withheld. Based on the foregoing, you allege that the County is in violation of the NPRS.

In Nebraska, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018); *Farmers Cooperative v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017). In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Id.*; *Davis v. Gale*, 299 Neb. 377, 908 N.W.2d 618 (2018). The plain language of § 84-712.04(1)(a) generally requires a public body to put any denial of access to public records in writing, describe the records withheld, and provide the specific statutory basis for the denial. In the present case, your amended request was very specific. You asked for “[a]ny and all email communications sent, received or drafted by” five identified County officials (including the County Attorney and the Deputy County Administrator (also an attorney)), pertaining to the DCUJC exchanged between August 1, 2017 and July 1, 2018. The County’s denial, provided to you in writing, indicated that the County performed an email search using the following terms: “Douglas County Unified Justice Center Development Corporation,” “501(c)(3),” or “JCDC.” The County informed you in its denial letter that it had identified records responsive to your request. Eight of those emails were made available to you; however, the County withheld other responsive emails which fell under the attorney-client communications privilege or constituted attorney-client work product. The County further informed you that the records were being withheld under §§ 84-712.01(1), 84-712.05(4), 27-503 and Nebraska Supreme Court Rule § 3-501.6. In response to your October 22 request, the County provided you four additional records, consisting of attachments to emails which were deemed privileged.

“Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction.” *Capitol City Telephone, Inc. v. Nebraska Dep’t of Revenue*, 264 Neb. 515, 527, 650 N.W.2d 467, 477 (2002). “This is particularly so when the Legislature has failed to take any action to change such an interpretation.” *Id.* Since its enactment in 1979 and subsequent

amendment in 1983,⁴ this office has consistently taken the position that § 84-712.04(1)(a) requires (1) a written denial, (2) a general description of the records withheld, and (3) the statutory basis for the denial. At no time during the preceding thirty-nine year period has this office construed § 84-712.04(1)(a) to require a written denial in the form of a privilege log, or that a public body has to justify the withholding of public records on an individual basis. We note further that, to our knowledge, there have been no attempts by the Nebraska Legislature to amend § 84-712.04 to address any perceived flaws in our interpretation.

In the present case, Mr. Pinkham has represented to this office that the County has provided you all records responsive to your request that do not fall within the privilege and doctrine cited. Based on our review, it appears to us that you received all of the information the County was required to provide you under § 84-712.04(1)(a), i.e., a denial in writing, a description of the records withheld (emails constituting attorney-client communications and work product), and the specific statutory basis for denial. There is nothing in the plain language of the statute that requires public bodies to provide a “privilege log”⁵ or index or individually identify each record withheld. Moreover, we are unaware of any Nebraska cases or statutes that would require a different result. Consequently, we believe that the County complied with the requirements of § 84-712.04 in its handling of your public records request, and any allegation that the County violated the NPRS by refusing to provide you a privilege log is without merit.

We will now address your allegation challenging the appropriateness of Ms. Carlson’s role under § 84-712.04(1)(b). You suggest that since the records directly relate to Ms. Carlson, she is prohibited from denying you access to them. We find no merit to your allegation for a couple of reasons. First, the plain language in § 84-712.04(1)(b) requires that the written denial include the name of the individual “responsible for the decision to deny the request.” There are no further qualifications or limitations. Second, the withheld records involve attorney-client confidential communications and records considered attorney work product. As set out in Mr. Pinkham’s response to this office above, Ms. Carlson has a professional duty as an officer of the court to keep such records confidential. She is expressly prohibited under law and rule from disclosing them to third parties and potentially waiving the attorney-client privilege. Consequently, in light of the types of records at issue, it would be antithetical to require a disinterested third party to review confidential records and make a decision as to their disclosure. Finally, to the extent you disagree with Ms. Carlson’s

⁴ See 1979 Neb. Laws LB 86, § 4; 1983 Neb. Laws LB 3, § 1.

⁵ Privilege logs are commonly required in the discovery phase of litigation. See Federal Rules of Civil Procedure 26(b)(5) (“When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.”). Access to public records through an administrative process authorized under § 84-712 of the NPRS is not litigation.

Chris Chappellear
November 21, 2018
Page 7

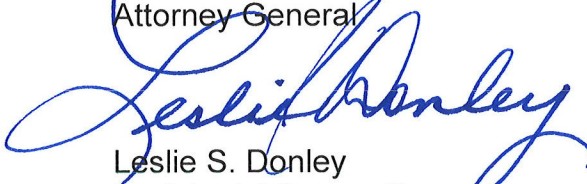
participation in the denial process, Mr. Pinkham represents to this office that he also reviewed the records at issue, and concurred that certain records were properly withheld.⁶

CONCLUSION

Since it appears that Douglas County complied in all respects with the provisions of the NPRS, and provided you all of its records responsive to your request that did not fall within the noted exceptions, this office will take no further action with respect to this file. 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: Jimmie L. Pinkham III

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⁶ 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.*