

STATE OF NEBRASKA
Office of the Attorney General

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DOUGLAS J. PETERSON
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

August 5, 2019

Stacy Heatherly
[REDACTED]

RE: *File No. 19-R-121; City of Fremont; Stacy Heatherly, Petitioner*

Dear Ms. Heatherly:

This letter is in response to the consumer complaint you submitted to our office on July 19, 2019, in which you sought our review of the denial of your public records request by the City of Fremont ("City"). We construed your complaint to be a petition for review under § 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"). In accordance with our normal practice relating to such petitions, we forwarded a copy to Molly J. Miller, with the City Attorney's office, and requested a response to the issues raised. We received Ms. Miller's response on July 29, 2019. We have now fully considered your petition and the City's response in accordance with the provisions of the NPRS. Our findings in this matter are set forth below.

RELEVANT FACTS

Our understanding of the facts in this case is based on your petition and the information we received from the City Attorney's office.

On July 17, 2019, you submitted a public records request to the City seeking the following information:

City Contract Date, Name, and internal Number for each Nebraska DED [Department of Economic Development] funded, sponsored, guaranteed or participated contract to which the City has been a party since January 1, 2013 that was contracted out to Getzschman Heating and Air as a contractor or sub-contractor for any and all jobs.

Ms. Miller responded to your public records request on July 18, indicating that the City had no document responsive to your request. In subsequent emails exchanged

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between you and Ms. Miller, you advised that the DED informed you that “[t]hese contracts are not currently in [DED] custody, rather they would reside with the city.” In another email to Ms. Miller you wrote, in part, that

[t]he City should have the ability to pull all contracts paid out to Getzschman Heating and Air either as a GC or as a subcontractor hired by a GC and then compare those contracts to the DED contracts and send me that report. That would be the first step. The next step would be to locate where the actual contracts are filed and send those contracts when located. Per my Public Records Request.

In response, Ms. Miller informed you that the City is not required to create documents in order to respond to a public records request. She further advised that the City reviewed your request again, and confirmed that the City had no responsive documents.

In her response to this office, Ms. Miller explained the process related to the one DED-funded contract with the City, which it received in October 2015. Under the terms of the contract, the City does not contract with any contractor for work performed. Rather, the City applies for DED funds to assist property owners meeting certain income restrictions renovate their properties. The City has contracted with the Northeast Nebraska Economic Development District (“NENEDD”) to process applications from property owners and handle housing management. Once NENEDD approves an application, and the list of repairs is agreed to, the property owner solicits bids for the work. Ms. Miller states that the City is not involved in the selection of the person or company to perform the work, and is not a party to the contracts for repairs. Consequently, the City does not have the contracts executed by the property owner and the selected person or company. However, the City does have invoices submitted by NENEDD seeking reimbursement from the DED fund. Ms. Miller indicates that “[a]ny contract held by NENEDD will not be provided to the City until the projects are monitored and closed out by [the] state,” which has not occurred to date.

You state in your petition that you contacted Ms. Miller “after receiving the denial letter and indicated [you] would settle for a report drawn by the City as they would do with and [sic] audit, and consider that a fulfillment of [your] Public Records Request.” When told by Ms. Miller that the City is not required to create documents in response to a public records request, you stated that creating a report would not be creating a document. You further indicate that the City has previously generated a report for you in response to a public records request, so you know it can be done.

DISCUSSION

The NPRS govern access to and obtaining copies of public records in Nebraska. Generally, those statutes allow interested persons the right to examine public records in the possession of public agencies during normal agency business hours, to make

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memoranda and abstracts from those records, and to obtain copies of records in certain circumstances. Under § 84-712(4), interested persons seeking access to or copies of a particular public record initiate that process by providing a written request to the custodian of that record for such access or copies. In connection with our enforcement authority under the NPRS, we have consistently taken the position that those statutes do not require public agencies to answer questions or to create records which do not otherwise exist. Instead, those statutes focus on providing access to and copies of *specific records*.

Upon review, it appears to us that you did not request specific records. Rather, you requested information, i.e., contract date, name, and internal number, "for each Nebraska DED funded . . . contract to which the City has been a party since January 1, 2013 that was contracted out to Getzschman Heating and Air The City represented to you that it did not have any document responsive to your request, and further declined your request to create a report containing this information. In addition, based on the process outlined by the City Attorney and set out above, to the extent contracts with Getzschman Heating and Air involving DED funds exist, those contracts would be in the possession of the NENEDD, not the City of Fremont.

As indicated above, it is the longstanding position of this office that public bodies and officials are not required to create a public record that does not otherwise already exist in response to a request made under § 84-712 of the NPRS. For example, in *File No. 18-R-122; Nebraska State Patrol, Annita Lucchesi, Petitioner*, issued July 25, 2018, the Attorney General concluded that the Nebraska State Patrol ("NSP") was not required to compile data on criminal cases involving Alaska Native and American Indian women and girls since the data would have to be culled from individual files to create a new record. In addition, the information sought was not stored in a NSP database which could be retrieved, compiled and produced under Neb. Rev. Stat. § 84-712(3)(b)(iii).

More recently, in *File No. 19-R-117; Department of Health and Human Services; Alec Ferretti, Petitioner*, issued June 20, 2019, we considered whether the costs estimated by the Department of Health and Human Services ("DHHS") to produce death certificate indexes contained in paper ledgers and an electronic database were appropriate under applicable law. The cost estimates included labor costs to verify the information in the database for accuracy and completeness. In this instance, we concluded "that DHHS is under no obligation to engage in a 'verification' process to supplement the record currently existing in its database," since it would essentially amount to creating a new record.

Applying these principles to the present case, we believe the City is under no obligation to create a report of contract information for you under a request made under § 84-712. Moreover, the City has represented to the undersigned that the NENEDD manages this particular process, and that the City is neither a party to, or in possession of, such contracts. Finally, the fact that City officials may have created a document for you in the past places no legal obligation on them to do so again.

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CONCLUSION

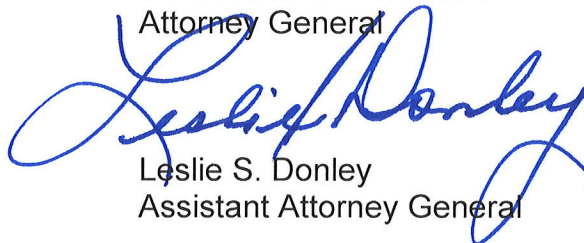
Based upon the matters discussed above, since the City does not have a record containing the items listed in your request, and is under no obligation to create a report for you under § 84-712, you have not been denied access to public records under the NPRS. Since no further action from this office is warranted, we are closing this file.

If you disagree with our analysis under the Nebraska Public Records Statutes set out above, you may wish to consult with your private attorney to determine what additional remedies, if any, are available to you under those statutes.

Sincerely,

DOUGLAS J. PETERSON

Attorney General



Leslie S. Donley

Assistant Attorney General

c: Molly J. Miller

49-2240-29