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Office of the Attorney General

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January 15, 2020

Via email at Ron.Petak@bellevueleader.com
Ron Petak
Executive Editor
Bellevue Leader

RE: *File No. 19-R-134; City of Bellevue; Ron Petak, Bellevue Leader, Petitioner*

Dear Mr. Petak:

This letter is in response to your correspondence submitted to our office on December 31, 2019, in which you requested our opinion on the denial by the City of Bellevue ("City") of your recent public records request. We considered 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, Supp. 2019) ("NPRS"). Upon receipt of your petition, we contacted City Attorney Bree Robbins, and advised her of the opportunity to supplement or revise the City's bases for denying you access to the requested records. We received Ms. Robbins' response on January 2, 2020. We have now fully considered your petition and the City's response in accordance with the provisions of the NPRS, and our findings in this matter are set forth below.

FACTS

You indicate that at the December 17, 2019, meeting of the Bellevue City Council, "it was announced the city's police chief [Mark Elbert] resigned and was being named the city's Community Development Director — a newly created position." On December 18, 2019, you sent the following email to City Administrator Jim Ristow:

I saw a television report last night that indicated the city interviewed three people for the Community Development Director. Please provide the names and submitted materials from the three candidates.

Ms. Robbins responded the same day, "denying [the] request pursuant to Neb. Rev. Stat. § 84-712.05(7), 'personal information in records regarding personnel [of] public bodies other than salaries and routine directory information' and also pursuant to *Steckelberg v.*

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Nebraska State Patrol, 294 Neb. 842, 885 N.W.2d 44 (2016). Ms. Robbins further indicated that the records withheld included “applications, resumes and/or letter of recommendations.”

You responded to Ms. Robbins on December 19. You asserted that Neb. Rev. Stat. § 84-712.05(17) required the disclosure of the requested records since the individuals interviewed for the community development director position were *finalists*, and again requested the materials. In response, Ms. Robbins stated that she reviewed Neb. Rev. Stat. § 84-712.05(17), which provides, in pertinent part, that “[j]ob application materials submitted by applicants, other than finalists or a priority candidate for a position described in section 85-106.06” may be withheld. She stated that reading the exception in § 84-712.05(17) in conjunction with the entire statute [§ 84-712.05], the City could withhold job application materials “except for those finalists or priority candidate positions described in 85-106.06.” (Emphasis omitted.) Ms. Robbins concluded that since the community development director position is not described in § 85-106.06, the City could withhold the requested records.

In your petition, you question the City’s application of both exceptions to your requests. You argue that assuming there were three candidates, the two unsuccessful candidates could not fall under the “personnel of public bodies” exception set out in § 84-712.05(7). You further question the City’s position that the disclosure of job application materials is limited solely to a priority candidate seeking “a high-level job with the University.” You assert that such a construction is inconsistent with the language in § 84-712.05(17) and this office’s previous opinions.

In her response to this office, Ms. Robbins reiterates that § 84-712.05(7) provides a valid basis to withhold the requested records, and relies heavily on the holding in *Steckelberg v. Nebraska State Patrol*, 294 Neb. 842, 885 N.W.2d 33 (2016), to support her position. She indicates that two of the three finalists were employed by the City. With respect to the successful candidate, Ms. Robbins indicates that Mr. Elbert

was employed with the City of Bellevue as the Police Chief. While employed with the City, Elbert applied for the open Community Development Director Position and eventually was offered the position. As such, Elbert clearly fits into the definition of a person employed by an organization as outlined in *Steckelberg* and the records sought contain personal information, therefore any records requested by Mr. Petak regarding submitted materials as it relates to Elbert may be withheld pursuant to 84-712.05(7). There is no requirement that in order to be exempt, the records must be kept within an employee’s own personnel record, the records need only be personal information about personnel, which is the case regarding Elbert.

Ms. Robbins applied this same rationale to the other City employee involved.

Ms. Robbins further indicates that the City construed the exception to the exception in § 84-712.05(17) to apply only to priority candidates, but “can see the argument that ‘finalists’ is separate from the ‘priority candidate’ in 85-106.06.” In this regard, she indicates that “[t]he City will defer to the Attorney General regarding the applicable interpretation herein” However, Ms. Robbins states that regardless of that analysis, the City would continue to rely on the exception in § 84-712.05(7) to withhold the records of Mark Elbert and the other city employee involved. Disposition of the records relating to the third finalist, who is not a City employee, was not addressed.

ANALYSIS

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.

(Emphasis added.) “Public records” in Nebraska “include all records and documents, regardless of physical form, of or belonging to” governmental entities in the state, “[e]xcept when any other statute expressly provides that particular information or records shall not be made public.” Neb. Rev. Stat. § 84-712.01(1) (2014). Thus, there is no absolute right to access public records in those instances where records are exempt from disclosure by statute. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009); *State ex rel. Nebraska Health Care Ass’n v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

Section 84-712.05 of the NPRS currently lists twenty-three categories of public 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 City is relying on two exceptions in § 84-712.05—subsections 7 and 17—to deny you access to the requested records.

However, we will focus our analysis on § 84-712.05(17), which expressly applies to the records at issue.

Neb. Rev. Stat. § 84-712.05(17) (Supp. 2019) currently provides an exception from disclosure for

[j]job application materials submitted by applicants, other than finalists or a priority candidate for a position described in section 85-106.06 selected using the enhanced public scrutiny process in section 85-106.06, who have applied for employment by any public body as defined in section 84-1409. For purposes of this subdivision, (a) job application materials means employment applications, resumes, reference letters, and school transcripts and (b) finalist means any applicant who is not an applicant for a position described in section 85-106.06 and (i) who reaches the final pool of applicants, numbering four or more, from which the successful applicant is to be selected, (ii) who is an original applicant when the final pool of applicants numbers less than four, or (iii) who is an original applicant and there are four or fewer original applicants

The Nebraska Legislature added this exception to § 84-712.05 in 1999. 1999 Neb. Laws LB 137, § 1. At that time, the exception applied only to

[j]job application materials submitted by applicants, other than finalists, who have applied for employment by any public body as defined in section 84-1409. For purposes of this subdivision, job application materials means employment applications, resumes, reference letters, and school transcripts, and finalist means any applicant who is offered and who accepts an interview by a public body or its agents, representatives, or consultants for any public employment position.

From its inception, the job application materials of finalists for any public employment position were excluded from the exception.

The Legislature significantly revised the exception in 2007. 2007 Neb. Laws LB 389, § 1. A “finalist” was further defined to include those individuals “whose candidacy survives all preliminary cuts and reaches the final pool of applicants numbering four or more from which the applicant is to be selected. When there are only four or fewer original applicants, and when the final pool of applicants is less than four, then every applicant for the position will be considered a finalist.” Committee Records on LB 389, 100th Neb. Leg., 1st Sess. 23 (Feb. 1, 2007) (Statement of Sen. Aguilar).

In 2016, the Nebraska Legislature further amended the exception. It clarified that “finalist” excluded any applicant for the chief executive officer of the University of Nebraska, or the chief administrative officers of the University of Nebraska-Lincoln, the

University of Nebraska at Omaha, the University of Nebraska at Kearney, and the University of Nebraska Medical Center. However, job application materials for a “priority candidate,” selected under the enhanced public scrutiny process set out in Neb. Rev. Stat. § 85-106.06, are subject to disclosure. See 2016 Neb. Laws LB 1109, § 1.

You have requested the “names and submitted materials” for the individuals who were interviewed for the community development director position. Ms. Robbins has confirmed that three individuals were interviewed for the position, so there is no question that these individuals would constitute “finalists” under the exception.¹ There is nothing in the statute to suggest that § 85-106.06 applies to the circumstances presented here. Therefore, based on the exception to the exception in § 84-712.05(17), you are entitled to receive the job application materials, i.e., employment applications, resumes, reference letters, and school transcripts, for the three individuals interviewed by the City for the community development director position.

As noted above, the City indicated that it would defer to this office with respect to the “applicable interpretation” of § 84-712.05(17), but would still rely on the exception in § 84-712.05(7) as another basis to withhold the requested records. In Nebraska, “[s]tatutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.” *Farmers Cooperative v. State*, 296 Neb. 347, 354, 893 N.W.2d 728, 734-735 (2017). “In construing 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.” *Aksamit Resource Management LLC v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 123, 907 N.W.2d 301, 308 (2018). “Because the Legislature has expressed a strong public policy for disclosure, an appellate court must narrowly construe statutory exemptions shielding public records from disclosure.” *Id.* at 122, 907 N.W.2d at 308. When words of a particular clause, taken literally, would plainly contradict other clauses of the same statute, or lead to some manifest absurdity or to some consequences which a court sees plainly could not have been intended, or to result manifestly against the general term, scope, and purpose of the law, then the court may apply the rules of construction to ascertain the meaning and intent of the lawgiver, and bring the whole statute into harmony if possible. *Rogers v. Jack’s Supper Club*, 304 Neb. 605, 935 N.W.2d 754 (2019). Beginning with the enactment of LB 86 in 1979,² through the 2019 legislative session, the Legislature has created and added to the categories of public records that may be withheld at the discretion of records custodians. However, no one exception in § 84-712.05 is superior to any other exception. Moreover, the statute contains no provision that would allow a public body to apply one

¹ However, this number raises a serious question as to whether there were only three original applicants for the position. If there were more than three applicants, and because the City only interviewed three finalists, all applicants to the position must be considered finalists (“[F]inalist means any applicant. . . (ii) who is an original applicant when the final pool of applicants numbers less than four . . .”).

² 1979 Neb. Laws LB 86, § 5.

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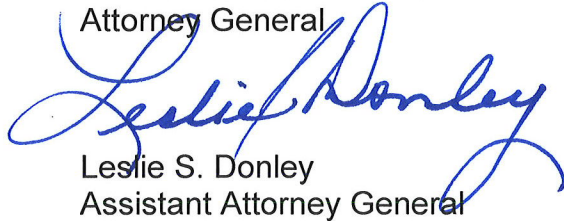
exception to withhold records when another exception provides that certain records must be disclosed. Since the plain language of the exception in § 84-712.05(17) expressly provides that the job application materials of finalists for public employment positions are subject to disclosure, § 84-712.05(7) provides no basis to shield those records. As such, we will decline to discuss it further.

CONCLUSION

For the reasons set forth above, we conclude that the City improperly applied the exceptions to disclosure in Neb. Rev. Stat. § 84-712.05(7) and (17) to withhold the job application materials of the three finalists for the community development director position. Consequently, we will direct the City to provide those records to you at its earliest possible convenience.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Bree Robbins (via email only)

49-2367-29