STATE OF NEBRASKA
# Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
TIERONE FAX (402) 471-4725

JON BRUNING
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

July 9, 2010

Al Graves, Mayor
Neida Mueller, Clerk/Treasurer
City of Long Pine
Box 398
Long Pine, NE 69217

RE: *File No. 10-R-117; City of Long Pine, Nebraska; Petitioner Goodrich*

Mr. Graves and Ms. Mueller:

We have concluded our review of the petition filed by Ruth Goodrich, in which she sought our assistance in obtaining certain public records belonging to the City of Long Pine (the "City"). Our review was conducted under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008; Supp. 2009). Our findings in this matter are set out below.

## FACTUAL BACKGROUND

According to the documentation provided to us, on April 7, 2010, Ms. Goodrich requested, among other records, the "Detailed Palmer bill for Oct-Nov-Dec 2009." This request was made using the City's form.[1] On April 14, 2010, you responded, indicating:

[1] In our response to you dated July 10, 2008, File No. 08-R-128, we specifically advised you that § 84-712 of the Nebraska Public Records Statutes does not require an individual requesting access to public records to provide a reason for his or her review of those records. We further advised you that the City *cannot* make the access to public records contingent upon citizens agreeing to certain conditions and restrictions with respect to those records, absent the authority to do so. We concluded by stating that the City's use of this form was **improper**. However, despite this admonition, we see that the City of Long Pine continues to use the same form which we found to be contrary to state law and the Nebraska Supreme Court's holding in *State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993).

> City Clerk was unable to fill the request of detailed bill for Palmer, city attorney, for the months of Oct.-Nov.-Dec. 2009 due to attorney/client confidentiality. Mrs. Goodrich request was given to her. She has received all other request on this page. Paid 6.00 for copies.
>
> [Signed] Neida L. Mueller
> City Clerk/Treas.
> Ruth C. Goodrich

We note that Ms. Mueller's response did not cite to any statute as a basis to withhold the requested records, other than "attorney-client confidentiality." Her response also did not list the name of the public official or employee responsible for the decision to deny the request and did not notify Ms. Goodrich of her right to administrative or judicial review. As such, the response did not comply with the requirements of § 84-712.04.[2]

Consequently, Ms. Goodrich filed her petition with our office. On April 20, 2010, the undersigned faxed a letter to Ms. Mueller, requesting an explanation as to why she believed the billing statements were protected by the attorney-client privilege. We received the City's response on April 28, 2010. Your response stated:

> In regards to your letter dated April 20, 2010, Ms Goodrich request of detailed bill for Palmer, city attorney, for the months of October-November-December 2009. Our denial for request has fallen under the Nebraska Rule of Evidence, Rule 27-503. A communication is confidential of [sic] 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. I have enclosed the Nebraska Rule of Evidence,

---

[2] In the event access to particular records is denied, § 84-712.04 requires the custodian of the record to provide the following information in a denial letter:

> (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.

> Rule 27-503, for your reference to the request. If further questions, please contact me. Thank you. [signed] Neida Mueller

Per the letter, a copy of the statute was attached.

## DISCUSSION

As you already know from previous contacts with this office, the Nebraska Public Records Statutes give individuals the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts from those public records, and to obtain copies of public records in certain circumstances. However, the statutes are not absolute, and do allow public bodies to withhold public records through express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). In particular, Section 84-712.05 is comprised of eighteen categories of documents which may be kept confidential from the public at the discretion of the agency involved. However, the burden of showing that an exception applies to particular records rests upon the custodian of the records. *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

Here, the City has claimed the exception set out in subsection (4), which provides:

> Records 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 [attorney-client privilege].

As discussed above, we asked you to articulate how the requested records were privileged. What we got in return was a copy of the statute and the definition of "confidential communication" recited back to us. Obviously, this office is fully aware of what those statutes say. Further, there is nothing on the face of this statute that explains why you believe these particular billing statements fall within the privilege.

Our office has previously examined whether attorney fee statements could be properly withheld under the exception set out in § 84-712.05(4). In a 2008 disposition letter involving this issue, we wrote:

> From our research concerning previous public records matters, it appears that there is case authority which generally supports the notion that itemized fee statements can constitute attorney work product and/or communications subject to the attorney/client privilege under certain circumstances. For example, with respect to attorney work product, some courts have indicated that itemized descriptions of the work which an attorney has performed for a client can offer insights into the attorney's thought processes or legal theories for a particular case. On the other hand, we do not believe that a simple designation of hours worked along with a general description of the time spent such as "review of discovery" or "preparation of trial brief" normally offers insights into an attorney's thought processes or implicates a privileged communication with the attorney's client. (Emphasis added.)

In the present case, we gave you an opportunity to provide us a response which would support your decision to withhold the City Attorney's fee statements. Your simple assertion that the records are confidential is insufficient. As a result, the City has not met its burden of showing that the fee statements fall within the exception in § 84-712.05(4). **Consequently, pursuant to Neb. Rev. Stat. § 84-712.03(2), we are ordering you to make available to Ms. Goodrich the billing statements which were part of her public records request filed with the City of Long Pine on April 7, 2010.**

Finally, we would once again remind you of the sanctions for violations of the Nebraska Public Records Statutes set out in Neb. Rev. Stat. § 84-712.09, a copy of which is enclosed for your review.

Sincerely,

JON BRUNING
Attorney General

Leslie S. Donley
Assistant Attorney General

Enclosure

cc: Ruth Goodrich
Rodney J. Palmer

49-506-30

**84-712.09. Violation; penalty.**

Any official who shall violate the provisions of sections 84-712, 84-712.01, and 84-712.03 to 84-712.08 shall be subject to removal or impeachment and in addition shall be deemed guilty of a Class III misdemeanor.

**Source:** Laws 1979, LB 86, § 10.