



STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

DOUGLAS J. PETERSON
ATTORNEY GENERAL

NATALEE J. HART
ASSISTANT ATTORNEY GENERAL

June 12, 2018

Dennis McCormick
[REDACTED]

RE: *File No. 18-RM-111; Washington County Board of Supervisors and
Washington County Attorney; Dennis McCormick, Complainant*

Dear Mr. McCormick:

This letter is in response to your correspondence received by us in which you requested that this office investigate alleged violations by the Washington County Board of Supervisors ("Board") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2014, Cum. Supp. 2016, Supp. 2017) and of the Washington County Attorney ("County Attorney") of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2014, Cum. Supp. 2016) ("NPRS"). In accordance with our normal procedures, we requested a response from the Board and the County Attorney after we received your complaint, and we subsequently received a response from the County Attorney, Scott Vander Schaaf, on behalf of both public agencies. As an initial matter, upon receipt of your complaint, we reviewed that portion related to the NPRS and determined that the County Attorney may be permitted under the NPRS to withhold the documents you requested and that in order to best respond to the entirety of your complaint, we would provide one response as to both your public record and open meeting complaints, once our inquiry was complete. We have now had an opportunity to review your allegations and the County Attorney's response in detail, and our conclusions are set out below.

FACTS

Our understanding of this case is based upon your complaint, its supporting documentation, and the response we received from the County Attorney. Your complaint concerns meetings of the Board and a records request made to the County Attorney concerning the process of selecting a "Construction Manager at Risk" ("CMAR") by the Board to supervise construction for a proposed addition to the county's law enforcement center. The County Attorney indicated that the Board is utilizing the

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Political Subdivisions Construction Alternatives Act, Neb. Rev. Stat. §§ 13-2901 through 13-2914 (Reissue 2012) in choosing a CMAR for the jail. A selection committee has been established by the Board, pursuant to Neb. Rev. Stat. § 13-2911, to review the proposals, rank the applicants, and provide a recommendation to the Board as to the highest ranked candidates for the CMAR. At the January 23, 2018 meeting of the Board, the Board selected three CMAR finalists in open session, based upon the recommendations of the selection committee.

The agenda for the Board's February 27, 2018 meeting then listed a "[c]losed session for the purpose of contract negotiations in the selection of a Construction Manager At Risk for the pending Law Enforcement addition and discussion of bond amounts. Open Session [Possible Action]: Selection of CMAR for the Law Enforcement Addition to the Court House." The minutes of this meeting state that the Board went into closed session, over the objections of two members of the Board who did not join the closed session, "to protect the public interest with respect to contract negotiations in the selection of a Construction Manager At Risk for the pending Law Enforcement addition and discussion of bond amounts." The closed session lasted nine minutes. After the Board returned to open session, the minutes reflect a vote to hire one of the three finalists as the CMAR. You believe this closed session violated the Open Meetings Act and that the vote following the closed session selecting one of the candidates is evidence that the applicants' cost proposals were discussed in closed session and that the Board decided in closed session which applicant to hire.

The Board responded by denying any violation had occurred and providing more information as to this closed session. The County Attorney states that the closed session was cut short due to the two members of the Board refusing to participate. The remaining Board members decided not to conduct discussion of the candidates and bond amounts in closed session, as they preferred to have all members of the Board in the room. The discussion in closed session was then limited to "procedurally how to handle an open session on this topic." Following the return to open session, the County Attorney states that the Board then discussed the selection of the CMAR during open session for ten minutes and subsequently voted to select one of the candidates.

Following this meeting, on or about March 16, 2018, you made a public records request to the County Attorney asking "who the three candidates [are] and what their estimated costs were for the Construction Manager at Risk (CMAR) for the jail project." The County Attorney responded on March 23, 2018 providing the names of the three candidates, but denying you access to information related to the costs under Neb. Rev. Stat. § 84-712.05(3). You do not believe the information you seek was properly withheld under the NPRS and request our review of this denial.

ANALYSIS

Open Meetings Act

Neb. Rev. Stat. § 84-1408 (2014) of the Nebraska Open Meetings Act provides:

It is hereby declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret.

Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies, except as otherwise provided by the Constitution of Nebraska, federal statutes, and the Open Meetings Act.

The primary purpose of the open meetings law is to ensure that public policy is formulated at open meetings. *Marks v. Judicial Nominating Comm.*, 236 Neb. 429, 461 N.W.2d 551 (1990). The Nebraska open meetings laws are a statutory commitment to openness in government. *Wasikowski v. Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002); *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984).

Your Open Meetings Act complaint concerns the closed session of the Board on February 27, 2018. Neb. Rev. Stat. § 84-1410 of the Open Meetings Act provides, in pertinent part:

(1) Any public body may hold a closed session by the affirmative vote of a majority of its voting members if a closed session is clearly necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual and if such individual has not requested a public meeting. The subject matter and the reason necessitating the closed session shall be identified in the motion to close. Closed sessions may be held for, but shall not be limited to, such reasons as:

(a) Strategy sessions with respect to collective bargaining, real estate purchases, pending litigation, or litigation which is imminent as evidenced by communication of a claim or threat of litigation to or by the public body;

(b) Discussion regarding deployment of security personnel or devices;

(c) Investigative proceedings regarding allegations of criminal misconduct;

(d) Evaluation of the job performance of a person when necessary to prevent needless injury to the reputation of a person and if such person has not requested a public meeting;

Nothing in this section shall permit a closed meeting for discussion of the appointment or election of a new member to any public body.

(2) The vote to hold a closed session shall be taken in open session. The entire motion, the vote of each member on the question of holding a closed session, and the time when the closed session commenced and concluded shall be recorded in the minutes. If the motion to close passes, then the presiding officer immediately prior to the closed session shall restate on the record the limitation of the subject matter of the closed session. The public body holding such a closed session shall restrict its consideration of matters during the closed portions to only those purposes set forth in the motion to close as the reason for the closed session. The meeting shall be reconvened in open session before any formal action may be taken. For purposes of this section, formal action shall mean a collective decision or a collective commitment or promise to make a decision on any question, motion, proposal, resolution, order, or ordinance or formation of a position or policy but shall not include negotiating guidance given by members of the public body to legal counsel or other negotiators in closed sessions authorized under subdivision (1)(a) of this section.

At the meeting, the Board voted to close the meeting to discuss "contract negotiations in the selection of a [CMAR] for the pending Law Enforcement addition and discussion of bond amounts" and entered into closed session for nine minutes before returning to open session. Two Board members voted against the adjournment into closed session and refused to participate in the closed session. You believe that the subject matter for the closed session was not proper and that the vote following the closed session to select a CMAR indicates that the closed session was used to discuss the CMAR applicant cost proposals and which applicant to hire. The Board does not specifically address that portion of your complaint as to whether the subject matter was appropriate for a closed session in its response to us. The Board only argues that the closed session was not ultimately utilized, as two Board members left the meeting and that all discussion as to the selection of the CMAR was held in open session.

The County Attorney advised this office, in his response to your complaint, that the closed session was not used to discuss the contract negotiations or bond, as two members of the Board objected to the use of a closed session and left the meeting. The Board wished to have its discussion with all Board members present. So, in the

nine minute closed session, the Board only discussed how to discuss these topics in an open session.¹ The Board then returned to open session and held its discussion on selection of the CMAR in that forum. As the three finalists were chosen at the prior meeting on January 23, 2018, it is not unreasonable to believe that the members of the Board used the intervening time to independently review the candidates and come to their own conclusions. At the February 27, 2018 meeting the County Attorney states that a ten-minute discussion was held before the vote to select the CMAR. This does not indicate to us that any discussion was held during the closed session as to which CMAR candidate to select or the cost proposals of those candidates, as your complaint alleges. There is no evidence that any such discussion took place. We find no violation of the Open Meetings Act as to this portion of your complaint.

Public Records

Your public records petition relates to a request by you to the County Attorney for costs estimates from the three CMAR candidates. The County Attorney denied access to those records under Neb. Rev. Stat. § 84-712.05(3), which states that a custodian may withhold records which are “[t]rade secrets, academic and scientific research work which is in progress and unpublished, and other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose.”

The NPRS generally allow interested persons the right to examine public records in the possession of public agencies in Nebraska during normal agency business hours, to make memoranda and abstracts from those records, and to obtain copies of records in certain circumstances. Except when any other statute expressly provides that particular information or records shall not be made public, public records shall include 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. Data which is a public record in its original form shall remain a public record when maintained in computer files. Neb. Rev. Stat. § 84-712.01(1). Under those statutes, every record “of or belonging to” a public body is a public record which individuals may obtain a copy of unless the custodian of the record can point to a specific statute which allows the record to be kept confidential. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those 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).

¹ Advice for conducting the open session was not within the subject matter provided in the motion to close. While this is a technical violation of the Open Meetings Act, as the Board took no action on this topic, we will simply remind it that *any* discussions held in closed session must be clearly set forth in the motion to close. Going outside of the stated topics violates the Open Meetings Act.

Neb. Rev. Stat. § 84-712 does not require a public agency to 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). This means the requestor is entitled only to make a request for specific documents or records, and the custodian is required only to provide documents or records responsive to the records request, if they exist. The requestor is not entitled to ask, and the custodian is not required to answer, any questions in the request. The custodian is also not required to create documents that do not exist, or to interpret a public records request to determine what records are being requested.

Although the NPRS provide for access to public documents, they are not absolute and also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). In the present case, the County Attorney claimed in his denial letter Neb. Rev. Stat. § 84-712.05(3) as his basis for denying you access to the requested records. However, in his response to this office the County Attorney claims that there are actually no documents responsive to your request for cost estimates from the three CMAR finalists. The County Attorney informs us that the cost estimates were presented only as part of the oral presentation given to members of the CMAR selection committee under Neb. Rev. Stat. § 13-2911 and were not provided in writing. Rather than simply stating in his response to you that he had no records responsive to your request, however, the County Attorney instead cited to Neb. Rev. Stat. § 84-712.05(3) "in the spirit of transparency," because he believes that the verbal presentations are still "pertinent information delivered to county officials." However, as the NPRS do not require a public body to create documents which otherwise do not exist, the denial under this subsection, rather than a statement that the County Attorney had no responsive documents, was inaccurate and created unnecessary confusion. Neb. Rev. Stat. § 84-712.05 is to be utilized to withhold public documents which are in the possession of the custodian, which requires there to be existing records. In the future, we would advise the County Attorney that unless he has specific, existing documents which are responsive to a request for records, he should respond by stating that he does not possess responsive records, rather than citing to a statutory exception to disclosure for documents which do not actually exist.

Because the County Attorney has advised us that no documents exist which are responsive to your request, you have not been improperly denied access to public records. You may, however, wish to review Neb. Rev. Stat. § 13-2909 to determine if there are any other documents which may be found in the responses of the three CMAR candidates to the request for proposals which you may wish to request of the Board or of the selection committee under the NPRS.

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CONCLUSION

For the reasons stated above, we do not believe the Board or the County Attorney have violated the Open Meetings Act or the NPRS as to the allegations in your complaint. Since we have determined that no further action by this office is warranted, we are closing this file. If you disagree with our analysis, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under the Open Meetings Act.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Scott Vander Schaaf

02-694-29