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February 28, 2022

Via email at amyamiller402@gmail.com

Amy A. Miller
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623 S. 32nd Street
Lincoln, NE 68510

RE: *File No. 22-R-106; City of Omaha; Amy A. Miller on behalf of Elizabeth Anne Dorr*

Dear Ms. Miller:

This letter is in response to your petition dated January 28, 2022, and received by this office on February 2, 2022, in which you requested our assistance in obtaining access to certain public records belonging to the City of Omaha (“City”). At our request, Deputy City Attorney Bernard in den Bosch provided us a response to your petition on February 11, 2022,¹ and on February 17, the undersigned spoke to Mr. in den Bosch about the City’s response. We subsequently wrote to you on February 17 indicating that we had conducted a preliminary investigation of your petition, and it appeared to us that the City had properly responded to your public records request. However, we indicated that our response would be delayed so that we could finalize our decision. We have now completed our review of your petition and the City’s response in accordance with the provisions of the Nebraska Public Records Statutes (“NPRS”), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020, Supp. 2021). Our findings in this matter are set out below.

BACKGROUND AND RELEVANT FACTS

This matter involves records withheld in response to three public records requests submitted to the City by parties other than your client relating “to moving and development

¹ We note that Mr. in den Bosch provided you a copy of the City’s response, which included, among other things, the affidavit of Kevin Andersen, Deputy Chief of Staff for Economic Development and Development Services in the City of Omaha Mayor’s Office.

of the downtown library site and other potential library projects.” Those requests included: (1) A request dated June 18, 2021, from Reece Ristau of the Omaha World-Herald (“OWH”); (2) a request dated September 28, 2021, by Isabeau Dasho, which included ten separate items; and (3) another request from Ms. Dasho dated October 4, 2021. Mr. In den Bosch indicates that the City produced hundreds of pages of records in response to these requests. In addition, for each request the City prepared a “privilege log”² documenting the records withheld.

In a letter dated November 24, 2021,³ addressed to City Attorney Matthew Kuhse, you indicated that your client had received and reviewed the public records provided by the City in response to the requests listed above. You attached the three privilege logs to your letter indicating that you had “marked in yellow highlighting the items we wish to have you review further as we renew our request for same.”

You challenged the City’s withholding of these records under the exception in Neb. Rev. Stat. § 84-712.05(3). You asserted that “[s]ince the issues being discussed in the requested records are between a nonprofit and a municipality, they do not involve ‘commercial’ matters nor are there any ‘business competitors’ to gain an advantage.” You further asserted that even if the City could claim “a business or commercial issue,” the exception in § 84-712.05(3) could only apply if the disclosure of the documents would “serve no public purpose,” citing *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018). You stated in this regard:

We thus conclude that the highlighted items in the three attached privilege logs that assert exemptions under Neb. Rev. Stat. 84-712.05(3) must be produced since they offer no advantage to a business competitor and, in any event, do serve a public purposes [*sic*]. We renew our request for same.

You also noted that records were withheld under the exception in § 84-712.05(6), and cited § 84-712.06, which states that “[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.” In this respect, you and your client “renew[ed] [your] request for records with redactions of any record thus far withheld under this exemption.”

² Under § 84-712.04(1), public officials are required to provide “[a]ny person denied any rights granted by sections 84-712 to 84-712.03” a written response including, in part: “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.” Public officials have no express duty to prepare “privilege logs” to document the records being withheld.

³ This letter also contained a new, separate request for public records. Mr. in den Bosch responded to this request on December 7, 2021, providing you a CD containing a number of records. A log was also provided to you which identified the four records withheld. According to Mr. in den Bosch, this request and the records withheld by the City in response to the request are not at issue here.

Mr. in den Bosch responded to this portion of your letter on December 8, 2021. Among other things, Mr. in den Bosch clarified “that the requests for which the privilege logs were generated were not made by your client and there has been no initial request to provide redacted materials.” He indicated that he reviewed the records you had highlighted in the privilege logs and believed the withholding to be “appropriate and well-founded,” and within the City’s authority. Mr. in den Bosch also indicated his willingness to make redactions, but noted that under the standard in § 84-712.06, and after reviewing the documents, “the substance of any particular merit would be withheld.” He asked you to let him know whether you wanted him to proceed.

With respect to your argument that the records did not involve commercial matters or involve business competitors, Mr. in den Bosch stated:

Based on the information being requested, much of the information that was withheld had to do with issues related to relocation of the library, sale of the property, and potential of redevelopment of those sites. Though some of the communications were with Heritage, disposition of the property was not necessarily for their benefit. This is exactly the type of information which could give an advantage to business competitors.

In response to your claim that release of the records would serve a public purpose considering the ongoing “intense public debate” regarding the city library matter, Mr. in den Bosch indicated that it would be easy to read the exception so broadly as to render it meaningless. He stated that *Aksamit* “requires a balancing of public purpose and interest in releasing the records versus the need to keep the information confidential. This analysis needs to be made on a document by document basis.” Mr. in den Bosch also indicated that a copy of the Attorney General’s disposition in *File No. 21-R-120; City of Omaha; David A. Lopez, Petitioner* (July 13, 2021) had been provided to you in response to the November 24, 2021, records request.

By email dated January 3, 2022, to Mr. in den Bosch, you clarified that you were seeking the withheld items on the three privilege logs. You also requested that he “redact any portions of the items on the privilege logs and provide the same.” In response to this email, on January 10, 2022, Mr. in den Bosch provided you redacted emails and attachments relating to the highlighted items in the privilege logs. He also produced records that were no longer subject to withholding due to public announcements made after the requests were submitted. We understand that this record production totaled 251 pages.

ANALYSIS

Based on this background, we proceeded with the understanding that the records at issue in this matter consisted solely of the highlighted items in the three privilege logs

prepared by the City in response to the public records requests made by Mr. Ristau and Ms. Dasho. Copies of the highlighted logs were provided to this office by Mr. in den Bosch. However, since Mr. in den Bosch provided you additional records on January 10, it is unclear to us exactly which records may still be at issue. In any event, you have taken the position that the exceptions in Neb. Rev. Stat. § 84-712.05(3) (“[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”), and § 84-712.05(6) (“[a]ppraisals or appraisal information and negotiation records concerning the purchase or sale, by a public body, of any interest in real or personal property, prior to completion of the purchase or sale”) do not apply to the records withheld by the City. We address your specific grounds challenging the appropriateness of the City’s denial below.

1. Redactions Include Material Previously Provided to Others.

You indicate that in the City’s production of records dated December 8, 2021 [sic], certain items were redacted but the same records that were provided to the OWH were unredacted. You assert that the overuse of redactions in one production compared to the broad production of records to the OWH suggests the redactions are improper. In response, Mr. in den Bosch states that the City “absolutely agrees” that records produced in response to one request are public records and would be produced in response to any subsequent request. He indicates that the City produced approximately one thousand pages of records in response to these requests, mostly email. He advised that there are numerous email strings that share the same date or have similar dates as other email strings. In addition, he states there are long email strings which contain duplicative email. Mr. in den Bosch further states:

We are not specifically aware of any records that were provided in one request and not provided or redacted in another. Though I do appreciate that this can be confusing due to the duplication of dates, it is possible that a mistake was made in reviewing the number of e-mail and this inadvertently occurred.

However, he points out that you have received all of the records the City produced plus the privilege logs. Thus, you have suffered no injury because you have received the records.

We accept Mr. in den Bosch’s explanation. It appears that any redactions that may have been done to the records provided to your client were done inadvertently. Also, you cannot claim you have been denied access to public records when you have received all of the records produced in response to numerous requests.

2. Redactions Include Material That Is Neither a Trade Secret⁴ Nor a Purchase Negotiation.

You argue that the City has redacted email between library staff, and not board members who are responsible for property negotiation. You indicate that some of the email involve library staff discussing “strategic planning.” You point out four specific emails that have been “redacted without explanation.” You assert that these examples do not relate to the sale or purchase of property. You find it inexplicable that the City would rely on § 84-712.05(6) as a basis to withhold records dealing with strategic planning when the library board has asserted publicly numerous times “that the strategic plan is being crafted separate from any land or building updates.”

In his affidavit, Mr. Andersen expressly refutes your contention that certain withheld email did not relate to property negotiations. In this respect, Mr. Andersen states:

I am aware of and have been involved in a number of discussions related to moving the downtown library, creating additional libraries in Omaha and the potential location for future library sites. The potential sites for relocation of the main library or other libraires were part of the discussions relative to Project Lite Brite, the Omaha Public Library Strategic Plan and the Do Space expansion. These discussions included the purchase of potential locations and the sale of current locations. The Omaha Public Library Strategic Plan has been publicly released, but the reference to the plan in the emails concerned the acquisition of and potential sale of City of Omaha library sites. If the potential locations were released publically, it might either make those sites difficult to acquire or certainly would raise the potential costs of those sites.

Andersen Affidavit at ¶ 6. The affidavit makes clear that the withheld records contained discussions relating to the potential sale of the library site and the potential purchase of other sites. Moreover, as required under the plain language in the exception, once the negotiation stage was over, the City provided you records that had been previously withheld. Thus, it appears to us that the City’s reliance on § 84-712.05(6) was appropriate.

3. The Requested Material Has a Significant Public Purpose.

You argue that even if the City could establish that the correspondence between the City and a nonprofit organization constituted a commercial matter that would give a business competitor an advantage, *Aksamit* requires disclosure because the city library issue has been the subject of intense public debate. In support of this claim, you provided us “a nonexhaustive list of news media coverage . . . to establish the public interest.”

⁴ There is nothing in the materials to suggest that the City asserted that any of the withheld records constituted a trade secret.

With respect to the City's reliance on § 84-712.05(3), Mr. in den Bosch states that

[t]he records sought by Mr. Ristau and Ms. Dasho concerned a variety of searches that implicated records on several subjects including potential development by various private companies in the downtown area including on property owned by the City, concerned the potential sale and movement of the main branch of the City library and specific information about potential commercial endeavors that might occur in downtown Omaha. This is precisely the type of information that the legislature contemplated could be withheld under the exceptions Private companies who are interested in developing property, purchasing City property and/or selling property to the City have to be able to have those conversations to explore the parameters of those projects without that information being made available to competitors and the public. That is the type of information that we are talking about here.

As noted above, Mr. in den Bosch provided you our disposition letter in File No. 21-R-120, where this office considered whether the City could withhold certain materials submitted by a casino in an application for tax increment financing under the exception in § 84-712.05(3). We will quote extensively from our letter below since the "and serve no public purpose" clause was at the heart of our analysis:

[In *Aksamit*], the Nebraska Supreme Court noted that NPPD focused on the confidentiality of the information and the competitive harm it would suffer in the event responsive records were disclosed. The court acknowledged that "[t]here is no real dispute that Aksamit seeks to compete with NPPD." *Id.* at 119, 907 N.W.2d at 306. However, since the exception's components "give advantage to business competitors" and "serve no public purpose" are connected by the conjunction "and," the court found that "both requirements must be met for the exception to become operative." *Id.* at 124, 907 N.W.2d at 309.

With respect to the "public purpose" to be served, the court stated:

"A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants." When we consider the meaning of the words "public purpose" in § 84-712.05(3), liberal public disclosure of the records of public entities is an important factor. The testimonies of Goss and the former NPPD employee articulated public purposes of the information well within political and economic realms; indeed, one can scarcely escape the intense public debate regarding the merits of fossil fuels versus renewable fuels.

Id. at 124-125, 907 N.W.2d at 309. The court concluded that while NPPD established that releasing the requested information would give advantage to its

competitors, it failed to establish by clear and convincing evidence that disclosing the information would serve no public purpose. Consequently, NPPD was not entitled to withhold the information under § 84-712.05(3).

We believe that a significant difference exists between the records sought in *Aksamit* and the records at issue here. In *Aksamit*, requesters sought detailed cost and revenue information for each of NPPD's generation units. In its analysis, the court noted the public policy necessitating a liberal construction of §§ 84-712 to 84-712.03 when *fiscal records* of a public entity are involved. [Footnote omitted.] The court also noted that there was nothing in the statutes that would operate to deny the public access to public power districts' books and records and that the Legislature had not, to date, "exclude[d] a public power district's competitive information from public scrutiny" *Id.* at 127, 907 N.W.2d at 310. In contrast, the records at issue here are financial and business records of a *private company* submitted to the City with respect to an application for a redevelopment project under the Community Development Law. They are not the fiscal records of a governmental body which, by statute, require a more liberal construction as to their disclosure. . . .

While the "crux" of the appeal in *Aksamit* was the meaning of the "and serve no public purpose" clause, determining what constitutes a "public purpose" for purposes of the exception remains unclear. In the present case, you assert that the public has the right to see the withheld records "so that the public may engage in meaningful and informed scrutiny of the TIF application—and engage with their elected officials" However, Mr. in den Bosch argues that construing § 84-712.05(3) in such a way to require the public "to have access to any information submitted to the City to confirm that the City is analyzing, reviewing, and awarding everything to its individual standards" would render the exemption "meaningless since everything could have a public purpose." We agree. We are also not convinced that a *public* purpose is served by providing you access to the withheld records and information based on Mr. Morgan's representations that you represent Elite, a Warhorse competitor.

"To give effect to all parts of a statute, an appellate court will attempt to reconcile different provisions so they are consistent, harmonious, and sensible, and will avoid rejecting as superfluous or meaningless any word, clause, or sentence." *Yagodinski v. Sutton*, 309 Neb. 179, 193, 959 N.W.2d 541, 551 (2021). In construing a statute, "[a] court must attempt to give effect to all parts of a statute, and if it can be avoided no word, clause or sentence will be rejected as superfluous or meaningless." *Newman v. Thomas*, 264 Neb. 801, 808, 652 N.W.2d 565, 571 (2002). "As an aid to statutory interpretation, appellate courts must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose rather than a construction which would defeat it." *Id.* at 808, 652 N.W.2d at 571. With these legal principles in mind, this office is unwilling to

construe the “and serve no public purpose” clause so broadly as to swallow the exception clearly authorized in § 84-712.05(3) to protect the proprietary information of private parties submitted to governmental entities. We also believe that if we were to direct the release of such proprietary materials, it would have a chilling effect on businesses’ dealings with governmental entities relating to services, contracts, permits and economic development. Consequently, based on our review of all of the materials provided to this office, we believe that the City has shown, by clear and convincing evidence, that the records at issue may be withheld under § 84-712.05(3).

Disposition Letter in File No. 21-R-120 at 8-10.

In the present case, Mr. in den Bosch argues that the “and serve no public purpose” clause should not be read so broadly “such that the public is required to have access to any information submitted to or provided by the City” In this respect, the exemption would be meaningless because everything would have a public purpose. He notes that the NPRS and its exemptions only apply to governmental bodies. If “potential development sites, confidential, financial and other information and market analysis” are considered to have a “public purpose,” the (1) statutory exemption would be undermined and (2) corporations and companies will be dissuaded from working with government “whether it is to be involved in future development, to bid for government projects, or to serve other government purposes.”

As we did in File No. 21-R-120, we refuse to read § 84-712.05(3) in such a way as to render it meaningless. The City has provided this office sufficient information to establish that the records constitute proprietary matters involving potential development by private entities and potential sales and purchases involving both City-owned and privately owned sites. Records also include private companies’ potential financial commitments, potential restructuring, and future business models. Andersen Affidavit at ¶ 3. We find that the City acted transparently, responsibly and in good faith with respect to producing records in response to all of these requests. Consequently, we find the City’s reliance on § 84-712.05(3) in this instance appropriate.

4. The Requested Material Seeks Records Involving the Expenditure of Public Funds.

You state that “a significant portion” of your client’s original request is “to understand the financial expenditures actually made and proposed by the city of Omaha.” In this respect, you reference redacted emails and invoices from 2019 and 2020 from Steven Jensen, an urban design consultant.

According to Mr. Andersen, the City’s Economic Development Team utilized Mr. Jensen “to assist in evaluating the merits of individual proposals.” Andersen Affidavit at ¶ 4. Mr. Jensen was involved in meetings in which the City discussed potential

redevelopment, purchase and sale of property, and business plans by various private companies. Mr. Jensen is paid by the City on an hourly basis and submits invoices to support payments. Mr. Andersen states that “I have had a chance to review the portion of Mr. Jensen’s invoices that were redacted and those portions address both commercial and proprietary information from private companies and the potential purchase and/or sale of City property including the main library.” *Id.* Mr. in den Bosch states that while there is no question the amounts paid to Mr. Jensen are public records, the itemized descriptions of the work performed may be subject to § 84-712.05(3) and (6). He further states that the fact that the itemization is in an invoice does not mean that it is not subject to the exemption. Mr. in den Bosch compares these invoices with attorney billing statements which contain communications between attorney and client and describes the work performed on behalf of the client.

This office has taken the position through the years that attorney billing statements may be redacted to remove information that would breach the attorney-client privilege and/or reveal attorney work product. However, the information as to the number of hours worked and the amount billed to the public body must be disclosed.⁵ We find no issue with the City redacting the commercial and proprietary information in the invoices so long as the hours worked and amount billed to the City was disclosed consistent with § 84-712.01(3).⁶

Finally, as we advised the petitioner in File No. 21-R-120, while the Attorney General has enforcement authority over the NPRS, there is no statutory mechanism to conduct an in camera review of the withheld records. Such review is left to the courts under § 84-712.03(2). Consequently, we will rely on representations from Mr. in den Bosch and Mr. Andersen that the records fall (and at one time fell) within the exceptions in § 84-712.05(3) and (6). In this respect, we note that “absent contrary evidence, public officers are presumed to faithfully perform their official duties.” *Thomas v. Peterson*, 307 Neb. 89, 98, 948 N.W.2d 698, 706 (2020).

⁵ See, e.g., *File No. 18-R-121; Blair Housing Authority; Petitioner Mark Welsch, GASP* (July 17, 2018); *File No. 07-R-154; Engelkemier; Cass County Board; McCartney* (May 22, 2008).

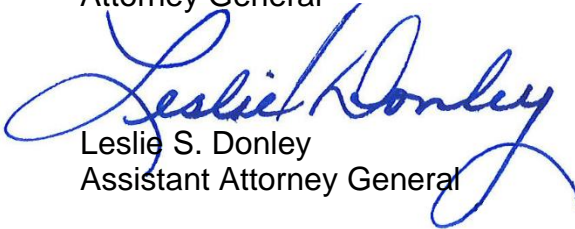
⁶ This subsection provides that “[s]ections 84-712 to 84-712.03 shall be liberally construed whenever any state, county, or political subdivision fiscal records, audit, warrant, voucher, invoice, purchase order, requisition, payroll, check, receipt, or other record of receipt, cash, or expenditure involving public funds is involved in order that the citizens of this state shall have the full right to know of and have full access to information on the public finances of the government and the public bodies and entities created to serve them.”

CONCLUSION

For the reasons discussed above, we conclude that the City of Omaha has met its burden and may continue to withhold the records and redacted information under § 84-712.05(3) and, as applicable, subsection (6). Since no further action by this office is necessary, we are closing 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 § 84-712.03.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Bernard J. in den Bosch (via email only)