



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

JON BRUNING
ATTORNEY GENERAL

NATALEE J. HART
ASSISTANT ATTORNEY GENERAL

June 17, 2014

Richard Lee
3771 Elston Drive
San Bruno, CA 94066
Via e-mail to rdlee@unomaha.edu

RE: *File No. 13-R-133; City of Bellevue; Complainant Richard Lee*

Dear Mr. Lee:

This letter is in response to your Public Records Request complaint received by us on October 25, 2013, in which you requested our review of a public record request made by you to the City of Bellevue ("City"), through the City Clerk, for a Fire Chief's Report. As is our normal practice with such complaints, we contacted the party against whom the complaint was made in regards to your complaint. We subsequently received a response from Patrick Sullivan, attorney for the City of Bellevue. We also spoke with Mr. Sullivan and Ms. Angela Schmidt via telephone on November 8 and November 12, 2013, respectively, regarding your request. We have now considered your complaint and the City's response under the Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2008, Cum. Supp. 2012, Supp. 2013), and our findings in this matter are set forth below.

FACTS

Our understanding of the facts in this case is based on your complaint, your Public Records request, and the response from the City.

On October 19, 2013, you made a public records request to the City, via the City Clerk, for "copies of the Fire Chief's report that was provided to the Bellevue City Council on September 14, 2009 by Fire Chief Guido Perry." The City, through its attorney, responded on October 24, 2013 denying your public records request, stating:

The City Clerk previously informed you that this report was provided to Council members during an executive session and was not made public

record in an open City Council meeting.

The City denies your public records request, pursuant to Neb. Rev. Stat. § 84-712.05(5), because it seeks [investigatory records].

In its response to this office, the City affirms its decision to withhold this report under Neb. Rev. Stat. § 84-712.05(5), and apparently under the Open Meetings Act.

ANALYSIS

The Nebraska Public Records Statutes generally allow interested persons in Nebraska the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts from those records, and to obtain copies of records in certain circumstances. 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 confidentiality statute applies to 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).

Although the Nebraska Public Records Statutes (“NPRS”) provide for access to public documents, they are not absolute. The NPRS also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). 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. In the present case, the City has claimed the “investigatory records” exception, which provides in relevant part:

(5) Records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, when the records constitute a part of the examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training, except that this subdivision shall not apply to records so developed or received relating to the presence of and amount or concentration of alcohol or drugs in any body fluid of any person;. . .

The Nebraska Supreme Court has held that a public record is an “investigatory record” for the purposes of Neb. Rev. Stat. § 84-712.05(5) “where (1) the activity giving rise to the document sought is related to the duty of investigation or examination with which the public body is charged and (2) the relationship between the investigation or examination and that public body’s duty to investigate or examine supports a colorable claim of rationality.” *State ex rel. Nebraska Health Care Ass’n v. Department of Health*

and *Human Services Finance and Support*, 255 Neb. 784, 792, 587 N.W.2d 100, 106 (1998). The Court further held that

a distinction must be drawn between (1) routine administration or oversight activities and (2) focused inquiries into specific violations of law. If a document is compiled ancillary to an agency's administrative function, then it is not protected from disclosure; when, however, an inquiry by an administrative agency *departs from the routine and focuses with special intensity on a particular party, an investigation is underway for purposes of the investigatory records exception.*

Id. (emphasis added).

Furthermore, the Nebraska Supreme Court has more recently held that the "investigatory records" language in § 84-712.05(5) means "investigations or examinations for performing adjudicatory or law enforcement functions." *Evertson v. City of Kimball*, 278 Neb. 1, 16, 767 N.W.2d 751, 764 (2009). In so holding, the Court agreed with Federal case law that interprets a similar provision found in the Freedom of Information Act that the records were compiled for "adjudicatory or enforcement purposes and not general agency monitoring of its programs and employees. And '[a]n agency's investigation of its own employees is for 'law enforcement purposes' only if it focuses 'directly on specifically alleged illegal acts, acts which could, if proved, result in civil or criminal sanctions.'" *Id.* at 16, 767 N.W.2d at 763-764.

You have sought a report prepared by the fire chief of the City of Bellevue Fire Department in 2009, which your request letter suggests you believe was submitted pursuant to his duties under 2008 Neb. Laws LB 1096, § 3, codified as Neb. Rev. Stat. § 16-222.03 (Reissue 2013). That statute requires the Fire Chief to keep complete records relating to volunteer firefighters in the Fire Department and provide an annual report to the City Council. Some of the information required in this report includes response times of the Department. However, it is our understanding from speaking with the attorneys for the City that the report you seek is not the annual report the Fire Chief prepared pursuant to Neb. Rev. Stat. § 16-222.03 and Bellevue City Ordinance. This is an additional report the Fire Chief prepared, based upon an internal study of response times of the Fire Department. This report was not prepared in compliance with any law or ordinance; there was no requirement for the report to be prepared.

We have not viewed the report the City has withheld, however, the attorney for the City did describe its contents. This report contains, among other things, statistical information on response times, the Fire Chief's experiences in responding to calls and in immersing himself in the day-to-day operations of the fire department, and the Fire Chief's research on national standards for call times for volunteer and full-time fire department. It also contains the Fire Chief's opinions and recommendations as to immediate improvements for the Department.

The City believes that this report constitutes an “investigatory record.” We do not agree. First, it does not appear to us that this report is a law enforcement record, or a record related to a duty of “investigation or examination of persons, institutions, or businesses” imposed upon the Fire Chief or his department. Here, there is no law enforcement function to the record – the Fire Chief was not investigating a fire or examining a possible violation of law. This report was also not prepared in connection with any duty of investigation or examination of people, institutions, or businesses as provided in Neb. Rev. Stat. § 84-712.05(5). It involves no specific inquiries by the fire department or fire chief into specific violations of law. The Fire Chief took it upon himself to study the response times of the department, prepare a report, and make recommendations based upon his findings. He did not do so in response to any statutory duty. The report here fits squarely into the category of “routine administration or oversight activity” and “general agency monitoring of its programs” and is not an inquiry departing from the routine and focusing with special intensity on a particular party, or focusing on specific alleged illegal acts. The report is also not one of an investigation or examination for an adjudicatory or law enforcement function. It was prepared as an report of the internal workings of the Fire Department, which is not an “investigatory record” under the definition in Neb. Rev. Stat. § 84-712.05(5) or under *Evertson, supra* or *State ex rel. Nebraska Health Care Ass’n, supra*.

In its written response to this office, the City has quoted from *State ex rel. Nebraska Health Care Ass’n v. Department of Health and Human Services Finance and Support*, 255 Neb. 784, 792, 587 N.W.2d 100, 106, as we have above, but did not provided us with any reasoning as to why this report is investigatory or falls within the reasoning of that case. Our further telephone conversations with the City Attorneys also did not provide us with a sufficient basis for the report to be withheld under Neb. Rev. Stat. § 84-712.05(5). The City has not met its burden to show that the record you seek should be withheld as confidential.

Additionally, the City, through the City Clerk appears to have informed you that the report was provided to City Council members during a closed session, and not “made public record in an open City Council meeting.” However, in our view, the Open Meetings Act does not provide a basis to keep public records confidential, and the fact that particular records were discussed or disclosed during a closed session does not, in and of itself, allow confidentiality.

CONCLUSION

For the reasons stated above, we believe that you have been improperly denied access to public records. We trust that City of Bellevue will provide you with the record you seek without delay, thus, no further action will be taken by this office with respect to this complaint. If you disagree with our analysis under the Public Records Statutes set out above, you may wish to review the applicable statutes and determine what additional remedies, if any, are available to you under those statutes.

Richard Lee
June 17, 2014
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Sincerely,

JON BRUNING
Attorney General

A handwritten signature in black ink, appearing to read "Natalee Hart". The signature is fluid and cursive, with the first name "Natalee" written in a larger, more prominent script than the last name "Hart".

Natalee J. Hart
Assistant Attorney General

cc: Patrick Sullivan, Angela Schmit

02-418-30