



STATE OF NEBRASKA  
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April 12, 2013

Ms. Linda Gierke  
1126 Eastridge  
Seward, NE 68434

Re: File No. 13-R-103; City of Seward; Gierke

Dear Ms. Gierke:

This letter is in response to your correspondence regarding access to various public records belonging to the City of Seward, Nebraska (the "City"). We received your correspondence on March 28, 2013, and we considered that correspondence to be a petition for access to public records under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2012). Our response to your records petition is set out below.

### **FACTS**

Our understanding of the facts in this instance is based upon your letter and the materials you provided to us. We also requested a response to your petition from the City, and we received such response from Attorney Kelly Hoffschneider on behalf of the City. Finally, we reviewed certain portions of the internet website operated by the Nebraska Department of Roads ("NDOR").

You submitted a request for public records to the City on February 8, 2013 in which you requested "All Traffic Studies done to date pertaining to Karol Kay Street Extension:" and "All Funds spent to date on Karol Kay street Extension Project." City Administrator Brett Baker responded to your request on February 12, 2013, and provided you with a portion of a long range planning document from 2009 showing traffic volume projection counts for the street extension project in question. Mr. Baker also provided you with a narrative of the city's allocated expenses for the project and an explanation of project cost estimates from NDOR.

On February 26, 2013, you submitted a second records request to the City for much the same public records as those you initially requested, along with a letter in which you stated that the documents which were provided to you the first time were not exactly what you requested. In your second public records request for records relating

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to funds spent on the Karol Kay Extension Project, you wrote that it "was stated at mtg. that \$100,000 was already spent," and you asked, "What was it spent on?"

City Administrator Baker responded to you a second time with a more detailed explanation of the City's records response. He explained that City has no current ground traffic studies specific to the street extension at issue, only the traffic projections which were provided to you earlier. He also explained that, to date, the City has no direct cash disbursements for the project at issue as all current expenses have been incurred by NDOR, the Federal Highway Administration, or the consulting engineering firm. However, he offered to create a separate document which gathered City expenditures for other purposes which were directly related to the Karol Kay Extension Project. Mr. Baker also addressed access to expenditure records of NDOR, and to those of the project's engineering and consulting firm.

In your subsequent Public Records petition to this office, you complained that you still haven't received the actual traffic counts which you requested from the City, only estimates, and that you were given the City's budget projection and not the actual expenses for the project to date. You also provided us with a "2011 Average Daily Traffic from Portable Counts" document which you indicated came from "the website." Our review of that document indicates that it likely came from the NDOR website. Finally, you stated that you are reluctant to submit a third request for records to the City as you did not "get appropriate answers to the 2 [records] attempts" which you made earlier.

## **ANALYSIS**

We will begin our analysis of your petition with brief discussion of the Nebraska Public Records Statutes. Those 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 therefrom, and to obtain copies of records in certain circumstances. However, we have consistently taken the position that those statutes do not require public officials to answer questions, or to create records which do not otherwise exist. In addition, public agencies are required to respond to records requests for records of which they are the custodian. They are not required to respond to a public records request for particular records by gathering responsive records belonging to other governmental agencies.

You requested two categories of records. First, you requested traffic studies regarding the Karol Kay Street Expansion and current traffic counts in the areas affected by the project. The City responded by providing you with a 2009 traffic study which included projected traffic counts for the areas in question. However, the City also indicated that it does not have any current traffic counts for those same areas. You then searched the internet, and apparently were able to obtain a more current traffic count for the areas at issue from the NDOR website.

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We do not believe that the City's Public Records response regarding traffic studies and traffic counts was improper. The City provided you with the traffic studies in its possession which were responsive to your request and indicated that it had no current traffic counts for the areas in question. Absent any direct evidence to the contrary, we must presume that public officials act in good faith and that they are speaking truthfully if they indicate that they do not have records responsive to a particular records request. Moreover, the traffic counts which you did obtain came from NDOR, and the City had no obligation to gather those materials for you from the state agency.

Your second request for records from the City concerned funds spent on the Karol Kay extension project, and it again appears to us that City's response to that request was entirely appropriate under the Public Records Statutes. The city indicated that it had no records regarding funds spent for the roads project in question because the expenditures for that project to date were incurred by other public agencies and other entities. The City also provided you with budget estimates for the project's costs, and offered to create another record which would calculate indirect costs for the project.

For the reasons discussed above, we do not believe that you were improperly denied access to public records by the City of Seward. As a result, 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 Public Records Statutes.

Sincerely,

JON BRUNING  
Attorney General



Dale A. Comer  
Assistant Attorney General  
Chief, Legal Services Bureau

cc: Kelly R. Hoffschneider

05-455-30