

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

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

June 5, 2012

Ravi V. Sitwala, Esq.
The Hearst Corporation
300 West 57th Street
New York, NY 10019-3792

RE: *File No. 12-R-112; City of Bellevue; Ryan Luby and KETV, Petitioners*

Dear Mr. Sitwala:

This letter is in response to your petition received by us on May 21, 2012, and supplemented by your letter of May 23, 2012, in which you requested our assistance in obtaining certain records belonging to the City of Bellevue, Nebraska (the "City"). As is our normal practice with such requests, we contacted the party against whom the complaint was made. In this case, we contacted one of the attorneys for the City, Aimee C. Bataillon, Adams & Sullivan, P.C., and requested a response. We received Ms. Bataillon's response on June 4, 2012. We have now fully considered your petition for access to records under Neb. Rev. Stat. § 84-712.03, as well as the City's response. Our review was conducted in accordance with the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010, Supp. 2011). Our findings in this matter are set forth below.

FACTS

Our understanding of the facts in this matter is based on your petitions and the information contained in the City's response.

On May 7, 2012, Ryan Luby, a reporter with KETV in Omaha, e-mailed a public records request to Bellevue City Administrator, Dan Berlowitz. Specifically, Mr. Luby requested the following records:

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[A]ny and all documents connected to Chief John Stacey's city-issued cell phone (402) 515-3768, between the dates of May 1, 2011 and May 7, 2012. Documents including a call log, a text message log (along with the contents of those text messages), and e-mails sent and received to Chief Stacey's city e-mail account, john.stacey@bellevue.net (including the contents of those e-mails).

The following day, the parties agreed that Mr. Luby's request would be limited in scope to only those communications between Chief Stacey and Colleen Lawry.

By letter dated May 11, 2012, Ms. Bataillon, on behalf of the City, denied Mr. Luby's request. Ms. Bataillon indicated that, pursuant to a subpoena issued by the Sarpy County Attorney, the e-mails at issue had been forwarded to the Sarpy County Sheriff's Office "for purposes of an ongoing criminal investigation or current enforcement of Nebraska criminal law." Consequently, the City denied the request relating to e-mails between Chief Stacey and Ms. Lawry based on Neb. Rev. Stat. § 84-712.05(5). On May 16, 2012, the City issued another denial letter. In this letter, Ms. Bataillon indicated that in addition to the ongoing Sarpy County investigation, "this office is continuing its investigation into Chief Stacey's actions, and the requested documents fall within the scope of that investigation." Ms. Bataillon reiterated that Mr. Luby's public records requests were being denied based on Neb. Rev. Stat. § 84-712.05(5).

In addition, in a letter dated May 17, 2012 addressed to Mr. Berlowitz, Mr. Luby requested "to review any and all e-mails sent and received from your city e-mail address: dan.berlowitz@bellevue.net between Jan. 1, 2012 and May 17, 2012." In response, Ms. Bataillon indicated that the City would require a deposit of \$2,500 prior to producing the requested records. The deposit amount was based on "a fee to retrieve, copy and review the requested documents to determine whether any of them [fell] within the exceptions enumerated in the Nebraska statutes" and included approximately \$48.00 for employee time to retrieve the records and Ms. Bataillon's hourly rate to review them. On May 21, 2012, we received your petition under Neb. Rev. Stat. § 84-712.03 filed on behalf of Mr. Luby and KETV.

DISCUSSION

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; . . .

We note that the City has claimed this exception as it relates to two separate investigations—one being conducted by the Sarpy County Sheriff’s Office, and its own internal investigation. As to the Sarpy County investigation, the City asserts that the “Stacey Records”¹ are “investigatory in nature” under the test set out in *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). There, the Nebraska Supreme Court held “that a public record is an investigatory record 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.” *Id.* at 792, 587 N.W.2d at 106. According to the City, since these records have been received “by a law enforcement agency and [are] related to an investigation,” they clearly fall within the parameters of § 84-712.05(5).

In response to the City’s contention with respect to the investigation undertaken by the Sarpy County Sheriff’s Office, you argue that the City cannot assert the investigatory records exception to disclosure under the Nebraska Public Records

¹ So named by Ms. Bataillon, and consisting of the telephone, text, and e-mail communications between former police chief John Stacey and Colleen Lawry between May 1, 2011, and May 12, 2012.

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Statutes based upon an investigation conducted by another public agency, i.e., a record is an investigatory record for the City only when the City itself is conducting the investigation. The City asks us to regard a record related to an investigation as just that—an investigatory record.

We do not need to consider the issue as to whether the City records in question are investigatory records as a result of an investigation by the Sarpy County Sheriff's Office because we believe they are investigatory records as a result of the City's own internal investigation. In *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009), the Nebraska Supreme Court discussed the application of the investigatory records exception when a public body investigates its own employees. The court stated "that an investigation of a public body's employee is 'for law enforcement purposes' if the alleged acts could result in a civil or criminal sanction." *Id.* at 16, 767 N.W.2d at 764. Additionally, the court stated that the investigatory records exception "should only apply to an investigation of a public body's employees if the investigation focuses on specifically alleged illegal acts." *Id.*

In this context, the City has represented to us that its own internal investigation "included [Stacey's] alleged violation of Nebraska Revised Statute § 69-2403 for providing Lawry with a gun." The City also represents that the Stacey Records are relevant to the investigation. It appears to us that this investigation does in fact rise to the level necessary to assert the investigatory records exception enumerated in *Evertson*—i.e., the existence of alleged illegal act(s) which could result in civil or criminal sanctions. Consequently, we believe that the City's reliance on Neb. Rev. Stat. § 84-712.05(5), as it relates to its own investigation of Mr. Stacey under the provisions of § 69-2403 *et seq.*, was appropriate.

Your second issue relates to the \$2,500 deposit amount requested by the City prior to disclosing Mr. Berlowitz's e-mails. According to the City, the request could easily exceed 10,000 pages. And at \$.25 a page, an amount we will not question,² those costs alone total \$2,500.

Moreover, this office has consistently taken the position that the Nebraska Public Records Statutes allow public agencies to recover the "actual cost" of providing copies of public records to interested persons. See Neb. Rev. Stat. § 84-712 (3)(b) (2008). In our view, "actual cost" in that context includes the cost of copy paper, copy machine rental, toner, etc., *in addition to* the staff time necessary to search for particular public records, make copies of the materials and then return those records to the proper files. If review by legal counsel is necessary to determine if portions of particular records can

² Under the Attorney General's current enforcement policy, the Office of the Attorney General will not question copying charges of up to 25 cents per page for copies of public records in addition to the other allowable charges discussed in Op. Att'y Gen. No. 01029.

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or must be kept confidential, then those costs may be assessed to the requester as well.³ See also Op. Att'y Gen. No. 01029 (August 2, 2001). In sum, it does not appear that the deposit amount requested by the City is unreasonable in light of the number of e-mails likely to be produced, plus the time required to retrieve, copy and review the requested documents.

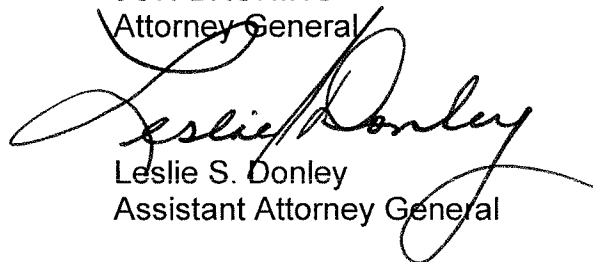
CONCLUSION

We believe that the requested documents belonging to the City of Bellevue may be kept confidential under the investigatory records exception set out in § 84-712.05(5), and in accordance with the holdings in *Evertson*, as it relates to the City's own internal investigation of Mr. Stacey. We further believe that the City's request for a deposit was not unreasonable given the scope and size of the request. Consequently, since we conclude that the City of Bellevue did not unlawfully deny Mr. Luby's public records requests, no further action by this office is warranted, and we are closing this records file.

If you disagree with our legal analysis set out herein, you may wish to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

JON BRUNING
Attorney General



Leslie S. Donley
Assistant Attorney General

cc: Aimee C. Bataillon, Esq.

³ We assume that the hourly rates quoted by Ms. Bataillon for her services are actually paid to her firm for those services. If that is not the case, then the City can charge its actual costs for services of counsel in reviewing documents.