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Office of the Attorney General

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DOUGLAS J. PETERSON
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June 21, 2018

Via email at [REDACTED]
Laura McCormick

RE: *File No.16-MR-137; Operation Youth Success; Laura McCormick, Petitioner/Complainant*

Dear Ms. McCormick:

This letter is in response to your email correspondence received by our office on October 28, 2016, in which you requested our assistance in obtaining certain records belonging to Operation Youth Success ("OYS"). We construed your correspondence to be a petition for review under Neb. Rev. Stat. § 84-712.03 of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2016) ("NPRS"). Your correspondence also contained general allegations of noncompliance with the Open Meetings Act¹ by OYS. Upon receipt of your petition, we contacted Deputy Douglas County Attorney Theresia Urich. We advised Ms. Urich that we questioned whether OYS was a public body subject to the NPRS, and requested that the county address that particular issue in its response to this office.² We further advised that we would only consider the public records matter, and would not consider any Open Meetings Act allegations at that time. On November 18, 2016, we received a response to your petition from Deputy County Attorney Shakil A. Malik. While we conveyed to you our preliminary findings that OYS is not a public body subject to the NPRS or the Open Meetings Act, no disposition letter memorializing those findings was ever issued. For the sake of completeness, we are issuing that disposition letter now for the parties' consideration.

¹ Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014, Cum. Supp. 2016, Supp. 2017).

² In this regard, we asked that the county apply the functional equivalency test set out in *Frederick v. City of Falls City*, 289 Neb. 864, 857 N.W.2d 569 (2015), to determine whether OYS, if determined to be a private entity, could be required to produce its records in response to a request made under § 84-712 of the NPRS.

YOUR PETITION

You indicate that on October 20, 2016, you emailed Janee Pannkuk, OYS executive director, and requested “any and all OYS observation protocol documents from the date January 2014 through today.” Ms. Pannkuk responded the following day, indicating that she would “put together the requested information by the end of next week.” She also indicated that she would confer with you regarding the exchange of information once she knew the size of the file. You responded to Ms. Pannkuk’s email on October 22, 2016. You asked that she respond in accordance with § 84-712 of the NPRS with respect to estimated costs and when the records would be available. In addition, you asked Ms. Pannkuk to provide you with an “exact number of responsive records along with the number—if any—of records denied.” You included a link to § 84-712 with your response.

Ms. Pannkuk responded on October 26, 2016, stating, in pertinent part:

Operation Youth Success is not the owner of the records you have requested. Therefore, the requested records are not subject to your public records request.

Please contact Kerri Peterson or Erin Bock at The Sherwood Foundation.³

You indicate that you have asked Ms. Peterson and Ms. Bock for other documents in the past, but your requests were denied.

You subsequently filed your petition with our office. In supplemental documentation submitted to our office on October 31, 2016, you indicate that you had previously received observation protocol documents from OYS.

THE COUNTY’S RESPONSE

According to Mr. Malik, it appears that OYS is an independent entity, only partly supported by Douglas County. OYS was established to “assist the communication and coordination of various juvenile justice stakeholders” in the county. Two county employees provide support to OYS, and are paid from a combination of public and private grant funds. The employees report to the OYS Steering Committee, and not the Douglas County Board of Commissioners or the county’s chief administrative officer. Generally, OYS is comprised of city, county, and private juvenile justice stakeholders. The OYS Steering Committee is made up of “key decisionmakers” from these stakeholders. Several “working groups”—comprised of OYS stakeholders and members of the public—work on juvenile justice reform efforts.

³ According to its website, the mission of the Sherwood Foundation is to “promote[] equity through social justice initiatives enhancing the quality of life in Nebraska.” The foundation limits grant funding “to organizations that are tax-exempt under section 501(c)(3), government entities, schools, or churches that are serving Nebraska. These organizations must be in good standing with the Internal Revenue Service.”

Douglas County is one of the stakeholders in OYS. However, the county did not create OYS or select the stakeholder entities or representatives. The county designated the OYS Steering Committee as the “comprehensive community team” responsible for developing the “comprehensive juvenile services plan,” which is required to be eligible for Community-based Juvenile Services Aid Program funds. See Neb. Rev. Stat. § 43-2404.01 (2016, 2018 Neb. Laws LB 670). Once produced, the plan is submitted to the Douglas County Board of Commissioners for approval or amendment. Upon finalization of the plan, it is submitted to the Nebraska Commission on Law Enforcement and Criminal Justice (“Crime Commission”). Mr. Malik notes that the records you seek do not relate to the plan or its creation.

Mr. Malik further informs us that various OYS stakeholders undertake juvenile reform work both independently and through OYS. He states that the records at issue “were created as a result of a developmental evaluation contract entered into between Sherwood Foundation and researchers from the University of Nebraska – Omaha” and that neither OYS nor Douglas County is a party to this contract. And while OYS staff received records relating to the evaluation to assist in improving the functioning of OYS working groups, Douglas County did not.

Finally, the county concluded, after an examination of the factors in the *Frederick* test, that OYS does *not* qualify as the functional equivalent of a county agency, branch, or department, which might mandate disclosure of its records. A summary of the county’s analysis is more fully discussed below.

ANALYSIS

The basic rule for open public records in Nebraska is found at Neb. Rev. Stat. § 84-712 of the Nebraska Public Records Statutes. That statute provides, in pertinent part:

Except as otherwise expressly provided by statute, all citizens of this state and all other persons interested in the examination of the public records as defined in section 84-712.01 are hereby fully empowered and authorized to (a) examine such records, and make memoranda, copies using their own copying or photocopying equipment in accordance with subsection (2) of this section, and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business and (b) except if federal copyright law otherwise provides, obtain copies of public records in accordance with subsection (3) of this section during the hours the respective offices may be kept open for the ordinary transaction of business.

"Public records" are defined as follows:

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) (2014). The purpose of § 84-712 of the NPRS is "to guarantee that public government records are public." Introducer's Statement of Purpose for LB 505, 72nd Nebraska Legislature (1961). Under this statute, it was intended that all public records of the state, its counties, and its other political subdivisions should be open to inspection, except where the Legislature has otherwise provided that the record shall be confidential. Judiciary Committee Statement on LB 505, 72nd Nebraska Legislature (1961).

As you note in your petition, "OYS is a public private partnership between Douglas County and the Sherwood Foundation." In contrast, the entities set out in § 84-712.01(1) above are obviously some form of *government*. Therefore, the threshold question in this case centers on whether the NPRS even applies to OYS. OYS serves as the "comprehensive community team" for purposes of developing a comprehensive juvenile services plan for Douglas County. A "comprehensive community team" is not defined in statute. Language in Neb. Rev. Stat. § 43-2404.01(1)(a) only requires that the plan "[b]e developed by a comprehensive community team *representing juvenile justice system stakeholders . . .*" (Emphasis added.) The Crime Commission defines a "community planning team" (not the exact term employed in § 43-2404.01(1)(a)) as

a local community team comprised of members who represent the interests of the county or Indian tribe within the community, and consist of individuals serving the community in the roles listed in the community planning resources, and is formed to oversee the planning and implementation of services developed and provided within each community or region.

Title 75, *Nebraska Administrative Code*, Ch. 1, § 003.07 (eff. Jan. 11, 2016). There is little question that OYS plays a critical role in terms of Douglas County's juvenile justice reform efforts. However, OYS is a community-based group, with public and private participants and funding. It is not a government entity. Therefore, since OYS is none of the governmental entities listed in § 84-712.01 above, we conclude that the Nebraska Public Records Statutes do not apply.

In *Frederick v. City of Falls City*, 289 Neb. 864, 857 N.W.2d 569 (2015), the Nebraska Supreme Court considered whether the Falls City Economic Development and Growth Enterprise, Inc. (EDGE), a nonprofit corporation formed to encourage economic development in Falls City and the surrounding area, was required to produce its records in response to a request made under § 84-712. EDGE denied such a request on the ground that the requested documents were not public records. The citizen making the request challenged the denial and the district court ordered, except for a few privileged documents, the disclosure of the requested documents. The corporation appealed.

To determine whether a private entity which has an ongoing relationship with a governmental entity can be considered an agency, branch, or department of such governmental entity within the meaning of § 84-712.01(1), the court adopted a four-part “functional equivalency” test. Under the test, the court considered (1) whether the private entity performs a governmental function, (2) the level of government funding, (3) the extent of government involvement or regulation, and (4) whether the private entity was created by the government. Applying the factors to the facts before it, the court found that EDGE performed a governmental function in promoting economic development, but that promoting economic development was *permissive* and not mandatory as the City of Falls City was not required by statute to engage in the promotion of economic development. With regard to the second factor, level of government funding, the court found that EDGE receives approximately 63 percent of its revenue from public sources, but that fact alone would not be sufficient to render it a public agency. Looking at the extent of government involvement with EDGE, the court pointed out that “the city has representation on EDGE’s board of directors, but not control.” *Id.* at 877, 857 N.W.2d at 578. Further, EDGE’s employees are not city employees; it maintains separate financial records and does not occupy city offices. With regard to the last factor, creation of entity, the court found that EDGE was incorporated by several private individuals. After weighing all factors, the court concluded that EDGE is *not* the functional equivalent of an agency, branch, or department of Falls City and its records are not “public records” as that term is defined in the Nebraska Public Records Statutes. *Id.* at 878, 857 N.W.2d at 579.

As noted above, Douglas County provided this office an analysis of the *Frederick* factors as applied to OYS. With respect to the first prong, whether the private entity performs a government function, Mr. Malik states that OYS does so to the extent it serves as the “comprehensive community team” to Douglas County for purposes of obtaining Community-based Aid funding. However, this function is permissive, not mandatory, since the county chooses to have a team to pursue grant funding. With respect to the second factor, level of government funding, OYS receives funding from several private entities, including the Sherwood Foundation and the Peter Kiewit Foundation, and one public entity, i.e., Douglas County. However, “OYS is majority funded and supported by private sources.” A review of the third factor, the extent of government involvement or regulation, indicates that Douglas County, along with the State of Nebraska, City of Omaha, and Westside School District, have members who serve on the OYS Steering Committee. However, representatives from Boys Town, Nebraska Family Support

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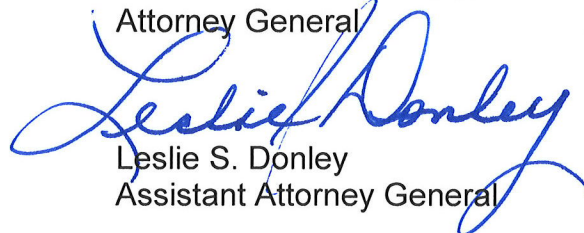
Network, Black Men United, the private defense bar, Sherwood Foundation, Urban League, and ReConnect also serve on the committee.⁴ No single governmental entity is responsible for selecting the members of the committee, except to appoint individuals to fill that entity's seat on the committee. Finally, with respect to the fourth factor, creation of the entity, Mr. Malik informs us that "OYS was created by a private consulting firm, FSG, pursuant to a collective impact project initiated by Douglas County and funded by the Sherwood Foundation and other private entities. No governmental entity, including Douglas County, has taken any action to establish or create OYS."

The court in *Frederick* indicated that it was not necessary, when applying the functional equivalency test, "that an entity strictly conform to each factor, but the factors should be considered and weighed on a case-by-case basis." *Id.* at 877, 857 N.W.2d at 578. Like the entity in *Frederick*, it appears that the strongest factor to support an argument that OYS is the functional equivalent of a county agency, branch, or department is the fact that it performs a governmental function, i.e., it develops the comprehensive juvenile services plan necessary to participate in the Community-based Juvenile Services Aid Program. However, while § 43-2404.01 authorizes Douglas County's participation in the program, it does not mandate it. In addition, while Douglas County has provided employees to provide support to OYS, those employees do not report to county officials, and are paid with a mixture of public and private grant funds. The other factors also do not support a determination that OYS is the functional equivalent of a Douglas County agency, branch or department, which would require disclosure of its records.

Finally, it is our understanding that OYS is attempting to follow both the NPRS and the Open Meetings Act in the course of its operations, despite no legal requirement to do so. A review of Operation Youth Success's website shows the names of group participants, posted meeting times, meeting notes, and audio recordings of Steering Group meetings. As such, it appears to us that OYS is demonstrating a level of transparency not only to the individuals and entities involved in OYS' mission, but to members of the general public as well.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Theresia Urich (via email)

49-2026-29

⁴ We note that membership in the OYS Steering Committee has changed since the date of Mr. Malik's response. However, according to the OYS website, representatives from the Omaha Police Department, Black Men United, Boys Town, The Sherwood Foundation, ReConnect, Inc., Omaha Public Schools and the Urban League remain members of the group.