

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

DOUGLAS J. PETERSON
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

March 2, 2017

Via email at gtrout@chelepis.com and
Regular U.S. Mail
Greg Trout
Chelepis & Associates, Inc.
8300 College Blvd., Suite 300
Overland Park, KS 66210

RE: *File No. 17-R-110; Hastings Utilities; Greg Trout, Petitioner*

Dear Mr. Trout:

This letter is in response to your correspondence dated February 7, 2017, and received by this office on February 13, 2017,¹ in which you challenge the denial of a public records request submitted to Hastings Utilities by your business associate, Ben Kaplan. When we receive petitions of this nature, our normal practice is to contact the entity involved and advise it of the opportunity to provide a response to this office. In the present case, we contacted the interim manager of Hastings Utilities, Al Meyer, and advised him accordingly. On February 24, 2017, we received a response to your petition from Hastings City Attorney David H. Ptak, who responded on behalf of the utility. We have 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"). Our findings in this matter are set forth below.

RELEVANT FACTS

Our understanding of the facts in this matter is based solely on your correspondence and the response and documentation we received from Mr. Ptak.

According to the documentation received, Mr. Kaplan submitted a public records request to the City of Hastings on January 19, 2017, as follows:

¹ For the record, the statutory timeframe in which to make a determination on the merits of your petition began to run on February 15 when we received a copy of the public records request submitted to Hastings Utilities.

Under the Nebraska Public Records Law I am kindly requesting actual copies or histories of all water and sewer bills for the most recent twelve months of service for the following facility:

AGP, 2801 E 7th St., Hastings, NE

Upon receipt, the city clerk forwarded the request to staff at Hastings Utilities. Later that day (January 19), Brian Strom, Manager of Customer Accounting for Hastings Utilities, emailed a response to Mr. Kaplan, stating:

Neb. Rev. Stat. 84-712 does give citizens the right to obtain Public Records. However, Neb. Rev. Stat. 84-712.05 (10) provides the information that you are seeking may be withheld from the public and it is Hastings Utilities policy not release [*sic*] that information without the customer's permission. If you can provide Hastings Utilities with a release of information from AGP, I will be more than happy to accommodate your request, otherwise Neb. Rev. Stat. 84-712.05 (10) applies.²

Apparently, Mr. Kaplan did not receive Mr. Strom's email, because on February 3 he emailed Mr. Strom inquiring about the status of his request. Mr. Strom promptly responded, and referred Mr. Kaplan to his original response made on January 19. Later that same day, Mr. Kaplan sent the following email to Mr. Strom:

To my understanding, § 84-712.05(10) exempts personally identified private citizen account payment and customer use information – the information I am requesting could not be stated to be personally identified, as it pertains to a large commercial manufacturing facility; such payment and customer use information would not serve to identify a particular individual or individuals. Accordingly, I contend that § 84-712.05(10) does not apply – while policy might indicate that this information be withheld, I would ask that

² While you did not raise it in your petition, Mr. Strom's response did not comport with the requirements set out in Neb. Rev. Stat. § 84-712.04 (2014), which requires that any person denied access to public records shall receive the following information, in writing:

(1)(a) 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;

(b) The name of the public official or employee responsible for the decision to deny the request; and

(c) Notification to the requester of any administrative or judicial right of review under section 84-712.03.

you provide citation of any portions of Nebraska Statute which would permit such nondisclosure. . . .

In response, Mr. Strom provided the text of § 84-712.05(10), and indicated that “AGP is a customer of Hastings Utilities. I will not disclose any information or usage history at this time.” He reiterated that Hastings Utilities would disclose the requested information if it were to receive authorization from AGP to do so.

In your petition, you repeat the same argument set out in Mr. Kaplan’s February 3 email, i.e., the records at issue pertain to a “large commercial manufacturing site,” and do not fall within the parameters of the exception relied on by Hastings Utilities.

DISCUSSION

Section 84-712 of the NPRS expressly provides that the right to examine or obtain copies of public records exists “[e]xcept as otherwise provided by statute.” The definition of “public records” in § 84-712.01(1) provides an exception from that definition “when any other statute expressly provides that particular information or records shall not be made public” Thus, in those instances where the custodian of records can point to a particular statute which provides an exception from disclosure, there is no right of access. The burden of showing that a statutory exception applies to disclosure of 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).

Neb. Rev. Stat. § 84-712.05 (Cum. Supp. 2016) is composed of twenty categories of records which may be kept confidential from the public at the discretion of the agency involved so long as those records have not been “publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties” In the present case, Hastings Utilities is relying on the exception to disclosure in § 84-712.05(10), which allows it withhold the following records:

With respect to public utilities and except as provided in sections 43-512.06 and 70-101, personally identified private citizen account payment and customer use information, credit information on others supplied in confidence, and customer lists[.]

We have carefully considered your argument that the records at issue pertain to a “large commercial manufacturing facility” and that the release of AGP’s payment and customer usage information “would not serve to identify any person or persons.” We believe this argument is flawed for a couple of reasons. First, in Nebraska, in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Swift and Company v.*

Nebraska Department of Revenue, 278 Neb. 763, 773 N.W.2d 381 (2009). Under the plain language of the exception, records that may be withheld include “personally identified private *citizen* account payment and customer use information.” Generally, a “citizen” refers to “[a] person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections” Black’s Law Dictionary 193 (abridged 7th ed. 2000). However, “[s]tatutes referring to persons, residents, or citizens generally include corporations within their meaning, especially when the intent and purpose of the statute seem to require it, at least where the company has a legal existence.” 8 Fletcher Cyc. Corp. § 4025. “The general tendency and policy of legislatures and courts has been to treat corporations, as far as their inherent nature will permit, on the same footing as individuals.” 18 Am. Jur. 2d Corporations § 65. In Nebraska law, the term “person” “include[s] bodies politic and corporate, societies, communities, the public generally, individuals, partnerships, limited liability companies, joint-stock companies, and associations[.]” Neb. Rev. Stat. § 49-801(16) (2010). As a result, we believe that the exception in § 84-712.05(10) could reasonably be read to include corporations, like AGP, in addition to private citizens.

Second, your argument appears to make disclosure of records contingent on whether private individuals could be “personally identified.” Under this scenario, release of AGP’s records is warranted because no particular individual would be identified by the disclosure. We disagree with this construct. The statute allows a public body to withhold records falling under this exception at its discretion so long as those records have not been already publicly disclosed. Since we have concluded above that the exception applies equally to all private customers of public utilities, a public body need not show that disclosure of records would identify “private individuals” in order to rely on the exception.

We have also looked at the legislative history of the exception for additional guidance. In 1979, the Nebraska Legislature enacted the first nine categories of records that could be withheld in response to a request made under § 84-712. Records pertaining to customers of public utilities were part of this initial group. At that time, the exception applied to “[p]ersonally identified private citizen account payment information held by public utilities.” 1979 Neb. Laws LB 86, § 5. In 1983, the exception was expanded to include “credit information on others supplied in confidence, and customer lists” 1983 Neb. Laws LB 108, § 1. The legislative history of that bill seems to support the idea that the exception applied not only to private citizens, but to corporate consumers as well:

[T]he bankers for utilities . . . require the utilities to obtain financial information of, for example, large livestock operations, large ranching operations, to see whether or not they are on a firm foundation and since the utility serves as an intermediary, the information gatherer, they want to make it explicit that they do not need to reveal this kind of credit information to third parties that are essentially disinterested in that relationship.

Floor Debate on LB 108, 88th Neb. Leg., 1st Sess. 2217 (March 25, 1983) (Statement of Sen. Landis). The exception was further expanded in 2011 by adding “customer use” to the type of information that could be withheld. 2011 Neb. Laws LB 230, § 1. In this regard, Senator Sullivan explained her proposed amendment to the public utility exception as follows:

LB 230 also allows public utilities to withhold customer use information. Currently there is a right to withhold payment and credit information, but there is no specific exception for customer use information. Customer use information is a privacy expectation for customers. Public utilities believe that customer use information is confidential and customers should have the right to protect or divulge such data as they deem appropriate.

Government, Military and Veterans Affairs Committee Hearing on LB 230, 102nd Neb. Leg., 1st Sess. 27 (January 26, 2011). In this instance, no distinction was made between a private citizen and a corporation. The focus of the legislation was protecting the *customers* of public utilities from unwarranted access to their private information.

CONCLUSION

Based on the foregoing, we believe that the exception in § 84-712.05(10) applies to the account payment, usage, and credit information of any private individual or corporation doing business with a public utility. Therefore, Hastings Utilities did not violate the Nebraska Public Records Statutes when it denied you access to AGP’s records under this exception. However, we will remind the utility, by sending a copy of this letter to Mr. Ptak, that it must fully comply with the requirements set out in Neb. Rev. Stat. § 84-712.04 in the event it denies any requester rights granted under the NPRS.

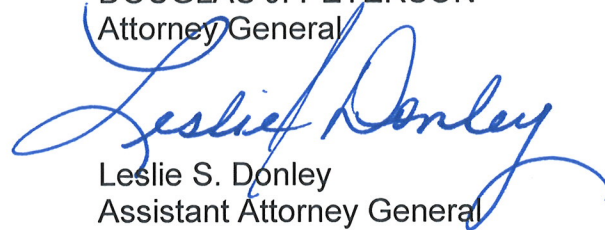
Since we have concluded that Hastings Utilities did not unlawfully deny your records request, no further action by this office is warranted. Accordingly, we are closing this file. If you disagree with the analysis we have set out above, you may wish to contact

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your private attorney to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

A handwritten signature in blue ink, appearing to read "Leslie S. Donley", is written over the typed name and title below.

Leslie S. Donley
Assistant Attorney General

c: David H. Ptak

49-1735-29