

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

August 17, 2018

Alex Heeb
[REDACTED]

RE: *File No.17-R-144; Papio-Missouri Natural Resources District; Alex Heeb, Petitioner*

Dear Mr. Heeb:

We are writing in response to your public records petition and supporting documentation received by this office on November 3 and 9, 2017, respectively, in which you requested our assistance in obtaining certain public records belonging to the Papio-Missouri Natural Resources District ("District"). On November 27, 2017, we wrote to you indicating that we had conducted a preliminary investigation of your petition, and it appeared to us that the District had properly withheld some of the requested records. However, we indicated that our response would be delayed so that we could further analyze the issues. We have now completed our analysis. We considered your petition and the District's response to your petition in accordance with the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2016¹) ("NPRS"). Our findings in this matter are set forth below.

FACTS

On October 16, 2017, you emailed a public records request to the District, seeking the following records²:

- (1) Any documents, emails, minutes, memorandum, letters or notes that concern or mention or a group called the 408 Coalition (whether by that exact name, or by similar names, such as the Section 408 Coalition).

¹ See also 2018 Neb. Laws LB 193; 2018 Neb. Laws 859; and 2018 Neb. Laws LB 902.

² All quoted material has been reproduced as originally written.

- (2) Such records as would show what funds your agency directed to the 408 Coalition, or on behalf of 408 Coalition activities.

District General Manager John Winkler responded to your request by letter dated October 30, 2017.³ Mr. Winkler provided you records responsive to your request, but withheld

[a] limited number of documents . . . because they are correspondence with the District's legal counsel. These documents have been withheld pursuant to the following exception found in the Nebraska Public Records Statutes: "Records which are confidential communications under the attorney-client privilege. Neb. Rev. Stat. §§ 84-712.05(4) and 25-703."

You subsequently filed your petition with our office, challenging the denial of the disclosure of certain documents based on the exception in § 84-712.05(4). You specifically assert that

there is an inherent conflict of interest in these documents being withheld, as the District's counsel - Husch Blackwell - is not only serving as its legal advisor, but also performing the lobbying on its behalf in Washington D.C. This fact - that the law firm is performing functions for the district other than legal functions - could allow them to claim privilege for records which do not specifically pertain to legal matters, but are instead relate to their lobbying arm. It would allow them to shield activities and documents which should be discoverable the Public Records Law, simply by the fact that Husch Blackwell's name appears on the documents.

You asked that this office review this matter, including examining the documents at issue, to see if they could in fact be withheld under the exception cited. You also asked that we pay special attention to three Husch Blackwell attorneys who "were specifically involved in the lobbying efforts"

At our request, the District, through its outside counsel Brent Meyer, Husch Blackwell, LLP, provided a response to your petition, which we received on November 21, 2017. Mr. Meyer confirmed that "[t]he documents withheld constitute confidential communications between the District" and the three attorneys named in your petition.

³ Neb. Rev. Stat. § 84-712(4) (2014) of the NPRS requires that, upon receipt of a written request for access to or copies of a public record, the custodian of that record must provide the requester a response as soon as is practicable and without delay, but not more than *four business days* after actual receipt of the request. Accordingly, the District was required to respond to your request no later than Friday, October 20, 2017—four business days after actual receipt of the request on October 16. There is no indication that the response made on October 30 was based on an extension secured by the District. We will remind District staff of the statutory timeframe and suggest that, in the future, if staff is unable to respond to a request for public records within the four business days "due to the significant difficulty or the extensiveness of the request," it has the option under the statute to delay the process, and set a reasonable time in the future to fulfill the request.

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Mr. Meyer states that the attorneys “represent the District in legal matters and in its lobbying efforts.”

Mr. Meyer refuted your assertion that any communications relating to lobbying activities could not be privileged because they do not pertain to legal matters *per se*. He noted that communications which otherwise meet the requirements to establish privilege do not lose that protection because the lawyer giving the legal advice is a lobbyist or because the legal advice pertains to legislation relating to the lobbying activities. *U.S. v. Illinois Power Co.*, 2003 WL 25593221 at *3 (S.D. Ill. April 24, 2003). Mr. Meyer indicated that, upon review, the District would supplement its record production, providing you “any communications with counsel that solely involve information ‘regarding lobbying, public relations, dealing with the media, and other non-privileged matters.’ *In re Bisphenol-A (BPA) Polycarbonate Plastic Prod. Liab. Litig.*, 2011 WL 1136440 at *3 (W.D. Mo. Mar. 25, 2011).” However, Mr. Meyer indicated that other records satisfying the elements of the attorney-client privilege, “notwithstanding their relation to lobbying activities,” would remain confidential under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(4) and § 27-503.

DISCUSSION

Neb. Rev. Stat. § 84-712.05 of the NPRS contains 21 categories of records that may be withheld at the discretion of the custodian of the records “unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties” The exception relied on by the District, § 84-712.05(4), encompasses “[r]ecords which represent the work product of an attorney and the public body involved which are related to preparation for litigation, labor negotiations, or claims made by or against the public body *or which are confidential communications as defined in section 27-503.*” (Emphasis added.) Section 27-503, which is part of the Nebraska Evidence Rules, provides, in pertinent part, that “[a] communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” Neb. Rev. Stat. § 27-503(1)(d) (2016).

We have considered your argument that records involving communications between the District and its attorneys should not be withheld because those attorneys also provide lobbying services for the District. You contend that this scenario would allow the District to claim privilege on all communications with the firm, including communications which do not involve “legal matters.” However, as indicated by the case law cited above, and our own research on this issue, we do not believe that a public body [or any other client] is automatically barred from withholding certain records under the attorney-client privilege because the attorneys involved are engaged in lobbying activities. For example, in *Barfield v. Sho-Me Power Elec. Co-op.*, 2014 WL 2575220 at *3 (W.D. Mo. June 9, 2014), the court found that certain communications which rose “above a mere

regurgitation of recent legislation actions or lobbying efforts and proposals and more closely resemble[d] legal advice and analysis” were protected by the attorney-client privilege. In *Barfield*, the communications found to be privileged included emails containing drafts of amendments to proposed legislation, the legal effect of the amendments to the entities involved, and an interpretation of the meaning of the proposed legislation and the parties affected.

On the issue of lawyering versus lobbying, the court in *In re Grand Jury Subpoenas dated March 9, 2001*, 179 F. Supp. 2d 270 (S.D.N.Y. 2001), stated:

Lawyers sometimes act as lobbyists, and thus the issue has arisen as to whether the attorney-client and work-product privileges protect communications made and materials prepared in the course of a lawyer's lobbying efforts.

Of course, the inquiry is fact-specific. The fact that a lawyer occasionally acts as a lobbyist does not preclude the lawyer from acting as a lawyer and having privileged communications with a client who is seeking legal advice. Many lawyers “have expertise in special areas of knowledge that enhances their skill as lawyers, and that does not diminish their legal status.” *Montgomery Co. v. Microvote Corp.*, 175 F.3d 296, 302 (3d Cir.1999).

On the other hand, “[i]f a lawyer happens to act as a lobbyist, matters conveyed to the attorney for the purpose of having the attorney fulfill the lobbyist role do not become privileged by virtue of the fact that the lobbyist has a law degree or may under other circumstances give legal advice to the client, including advice on matters that may also be the subject of the lobbying efforts.” Edna Selan Epstein, *The Attorney-Client Privilege & the Work Product Doctrine* 239 (2001). For example, “[s]ummaries of legislative meetings, progress reports, and general updates on lobbying activities do not constitute legal advice and, therefore, are not protected by the work-product immunity.” *P. & B. Marina v. Logrande*, 136 F.R.D. 50, 59 (E.D.N.Y.1991), *aff'd mem.*, 983 F.2d 1047 (2d Cir.1992).

Id. at 285. However, here the court found that the attorney-client privilege did not apply to the records at issue because they involved “non-legal items and lobbying efforts,” *id.* at 291, and not “confidential communications made for the purpose of obtaining legal advice.” *Id.* at 290.

Mr. Meyer has represented to this office that the District reexamined the withheld records, and released communications dealing solely with nonprivileged matters, e.g., lobbying activities and public relations. Other communications which contain legal advice will continue to be withheld by the District.

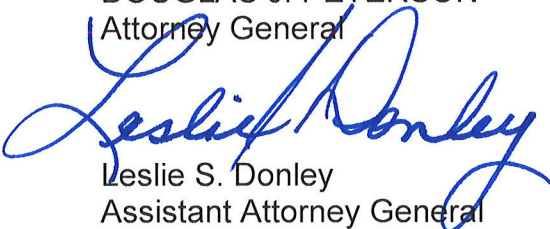
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Further, while you have asked us to review the records at issue to determine whether they may be withheld under the attorney-client privilege, this office does not have access to the records you seek. Although Neb. Rev. Stat. § 84-712.03 creates enforcement responsibilities for this office, there is no statutory mechanism for an *in camera* review of the documents by the Attorney General. Under § 84-712.03(2), that procedure is left for the courts. Consequently, we will rely on representations from the District's attorney that the records fall within the exception in § 84-712.05(4), and are in fact communications containing legal advice conveyed to District officials.

Since it appears the District has provided you all of its records responsive to your request, and because we have no ability to inspect the communications at issue, this office will take no further action with respect to this file. If you disagree with the conclusion reached in this disposition letter, you are free to pursue the other legal remedies available to you under Neb. Rev. Stat. § 84-712.03 of the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Brent Meyer (via email)
John Winkler (via email)

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