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Office of the Attorney General

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March 21, 2023

Via email at nathan.arentsen@gmail.com
Nathan Arentsen
ACP #21-04
P.O. Box 98921
Lincoln, NE 68509

RE: *Public Records Matter Involving the Nebraska Equal Opportunity Commission*
File No. 20231025

Dear Mr. Arentsen:

This letter is in response to your public records petition ("Petition") received by this office on February 27, 2023. We received a written correction from you the following day. You have requested the assistance of the Attorney General relating to your public records request submitted to the Nebraska Equal Opportunity Commission ("NEOC") on February 3, 2023. At our request, you provided us the documents underlying your Petition, i.e., copies of your public records request and the response you received from Paula Gardner, NEOC Executive Director, along with the transmittal email, on March 6. We considered your Petition in accordance with the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2022). Our findings with respect to this matter are set out below.

RELEVANT FACTS

Your February 3 public records request contained the following items:

All documents, electronically stored information, and tangible things, including but not limited to any emails, text messages, electronic messages, letters, notes, agendas, minutes, memoranda, exhibits, drafts, research materials, tapes, transcripts, contracts, agreements, or amendments, which satisfy the characteristics ('a,' 'b,' and 'c') below:

- a. The record was either received from, or sent to, the Nebraska Attorney General or the Nebraska Attorney General's Office;
- b. The record was received or sent between October 20, 2022 and February 3, 2023; and
- c. The record mentions, discusses, or relates to "Arentsen," "Children's Commission," or the NEOC case NEB 1-21/22-5-3738-PA.

Ms. Gardner timely responded on February 9. She indicated that the NEOC had records responsive to your request, including its request for an Attorney General opinion dated October 24, 2022, and the Attorney General's response dated January 5, 2023. Ms. Gardner informed you that the NEOC would withhold those documents under the exceptions to disclosure in Neb. Rev. Stat. § 84-712.05(5) pertaining to investigative materials and attorney-client privileged communications and attorney work product.¹

You indicate in your Petition that your NEOC complaint was tabled by the commission at its October 21, 2022, meeting "to seek an Attorney General's opinion regarding whether the Respondent is covered under the statute" Petition at 2. You further indicate that during the discussion on the motion to table, "there was no mention of any ongoing or future investigation conducted by the NEOC or Attorney General, nor any litigation by or against the NEOC." Rather, you state that staff had already concluded their investigation and presented a report of that investigation to the commissioners. You state that this "is the normal manner by which the NEOC operates." *Id.* The NEOC's opinion request letter was subsequently sent to the Attorney General on October 24, 2022.

At the NEOC's meeting conducted on January 20, 2023, Ms. Gardner informed the commission that the Attorney General had declined to issue an opinion, "and had instead chosen to advise the NEOC only as their 'counsel.'" *Id.*

DISCUSSION

Section 84-712 of the NPRS generally allows Nebraska citizens and other interested persons the right to examine public records in the possession of public agencies during normal agency business hours and to obtain copies of records in certain circumstances. However, access to public records is not absolute. Section 84-712 "provide[s] that exceptions may be created by express and special provisions." *Orr v. Knowles*, 215 Neb. 49, 55, 337 N.W.2d 699, 703 (1983). In addition, Neb. Rev. Stat. § 84-712.05 contains twenty-five categories of public records that may be withheld at the

¹ As noted in your petition, attorney-client communications and attorney work product may be withheld under the exception in Neb. Rev. Stat. § 84-712.05(4).

discretion of the public body so long as those records have not been “disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties” The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 788, 943 N.W.2d 231, 240 (2020).

The NEOC is relying on the exception in § 84-712.05(4) as one basis to withhold the requested documentation between the NEOC and this office. This exception applies to

[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.

Neb. Rev. Stat. § 27-503 (2016) states, in pertinent part:

(1)(d) 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.

(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (a) between himself or his representative and his lawyer or his lawyer's representative, or (b) between his lawyer and the lawyer's representative, or (c) by him or his lawyer to a lawyer representing another in a matter of common interest, or (d) between representatives of the client or between the client and a representative of the client, or (e) between lawyers representing the client.

There is no question that the NEOC is the client as contemplated in the statute, and that the Nebraska Department of Justice (“NDOJ”) is statutorily required to represent the NEOC.² There is also no question that the NEOC sought legal advice from this office on a question relating to your pending NEOC complaint, and that we responded in writing to that request. Under § 84-712.05(4) and § 27-503, the NEOC has a statutory right to refuse to disclose the communications at issue. “The privilege is not limited to communications made in the context of litigation or even a specific dispute, but extends to all situations in which an attorney's counsel is sought on a legal matter. While its

² “The Department of Justice shall have the general control and supervision of all actions and legal proceedings in which the State of Nebraska may be a party or may be interested, and shall have charge and control of all the legal business of all departments and bureaus of the state, or of any office thereof, which requires the services of attorney or counsel in order to protect the interests of the state.” Neb. Rev. Stat. § 84-202 (2014).

purpose is to protect a client's disclosures to an attorney," the privilege also extends "to an attorney's written communications to a client, to ensure against inadvertent disclosure, either directly or by implication, of information which the client has previously confided to the attorney's trust." *Coastal States Gas Corp. v Dept. of Energy*, 617 F.2d 854 (D.C. Cir. 1980) [*Coastal States*].

You have offered several arguments as to why you believe the records at issue are not privileged and should be disclosed, including that this office is required in all instances to provide written public opinions to agency heads upon request under Neb. Rev. Stat. § 84-205(4) (2014). For your information, we render legal advice to the agencies we represent in a variety of forms—including formal and informal opinions, letters, email and verbally. It is not the form in which the legal advice is provided, but whether the communication is "made for the purpose of facilitating the rendition of professional legal services to the client." In this respect, the correspondence falls within the definition of an attorney-client confidential communication.

Moreover, we disagree with your argument that the attorney work product doctrine could not apply to the requested correspondence, particularly our written response. The doctrine "has uniformly been held to be limited to documents prepared in contemplation of litigation." *Coastal States* at 864. The NEOC's request was made in the context of your NEOC complaint. Under the Public Accommodations Act, Neb. Rev. Stat. §§ 20-132 to 20-143 (2022), upon a reasonable cause finding, administrative proceedings may be held and appeals taken under the Administrative Procedure Act. Your assertion that the NEOC's request and our response do not pertain to potential litigation is without merit.

Having concluded that the exception in § 84-712.05(4) applies to withhold the communications between the NEOC and the NDOJ, it is unnecessary to consider whether the investigatory records exception also applies. However, we will briefly address your argument that the exception does not apply because the NEOC had completed its investigation and placed your case on the October 2022 meeting agenda. The NEOC's tabling of your case in order to seek legal guidance shows the matter had not been finalized and the investigation was ongoing. In any event, the status of an investigation has no bearing on a public body's ability to withhold investigatory records under § 84-712.05(5). The exception contains no language which distinguishes between active and closed investigations. The determining factor here is whether the records were developed or received by the NEOC in conjunction with its duty of examination/investigation of persons, institutions, etc. and the records constitute a part of the examination/investigation. The correspondence between the NEOC and the NDOJ are records developed and received by the NEOC in accordance with its duties to investigate your complaint, and thus may be withheld under § 84-712.05(5).


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CONCLUSION

Based on the foregoing, the NEOC appropriately withheld the correspondence between the NEOC and the NDOJ under the exceptions to disclosure in § 84-712.05(4) and (5). Since you have not been denied access to public records, no further review by this office is necessary and we are closing this file. If you disagree with the conclusion reached above, you may wish to review the other remedies available to you under Neb. Rev. Stat. § 84-712.03.

Sincerely,

MIKE HILGERS
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Paula Gardner (via email only)

49-3178-30