



STATE OF NEBRASKA  
**Office of the Attorney General**

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**JON BRUNING**  
ATTORNEY GENERAL

**NATALEE J. HART**  
ASSISTANT ATTORNEY GENERAL

April 15, 2010

Andreas J. Allen  
Nebraska Firearms Owners Association  
PO Box 419  
Syracuse, NE 68446

RE: *File No. 10-R-114; City of Omaha; Andreas Allen*

Dear Mr. Allen:

This letter is in response to your Public Records complaint received by us on March 31, 2010, in which you requested our review of a response by the City of Omaha ("City") to your request for records. We have carefully reviewed your request and its enclosures under the Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Supp. 2009). We also contacted the Omaha City Attorney regarding your complaint, and reviewed the City's response before responding to your complaint. We have now concluded our review and our findings in this matter are set forth below.

### **FACTS**

Our understanding of the facts in this case is based on your Public Records Request, its enclosures, and the City's response. You sent a public records request to the City on March 9, 2010. Your complaint is that you believe the City improperly withheld documents pursuant to the attorney-client privilege.

### **ANALYSIS**

You have requested from the City an "opinion written in January or February of 2010; dealing with the registration of concealable firearms under city ordinance, by persons with a concealed weapons permit, as requested by the Omaha Police Department." The City ultimately responded to your request on March 24, 2010 with a denial based upon Neb. Rev. Stat. § 84-712.05(4), as the opinion and related documents "request legal assistance and provide legal advice" between the Omaha City Attorney's Office and the Omaha Police Department.

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The Nebraska Public Records Statutes are found at Neb. Rev. Stat. §§ 84-712 through 84-712.09. Neb. Rev. Stat. § 84-712.01(1) (2008) provides:

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.

The City, therefore, is subject to the Nebraska Public Records Statutes. Neb. Rev. Stat. § 84-712.05 (2009) sets forth certain public records which may be withheld from disclosure by the public body:

The following records, unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties, may be withheld from the public by the lawful custodian of the records:

(4) Records 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.

The City has withheld the document you requested as a record which is a confidential communication as defined in section 27-503. Neb. Rev. Stat. § 27-503 (2008) codifies the "attorney-client privilege" and sets forth the following definitions:

(1)(a) A client is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him;

(b) A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation;

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(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.

The relationship between the Omaha City Attorney's Office and the Omaha Police Department fits squarely in the definitions of lawyer and client, and an opinion from the attorney to the client may be held in confidence. Neb. Rev. Stat. § 27-503(3) states:

*The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.*

(emphasis added). The City of Omaha has claimed the attorney-client privilege, pursuant to Neb. Rev. Stat. § 84-712.05(4), on the opinion you requested written by an Assistant City Attorney for the Omaha Police Department. We have no reason to believe that the City does not have the authority to claim this privilege.

In your complaint, you cite two exceptions to the attorney-client privilege which you believe apply to this situation, found in Neb. Rev. Stat. § 27-503(4).

There is no privilege under this rule:

(a) If the services of the lawyer are sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

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(d) As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness.

Neither of these exceptions applies here. First, we fail to see how any fraud or crime was committed or planned between the Omaha Police Department and the Omaha City Attorney's Office. We do not believe that passing, or interpreting, an ordinance that contravenes state statute involves a crime or fraud. Second, the exception as to attested documents does not apply. An "attested document to which the lawyer is an attesting witness" is one in which an attorney has vouched for another's signature. This

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would apply, for example, where an attorney performed the duties of a notary public to a signature on a document. That is not the case here. A legal opinion from an attorney to a client is not an attested document to which the lawyer is an attesting witness.

We conclude that the City was entitled to keep the opinion you requested on March 9, 2010, confidential under the Nebraska Public Records Statutes. No violation of those statutes has occurred here.

We will however remind the City, through a copy of this letter to the City Attorney, that a response to a written public records request must be completed within four business days from the date the request is received. Neb. Rev. Stat. § 84-712(4) (2008). Our review indicated that the City did not comply with this requirement of the Public Records Statutes. However, we will take no action against the City for this oversight.

#### CONCLUSION

For the reasons stated above, we do not believe that you have been denied access to public records. If you disagree with our analysis under the Public Records Statutes set out above, you may wish to determine what additional remedies, if any, are available to you under those statutes.

Sincerely,

JON BRUNING  
Attorney General

A handwritten signature in black ink, appearing to read "Natalee J. Hart". The signature is written in a cursive, flowing style.

Natalee J. Hart  
Assistant Attorney General

cc: Thomas O. Mumgaard  
Deputy City Attorney, City of Omaha