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July 23, 2012

Mary Tingelhoff
353 City View Drive
Wahoo, NE 68066

RE: *File No. 12-R-118; City of Wahoo; Petitioner Mary Tingelhoff*

Dear Ms. Tingelhoff:

This letter is in response to your e-mail sent to this office on July 9, 2012, in which you requested our assistance in obtaining certain public records belonging to the City of Wahoo (the "City"). We have considered your e-mail under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010, Supp. 2011) ("NPRS"). Our findings and future action in this matter are set forth below.

FACTS

On July 2, 2012, you made a public records request to Jim Gibney, whom we understand is the utilities manager for the City of Wahoo. Specifically, you requested the following records:

> 1. All documents . . . regarding any complaint submitted to the City of Wahoo with regards to any waste water line or sewer line malfunction within the last five years. These documents should include everything from the submittal of the complaint, all internal communications between the City of Wahoo employees regarding said complaint, all external communications between the City of Wahoo employees and third parties regarding said complaint and the disposition of the complaint.
>
> 2. All documents . . . regarding the evaluation of the Chestnut Street waste water line within the last five years. These documents should include everything from the initial evaluation of the original Chestnut Street waste water line, all internal communications between the City of Wahoo

> employees regarding the evaluation of the original Chestnut Street waste water line, and all external communications between the City of Wahoo employees and third parties regarding said evaluation.
>
> 3. All documents . . . regarding the design and installation of the new Chestnut Street waste water line within the last five years. These documents should include everything from the initial design and installation of the new Chestnut Street waste water line, all internal communications between the City of Wahoo employees regarding the design and installation of the new Chestnut Street waste water line, and all external communications between the City of Wahoo employees and third parties regarding design and installation of the new Chestnut Street waste water line.

Later that afternoon, you received an e-mail response from City Attorney Jovan Lausterer, denying your request. In his e-mail, Mr. Lausterer stated the following as the reason for the City's denial:

> Our office has taken the position that the request is barred pursuant to Neb. Rev. Stat. 84-712.05(4). More specifically, legal authorities applying the attorney client privilege and attorney work product protections of the Freedom of Information Act and state public records access acts have held that such provisions are primarily designed to prevent a litigant opposing the government from using public records act's disclosure provisions to accomplish earlier or greater access to records pertaining to pending litigation or tort claims than would otherwise be allowed under the rules of discovery.

Mr. Lausterer also cited four cases in support of his reason for denial: *Renegotiation Board v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1 (1974); *Honeywell Inc. v. Consumer Product Safety Commission*, 582 F. Supp. 1072 (1984); *John Doe Agency & John Doe Government Agency v. John Doe Corporation*, 493 U.S. 146 (1989); and *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 853 P.2d 496 (1993).

You responded in turn, indicating that the information you were seeking was not attorney client privileged information or attorney work product. You further indicated that if the City did not comply with your request, you would file a complaint with this office. You indicate that Mr. Lausterer responded as follows: "I would suggest that you review the federal authorities as cited within my response as they are quite clear in that public records requests are barred during the pendency of a trial as such requests should be directed in the form of interrogatories and request for production pursuant to the Nebraska Rules of Discovery." Finally, you indicate that on July 9, you contacted

Mr. Lausterer to see if your records were ready to be picked up. He indicated that the City had not changed its position.

Also, for the record, the undersigned was contacted by Mr. Lausterer on July 9, 2012, regarding comments concerning provisions of the public records law[1] we made to your husband, Scott Tingelhoff, on July 5, 2012. In response to that inquiry, the undersigned wrote to Mr. Lausterer, in pertinent part:

> I was asked, in the context of a public records request, whether records involving "pending or threatened litigation" can be kept confidential. My response was generally no. In other words, just because there may be pending or threatened litigation does not make a certain record confidential and allow the custodian of the record to withhold it. However, clearly any record that constitutes attorney work product or falls under the attorney client privilege may be withheld under Neb. Rev. Stat. § 84-712.05(4).

On July 9, 2012, you filed your petition with this office.

ANALYSIS

The Nebraska Public Records Statutes generally allow interested persons in Nebraska the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts from those records, and to obtain copies of records in certain circumstances. Under those statutes, every record "of or belonging to" a public body is a public record which individuals may obtain a copy of unless the custodian of the record can point to a specific statute which allows the record to be kept confidential. The burden of showing that a statutory exception to disclosure applies to 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).

Although the Nebraska Public Records Statutes provide for access to public documents, they are not absolute. The NPRS also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). Section 84-712.05 is comprised of eighteen categories of documents which may be kept confidential from the public at the discretion of the agency involved. In the

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[1] This office has express enforcement authority over the Nebraska Public Records Statutes pursuant to Neb. Rev. Stat. § 84-712.03. As such, we are often contacted by government officials and private citizens to address those statutes, their meaning and application.

present case, the City initially cites to the exception set out in § 84-712.05(4) as the basis for its denial. That particular exception allows a public body to withhold

> [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 [attorney-client privilege].

In addition, the City also has taken the position that "public record requests are barred during the pendency of a trial as such requests should be directed in the form of interrogatories and request for production pursuant to the Nebraska Rules of Discovery." However, we are unaware of any Nebraska law or case law that would support this proposition. We have also reviewed the federal authorities and the California case relied upon by the City, and do not believe that those cases support the idea that, in Nebraska, you are precluded from submitting a public records request to a governmental agency while you have a pending lawsuit with that agency.

Notwithstanding the City's alternative position for denying you access to records, which we summarily reject, the City also denied you access to all of the requested records under the attorney work product doctrine and the attorney client confidential communication exception set out in § 84-712.05(4). However, we have reviewed the categories of documents that you have requested, and we simply do not see how that could be the case. For example, requested documents relating to "the design and installation of new Chestnut Street waste water line within the last five years" would not appear to be "[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 *privileged communications.* Consequently, we will request that the City provide us a description of the documents it has in its possession responsive to your request, and an explanation as to why the attorney-client privilege and the attorney work product doctrine apply to those records. We would also ask the City to strictly adhere to Neb. Rev. Stat. § 84-712.04, particularly subsection (1), which requires a public body, when denying a person access to public records, to provide

> [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; . . .

Finally, we would ask that the City provide us this information no later than the close of business on August 3, 2012.

In the meantime, if you have any questions with respect to the foregoing, please do not hesitate to contact the undersigned.

JON BRUNING
Attorney General

Leslie S. Donley
by DAC

Leslie S. Donley
Assistant Attorney General

cc: Jovan Lausterer

49-873-30