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

JON BRUNING
ATTORNEY GENERAL

NATALEE J. HART
ASSISTANT ATTORNEY GENERAL

December 4, 2013

Deena Winter
deenawinter@hotmail.com
Via e-mail only

RE: *File No. 13-R-138; City of Gretna; Complainant Deena Winter*

Dear Ms. Winter:

This letter is in response to your Public Records complaint received by us on November 19, 2013, in which you requested our review of a public record request made by you to the City of Gretna ("City"), through the City Clerk, for documents related to the Nebraska Crossing Outlet Mall. As is our normal practice with such complaints, we contacted the party against whom the complaint was made in regards to your complaint. We subsequently received a response from Jeff Miller, attorney for the City. We have now considered your complaint and the City's response under the Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2008, Cum. Supp. 2012, Supp. 2013), 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 Petition and the City's extensive response. On October 21, 2013 you requested

> to view all communications, written or electronic, between any city official in the city of Gretna regarding the subsidies to the Nebraska Crossing outlet mall with regard [to] marketing and communication. The redevelopment agreement with the developers says $16 million of the subsidies will be for marketing and communication – I am interested in any information about the specifics of those subsidies.

You included some additional e-mails in your Petition, including a follow-up e-mail on November 12, 2013 requesting the name of the City Attorney, and noting that you had not yet received a response to your request, and select e-mails dated back to

September 19, 2013. In its response, the City also provided us with e-mails between you and the City beginning on September 10, 2013, which provide a more comprehensive look at the history of your Public Records request and the information that has been provided to you by the City.

You have two complaints regarding the response of the City. One, that the City did not respond within four business days of your October 21, 2013 request; and two, that the City is improperly withholding documents which are responsive to your request without providing you with a proper denial under the Public Records Statutes. Because the facts as to your two complaints are identical, they involve the same provision of the Public Records Statutes, and the issues are so intertwined, we will discuss both together.

ANALYSIS

The Nebraska Public Records Statutes are found at Neb. Rev. Stat. §§ 84-712 through 84-712.09. Neb. Rev. Stat. § 84-712 (2013) provides:

> (4) Upon receipt of a written request for access to or copies of a public record, the custodian of such record shall provide to the requester as soon as is practicable and without delay, but not more than four business days after actual receipt of the request, an estimate of the expected cost of the copies and either (a) access to or, if copying equipment is reasonably available, copies of the public record, (b) if there is a legal basis for denial of access or copies, a written denial of the request together with the information specified in section 84-712.04, or (c) if the entire request cannot with reasonable good faith efforts be fulfilled within four business days after actual receipt of the request due to the significant difficulty or the extensiveness of the request, a written explanation, including the earliest practicable date for fulfilling the request, an estimate of the expected cost of any copies, and an opportunity for the requester to modify or prioritize the items within the request. The requester shall have ten business days to review the estimated costs, including any special service charge, and request the custodian to fulfill the original request, negotiate with the custodian to narrow or simplify the request, or withdraw the request. If the requester does not respond to the custodian within ten business days, the custodian shall not proceed to fulfill the request. The four business days shall be computed by excluding the day the request is received, after which the designated period of time begins to run. Business day does not include a Saturday, a Sunday, or a day during which the offices of the custodian of the public records are closed.

The relevant history related to your complaint is as follows. On September 10, 2013, the City's e-mail records show you were provided with the "Redevelopment Agreement" for the Nebraska Crossing Outlet Mall project. Following receipt of that document, in September and early October, you posed questions of the City via e-mail regarding advertising at the Outlet Mall. The City Clerk advised on September 19 and again on October 1 that the City had no information regarding advertising at the Outlet Mall and that you must contact the developer for such information.

You then made the Public Records request relevant to your Petition, as quoted above, on October 21. The e-mails provided by the City show you followed-up with the City Clerk on November 4, 2013 inquiring as to your request. She replied approximately 20 minutes later, apologizing for the delay and explaining she had been out of the office with an injury. She sought clarification of your request. You responded the following day, November 5, and the City Clerk then provided you with information and explanation regarding incentive money as it relates to communication and marketing. You posed additional questions to the City Clerk, which she then also shared with the City Administrator. Additionally, in an effort to further clarify the information relating to marketing and communication funds, the City had attorney Kent Seacrest create a Memorandum on November 12, 2013, which was provided to you the same day, explaining "LB 562 proceeds" and "LB 562 Improvements." The final e-mail we have been provided is dated November 12, from you to the City Clerk and states, with respect to the Seacrest memo: "That helps. So the city has no other written or electronic documents on this topic? That is what I was requested (sic) in the open records request. If you're not used to dealing with such records request (sic), feel free to give me a call and I can clarify."

The City has also advised that as of November 19, 2013 differing City officials, including the City Attorney, the City Clerk, and the City Administrator had had telephone conversations with you assuring you that you had previously received all documents in the possession of the City which were responsive to your Public Records Request of October 21, 2013. This City Attorney insists, in his letter to this office, that "there are no other documents which are responsive to [the October 21] request, and the City cannot provide documents that do not exist. I personally discussed and explained this to Ms. Winter during our telephone conversation." Additionally, the City Attorney has verified, once again, with the City Clerk, the City Administrator, and attorney Kent Seacrest "that there are no documents outside of or other than the Redevelopment Agreement which list, itemize, describe, or narratively discuss the different types of advertising (i.e., marketing and communication) or the amounts to be spent thereon, which the redeveloper will do for Nebraska Crossing."

It appears to us that the City has been forthcoming with you, and has gone beyond the requirements of the Public Records Statutes in answering questions posed by you via e-mail. The Public Records statutes do not require a public body to create records which do not exist nor do they require a public body to answer any questions posed of it. They only require a public body to provide documents responsive to a request.

Consequently, as to your allegation that the City has not provided all documents which are responsive to your request, we cannot agree. It is clear that the City has assured you on a number of occasions that you have received all responsive documents. It even went to the lengths of creating an additional document on November 12 to ensure that you had all possible information related to your request. As the City has insisted on a number of occasions that you have been provided with all documents, we must presume that it is acting in compliance with the Public Records Statutes, unless there is specific evidence to the contrary. We are in possession of no facts or evidence that would lead us to conclude that the City is withholding any documents responsive to your request.

You also complain that the City did not respond within four business days. Your Public Records request was submitted via e-mail to the City on October 21, 2013. The City's response, therefore, was due to you on October 25, 2013. However, the City has argued to this office that the requirements of Neb. Rev. Stat. § 84-712(4) do not apply to your request because you had previously been provided with all documents maintained by the City which were responsive to your request. Therefore, the City concludes, it was under no obligation to respond to your October 21 request within four business days. It argues that because Neb. Rev. Stat. § 84-712(4) requires a public body to either (1) produce responsive records, (2) provide a denial letter, or (3) explain a delay in providing records, that responding to your request explaining that you have previously been provided all records is not covered by this statute.

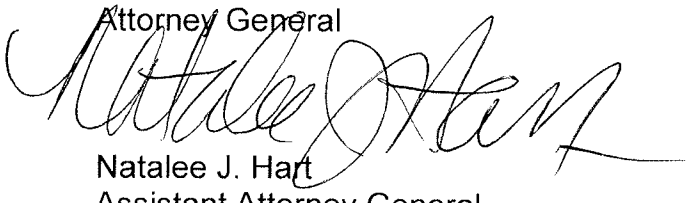
However, we do not agree with the City. In essence, the City is advocating that the statute allows a public body to ignore a public records request if it has been fulfilled previously or if the public body has no documents responsive to the request. However, such a result does not comply with the spirit of the Public Records Statutes. This office has previously stated that there is a fourth, albeit unwritten, option in Neb. Rev. Stat. § 84-712(4) for responding to a public records request. The public body may inform the requestor that it has no documents responsive to a request, or, as in this case, that it has previously provided all documents responsive to a request. A public body may not, however, ignore a written request for documents. All requests for public records, properly filed under the Nebraska Public Records Statutes, must be afforded a response by the public body to whom they are directed. We agree with you that the City did not respond to your October 21 request within four business days. However, as you had previously been provided with all documents responsive to your request, the delay in responding did not cause you to be denied access to any public records. We will advise the City, through a copy of this letter, that all public records requests, even if previously fulfilled, must be responded to within four business days of receipt.

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



Natalee J. Hart
Assistant Attorney General

cc: Jeff Miller

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