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ATTORNEY GENERAL

NATALEE J. HART
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June 18, 2015

Mike Nutting
86848 Hwy 13
Creighton, NE 68729

RE: *File No. 15-R-125; City of Creighton; Mike Nutting, Petitioner*

Dear Mr. Nutting:

This letter is in response to your Public Records petition received by us on June 3, 2015. You seek our review of responses to two requests made by you to the City of Creighton ("City") for certain records belonging to the City. As is our normal practice with such requests, we contacted the party against whom the complaint was made and spoke with the City Administrator, Lisa Parnell, on June 4, 2015. We have carefully reviewed your request, its enclosures, and materials received by our office from the City under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2014). 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 information received from the City. On May 1, 2014, you submitted the following public records request to the City:

> On 3-26 Marshalls [sic] bill "call to outside atty"
> 1. Who was outside atty?
> 2. Was brief or opinion given? I would like a copy
> 3. Charge from outside atty.

On May 6, 2014, a response was sent to you by Allison Bentley, the former City Administrator. That response included materials provided pursuant to a second public records request made by you on May 1, which is not the subject of your petition, along with materials to satisfy the first and third requests, as reproduced above. As to your request for any brief or opinion written by the City's outside counsel, Mike Cox of Koley Jessen P.C., L.L.O., the City denied your request under Neb. Rev. Stat. § 84-712.05(4), attorney-client privilege and the work product doctrine.

On May 12, you made an additional public records request of the City for:

> A copy of the opinion written by Mike Cox, from the firm Koley Jessen, addressing Free Speech and concerning actions against me. I further request all attorney notes, email, letters, and any other written communication that passed between Lawyer Marshall, ACT Bentley, Mayor Keck, and all City Councilmen concerning action against me.

The City denied this public record request under Neb. Rev. Stat. § 84-712.05(4), attorney-client privilege and the work product doctrine.

You seek our review of the denial by the City of your May 1 and May 12 requests for materials prepared by the City's outside counsel and documents exchanged between the former City Attorney, Andrew Marshall, and various City officials.

ANALYSIS

Generally speaking, the Nebraska Public Records Statutes ("NPRS") allow interested persons the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts from those public records, and to obtain copies of public records in certain circumstances. However, while the NPRS provide for access to and copies of public records, it does not require public officials to answer questions, or to create records which do not otherwise exist. Additionally, even though the NPRS do provide for access to public documents, they are not absolute, and they also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983).

Neb. Rev. Stat. § 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 particular, as relevant here, § 84-712.05(4) provides:

> 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 documents you requested as records which are 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:

> (1) As used in this rule:
>
> > (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;
> > ***
> > (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.
>
> (3) 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.

The relationship between the City of Creighton and its attorneys, whether the appointed City Attorney or outside counsel hired to assist the City Attorney, fits squarely in the definition of lawyer and client, and an opinion from the attorney to the client may be held in confidence. The City has claimed the attorney-client privilege, pursuant to Neb. Rev. Stat. § 84-712.05(4), on the documents you seek concerning legal advice to the City from Mike Cox and Andrew Marshall. We have no reason to believe that the City does not have the authority to claim this privilege. The attorney-client and work product privileges may be claimed whether Mr. Cox and/or Mr. Marshall continue to represent the City, or not. Dissolution of the attorney-client relationship does not

terminate the continued existence of the privilege between attorney and client or the protection of any attorney work product; nor does the expiration of the statute of limitations. Based on the information you provided to us in your petition, the legal advice provided by Mr. Cox and/or Mr. Marshall to the City was related to possible litigation with you concerning letters to the editor you wrote to the local paper. We believe such advice qualifies as being related to "preparation for litigation" and/or "claims made by or against the public body." The Nebraska Public Records Statutes do not require litigation to have actually been commenced in order for the related documents to be kept confidential by the public body. As a result, we believe the City may withhold the requested documents under the Nebraska Public Records Statutes.

Your petition states that you "think the law says something about exempt union negotiations, personnel matters, and PENDING litigation." However, we believe you are referring to the provisions in the Open Meetings Act which allow a public body to go into closed session for certain reasons. *See* Neb. Rev. Stat. § 84-1410(1)(a). That provision is separate from the one upon which the City relies in keeping these documents confidential.

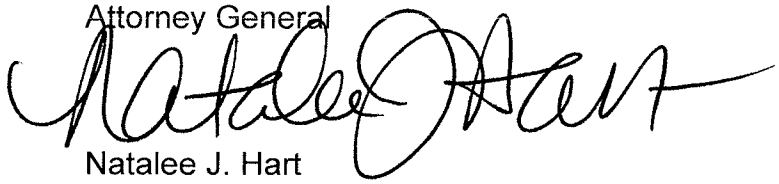
We conclude that the City was entitled to keep the documents you requested on May 1, 2014 and May 12, 2015 confidential under the Nebraska Public Records Statutes and is not in violation of those statutes by so doing.

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,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Lisa Parnell

02-507-29