



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

DALE A. COMER
ASSISTANT ATTORNEY GENERAL
CHIEF, LEGAL SERVICES BUREAU

August 1, 2012

Mr. Charles D. Tobin
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W. Suite 100
Washington, DC 20006

Re: File No. 12-R-121; City of Bellevue; Tobin/Gray Television.

Dear Mr. Tobin:

This letter is in response to your correspondence dated July 16, 2012, regarding the City of Bellevue, Nebraska (the "City") and the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010, Supp. 2011). We received your correspondence on July 17, 2012, and we considered that correspondence to be a petition under § 84-712.03. Our response to your petition is set out below.

FACTS

Our understanding of the facts in this case is based upon your letter and the materials which you provided to us with it. We have also discussed this matter with counsel for the City, and reviewed the City's technology policy.

You represent Gray Television station, WOWT-TV, which has its principal office in Omaha, Nebraska. On June 13, 2012, WOWT reporter Brian Mastre submitted a public records request by email to Bellevue City Attorney Patrick Sullivan requesting "email correspondence between Chief Stacey and Ms. Lawry which was subpoen[a]ed by the Sarpy County Attorney." Shortly thereafter, attorney Aimee C. Bataillon, on behalf of Mr. Sullivan and the City, denied access to the records in question for the stated reason that the requested documents fell "within the scope of the City's investigation into Chief Stacey's actions and contain personal information in records regarding City personnel." Ms. Bataillon relied upon §§ 84-712.05(5) and 84-712.05(7) as the statutory basis for her denial of access to those records.

Mr. Charles D. Tobin
August 1, 2012
Page 2

On June 20, 2012, your office submitted a modified records request to the City on behalf of WOWT. In that instance, you requested “[a]ll correspondence, including but not limited to email correspondence, between former Bellevue Chief of Police John Stacey and former Gretna City Administrator Colleen Lawry.” Ms. Bataillon responded to your second request for records on June 26, 2012 and again denied WOWT access to the records at issue. Ms. Bataillon indicated that:

These documents contain personal information in records regarding City personnel. As such the City is denying your public records request based upon Neb. Rev. Stat. § 84-712.05 (7).

The second denial letter from Ms. Bataillon precipitated your public records petition to this office.

The City apparently does have email correspondence between former Bellevue Chief of Police John Stacey and former Gretna City Administrator Colleen Lawry which is responsive to your records request.

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 therefrom, and to obtain copies of records in certain circumstances. However, while the Nebraska Public Records Statutes 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). For example, § 84-712.05 sets out a number of categories of documents which may be kept confidential from the public at the discretion of the agency involved.

In this instance, the City relies on § 84-712.05 (7) as a basis for keeping the email correspondence at issue confidential. That statutory exception to disclosure pertains to “personal information in records regarding personnel of public bodies other than salaries and routine directory information.” You maintain that § 84-712.05 (7) does not apply to email correspondence from one public official to another which is not part of an employee’s internal personnel file.

In Nebraska, in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Swift and Company v. Nebraska Department of Revenue*, 278 Neb. 763, 773 N.W.2d 381 (2009). In that regard, “personal” is defined as “1. Of or affecting a

Mr. Charles D. Tobin
August 1, 2012
Page 3

person” Black’s Law Dictionary 932 (abridged 7th ed. 2000). Webster’s New Universal Unabridged Dictionary 1338 (2nd ed. 1983) defines “personal” as “2. Private; individual; affecting individuals; peculiar or proper to a certain person or to private actions or character; . . .” “Information” may be defined as “knowledge acquired in any manner; facts; data; learning; lore. . . .” Webster’s at 940. Based upon those definitions, we believe that personal information regarding personnel of public bodies includes private facts concerning those individuals. We also believe that email exchanges between public officers in connection with their official duties would not generally constitute such private facts. In addition, it is our understanding that the City’s Technology Policy provides that emails sent or received on City computers are not considered private or restricted communications. For those various reasons, we conclude that the email correspondence at issue in this instance may not be kept confidential on the basis of § 84-712.05 (7).

On the other hand, in our conversations with counsel for the City, counsel also asserted the exception to disclosure for investigatory records set out in § 84-712.05 (5) as an additional basis for keeping portions of the email exchanges at issue confidential. In that regard, the City has previously represented to us that it conducted its own internal investigation of former Chief Stacey’s conduct regarding an alleged violation of Neb. Rev. Stat. § 69-2403 (2010) for providing Lawry with a gun, and regarding potential personnel actions against former Chief Stacey. Some of the email exchanges responsive to your request were judged to be relevant to that investigation, and were gathered by the City as a part of that investigation. We previously determined, in connection with another public records petition very similar to your current request, that those precise emails gathered by the City were investigatory records. We continue to believe that to be the case, even though the City has no ongoing investigation at this time.¹ Consequently, we believe that the City may keep those portions of the email exchanges at issue which were part of its investigation of former Chief Stacey confidential under § 84-712.05 (5). The remainder of the emails responsive to your request should be provided to you.²

1. The exception to disclosure for investigatory records contained in § 84-712.05(5) contains no limitation as to time, and we have consistently taken the position that investigatory records remain subject to confidentiality under that exception even after an investigation is completed. The fact that an investigation is completed creates an argument that a public body should exercise its discretion and voluntarily release particular investigatory records.

² Under the Public Records Statutes, the City can charge you the actual cost of providing copies to you including the cost of any searches conducted in connection with your records request.

Mr. Charles D. Tobin
August 1, 2012
Page 4

It is our understanding that the City will provide you with copies of the email exchanges discussed above in accordance with our analysis. Therefore, it does not appear that you will be denied access to public records, or that there is any need for further action by this office. We will, however, suggest to the City that any future denials of access to public records under § 84-712.04 should contain a more detailed description of the records withheld.

We are closing this file. If you disagree with our analysis of this matter, you should review the Nebraska Public Records Statutes to determine what, if any, additional remedies are available to your client.

Sincerely,

JON BRUNING
Attorney General

A handwritten signature in black ink, appearing to read "Dale A. Comer". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Dale A. Comer
Assistant Attorney General
Chief, Legal Services Bureau

cc. Aimee Bataillon

05-408-30