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Office of the Attorney General

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August 17, 2020

Via email at [REDACTED]
Andy Harpenau

RE: *File No. 20-R-122; City of Gretna; Andy Harpenau, Petitioner*

Dear Mr. Harpenau:

This letter is in response to your petition received by this office on July 31, 2020, in which you requested that this office review the denial by the City of Gretna (“City”) of ten public records requests you mailed to the City on or about February 8 and 22, 2020. You also allege that the City failed to timely respond to your requests.¹ In accordance with our normal practice, we forwarded a copy of your petition to Gretna City Administrator Jeff Kooistra, and advised him of the opportunity to respond to the petition. On August 11, we received a response from Gretna City Attorney, Jeff Miller. We have considered your petition and the City’s response in accordance with the provisions of the Nebraska Public Records Statutes (“NPRS”), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018, Supp. 2019). Our findings in this matter are set out below.

FACTS

You mailed seven separate public records requests to the City on February 8, 2020, and three separate requests on February 22, 2020. Each public records request begins with the statement: “Please send the following information . . .” and concludes with “[t]he address to mail to: . . .” Each request and the City’s response is summarized below using the “FOIA”² designation specified in your petition, as follows:

¹ You further allege that “there are several examples of misconduct and discriminatory actions on display” by the City. However, our authority under Neb. Rev. Stat. § 84-712.03(1)(b) of the NPRS is limited to determining whether you have been unlawfully denied access to public records or whether the public body involved is in compliance with these statutes. We are not authorized to make any determinations with respect to the ongoing disagreements and conflicts you may have with the City of Gretna.

² For your information, the Freedom of Information Act or *FOIA* is a federal law, codified at 5 U.S.C. § 552, which provides a statutory right to obtain access to federal agency records subject to certain

“FOIA #1”—dated February 8, 2020. This request sought the minutes from the January 21, 2020, city council meeting, and the audio recording from the meeting. According to the return receipt card, the City received your request on February 12, 2020. By letter dated February 18, 2020, Mr. Kooistra “partially denied” your request. He indicated that the minutes were available on the City’s website at www.gretnane.org, or you could examine the minutes free of charge at city hall. The partial denial was based on the fact that no audio recording for January 21 meeting existed.³

“FOIA #2”—dated February 8, 2020. This request sought “[a] copy of the written and signed complaint that was stated to have been filed against Gretna Sanitation and was referred to at the [Jan. 21] meeting.” According to the return receipt card, the City received your request on February 11. By letter dated February 18, Mr. Kooistra denied your request on the basis of the exception in Neb. Rev. Stat. § 84-712.05(5).

“FOIA #3”—dated February 8, 2020. This request sought certain information relating to a complaint filed with the Nebraska Department of Environmental Quality (“NDEQ”) on February 6, 2020. According to the return receipt card, the City received your request on February 11. By letter dated February 18, Mr. Kooistra denied your request on the basis of the exception in Neb. Rev. Stat. § 84-712.05(5).

“FOIA #4”—dated February 8, 2020. You requested that the City “send the following information pertaining to a conversation had in a meeting at and concerning the new construction building at 21824 Williams Cir and denying a final inspection.” One of the items included “copies of inspection paperwork for these projects that were done by Kris Faris.” According to the return receipt card, the City received your request on February 11. By letter dated February 18, Mr. Kooistra denied your request, stating in pertinent part:

[Your request] involves a continuing dispute between you (d/b/a/ Gretna Sanitation) and the City of Gretna, and [your request] make statements and assertions and asks questions about what certain City staff supposedly said, did, or did not do. But the [NPRS] do not require the City to provide written responses or information and the supporting documents therefor, about what certain City staff supposedly said, did or did not do, in response to a citizen’s letter or complaint about the City staff’s supposed statements, actions and inactions. Nor do the [NPRS] require the City to create lists or any new documents in response to a citizen’s letter, complaint or request.

exemptions. FOIA provides no basis to obtain public records belonging to state and local governmental agencies in Nebraska.

³ As discussed later in this disposition letter, a denial of records under the NPRS requires compliance with Neb. Rev. Stat. § 84-712.04. If a public body does not have records responsive to a particular request, there is no denial *per se*.

“FOIA #5”—dated February 8, 2020. This request sought: (1) the “[p]ermit to haul applications and approvals” for fifteen listed companies operating in the City; (2) complaints filed against any hauler from 2019-2020; (3) a “[c]omplete list of annual licenses, occupation taxes, permits etc. (fees) . . . imposed upon businesses operating in Gretna”; (4) a [c]omplete list of the individual businesses that are sent notice of the above”; (5) a [c]omplete list of businesses that have or have not paid fees for the years 2018-2020. The final item requested the City to “[s]end documentation/code/ordinance that details who is required to pay the above fees, the penalty if they do not and which Gretna employee(s) are responsible for enforcement.” According to the return receipt card, the City received your request on February 11. By letter dated February 18, Mr. Kooistra partially denied your request. With respect to items 1, 2, 4 and 5, Mr. Kooistra indicated that those records did not exist. For items 3 and 6, he indicated that you could examine Gretna Ordinance No. 2051 free of charge at city hall.

“FOIA #6”—dated February 8, 2020. You requested that the City explain a statement contained in a letter sent to you by the City on January 15, 2020, provide proof of allegations, and send documentation supporting another statement. According to the return receipt card, the City received your request on February 11. By letter dated February 18, Mr. Kooistra denied your request indicating that the NPRS “do not require the City to provide written responses or information, or explanations or proof, or supporting evidence/documentation for any matters set forth in a City letter. Nor do the [NPRS] require the City to create lists or any new documents in response to a citizen’s letter, complaint or request.”

“FOIA #7”—dated February 8, 2020. This request sought information about the City’s complaint process, including “[d]ocumentation/code/ordinance that describes how a complaint from the public be filed in order for it to be enacted upon by the City” and a “[c]opy of the complaint form that is filled out by complainant.” According to the return receipt card, the City received your request on February 13. By letter dated February 18, Mr. Kooistra partially denied your request indicating that “no such public complaint descriptions, documents, information or protocols exist, and the [NPRS] do not require the City to create such or any new documents in response to a citizen’s letter, complaint or request.” With respect to the complaint form, Mr. Kooistra indicated that you could examine the form free of charge at city hall.

“FOIA #8”—dated February 22, 2020. This request sought certain information regarding the property located at 21864 Platteview Road, including, but not limited to, the building permit application, approval, fee schedule, correspondence between property owner and City staff regarding the project, building plans and specs, NDEQ inspection paperwork, and code violations cited during construction. According to Mr. Kooistra, the City received your request on February 24. By letter dated February 28, Mr. Kooistra partially denied your request to the extent that some items listed in your request did not exist and the City was not required to create new documents under the NPRS. However,

he indicated that some documents responsive to your request did exist, and you could examine those records free of charge at city hall.

“FOIA #9”—dated February 22, 2020. This request sought the following:

1. Protocol/repercussions for complaints filed against Gretna City staff
2. Records indicating the chain of command at the City of Gretna
3. Records and protocols relating to conducting complaint investigations when a citizen complaint is filed against City staff.
4. All complaints filed against City of Gretna and staff for the years 2018, 2019, 2020
5. Disciplinary action taken in response to these complaints

According to Mr. Kooistra, the City received your request on February 24. By letter dated February 28, Mr. Kooistra partially denied your request. He indicated that items 4 and 5 constitute personal information in records of City personnel, and is not salary or routine directory information. Consequently, Mr. Kooistra denied you access to these records under Neb. Rev. Stat. § 84-712.05(7). Similarly, to the extent items 1 and 3 constitute personal information pertaining to City personnel, those records were also withheld under § 84-712.05(7). However, to the extent items 1 and 3 relate to “written procedures for investigations involving citizen complaints involving City staff,” and as to item 2, Mr. Kooistra advised that you could examine the “Employee Handbook and Personnel Manual and an organizational chart free of charge” at city hall.

FOIA #10—dated February 22, 2020. This request sought the “[a]nnual salaries, including bonuses, sick time, paid time off, vacation time, cell phone payments, city vehicle incentives, health insurance, pay stubs and any other financial compensation itemized” for four City employees for the years 2014-2020. You also requested the “[l]egal bills submitted to and paid by the City of Gretna from Young and White Law Offices and Jeff Miller for the following years: 2014, 2015, 2016, 2017, 2018, 2019, 2020.” According to Mr. Kooistra, the City received your request on February 24. By letter dated February 28, Mr. Kooistra partially denied your request, indicating that bonuses, sick leave, paid time off, vacation time, cell phone payments, city vehicle incentives and other itemized financial compensation constituted personal information in the records of City personnel and would be withheld under Neb. Rev. Stat. § 84-712.05(7). However, Mr. Kooistra indicated that certain salary information would be available for examination free of charge at city hall. With respect to the requested legal bills, those records were withheld under the exception in Neb. Rev. Stat. § 84-712.05(4), pertaining to confidential attorney-client communications and attorney work product.

By letter dated July 11, 2020, you informed the City that “[d]ue to an exposure to Covid-19, I am unable to physically enter City Hall. I am requesting that all records that were requested from previous FOIA attempts be copied and mailed to the below address.”

The City's response indicates that copies of responsive records pertaining to FOIA ## 1, 5, 7, 8, 9, and 10 were subsequently mailed to you on July 21.

You have alleged that the City's responses were untimely; that requiring you to enter city hall and request the records again "was an attempt to cause us hardship . . . and therefore discourage us from obtaining the records"; that there is no formal investigation being conducted that would allow the City to withhold records under Neb. Rev. Stat. § 84-712.05(5); that Neb. Rev. Stat. § 84-712.03 does not support the City's denial of your requests; and that the exceptions in Neb. Rev. Stat. § 84-712.05(4) and (7) do not provide a basis to withhold the requested records.

DISCUSSION

We will begin our discussion with some comments regarding the general parameters of the NPRS. These statutes allow Nebraska citizens and other 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 records, and to obtain copies of records in certain circumstances. Under the NPRS, 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. However, there is no absolute right to access public records in those instances where records are exempt from disclosure by statute. This office has also consistently taken the position that the NPRS do not require public officials to answer questions or to create documents which do not otherwise exist. See Op. Att'y Gen. No. 87104 (October 27, 1987); Op. Att'y Gen. No. 94035 (May 13, 1994). Instead, those statutes focus on access to and obtaining copies of specific records.

Neb. Rev. Stat. § 84-712(4) (2014) sets out the basic procedure to obtain public records. This statute provides that

[u]pon 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.

As you can see, § 84-712(4) requires the custodian to respond to the requester no more than four business days after actual receipt of a written request. For example, if a public body receives a public records request on September 3, 2020, September 4 would be day one, September 8 would be day two, September 9 would be day three, and September 10 would be day four. The weekend days (September 5-6) and Labor Day (September 7) are not counted. Accordingly, so long as the response is emailed or postmarked on September 10, the response is timely. The actual response may take several different forms. For example, the custodian (1) can provide the requester with the requested records; (2) deny access to the records, and provide the basis for denying access; (3) indicate that more time is necessary to produce the requested records; or (4) inform the requester that there are no records responsive to the request.

In the event a public body denies a requester any rights granted to him or her under Neb. Rev. Stat. §§ 84-712 to 84-712.03, the public body must provide the requester the following information, in writing:

- (a) 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;
- (b) The name of the public official or employee responsible for the decision to deny the request; and
- (c) Notification to the requester of any administrative or judicial right of review under section 84-712.03.

Neb. Rev. Stat. § 84-712.04 (2014).

We will now turn to your specific requests:

FOIA #1

The City received your request on February 12 and mailed its response on February 18. Four business days after February 12 is February 19. The weekend days and Presidents' Day are not counted in calculating the four business days. Thus, the response was timely.

The City was acting in accordance with § 84-712(3)(a) when it directed you to its website to obtain a copy of the meeting minutes.⁴ This provision states, in pertinent part, that § 84-712 "shall not be construed to require a custodian to copy any public record that is available to the requester on the custodian's web site on the Internet. The custodian of the public record is required to provide the location of the public record on the Internet to the requester." The custodian is only required to produce a copy when "the requester does not have reasonable access to the Internet due to lack of computer, lack of Internet availability, or inability to use a computer or the Internet." However, we understand that the City mailed a copy of the minutes to you in response to your July 11 request. With respect to the audio recordings, both Mr. Kooistra and Mr. Miller represent that no such recordings exist.

FOIA #2

The City received your request on February 11, and mailed its response on February 18. Based on the analysis discussed in our response to FOIA #1 above, the City's response was timely.

We further conclude that the City may withhold the requested complaint under Neb. Rev. Stat. § 84-712.05(5). Neb. Rev. Stat. § 84-712.05 contains categories of public records that may be withheld at the discretion of the records custodian, "unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties." Subsection (5) pertains in part to

[r]ecords developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, when the records constitute a part of the examination, investigation, intelligence information, citizen complaints or inquiries, [and] informant identification

Mr. Miller represents that the City received a citizen complaint "about conduct or actions by [you] and/or Gretna Sanitation." He indicates that the complaint is part of its ongoing

⁴ We did not consider your allegations that the meeting minutes were incomplete in our review of this public records petition file. Please keep in mind that under Neb. Rev. Stat. § 84-1413(1) (Cum. Supp. 2018), meeting minutes must contain "the time, place, members present and absent, and the substance of all matters discussed." Meeting minutes are not required to be a verbatim transcript of the proceedings. If you want to pursue this issue, please advise.

investigation and examination into numerous violations” Mr. Miller also states that the mayor mentioned receipt of the complaint during the January 21, 2020 city council meeting, but the topic was not on the agenda, nor was it part of the agenda materials. Since the complaint was not generally disclosed at the meeting, the City is not precluded from relying on the exception to withhold the requested complaint. We note that while the City’s response refers to a specific statute as authority for its denial, the response does not include a general description of the records being withheld, which is required under § 84-712.04(1)(a).

FOIA #3

The City received your request on February 11, and mailed its response on February 18. Based on the analysis discussed in our response to FOIA #1 above, the City’s response was timely.

Our response to FOIA #2 with respect to the City’s ability to withhold complaint information pursuant to § 84-712.05(5) applies to this particular request as well.

FOIA #4

The City received your request on February 11, and mailed its response on February 18. Based on the analysis discussed in our response to FOIA #1 above, the City’s response was timely.

We agree with the City that it is under no obligation to send you documentation to support statements made and actions taken by City officials. In addition, the City is not required to answer questions presented in a public records request. It is up to you to articulate the records you wish to receive. In that regard, we note that you did request that the City “[s]end copies of inspection paperwork for these projects that were done by Kris Faris” under item 2. Consequently, we will ask Mr. Miller to follow up with Mr. Kooistra to determine if any such records exist.

FOIA #5

The City received your request on February 11, and mailed its response on February 18. Based on the analysis discussed in our response to FOIA #1 above, the City’s response was timely.

The City represents that it had no records responsive to items 1, 2, 4, and 5. As discussed above, a public body is not required to review documents and create abstracts or other lists, to answer questions or to create documents which do not otherwise exist. With respect to items 3 and 6, you were initially advised that you could review an ordinance at city hall. However, the City mailed you responsive records on July 21.

As we noted on page 1, each of your requests asked that the following information be sent to you at a physical address listed in the request. However, in each case where responsive records were available, the City advised that you could examine the records free of charge at city hall. We disagree that there was any ambiguity regarding your request for *copies*. It is also irrelevant that some of the records may have been quite voluminous or that you have access to city hall. The NPRS allows a public body to charge for the actual cost of the copies, including a special service charge for “searching, identifying, physically redacting, or copying” public records. Neb. Rev. Stat. § 84-712(3)(c) (2014). In addition, in the event the estimated costs exceed \$50, the City has the option to ask for a deposit prior to beginning its search and production. Consequently, we find that the City failed to comply with § 84-712 when it did not provide an estimate of costs for copies of responsive records in its response.

FOIA #6

The City received your request on February 11, and mailed its response on February 18. Based on the analysis discussed in our response to FOIA #1 above, the City’s response was timely.

As noted in our responses to FOIA ## 4 and 5 above, the City is not required to answer questions, or provide documentation to support statements made or actions taken by City officials.

FOIA #7

The City received your request on February 13, and mailed its response on February 18. Based on the analysis discussed in our response to FOIA #1 above, the City’s response was timely.

While the City did not have responsive records to items 1 and 2 of this request, it did have a complaint form responsive to item 3. As discussed in our response to FOIA #5 above, the City should have provided you a copy of this form in accordance with your February 8 request. We note that the City mailed you a copy in response to your July 11 letter.

FOIA #8

The City received your request on February 24, and mailed its response on February 28, which is four business days after February 24. Thus, the response was timely.

The City’s response to this request does not comport with § 84-712. To the extent the City had records responsive to the items in your request, it should have provided you an estimate of costs relating to obtaining those copies or simply provide you the copies

of the requested records. We note that the City mailed you responsive records on July 21.

FOIA #9

The City received your request on February 24, and mailed its response on February 28, which is four business days after February 24. Thus, the response was timely.

We conclude that the City's reliance on Neb. Rev. Stat. § 84-712.05(7) (Supp. 2019) to withhold some of the requested information was appropriate. Subsection (7) allows public bodies to withhold "[p]ersonal information in records regarding personnel of public bodies other than salaries and routine directory information." It appears to us that complaints filed against City of Gretna staff and any resulting disciplinary action taken as a result of those complaints would constitute personal information in records regarding City staff. However, as noted in our response to FOIA #5, the City has an obligation to generally describe the records that are being withheld in accordance with Neb. Rev. Stat. § 84-712.04(1)(a). Finally, as previously discussed, the City had an obligation to provide you an estimate of costs for any responsive records or, alternatively, provide you copies. We note that the City mailed you responsive records on July 21.

FOIA #10

The City received your request on February 24, and mailed its response on February 28, which is four business days after February 24. Thus, the response was timely.

The exception in Neb. Rev. Stat. § 84-712.05(7) discussed in FOIA #9 above relates to personal information in records of personnel of public bodies, *except* for salaries and routine directory information. The items listed in item one, except for "[a]nnual salaries" and "pay stubs," constitute personal information and may be properly withheld under § 84-712.05(7). As previously discussed, the City had an obligation to provide you an estimate of costs for the salary information or, alternatively, provide you copies. We note that the City mailed you responsive records on July 21.

Your final request relates to the legal bills submitted to the City by Mr. Miller for the years 2014 to 2020. With respect to those bills, Mr. Miller states that they were properly withheld under §§ 84-712.05(4) and 27-503 "because they are itemized statements which among other things detail and describe attorney-client communications between us and the Mayor, Council members, City staff, and City consultants" Mr. Miller further states that the statements "detail and describe attorney work and attorney work product in a great multitude of confidential City matters" Mr. Miller asserts that the "statements are thus privileged and confidential and are therefore not intended to be disclosed to third parties other than City officials and staff whom disclosure is in

furtherance of the rendition of legal services to the City and are reasonably necessary for the transmission of those communications.”

Our office has previously analyzed whether attorney fee statements could be properly withheld under the exception set out in § 84-712.05(4). In a 2008 disposition letter involving this issue and the Cass County Board of Commissioners, we wrote:

From our research concerning previous public records matters, it appears that there is case authority which generally supports the notion that itemized fee statements can constitute attorney work product and/or communications subject to the attorney/client privilege under certain circumstances. For example, with respect to attorney work product, some courts have indicated that itemized descriptions of the work which an attorney has performed for a client can offer insight into the attorney’s thought processes or legal theories for a particular case. On the other hand, we do not believe that a simple designation of hours worked along with a general description of the time spent such as “review of discovery” or “preparation of trial brief” normally offers insights into an attorney’s thought processes or implicates a privileged communication with the attorney’s client.

Disposition Letter in *File No. 07-R-154; Engelkemier; Cass County Board; McCartney* (May 22, 2008) at 4-5. See also Disposition Letter in *File No. 18-R-121; Blair Housing Authority; Petitioner Mark Welsch, GASP* (July 17, 2018).

We must also take into consideration that under Neb. Rev. Stat. § 84-712.01(3) (2014), provisions of the NPRS must be liberally construed when the fiscal records of a public body are involved so that citizens “have full access to information on the public finances of government.” *Aksamit Resource Management LLC v. Neb. Pub. Power Dist.*, 299 Neb. 114, 122, 907 N.W.2d 301, 307-308 (2018) (“Because the Legislature has expressed a strong public policy for disclosure, an appellate court must narrowly construe statutory exemptions shielding public records from disclosure.”). Consequently, we will request that Mr. Miller conduct a review of his billing statements submitted to the City and redact all entries that would disclose privileged and confidential matters. The redacted statements shall be made available to you within 14 days.

OTHER FINDINGS

You indicate in your petition that Neb. Rev. Stat. § 84-712.03 does not provide a statutory basis to withhold the records. You are correct. This statute provides the administrative and judicial remedies available to you in the event you are denied rights granted under §§ 84-712 to 84-712.03. The City is required to inform you of these rights in accordance with § 84-712.04(1)(c). Finally, the Confrontation Clause in the U.S. Constitution cited in your petition provides no basis to obtain public records from the City of Gretna under the NPRS.

CONCLUSION

Based on the foregoing, it appears that except for the requested records in FOIA #4 discussed above, and the attorney billing statements, you have received all of the available records responsive to your records requests. We will reiterate that the City of Gretna is under no obligation to answer your questions, or create documents and lists in response to a public records request. Nor is it required to locate and provide you documents that support statements and actions taken by City officials.

We will also take this opportunity to remind City officials that copies must be made available upon request in accordance with § 84-712. And in the event records are denied, Neb. Rev. Stat. § 84-712.04(1)(a) requires that a general description of the withheld records be provided in the denial letter.

Since we believe your petition has been resolved, no further action by this office is necessary and we are closing this file. If you disagree with the findings reached above, you may wish to review the other remedies available to you under Neb. Rev. Stat. § 84-712.03.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Jeff Miller (via email only)