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Office of the Attorney General

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October 5, 2021

Via email at [REDACTED]
Gloria Yerger

RE: *File No. 21-R-136; City of Fremont; Gloria Yerger, Petitioner*

Dear Ms. Yerger:

We are writing in response to your petition received by this office on September 20, 2021, in which you requested our review of the denial by the City of Fremont (“City”) of your September 10, 2021, public records request. On September 21, 2021, we forwarded your petition to Molly J. Miller, with the City Attorney’s Office, and on September 24, we received Ms. Miller’s response on behalf of the City. We considered your petition and the City’s response under the Nebraska Public Records Statutes (“NPRS”), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020). Our findings in this matter are set forth below.¹

RELEVANT FACTS

On September 10, 2021, you submitted a public records request to the City, in which you sought the following:

[A] copy of the most recently completed Job Title and Pay Grade “comparable” salary studies performed for the City’s “non-bargained for” employees for the 2021-2022 / 2022-2023 biennial City budget as presented and discussed by the City’s

¹ We note that your petition contains information as to why you are seeking these particular records. For your information, “[t]he public records statutes apply ‘equally to all persons without regard to the purpose for which the information is sought.’ As a general rule, citizens are not required to explain why they seek public information.” *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 801, 943 N.W.2d 231, 247 (2020) [“*BH Media*”]. Accordingly, we do not consider the reason or purpose for a records request when making our determination under § 84-712.03(1)(b).

consultant and the Director of HR at the September 7, 2021 Special City Council meeting.

Note: I am not seeking studies associated [*sic*] those employees who are part of the City's various "union bargained for" groups.

Ms. Miller denied your request on September 16, indicating that "[t]he documents you are seeking may be withheld from the public pursuant to Neb. Rev. Stat. § 84-712.05(4) and the City of Fremont is asserting this exception."

You state in your petition that you "believe [your] request to be straight forward and specific." In this respect, you specifically asked for "studies that pertain to the City-side non-bargained for administrative staff," and not "studies pertinent to union bargained for labor negotiations."

Ms. Miller indicates that the exception in § 84-712.05(4) applies to the requested records since "the information sought is a product of the public body and used for the preparation of labor negotiations." She states that while you requested the studies for non-union employees, and the content of the requested studies "may include non-union based jobs," this information "is directly utilized in labor negotiations with bargaining units, including a portion of the job descriptions of non-unionized positions as these non-unionized positions may be bargained or in the process of being bargained as additions to the various unions." She further states that the complete study is used in labor negotiations to compare non-union and union supervisors, among other things.

Ms. Miller further represents that the City is currently in negotiations with one union, and will be negotiating again with another union in less than two years. She states that the requested study is not only being used now, but will also be employed in future negotiations. She points out that the exception in § 84-712.05(4) relates generally to "labor negotiations" and is not limited to *union*-based negotiations. In this regard, Ms. Miller indicates that the "studies are used to negotiate non-union based employees' compensation as well." Lastly, she asserts that since there is no "expiration date" on the application of the exception, the City has the ability to withhold the requested information "even when negotiations are complete."

DISCUSSION

The basic rule for access to public records is set out in Neb. Rev. Stat. § 84-712(1) (2014). That provision states:

Except as otherwise expressly provided by statute, all citizens of this state and all other persons interested in the examination of the public records as defined in section 84-712.01 are hereby fully empowered and authorized to (a) examine such records, and make memoranda, copies using their own copying or photocopying

equipment in accordance with subsection (2) of this section, and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business and (b) except if federal copyright law otherwise provides, obtain copies of public records in accordance with subsection (3) of this section during the hours the respective offices may be kept open for the ordinary transaction of business.

(Emphasis added.) “Public records” in Nebraska “include all records and documents, regardless of physical form, of or belonging to” governmental entities in the state, “[e]xcept when any other statute expressly provides that particular information or records shall not be made public.” Neb. Rev. Stat. § 84-712.01(1) (2014). Thus, there is no absolute right to access public records in those instances where records are exempt from disclosure by statute. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *BH Media*, 305 Neb. at 788, 943 N.W.2d at 240 (2020) ; *Aksamit Resource Mgmt. LLC v. Neb. Pub. Power Dist.*, 299 Neb. 114, 123, 907 N.W.2d 301, 308 (2018).

Section 84-712.05 of the NPRS contains several 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” At issue here is whether the exception in § 84-712.05(4), pertaining to “[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” provides a basis to withhold the requested studies.

“Statutory interpretation begins with the text, and the text is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of words which are plain, direct, and unambiguous.” *State ex rel. Peterson v. Shively*, 310 Neb. 1, 14, 963 N.W.2d 508, 518 (2021). The plain language of the exception allows a records custodian to withhold records belonging to the public body relating to *labor negotiations*. In this context, “labor” may be defined as “the services performed by workers for wages as distinguished from those rendered by entrepreneurs for profits” or “workers employed in an establishment.”² To “negotiate” means “to confer with another so as to arrive at the settlement of some matter.”³ “Negotiations” are the action[s] or process of negotiating or being negotiated.”⁴

As illustrated above, the exception does not distinguish between union and non-union employees. Ms. Miller has represented to this office that the requested studies are

² See <https://www.merriam-webster.com/dictionary/labor> (visited October 5, 2021).

³ See <https://www.merriam-webster.com/dictionary/negotiate> (visited October 5, 2021)

⁴ See <https://www.merriam-webster.com/dictionary/negotiations> (visited October 5, 2021).

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being used by the City in its salary negotiations with City employees—both union and non-union. Those negotiations are ongoing. Further, there is nothing in the exception that would require disclosure of the studies at the conclusion or the negotiations or at a designated time thereafter. Consequently, your specific request for studies relating only to non-bargained for employees has no bearing on the City's ability to withhold the studies under § 84-712.05(4).

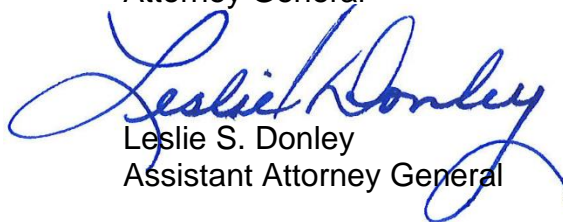
CONCLUSION

For the reasons explained above, we conclude that the City of Fremont may withhold the requested salary studies under Neb. Rev. Stat. § 84-712.05(4). Since the City did not unlawfully deny your records request, no further action by this office is warranted. Accordingly, we are closing this file.

If you disagree with our analysis set out above, you may wish to review the judicial remedies available to you under § 84-712.03.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Molly J. Miller (via email only)