



STATE OF NEBRASKA
Office of the Attorney General

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MIKE HILGERS
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July 18, 2024

Via email at [REDACTED]
Mickey and Sheila Clark

RE: *Public Records Matter Involving the Custer County Clerk*
Our File No. 20241132

Dear Mr. and Ms. Clark:

This letter is in response to the public records petitions you submitted to this office on July 3 (Sheila) and July 9 (Mickey), 2024. You have requested our assistance pertaining to a public record request you each submitted to the Custer County Clerk, Constance Gracey, seeking claims and invoices relating to legal services provided by Dvorak Law Group, LLC ("Dvorak Law"). We considered your petitions in accordance with the Nebraska Public Records Statutes ("NPRS") as set forth in Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2022), amended 2024 Neb. Laws LB 43. Our conclusions with respect to the record matters are set forth below.

You both also allege that the Custer County Board of Supervisors ("Board") violated the Open Meetings Act ("Act"), Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2014, Cum. Supp. 2022), amended 2024 Neb. Laws LB 43 and LB 287, by failing to properly retain Dvorak Law to handle personnel matters for the county. You also express general concerns about how county business is being conducted. You have requested this office to pursue anything we find "civilly or criminally" on your behalf.

For your information, our enforcement authority under the Act is limited to determining whether a public body has complied with the various procedural provisions relating to notice, agenda, closed session, voting, minutes, etc. Our research indicates

that the Board, acting as the Board of Equalization, voted to approve the hiring of Dvorak Law at an open meeting conducted on July 27, 2021. The minutes with respect to the hiring state, in part: “Motion by Longmore, 2nd Stunkel, to hire the Dvorak Law Firm, spend no more than \$10,000.” The invoices attached to your petitions indicate that the firm has handled “TERC Appeals” and “General Corporate” matters. Your allegations that the scope of work has changed or the \$10,000 fee cap has been exceeded does not implicate the Act per se. This office has no authority to supervise the Board. We also question our authority to compel public bodies to consider certain matters at public meetings. The county attorney, however, is statutorily authorized to represent the Board and ensure its compliance with the Act. Consequently, this office will decline to take any action with respect to your open meeting claims.

FACTS

Per your petition and the attached materials, Sheila hand-delivered her request to Ms. Gracey on June 10. The request sought copies of “[c]ounty claim[s] and attached invoice[s] for fees . . . paid to Dvorak Law Group LLC [and] approved by the Custer County Board of Supervisors” from March 28, 2023 to March 26, 2024. Following a brief delay, Ms. Gracey produced the requested records on June 21, 2024. She stated that “[t]he requested documents contain confidential information pursuant to the attorney-work product doctrine and attorney-client privilege” and were redacted pursuant to the exception found at § 84-712.05(4).

It appears that Mickey submitted the same public records request to Ms. Gracey on or about June 20. Ms. Gracey produced the requested records on June 24, indicating that the records had been redacted pursuant to § 84-712.05(4).

You are challenging the propriety of the redactions. You both assert that you should have access to the records because the bills were paid with tax dollars. Sheila questions whether the redacted information is privileged. Mickey claims that “[t]he records I received were almost completely redacted.”

The undersigned reviewed the records produced by Ms. Gracey. The invoices contain general descriptions of the matters handled by Dvorak Law and the amounts billed for legal services rendered. Contrary to Mickey’s assertion, the specific billing entries describing Dvorak Law’s legal services were the only items redacted.

DISCUSSION

As a preliminary matter, we observe no issues concerning the timeliness and form of Ms. Gracey’s response under the NPRS. Ms. Gracey’s response relied on the attorney work product exception as the basis to redact the billing entries in Dvorak Law’s invoices. Section 84-712.05(4) provides in pertinent part:

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 those 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.

Our office has previously analyzed whether attorney fee statements may be withheld under § 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. 20-R-122; City of Gretna; Andy Harpenau, Petitioner* (August 17, 2020); Disposition Letter in *File No. 18-R-121; Blair Housing Authority; Petitioner Mark Welsch, GASP* (July 17, 2018).

We must also consider that, pursuant to Neb. Rev. Stat. § 84-712.01(3), provisions of the NPRS must be "liberally construe[d] . . . in favor of disclosure in cases which concern the expenditure of public funds . . ." See *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 799, 943 N.W.2d 231, 246 (2020). See also *Aksamit Resource Management LLC v. Neb. Pub. Power District*, 299 Neb. 114, 122, 907 N.W.2d 301, 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.").

We understand that the above-described redactions reflect the legal advice Ms. Gracey received from counsel that the redacted entries constitute information protected by the attorney-client privilege and the attorney work product doctrine. We first observe

that, in connection with its representation of Custer County, Dvorak Law's attorneys have a professional and ethical duty as counsel to preserve confidentiality in connection with the legal services rendered. This duty is reflected in the exception to disclosure provided by § 84-712.05(4). We must therefore be mindful of the duties imposed on attorneys when providing legal advice and services. The redactions in this matter also reflect Custer County's interest as a client in preserving the privileges at issue in this matter.

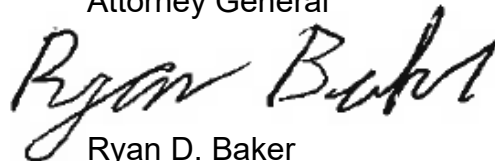
Moreover, although § 84-712.03(1)(b) creates enforcement responsibility for the Attorney General's Office under the NPRS, there is no statutory mechanism or other authority under Nebraska law enabling this office to conduct an independent review of unredacted copies of the requested records to determine whether such records are privileged. Pursuant to § 84-712.03(2), only the courts may conduct an *in camera* review of the requested records without redaction before determining whether a petitioner has been denied his or her rights under the NPRS. We will therefore rely on Ms. Gracey's representations as the Custer County Clerk that the entries redacted from Dvorak Law's billing invoices contain privileged information and conclude that such information need not be produced under the exception § 84-712.05(4).

CONCLUSION

Based on the foregoing, we conclude that Ms. Gracey, as Custer County Clerk, complied with the NPRS in producing the requested invoices. We further believe that the redacted billing entry descriptions constitute information that may be withheld under § 84-712.05(4). Consequently, this office will take no further action on this matter and will close this file. If you disagree with our findings in this letter, you may wish to consult with an attorney to consider the other remedies that may be available under the NPRS or any other provision of Nebraska law.

Sincerely,

MIKE HILGERS
Attorney General



Ryan D. Baker
Assistant Attorney General

c: Constance Gracey (via email only)
55-042