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Office of the Attorney General

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MIKE HILGERS
ATTORNEY GENERAL

RYAN D. BAKER
ASSISTANT ATTORNEY GENERAL

November 5, 2024

Via email: [REDACTED]
Jon Sulzbach

RE: *Public Record Matter Involving Dakota County Board of Commissioners*
Our File No. 20241203

Dear Mr. Sulzbach:

This letter is in response to your correspondence received by this office on October 21, 2024, in which you sought our assistance regarding your public records request to the Dakota County Board of Commissioners (“Board”) dated September 23, 2024. On October 29, 2024, the undersigned spoke to Dakota County Attorney Kim Watson regarding your request, and she provided additional information for our consideration of your correspondence. We construed your correspondence as a petition with this office under the Nebraska Public Records Statutes (“NPRS”), Neb. Rev. Stat. §§ 84-712 to 84-712.09 (2014, Cum. Supp. 2022), amended by 2024 Neb. Laws LB 43 and LB 1204.¹ Our findings in this matter are set out below.

RELEVANT FACTS

Our understanding of the facts in this matter is based on your petition and the undersigned’s communication with Ms. Watson. On September 23, 2024, you submitted via email a request to the Board for documents and other records “related to the decision-making process” for the award of the “Likuwanta Street Improvements construction project,” including but not limited to:

¹ We note that you indicate that your request was made pursuant to the Freedom of Information Act (“FOIA”), codified at 5 U.S.C. § 552. FOIA generally provides the right to request access to *federal* agency records or information. For your information, FOIA does not govern your right to access records of or belonging to Nebraska governmental entities such as the Board.

- Meeting agendas and board packets related to the Likuwanta Street project.
- Emails and correspondence between County officials, board members, and any contractors.
- Phone records, particularly any calls made to Steve Harris Construction days before the award decision.
- Text messages and informal communications concerning the bid and award.
- Minutes or notes from meetings where this project was discussed.
- Any documentation or rationale justifying the selection of a higher bid.²

On September 27, 2024, Ms. Watson responded to your request via email and provided you with “board packets and agendas relating to the Likuwanta Street Improvements project” as well as links to the minutes and audio recordings of Board meetings.

Subsequently on September 30, 2024, you responded to Ms. Watson’s email, acknowledging your receipt of the board packets and agendas. You further indicated that you had not received

- Emails and correspondence between County officials, board members, and any contractors
- Phone records, particularly any calls made to Steve Harris Construction
- Text messages and informal communications regarding the bid and award
- Any additional documentation or rationale justifying the selection of a higher bid

Ms. Watson thereafter responded via email on October 4, 2024, indicating that she had “not received any further records from any Commissioner to fulfill your request.” Ms. Watson further stated that Dakota County “has phone and email communications with its legal counsel regarding the bidding process and your records request that are protected by the attorney-client privilege,” withholding production of such records pursuant to §§ 84-712.05(4) and 27-503.

Following Ms. Watson’s October 4 response, you sent a subsequent email on October 7, 2024, in which you sought additional explanation regarding Ms. Watson’s October 4 email. You further requested that you be provided with “all information about . . . Steve Harris Construction, including their bid documents, prior project performance, and any communications between the commissioners and the contractor,” as well as the “signed contract.” Additionally, you requested that your records request “be extended

² Your email correspondence also discusses your reasons for seeking the requested materials. 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.” *See BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 801, 943 N.W.2d 231, 247 (2020). Accordingly, this office does not consider the reason or purpose for a records request when making our determinations under § 84-712.03(1)(b). Moreover, any alleged wrongdoing referenced in your correspondence is outside the boundaries of this office’s enforcement powers under the NPRS and will not be considered in this letter.

throughout the project.” You then emailed our office requesting our review of the correspondence attached to your email.

On October 29, 2024, the undersigned spoke with Ms. Watson regarding your public records request. Ms. Watson informed us that documents relating to Steve Harris Construction and to its bid and awarded contract were provided to you. Ms. Watson also stated that the records withheld under the attorney-client privilege exception involved the provision of legal advice concerning the determination of the successful bid and your records request. With respect to all other records you requested, Ms. Watson further advised that there were no other records in the possession of Dakota County and the Board commissioners responsive to your requests.

DISCUSSION

Based on our review in this matter, the only issue for our consideration is whether the county’s assertion of attorney-client privilege and the corresponding exception to disclosure under the NPRS was appropriate.

The basic rule for public records in Nebraska is found at § 84-712, which provides in pertinent part:

Except as otherwise expressly provided by statute, all residents 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.

In addition, “public records” in Nebraska

[i]nclude all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing.

Section 84-712.01(1).

Notwithstanding the above statutes, the NPRS are not absolute, and public bodies may withhold public records pursuant to the exceptions to disclosure set forth in § 84-712.05. As relevant to this matter, § 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 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.

Based on the undersigned's communication with Ms. Watson, it is apparent that this matter does not involve attorney work product but rather communications which are privileged pursuant to Neb. Rev. Stat. § 27-503 (2016). In pertinent part, § 27-503(2) provides:

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.

(Emphasis supplied). While the statutory exceptions to the NPRS must be "narrowly construe[d]," see *Aksamit Resource Management LLC v. Neb. Pub. Power District*, 299 Neb. 114, 122, 907 N.W.2d 301, 308 (2018), the information available to our office indicates that the § 84-712.05(4) exception for confidential attorney-client communications was appropriately asserted in this matter. Ms. Watson advised the undersigned that the requested communications involved discussions between her and the County's counsel regarding your records request and the decision of the Board to award Steve Harris Construction the contract for the Likuwanta Improvement project. Such communications are clearly contemplated by § 27-503(2)(a) and may therefore be withheld under the NPRS.

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 rights under the NPRS. We will therefore rely on Ms. Watson's

representations that the communications withheld are privileged under § 27-503(2)(a) and conclude that such information need not be produced under the § 84-712.05(4) exception.

Your petition also appears to allege that Ms. Watson provided an insufficient description of the materials withheld and did not adequately describe her underlying reasoning in responding to your email of September 30, 2024, we conclude that Ms. Watson's descriptions were sufficient under the NPRS. Pursuant to § 84-712.04(1)(a), public bodies are required to provide the following information when denying a public record request:

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.

Based on information received subsequent to her initial response, Ms. Watson's October 4, 2024, email stated that "[t]he County has phone and email communications with its legal counsel regarding the bidding process and your records request that are protected by the attorney-client privilege." Ms. Watson further identified the attorney-client exception under § 84-712.05(4). Ms. Watson sufficiently described the contents of the records withheld and adequately referenced the § 84-712.05(4) exception.

As a final matter, to the extent your petition to this office and the attached emails may contest Ms. Watson's statement that further records responsive to your request do not exist, you have provided no evidence to support your claim. We again have no reason to find that Ms. Watson or the Board commissioners have acted in bad faith and will therefore rely on Ms. Watson's representations that no such records exist.³

CONCLUSION

As discussed above, we conclude that the Board, through Ms. Watson, has properly provided you records responsive to your request and otherwise appropriately withheld confidential communications under the attorney-client privilege exception to the NPRS. As a result, no further action by this office is warranted, and we are closing this

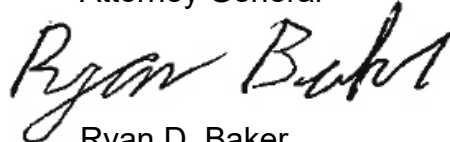
³ Under Nebraska law, it is generally presumed that public bodies and officers carry out their duties in good faith. See *Wolf v. Grubbs*, 17 Neb. App. 292, 310, 759 N.W.2d 499, 518 (2009) (observing that, in a case involving the Open Meetings Act, "[i]n the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties").

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file. If you disagree with our findings set out in this letter, you may pursue the other remedies available to you under the Nebraska Public Records Statutes.

Sincerely,

MIKE HILGERS
Attorney General

A handwritten signature in black ink, appearing to read "Ryan Baker". The signature is written in a cursive, flowing style.

Ryan D. Baker
Assistant Attorney General

c: Kim Watson

55-056