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November 20, 2024

Via email: [REDACTED]
Andy Harpenau

RE: *Public Record Matter Involving Village of Cedar Creek*
Our File No. 20241209

Dear Mr. Harpenau:

This letter is in response to your email correspondence received by this office on October 29, 2024, in which you sought our assistance regarding your public records requests to the Village of Cedar Creek (“Village”) dated September 19 and October 16, 2024. 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 On November 13, we wrote to you indicating that our final response would be delayed pending receipt of additional information from Village counsel. We have now completed our review. Our findings in this matter are set out below.

RELEVANT FACTS

Our understanding of the facts in this matter is based on your correspondence and the documents attached thereto, as well as the undersigned’s communications with Village counsel, Angela Minahan and Robert Larsen. On September 19, 2024, you submitted a written request to the Village for records regarding a waste management contract entered into by the village, as follows:

¹ We note that you indicate that your requests were 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 Village.

1. Emails, text messages, correspondence between the Village and Abe's Trash regarding the Village trash contract.
2. Copies of the contract/addendums submitted by Abe's Trash in reference to the Village trash contract.
3. Copies of 2023 and 2024 year-to-date legal bills submitted to the Village from the Village attorney's legal firm.

Following receipt of your request, the Village issued a written denial of your request through counsel in a letter dated September 27, 2024. In pertinent part, the "reason for [the] denial is because the information you are requesting are not public records as defined by Neb. Rev. Stat. § 84-712." As further stated in the letter:

1. There was an ongoing trash contract out for bid. The items requested are proprietary in nature and or commercial information of another party that you are seeing [*sic*] and if released would give advantage to you as a business competitor and serve no public purposes. Neb. Rev. Stat. § 84-712(3).
2. See Response to item number 1 above.
3. Denied. Neb. Rev. Stat. § 84-712 (4) the content of the bills contain work product of an attorney and the public body involved or are confidential communications as defined in Neb. Rev. Stat. § 27-503.
4. The amount of the bills paid are public records that are maintained by the Village in the approval of the claims and accounts announced during the meeting and memorialized in the meeting minutes requested are published online and available review on www.cedarcreeknebraska.com, under the tab Village, then Meeting Minutes. The minutes are organized by year and then each month. Please advise if you would like hard copies of the meeting minutes and I will provide you hard copies.

You thereafter submitted a second request to the Village via letter dated October 16, 2024. In particular, you sought:

1. All emails, text messages, correspondence between the Village and any and all contractors regarding the current Village trash contract bid.
2. Copies of bid submittals from all contractors regarding the current Village trash service.
3. Copies of the contract/addendums submitted by Abe's Trash in reference to the Village trash contract.

4. Copies of 2023 and 2024 year-to-date legal bills submitted to the Village from the Village attorney's legal firm.
5. Copy and dates of the advertisement that was published in the public notices for the village trash contract bid process.

In this letter, you indicated that items 3 and 4 were part of your previous request and had not been disclosed by the Village. Following its receipt of your second request on October 21, 2024, the Village responded through counsel via letter dated October 23, 2024. With respect to items 1, 2, and 3 of your second letter, the Village denied your request on the basis that

[t]here was an ongoing trash contract out for bid. The items requested are proprietary in nature and/or commercial information of another party that, if released, would give an advantage to you as a business competitor and serve no public purposes. Neb. Rev. Stat. § 84-712.05(3). I would also note that your father has made multiple visits to the Village Clerk with the intent of intimidating her, and on his October 11th, 2024 visit implied that litigation would be pursued if the bids were not "apples to apples." Given the possibility of litigation as indicated by your father as an agent of Gretna Sanitation, we would also draw your attention to Neb. Rev. Stat. § 84-712.05(4) and Neb. Rev. Stat. § 27-503.

In responding to item 4 of your second request, the Village stated:

The content of the bills requested contain work product of an attorney and the public body involved as described in Neb. Rev. Stat. § 84-712.05(4) or are confidential communications as defined in Neb. Rev. Stat. § 27-503. The amount of the bills paid are public records that are maintained by the Village in the approval of the claims and accounts announced during the meeting and memorialized in the meeting minutes. The minutes are published online and are available for review on www.cedarcreeknebraska.com, under the tab Village, then Meeting Minutes. The minutes are organized by year and then by month. Please advise if you would like hard copies of the meeting minutes and I will provide you with hard copies.

Finally, the Village produced a copy of the "Proof of Publication" Affidavit regarding the Village's notice seeking bids for contracted waste disposal services published on September 27, 2024.

DISCUSSION

Our review of this matter centers on whether the requested records may be properly withheld under the exceptions set forth in § 84-712.05. Based on your petition, the denied record requests fall within four categories: (1) communications between the

Village and contractors in connection with the Village trash contract; (2) the Village's contract with Abe's Trash; (3) bid submissions for the Village trash contract; and (4) the billing statements for legal services provided by Village counsel for 2023 and 2024. We will address these requests and the Village's responses in further detail below.

1. Requested Documents as Public Records

As a preliminary matter, it appears the Village claimed in its September 27, 2024, letter that the requested documents were not "public records" under the NPRS. 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.

The definition of public records is set forth in § 84-712.01(1), which provides:

Except when any other statute expressly provides that particular information or records shall not be made public, **public records shall include 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.** Data which is a public record in its original form shall remain a public record when maintained in computer files.

(Emphasis supplied). This definition includes "any documents or records that a public body is entitled to possess—regardless of whether the public body takes possession." See *Evertson v. City of Kimball*, 278 Neb. 1, 9, 767 N.W.2d 751, 759 (2009).

Section 84-712.01(1) is clear: all records and documents of or belonging to public bodies, including the Village, are public records unless otherwise provided by statute. No statute, case law, rule, regulation, or other mechanism of Nebraska law provides that the records requested in this matter are not public records under the NPRS. Thus, the sole issue is whether the Village properly withheld the requested public records under the exceptions set forth in § 84-712.05.

2. Exception to Disclosure for Proprietary or Commercial Information

With respect to the Village's withheld communications with contractors, the contractors' bid submissions, and the contract with Abe's Trash, the Village primarily relies on the exception to disclosure provided by § 84-712.05(3). Under this statute, a public body may withhold "[t]rade secrets, academic and scientific research work which is in progress and unpublished, and other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose."

The framework for reviewing whether public records were properly withheld under § 84-712.05(3) was established by the Nebraska Supreme Court in *Aksamit Res. Mgmt. LLC v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018) ["*Aksamit*"].² In that case, *Aksamit*, a competitor of the Nebraska Public Power District ("NPPD"), sought records from NPPD showing cost and revenue information broken down by generation unit, and NPPD denied access to those records pursuant to § 84-712.05(3). Construing the exception narrowly, the Court concluded that "[i]nformation which would give a business competitor an advantage may be withheld only if it would 'serve no public purpose.'" *Id.* at 125, 907 N.W.2d at 309. "When we consider the meaning of the words 'public purpose' in § 84-712.05(3), liberal public disclosure of the records of public entities is an important factor." *Id.* at 124, 907 N.W.2d at 309. Thus, the Court held that a public entity seeking to withhold public records under § 84-712.05(3) has the "burden to show both that the information would give advantage to competitors and that the information would serve no public purpose." *Id.*

In addition to the Nebraska Supreme Court's guidance in *Aksamit*, our office has continued to look to previous opinions of the Attorney General where we determined whether the exception in § 84-712.05(3) applied in the circumstances then presented. These opinions address only the first part of the two-part test, i.e., whether the public body has demonstrated that requested documents contain proprietary or commercial information which would give advantage to competitors, and do not opine as to whether disclosure of the records would serve no public purpose. In Op. Att'y Gen. No. 92068 (May 7, 1992), we fashioned the following standards:

- (a) Section 84-712.05(3) does not impose any requirement of "substantial" competitive injury or advantage to make the exception from disclosure available;
- (b) A bare assertion by the provider of commercial information that such information is confidential is insufficient to justify nondisclosure; and
- (c) Nondisclosure must be based upon a showing that a specified competitor may gain a demonstrated advantage by disclosure rather than a mere assertion that

² We note that while the Nebraska Legislature subsequently passed 2018 Neb. Laws LB 1008, § 3 to allow public power districts to withhold competitive or proprietary information which would give advantage to competitors, that provision does not apply to this matter.

some unknown business competitor may gain some unspecified advantage.

3. Village Communications, Bidding Documents, and Abe's Trash Contract

As previously discussed, the Village declined to produce (1) its communications with various contractors regarding the trash contract award, (2) the bidding documents received by the Village, and (3) the Abe's Trash contract on the basis that these documents were "proprietary in nature" or otherwise contained "commercial information" able to be withheld under § 84-712.05(3). The burden is on the Village to demonstrate that the withheld public records would, if disclosed, give a specific advantage to a specified competitor where such disclosure would serve no public purpose. See *Aksamit*, 299 Neb. at 125, 907 N.W.2d at 309.

Even if the requested records contain proprietary or commercial information that would give a competitor an advantage upon disclosure, the Village cannot withhold these records in their entirety. The NPRS are to be liberally construed in favor of disclosure, and this is especially true in cases concerning the expenditure of public funds. See § 84-712.01(3). The records requested in this matter clearly pertain to the expenditure of public funds, and it cannot be said that disclosure of correspondence and documents relating to the Village's contractor selection does not serve a public purpose.³

Under the circumstances, we will request the Village, by providing a copy of this letter to Ms. Minahan and Mr. Larsen, to review documents responsive to your request. If, during the course of review, there are portions of those records which are determined to be proprietary or commercial information able to be withheld under § 84-712.05(3), those portions may be redacted. The other portions of the records should thereafter be provided to you. See § 84-712.06 ("Any reasonably segregable public portion of a record shall be provided to the public as a public record . . . after deletion of the portions which may be withheld."). Alongside any redactions made, the Village must also provide you with a denial letter containing the information required by § 84-712.04(1). We would ask counsel to produce these redacted documents no later than December 4, 2024.

We note as a final matter that in its October 23, 2024, response letter, the Village indicated that "[g]iven the possibility of litigation as indicated by your father as an agent of Gretna Sanitation, [it] would also draw your attention to" § 84-712.05(4). There is no indication that (1) the requested correspondence, bid submissions, and contract came about in anticipation or preparation for litigation or (2) that such records constituted or otherwise involved confidential attorney-client communications. We therefore conclude that this exception is inapposite to these particular records based on the information available.

³ We also note that the NPRS "apply 'equally to all persons *without regard to the purpose for which the information is sought.*'" *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. at 801, 943 N.W.2d at 247 (emphasis added). Consequently, any subjective intent of the requester is wholly irrelevant to our disposition in this matter.

4. Village Attorney Billing Statements

Per its response letters, the Village withheld the billing statements from its counsel on the basis that they constituted attorney work product able to be withheld under the exception set forth at § 84-712.05(4). In lieu of the billing statements, the Village stated that its monthly meeting minutes included the claims pending for its attorney fees. 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. 2024-1025; Village of Brownsville; Shane Sailors, Petitioner* (February 20, 2024); 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).

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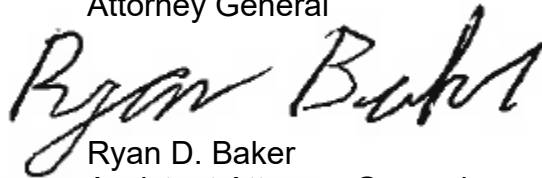
Our prior dispositions were guided by the same principle that, as discussed previously in this letter, provisions of the NPRS must be “liberally construe[d] . . . in favor of disclosure in cases which concern the expenditure of public funds” See *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. at 799, 943 N.W.2d at 246. See, also, *Aksamit*, 299 Neb. at 122, 907 N.W.2d at 308 (“Because the Legislature has expressed a strong public policy for disclosure, an appellate court must narrowly construe statutory exemptions shielding public records from disclosure.”). Given our office’s previous dispositions, we do not believe that claim information in the Village’s meeting minutes satisfies a request for legal billing statements. We will therefore request that Ms. Minahan and Mr. Larsen conduct a review of their firm’s billing statements submitted to the Village, redact all entries that would disclose privileged and confidential matters, and thereafter provide those requested billing statements to you. We would ask counsel to produce these redacted billing statements no later than December 4, 2024.

CONCLUSION

Based on the foregoing, we conclude that the Village’s communications, bid submissions, and contract with Abe’s Trash were improperly withheld. We likewise conclude that that the requested billing statements for Village counsel’s legal services to the Village were improperly withheld. These requested records should be disclosed with appropriate redactions of information that would constitute commercial or proprietary information belonging to the contractors or otherwise be confidential and/or privileged.

Sincerely,

MIKE HILGERS
Attorney General

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

Ryan D. Baker
Assistant Attorney General

c: Angela Minahan
Robert Larsen

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