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June 26, 2019

Dustin J. Antonello
Director of Policy and Research
Lincoln Independent Business Association
620 N. 48th Street, Suite 205
Lincoln, NE 68504

RE: *File No. 19-R-119; Lancaster County Board of Commissioners; Lincoln Independent Business Association, Petitioner*

Dear Mr. Antonello:

This letter is in response to your correspondence dated June 14, 2019, in which you seek our assistance in obtaining records from the Lancaster County Board of Commissioners ("the Board"). On June 14, 2019, we contacted the Board's Chief Administrative Officer, Kerry Eagan, who handled your request, and advised him of the opportunity to provide this office a response to the petition. We received Mr. Eagan's response on June 18, 2019. We have now had the opportunity to fully consider your petition and the Board's response in accordance with the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018). Our findings in this matter are set forth below.

FACTS

Our understanding of the facts in this matter is based upon your petition, the documentation you provided this office, and the response and information we received from Mr. Eagan.

On March 5, 2019, the Lincoln Independent Business Association ("LIBA") mailed a request for records to the Board, addressed to the Board's Records Custodian. Specifically, LIBA sought the following records:

[A] document produced by the Lancaster County Attorney's Office at the request of the Lancaster county Board of Commissioners outlining the legal options for implementing a wheel tax in Lancaster County to fund infrastructure improvements.

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In a letter dated March 6, 2019, Mr. Eagan denied your request for records, citing to attorney-client privilege under Neb. Rev. Stat. § 27-503 (Reissue 2016) as his basis for denial, and further stating that the Board does not wish to waive attorney-client privilege.

On June 14, 2019, you sent a letter to our office asking us to review the Board's refusal to produce the requested records. Specifically, your letter states that you believe the document requested meets the definition of a public record because it involved a public policy matter, and it was produced by the elected Lancaster County Attorney at the request of the elected members of the Board.

DISCUSSION

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

[e]xcept 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.

The purpose of this statute is "to guarantee that public government records are public." Introducer's Statement of Purpose for LB 505, 72nd Nebraska Legislature (1961). Under § 84-712, it was intended that all public records of the State, its counties, and its other political subdivisions should be open to inspection, *except where the Legislature has otherwise provided that the record shall be confidential*. Judiciary Committee Statement on LB 505, 72nd Nebraska Legislature (1961) (emphasis added).

Neb. Rev. Stat. § 84-712.05 (Cum. Supp. 2018) currently contains twenty-one categories of 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" The Board is relying on the exception in subsection (4) as its basis to deny you access to the records at issue, which applies 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*.

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(emphasis added.) Neb. Rev. Stat. § 27-503, which is part of the Nebraska Evidence Rules, provides in pertinent part that “[a] communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” Neb. Rev. Stat. § 27-503(1)(d) (2016).

The record LIBA has requested is a legal opinion produced by the Lancaster County Attorney’s Office at the request of the Board. Your petition acknowledges this opinion provides legal advice on whether the Board would need to form an interlocal agreement or a joint public agency with Waverly, Nebraska and/or Hickman, Nebraska in order to implement a county wheel tax.

The record at issue is a communication between a client and lawyer, i.e., the Board and the Lancaster County Attorney’s Office. See Neb. Rev. Stat. § 23-1203 (Reissue 2012) (“The county attorney shall without fee or reward give opinions and advice to the board of county commissioners and other civil officers of their respective counties, when requested to do so by such board of officers . . .”). The requested legal opinion contains the legal advice provided to the Board by the County Attorney’s Office. More specifically, it addresses whether the Board would need to form an interlocal agreement or public agency with surrounding towns to implement a county wheel tax. There is no indication that any of the requested information has been disclosed to third parties. Since the communication between the parties is subject to the attorney-client privilege, this record falls squarely within the exception to disclosure in § 84-712.05(4).

CONCLUSION

For the reasons explained above, we believe that the Board’s reliance on § 84-712.05(4) to withhold the requested record was appropriate. If you disagree with the conclusion reached in this disposition letter, you are free to pursue other legal remedies available to you under Neb. Rev. Stat. § 84-712.03 of the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General


Laura A. Nigro
Assistant Attorney General

cc: Kerry Eagan