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April 30, 2014

Shawn D. Renner
Cline Williams Wright
Johnson & Oldfather, LLP
233 South 13th Street
1900 U.S. Bank Building
Lincoln, NE 68508-2095

RE: *File No. 14-R-111; Nebraska State Patrol; Nebraska Educational Television, Petitioner*

Dear Mr. Renner:

We are writing in response to your correspondence received by this office on April 15, 2014, in which you requested that we determine whether certain records belonging to the Nebraska State Patrol ("NSP") may be withheld from public inspection. Your request was submitted on behalf of Nebraska Educational Television ("NET"). As is our normal practice with such requests, we contacted the party against whom the complaint was made. In this case we directed your correspondence to Wendy A. Wussow, NSP Legal Counsel. Ms. Wussow provided our office a brief response, as well as the copy of the redacted pages for our review. We also requested and received documentation from the NSP relating to the actual request for records, and any other correspondence relating to the request. We considered your correspondence to be a petition under § 84-712.03 of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Supp. 2013) ("NPRS"). Our findings in this matter are set forth below.

RELEVANT FACTS

You indicate that the NSP engaged the University of Nebraska Public Policy Center to examine shift coverage and labor force allocation for the agency. In December 2013, the center issued the "Shift Coverage and Labor Force Allocation Study Completed for the Nebraska State Patrol" ("NSP Study"). According to the executive summary, "[the NSP Study] included a comprehensive review of literature,

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Nebraska State Patrol data, Nebraska legislative mandates and a survey of Troopers augmented by interviews in each Troop Area.” NSP Study at 1.

In a letter dated February 25, 2014, Bill Kelly, a reporter with NET, requested a copy of the NSP Study. Specifically, Mr. Kelly requested

a copy of research reports and related appendixes and attachments prepared by the University of Nebraska Public Policy Center or similar entity, reviewing Nebraska State Patrol staffing levels, budgeting, and related matters. The report would have been prepared within the last 12 months.

Following a brief delay period, the NSP produced the requested study sometime on or around March 14, 2014. In the letter accompanying the requested records, NSP paralegal Deb O'Brien stated, in pertinent part:

I have attached 130 pages of information regarding the above referenced request. The Nebraska State Patrol is **partially** denying your request. We have redacted the locations and the active workforce numbers for all troop areas. This is pursuant to Neb. Rev. Stat. § 84-712.05 subsection (8).

(Emphasis in original.)

YOUR PETITION

You argue in your petition that the plain language of Neb. Rev. Stat. § 84-712.05(8) does not authorize the redactions made by the NSP. In this regard, you state that the subsection “describes five disjunctive classes of security-related information separated by semicolons which may be withheld by a custodian,” and that “[t]he plain language defining those classes of information does not cover either the active troop force numbers withheld or the maps that have been redacted.” You also argue that “since NSP has regularly previously publicly released similar information . . . NSP’s apparent security rationale is not appropriate.”

You further assert that the “seventh ‘conclusion’” set out in the NSP Study is relevant to your petition. This conclusion provides:

NSP continues to move toward civilian staffing whenever possible, which is cost effective and prudent. However, an increase in qualified, trained, sworn law enforcement personnel is justified and needed by the NSP. Nebraska deserves a state patrol with resources adequate to meet the mandates given by its legislature. Public safety and Trooper safety would

both be enhanced if sworn personnel staffing levels were even slightly increased. To achieve the desired staffing levels in every Troop Area we believe it would require a total of 80 additional positions which is not currently feasible or realistic. However we believe it is realistic to expect adequate staffing levels to achieve 24 hour coverage along the interstate and in urban areas, and 21 hour coverage in rural areas.

NSP Study at 18-19.

Finally, you indicate that the redacted portions of the NSP Study are generally described on page 1 of Appendix A, in relevant part as follows:

The following maps display currently staffing of traffic enforcement Troopers and Sergeants in each of the six Troop Areas, and their respective duty stations. . . . It should be noted that with the exception of one Troop Area (Troop A), all of the NSP's Troop Areas are currently (as of December 2013) experiencing vacancies.

You indicate that Appendix A contains a map and the authorized and actual workforces for each Troop Area. However, for each area the map and active workforce numbers have been blacked out.

DISCUSSION

Generally speaking, the Nebraska Public Records Statutes allow interested persons in Nebraska the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts from those public records, and to obtain copies of public records in certain circumstances. Under those statutes, every record "of or belonging to" a public body is a public record which individuals may obtain a copy of unless the custodian of the record can point to a specific statute which allows the record to be kept confidential. The burden of showing that a statutory exception to disclosure applies to particular records rests upon the custodian of those records. *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

Neb. Rev. Stat. § 84-712.05 of the NPRS is comprised of eighteen categories of documents which may be kept confidential from the public at the discretion of the agency involved. In the present case, the NSP has claimed the exception set out in subsection (8) as its basis for denying you access to the maps and active trooper workforce numbers set out in pages 2-4 of Appendix A. Subsection (8) provides, in pertinent part:

Information solely pertaining to protection of the security of public property and persons on or within public property, such as [1] specific, unique vulnerability assessments or specific, unique response plans, either of which is intended to prevent or mitigate criminal acts the public disclosure of which would create a substantial likelihood of endangering public safety or property; [2] computer or communications network schema, [3] passwords, and user identification names; [4] guard schedules; or [5] lock combinations (Numbers added.)

We are aware of no Nebraska cases which discuss the security exception to disclosure of public records. However, we have in the past discussed the applicability of the security exception in general, and in instances where the records sought did not fit under any of the five examples set out in the statute. In one instance, purported adversaries of a Douglas County judge requested his swipe card access records, ostensibly to establish how many hours the judge actually spent at the courthouse. The custodian of the records withheld the records pursuant to subsection (8) and, upon review, we agreed with that decision. We concluded that disclosure of these particular records could potentially expose the judge to unwanted contact and harassment or personal risk to the extent individuals could use the information to establish his schedule and whereabouts at any given time of day.

In 2010, we considered another petition involving a request for swipe card access records. In this instance, the petitioner sought the records for all rooms where nonhuman primates were located at the University of Nebraska Medical Center ("UNMC") animal research facilities. The UNMC also claimed the security exception to support nondisclosure of the records. We ultimately concluded that "disclosing swipe card access information could potentially compromise the security of the UNMC facilities and the protection of the UNMC staff."¹ Our conclusion was based in part with the understanding that animal research was a controversial issue, and that certain groups have targeted research institutions using a variety of legal and illegal tactics.

In the present case, you contend that the plain language of § 84-712.05(8) does not support the NSP's decision to redact the troop area maps and the active trooper workforce numbers. Ms. Wussow contends that disclosing this information would let individuals know where troopers are stationed and where they are *not* stationed. She indicates that "[s]ome counties have no troopers stationed, and as they have to live within a certain mile area from their duty station, it in essence could tell a criminal where to go to rob a convenience store without any worry that there would be a trooper within a 50 mile radius." It appears to us then that release of the redacted information could compromise the security of public property and persons in numerous counties where there is a lack of trooper presence. And while we agree with your assertion that the

¹ Disposition Letter to *File No. 10-R-109; University of Nebraska Medical Center; Petitioner Amy Coburn, DVM* (May 20, 2010), at 7.

redacted information does not fit under any of the five examples set out in subsection (8), they are only examples. We believe that the redacted information does pertain to “[i]nformation solely pertaining to the protection of the security of public property and persons on or within public property” As a result, we believe that the NSP’s reliance on § 84-712.05(8) to support its redaction of the maps and active trooper workforce numbers was appropriate under the circumstances here.

Your final argument relates to the propriety of the NSP’s redactions “given that it previously has publicly disclosed similar troop strength statistics in the past.” You further allege that the NSP has overstated its security concerns considering that the NSP has previously disclosed “such information without apparent incident.” We believe these arguments fail for a couple of reasons. First, while the information may be similar, it is not the same. Nowhere in your petition have you reproduced or been able to reference the same information now being redacted by the NSP, i.e., *maps showing the location of stationed troopers by county*. Second, assuming that the NSP has released this information in the past, this does not mean the NSP has waived its ability to withhold such records in the future, so long as those records have not been “disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties” Neb. Rev. Stat. § 84-712.05 (Supp. 2013).

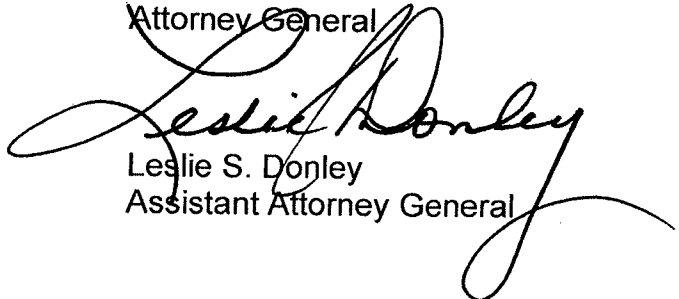
CONCLUSION

For the reasons set out above, we believe that the redacted information set out in Appendix A to the NSP Study may be kept confidential under § 84-712.05(8). We further believe that the NSP did not unlawfully deny you access to public records, and that no further action by this office is warranted. Consequently, we are closing this records file.

If you disagree with our legal analysis set out herein, you may wish to consult with NET and determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

JON BRUNING
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Wendy A. Wussow