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August 3, 2015

Via email and regular U.S. Mail

Robert M. Slovek  
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The Omaha Building  
1650 Farnam Street  
Omaha, NE 68102-2186

RE: *File No. 15-R-130; City of Omaha Police and Fire Departments; General Electric Railcar Services Corporation, Petitioner*

Dear Mr. Slovek:

This letter is in response to your petition submitted on behalf of your client General Electric Railcar Services Corporation ("GE Rail"), which we received on July 17, 2015. You are seeking our review of the denial of a certain public record by the City of Omaha Police Department and Fire Department ("Departments"). As is our normal practice with such requests, we contacted the public body against whom the petition was made. In this case, we contacted Thomas O. Mumgaard, Deputy City Attorney, and requested a response to your petition.<sup>1</sup> On July 29, Senior City Attorney Michelle Peters responded on behalf of the Departments. We have now completed our analysis and have fully considered your petition for access to records as well as the Departments' response. We considered your petition under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS"), and our findings are set forth below.

### FACTS

Our understanding of the facts in these matters is based on your petition and the information contained in the Departments' response.

According to your petition, by letter dated May 13, 2015, Jeremy Fitzpatrick, an attorney in your firm, submitted a request for public records on behalf of GE Rail to Omaha City Attorney Paul Kratz. Specifically, Mr. Fitzpatrick requested

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<sup>1</sup> On July 24, we learned that Mr. Mumgaard has since retired from the City Law Department.

production of records we understand are in the possession of the City of Omaha Fire Department and the City of Omaha Police Department. The records relate to an explosion and fire to a rail car which occurred in Omaha on April 14, 2015 at facilities utilized by GE Rail and which resulted in the deaths of two employees of Nebraska Railcar Cleaning Services (“NRCS”) (the “April 14 Incident”).

Specifically, we understand that NRCS provided the Fire Department and the Police Department with copies of videotapes of the April 14 Incident and/or photographs of the April 14 Incident. We are requesting copies of any such videotapes and photographs.

Mr. Fitzpatrick indicated that access to the requested materials would “allow GE Rail to evaluate opportunities for it to continue to enhance its operational best practices.”

By letter dated May 19, 2015, Mr. Mumgaard, responding on behalf of the Departments, denied your request. Mr. Mumgaard stated, in pertinent part:

The recording and photographs are withheld pursuant to Neb. Rev. Stat. § 84-712.05(5).

Any video recordings possessed by these Departments were created as part of an investigation of persons by a law enforcement agency or other public body, including whether the fire resulted from any violation of law. As you note, a recording made by equipment at a private business was obtained as evidence during this criminal investigation. Both the Police Department and Fire Department have copies of that recording and the original digital recording was left with the business. Photographs were taken by investigators in the Fire Department’s fire investigation unit to document the scene and evidence. These investigators have the power of arrest and the duty to investigate the origin and cause of fires, including fires of unlawful cause. The video and photographs constitute part of that investigation. They contain no reasonably segregable public portions. The status of the Departments’ copies under the Public Records Act is not affected by the private source of the original recording.

In your petition, you state that GE Rail wishes to view the videotape<sup>2</sup> for “public safety reasons” in an effort to identify and address all possible ignition sources for the

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<sup>2</sup> For the record, the petition only seeks our review of the denial of the videotape in the possession of the Departments.

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explosion. You also state that at the suggestion of Mr. Mumgaard, you submitted a request to Fire Chief Kanger to view the videotape, in lieu of receiving a copy. This request was also denied.

With respect to the specific exception claimed by the Departments to withhold the requested records, i.e., Neb. Rev. Stat. § 84-712.05(5), you assert that the videotape at issue was created by NRCS, and not by either department. You further state that the fact that the city has allowed NRCS to retain a copy of the videotape “significantly if not completely undercuts the assertion that allowing persons other than law enforcement to view the videotape could somehow impair an ongoing investigation.” You point out that the withholding of records under Neb. Rev. Stat. § 84-712.05(5) is done at the discretion of the public body, and that our office has the discretion under Neb. Rev. Stat. § 84-712.03 to determine that the requested record should not be withheld. You exhort us to make this determination “in the interest of public safety.”

In her response to this office, Ms. Peters states that the City of Omaha does not contest that the requested videotape is a public record under the NPRS. However, she believes that the request was properly denied using the exception set out in Neb. Rev. Stat. § 84-712.05(5). Ms. Peters states that pursuant to Neb. Rev. Stat. §§ 14-102(25) and 14-709 (2012), and Omaha Home Rule Charter § 3.11, the Omaha Fire Department is a law enforcement agency as that term is used in § 84-712.05(5). She indicated that “sworn law enforcement officers in the Fire Investigation Unit of the Omaha Fire Department have the power to arrest persons for violations of law and a corresponding duty to investigate persons’ conduct when enforcing the laws.”

With respect to your assertions that the videotape was created by NRCS and not the Departments, and the fact that the Departments allowed NRCS to retain a copy of the videotape, which could allow others to view it, Ms. Peters believes that this view misreads the statute. She states that the statute applies to records in the *possession* of the city, not just records the city generates. Ms. Peters states that NRCS made the decision with respect to securing the original videotape or making copies, and the issue does not implicate any rights under the statute.

Ms. Peters also challenges GE Rail’s stated reason to obtain the requested records, i.e., for public safety reasons relating to identifying and addressing possible ignition sources relating to the explosion. She indicates that as Captain Dooley’s affidavit confirms (see below), the videotape does not contain any images as to what happened inside the railcar. Ms. Peters states that “[t]he statute does not make disclosure or non-disclosure depend on any person’s intended use of records, and attorneys have no greater right to see law enforcement records than any member of the public.”

In addition to her response, Ms. Peters also included an affidavit of Omaha Fire Captain Donald Dooley. According to his affidavit, Captain Dooley has held the position of Fire Investigator since December 2008 and is assigned to the Fire Investigation Unit. Part of his duties involves investigating fires that occur within the city limits of Omaha. With respect to the April 14 incident, Captain Dooley states that he and his partner were dispatched to the scene (120 Hickory Street) to conduct an investigation into the cause of the incident. Captain Dooley states that he is the lead investigator on this matter. Captain Dooley further states that he conducted interviews with the owner and employees involved in the incident. He also examined the exterior of the rail car, tools used and the area surrounding the rail car as part of his investigation. Captain Dooley was assisted on the day of the incident by Omaha Police Department (“OPD”) homicide detectives and an OSHA representative. He has since been contacted by representatives from the EPA, who have asked for Captain Dooley’s assistance in its investigation. Captain Dooley states that his investigation has resulted in several possible scenarios that could lead to criminal charges. OSHA and EPA have ongoing investigations that could also lead to criminal charges.

Captain Dooley states that NRCS provided a videotape of the scene to investigators during the immediate hours after the incident. He states that he has reviewed the videotape at issue, and provided us a general description of the activities depicted. Captain Dooley states that the videotape is from a great distance and “does not show anything that occurred inside the railcar were [sic] I believe the incident started.” He states that the videotape was booked into the OPD Property Unit, and that personnel from the OPD Crime Lab have made one or more copies of the original videotape. These crime lab recordings are property of the OPD per standard operating procedure, and may not be disseminated without specific authorization of the Chief of Police or his designee. Captain Dooley states that none of the videotapes have been publicly displayed at the time of the incident, or subsequently. Captain Dooley states “[t]he video is evidence obtained during my investigative process for use in the subsequent investigation and for use by the grand jury or other prosecutorial inquiry.”

Finally, Ms. Peters states that the Nebraska Legislature has determined the public policy to be followed with respect to the investigatory records of law enforcement agencies, and “has established the amount of transparency required of police operations.” Further, she states that this policy—that records compiled during an investigation by law enforcement into potential criminal conduct need not be put out into the public domain—has remained unchanged for many years. She strongly urges that the policy remain unchanged, and suggests that the Attorney General does not have the ability to change it.

## DISCUSSION

The Nebraska Public Records Statutes generally 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 records, and to obtain copies of 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 applies to disclosure of 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).

Also as an initial matter, Neb. Rev. Stat. § 84-712 does not require any showing by a person requesting access to public records of the reason for his or her review of those records. The underlying reason(s) for GE Rail's public records request is not relevant in determining whether the Departments have complied with these statutes, and we do not consider it in our analysis. See *State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993).

### Investigatory Records Exception

Although the Nebraska Public Records Statutes provide for access to public documents, they are not absolute. The NPRS also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). 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 Departments have claimed the exception set out in subsection (5) as its basis for denying you access to the requested videotape [and photographs]. That subsection 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 the records:

(5) Records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, when the records constitute a part of the examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training, except that this subdivision shall not

apply to records so developed or received relating to the presence of and amount or concentration of alcohol or drugs in any body fluid of any person;

In Nebraska, in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Swift and Company v. Nebraska Department of Revenue*, 278 Neb. 763, 773 N.W.2d 381 (2009). The plain and ordinary reading of § 84-712.05(5) indicates that law enforcement agencies may withhold records they develop or receive which relate to investigations which they have undertaken.<sup>3</sup> There is little question that the Omaha Police Department and the Omaha Fire Department-Fire Inspection Unit are law enforcement agencies. The videotape at issue was created at the April 14 incident scene, and was forwarded to the Departments in the course of their investigations. In our view, the videotape falls squarely within the claimed exception, and we do not believe that the Departments generally, or Chief Kanger in particular, exceeded their authority by declining to provide you the requested videotape.

We find additional guidance in the Nebraska Supreme Court case *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). In *Nebraska Health Care Association*, the court considered whether certain records generated by the Department of Health and Human Services [DHHS] in the course of its audits of nursing homes were “investigatory records,” which could be withheld by the agency under § 84-712.05(5). To aid in its analysis, the court created the following standard, concluding

a public record is an investigatory record where (1) the activity giving rise to the document sought is related to the duty of investigation or examination with which the public body is charged and (2) the relationship between the investigation or examination and that public body’s duty to investigate or examine supports a colorable claim of rationality.

*Id.* at 792, 587 N.W.2d at 106. The court found that DHHS was a public body charged with the duty to investigate nursing homes’ medicaid reimbursement claims, and that its auditing activities were “clearly and rationally related to the Department’s investigatory duty.” *Id.* However, it questioned whether DHHS’ auditing activities were “investigations or examinations within the meaning of § 84-712.05(5).” *Id.* In addressing this question, the court conceived another standard, stating:

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<sup>3</sup> The term “law enforcement” is defined as “1. The detection and punishment of violations of the law . . . [and] 3. Police officers and other members of the executive branch of government charged with carrying out and enforcing the criminal law.” BLACK’S LAW DICTIONARY 714 (abridged 7<sup>th</sup> ed. 2000).

It has generally been held that a distinction must be drawn between (1) routine administration or oversight activities and (2) focused inquiries into specific violations of law. . . . If a document is compiled ancillary to an agency's administrative function, then it is not protected from disclosure; when, however, an inquiry by an administrative agency departs from the routine and focuses with special intensity on a particular party, an investigation is underway for purposes of the investigatory records exception.

*Id.* at 792, 587 N.W.2d at 106-107 (internal citations omitted). The court ultimately concluded that the DHHS' auditors had departed from the routine when they decided to make specific requests for further information to address particular deficiencies in the cost reports submitted by nursing homes. As a result, the court found that DHHS could lawfully withhold the requested documents under the exception in § 84-712.05(5).

Applying the standards set out in *Nebraska Health Care Association* to the circumstances here, it appears to us that the City of Omaha has established that (1) the Departments are public bodies charged with duties of investigation or examination of persons, institutions, or businesses; (2) the investigation into the April 14 incident, during which the videotape was produced, was related to the Departments' duties of investigation and examination; and (3) that the specific investigation was rationally related to the investigatory duties imposed on the Departments by law. Finally, the Departments have shown that the videotape was not compiled ancillary to their administrative functions, but rather focused with special intensity on a particular event, where two individuals were tragically killed. Based on the foregoing, we believe that the requested videotape does constitute an "investigatory record" as contemplated in Neb. Rev. Stat. § 84-712.05(5).

#### Videotape Was Provided by NRCS and Not Created by the Departments

Your petition contains an assertion that the exception set out in § 84-712.05(5) may not be applicable because NRCS created the videotape, not the Departments. Ms. Peters argues that the exception relates to those records that the Departments may possess, not actually generate. We agree. The broad language found in § 84-712.01, which defines public records as records "of or belonging to" a public body, includes any documents or records that a public body is entitled to possess, regardless of whether the public body takes possession. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009). Moreover, the plain language of the statutory exception indicates that any records *developed or received* by law enforcement agencies may be withheld if those records constitute part of the investigation. According to Captain Dooley's affidavit, "NRCS provided a videotape of the scene to investigators" sometime immediately after

the explosion. It is not necessary under the statute that the records be actually created by the public body in order to assert an exception.

#### Videotape Retained by NRCS

Your last argument relates to the fact that NRCS retained a copy of the requested videotape. You state that this fact “significantly if not completely undercuts the assertion that allowing persons other than law enforcement to view the videotape could somehow impair an ongoing investigation.” Ms. Peters states that NRCS made the decision as to who retained the original videotape or copies, and does not implicate any rights under the statute. We believe that Ms. Peters is correct in this regard. You have requested the videotape from two public bodies, who have asserted § 84-712.05(5) to withhold it from public disclosure. The fact that NRCS may have retained the original videotape does not alter or impact our analysis as to whether the Departments may rely on the stated exception to withhold it.

### **CONCLUSION**

For the reasons explained above, we believe that the requested videotape belonging to the Omaha Police Department and the Omaha Fire Department may be lawfully withheld under Neb. Rev. Stat. § 84-712.05(5). We further believe that the Omaha Police Department and the Omaha Fire Department did not unlawfully deny your records requests, and that no further action by this office is warranted. Accordingly, we are closing this file.

Our responsibility under Neb. Rev. Stat. § 84-712.03 is to determine whether a record may be withheld from public inspection or whether the public body is otherwise in compliance with the NPRS. We agree with you that under Neb. Rev. Stat. § 84-712.05, certain records *may* be withheld from the public. The exceptions to disclosure are not mandatory, and a public body has discretion to determine whether it will assert an exception. In the present case, however, we have determined that the Departments were authorized to withhold the videotape under the investigatory records exception. We have no authority to direct a public body to change its policy with respect to the disclosure of public records when we have determined that withholding the record is authorized.

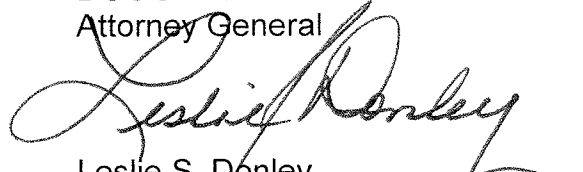


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If you disagree with the analysis we have set out above, you may wish to consider what additional remedies may be available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General



Leslie S. Donley  
Assistant Attorney General

c: Michelle Peters  
Senior City Attorney

49-1358-29