

STATE OF NEBRASKA
Office of the Attorney General

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DOUGLAS J. PETERSON
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LESLIE S. DONLEY
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March 22, 2018

Juanita Phillips
[REDACTED]

RE: *File No. 18-R-106; Lincoln Police Department; Juanita Phillips, Petitioner*

Dear Ms. Phillips:

This letter is in response to your petition received by this office on March 6, 2018, in which you sought our assistance in obtaining certain public records from the City of Lincoln Police Department ("Department"). Upon receipt of your petition, we wrote to you requesting a copy of your original public records request and any other underlying documentation associated with your request, which we received on March 7.¹ We subsequently contacted Assistant City Attorney Rick Tast, who handled your request, and advised him of the opportunity to provide this office a response to the petition. On March 19, 2018, we received Mr. Tast's response. On March 21, 2018, the undersigned contacted Mr. Tast to clarify portions of the Department's response. We have now had the opportunity to fully consider your petition and the Department's response in accordance with the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2016) ("NPRS"). Our findings in this matter are set forth below.

RELEVANT 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. Tast.

¹ Our investigation of any petition submitted to this office under § 84-712.03 (2014) begins once we receive documentation sufficient to investigate the petition, i.e., the public records request, a copy of the response from the public body, if any; and any other documentation associated with the request, denial and/or noncompliance by the public body of the NPRS.

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On February 8, 2018, you emailed a request for public records to the Department, addressed to Chief of Police Jeff Bliemeister. Specifically, you sought the following records:

[A]ny and all content, including but not limited to dashcam video and related audio, dispatcher logs, police reports, witness statements at the scene, internal memos, related departmental policies, release of any content/information/video/audio and/or any related information released to any news- or media-related agency and/or personnel, any information requests made by any news- or media-related agency and/or personnel and the name and contact information of such news/media agency or personnel related to the incident that occurred on or about September 1995 involving Lawrence Phillips, Kate McEwen, and Scott Frost, Lancaster County, Nebraska CASE NUMBER #95-096843, alleging the following charges against Lawrence Phillips: trespassing; misdemeanor assault and any and all information related to the date and outcome of such charges. Please provide "certified copies" of all official documents.

Following a series of emails between you and Mr. Tast, in which the date of producing responsive records was scheduled and subsequently modified,² responsive documents were emailed to you on March 4.³ In his letter accompanying the production, Mr. Tast indicated that

[a]dditional reports and documents are within the custody of the City, but have been withheld because they have been determined by Chief Jeffrey Bliemeister to be records not disclosable under Neb. Rev. Stat. § 84-712.05.

Documents specifically being withheld include case investigation documents including but not limited to transcribed statements from the victim and witnesses, as well as investigation reports, and documents concerning the production of such documents as it has been determined they are records developed or received by a law enforcement agency which constitute part of an investigation as contemplated by Nev. [sic] Rev. Stat. § 84-712.05(5).

² To the extent you question the amount of time it took to receive records from the Department, Neb. Rev. Stat. § 84-712(4) (2014) allows the custodian of records to delay any production beyond four business days after actual receipt "due to the significant difficulty or the extensiveness of the request." However, the custodian must provide the requester "a written explanation, including the earliest practicable date for fulfilling the request, an estimate of the expected cost of any copies, and an opportunity for the requester to modify or prioritize the items within the request." In this regard, we will remind Mr. Tast to carefully review the statute to ensure full compliance in the future.

³ Specifically, those records included a photograph of Mr. Phillips, a Lincoln Police Department Public Record Criminal History report for Lawrence L. Phillips; and an incident report for Case No. 95-096843.

Upon review, you found the documents provided by the Department unresponsive, “[s]pecifically victim and witness statements, investigations, as well as public relations requests and responses regarding media involvement and publicity are specifics of the requested documents which you have failed to release.” You challenged the application of § 84-712.05(5) to withhold such documents and you also informed the Department that its “former ‘disclosure’ of the requested records allegedly to media, as is documented in publicly accessible media, voids your claim of ‘confidential records.’” In your petition to this office, you have asked us

to determine whether the case investigation documents and reports, statements from the victim and witnesses, and public relations records regarding contact with and disclosure of such records to media (which are still widely reported by media to the general public as factual), are being unlawfully withheld from release to me.

DISCUSSION

Neb. Rev. Stat. § 84-712 (2014) of the Nebraska Public Records Statutes sets out the general rule for access to public records in Nebraska. That statute provides, in pertinent part, 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.

Neb. Rev. Stat. § 84-712(1) (2014) (emphasis added). “Public records” are defined as follows:

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.

Neb. Rev. Stat. § 84-712.01(1) (2014) (emphasis added). As indicated by the underscored language above, access to public records is not absolute. In those instances where the Legislature has provided that a particular record shall be confidential or may be withheld at the discretion of the records custodian under the categories of records set out in § 84-712.05, there is no right of access. 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).

In the present case, the Department is relying on the exception in Neb. Rev. Stat. § 84-712.05(5) (Cum. Supp. 2016) as its legal basis to withhold the requested investigatory records. That exception 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:

* * *

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

On several previous occasions, this office has considered petitions filed under § 84-712.03 of the NPRS where the petitioner(s) specifically sought investigatory records from law enforcement agencies. We determined in each instance that the agencies involved could properly withhold the requested records under the exception in § 84-712.05(5).⁴ Our conclusions were based, in large part, on the plain language of the

⁴ See, e.g., File No. 17-R-133; *Alliance Police Department; Cheryl Spencer, Petitioner* (July 18, 2017); File No. 17-R-121, *Wymore Police Department, Wayne and Sandi Gridley, Petitioners* (April 20, 2017); File No. 16-R-134, *University of Nebraska-Lincoln [Police Department], Ralph W. Edwards, Petitioner* (September 28, 2016); File No. 16-R-102, *Omaha Police Department, KETV, Petitioner* (February 8, 2016); File No. 15-R-145, *Nebraska State Patrol, Joshua Renth, Petitioner* (November 2, 2015); File No. 15-R-130, *City of Omaha Police and Fire Departments, General Electric Railcar Services Corp., Petitioner* (August 3, 2015); and File Nos. 15-R-110 and 15-R-112, *Omaha Police Department, Cathy Beeler, KETV Newswatch 7, Petitioner* (April 8, 2015); and File No. 13-R-139; *City of Lincoln Police Department; Emily*

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exception,⁵ which expressly permits “law enforcement agencies” to withhold records developed or received by the agencies when the records relate to investigations of persons, institutions or businesses.

There is nothing in your request or petition that would warrant a different result. The records at issue were developed by the Lincoln Police Department—a law enforcement agency—with respect to a criminal investigation of Mr. Phillips stemming from an incident occurring on September 10, 1995. The Department is the lawful custodian of the records. According to Mr. Tast, none of the withheld records were publicly disclosed in open court or another forum, which would nullify the application of the exception. In addition, it appears that the Department provided you the criminal history record information it is required to disclose under the Security, Privacy, and Dissemination of Criminal History Information Act, Neb. Rev. Stat. §§ 29-209, 29-210, 29-3501 to 29-3528, and 81-1423 (2016).⁶ As a result, we conclude that the Department may continue to withhold the requested investigatory records under the exception in § 84-712.05(5).

We note that your records request sought other records that would not fall within the parameters of the investigatory records exception, i.e., “public relations requests and responses regarding media involvement and publicity” In this regard, we contacted Mr. Tast to confirm that the Department had no records relating to such disclosures to the news media. Mr. Tast clarified that in the course of the Department’s search, the search was extended to the Mayor’s Office and Information Technology when it appeared that these departments may have been implicated by your request. However, he indicated that after a thorough search, no other records were located. Mr. Tast represents that “it has been and continues to be the practice of the City of Lincoln and the Lincoln Police Department to not release any investigative reports to the press or media outlets.” Mr. Tast further informed us that

Bazon, *Slate Magazine*, *Petitioner* (December 9, 2013). Copies of our disposition letters relating to these files are accessible at <https://ago.nebraska.gov/disposition-letters>.

⁵ 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. *Farmers Cooperative v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017).

⁶ We note that the act defines “criminal history record information” as “information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of issuance of arrest warrants, arrests, detentions, indictments, charges by information, and other formal criminal charges, and any disposition arising from such arrests, charges, sentencing, correctional supervision, and release. Criminal history record information shall include any judgment against or settlement with the state as a result of a wrongful conviction pursuant to the Nebraska Claims for Wrongful Conviction and Imprisonment Act. Criminal history record information shall not include intelligence or investigative information.” Neb. Rev. Stat. § 29-3506 (2016) (emphasis added).

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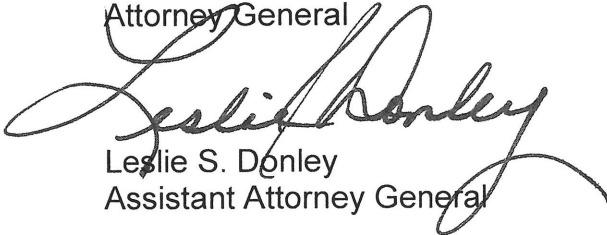
[i]t has been the City's experience that from time to time, and especially in circumstances where a matter has more social value, is highly publicized, or has a great deal of interest within the community, members of the media, through their own resources and investigation, have been able to determine particular facts about a matter and/or the identity of individuals involved. We believe this to be the case in this matter, as this incident had garnered national media coverage when it occurred.

CONCLUSION

For the reasons discussed above, the Lincoln Police Department may continue to withhold any investigatory records pertaining to the incident at issue under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(5). With respect to your request for any records disseminated to the news media by the Department, those records do not exist. Since we have concluded that you were not improperly denied access to public records, no further action by this office is necessary and we are closing this file. Finally, if you disagree with our analysis, you may wish to discuss this matter with your private attorney to determine what, if any, additional remedies might be available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Rick Tast

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