

STATE OF NEBRASKA
Office of the Attorney General

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DOUGLAS J. PETERSON
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July 25, 2018

Via email at [REDACTED]
Annita Lucchesi

RE: *File No. 18-R-122; Nebraska State Patrol; Annita Lucchesi, Petitioner*

Dear Ms. Lucchesi:

This letter is in response to your email correspondence received by this office on July 10, 2018, in which you sought our assistance in obtaining certain public records from the Nebraska State Patrol ("NSP"). We construed your correspondence to be a petition for review under § 84-712.03 of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2016¹) ("NPRS"). Upon receipt of your petition, we contacted the NSP's legal counsel, Nicole Hutter, to inquire about your request. We also requested and received all correspondence exchanged between you and NSP staff regarding your initial and subsequently modified request. Our findings in this matter are set forth below.

RELEVANT FACTS

On July 9, 2018, you emailed a request for public records to the NSP (via MuckRock.com, a third-party news site) seeking the following "records":

Data on all cases of: unsolved missing persons, homicides, suspicious deaths, and deaths in custody involving an Alaska Native/American Indian woman or girl victim within your jurisdiction(s). For the purposes of this request, "Alaska Native/American Indian" is defined as any individual who was identified as a member of an Alaska Native or American Indian community or as having Alaska Native/American Indian heritage. "Woman or girl" includes all victims identified as females, as well as transgender women. If there are any Jane Does that have been identified as potentially Alaska Native or American Indian, please include them as well.

¹ See also 2018 Neb. Laws LB 193; 2018 Neb. Laws 859; and 2018 Neb. Laws LB 902.

This request is for basic information on cases as classified above. Such information may include but is not limited to victim name, location and date of disappearance/death, age of victim, status of case (solved or unsolved).

Ms. Hutter responded to your request on July 10, 2018. She indicated that the requested "information is considered investigative in nature" and denied you access to the information under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(5) of the NPRS.

You subsequently modified your request to include only "victim names and incident dates." You further limited your request to "all data beginning in 2009," and asked for a quote to access records prior to 2009. On July 16, Ms. Hutter denied your modified request. Ms. Hutter indicated that her office "spent a couple hours looking through [their] records regarding the information you [were] seeking" However, she indicated that it would take several hours for the NSP to compile the data in the form requested. Citing to three Attorney General opinions² in which this office indicated that "§ 84-712 does not require a public agency to review documents and create abstracts or other lists, to answer questions or to create documents which do not otherwise exist," Ms. Hutter indicated that the NSP had no records responsive to your request.

Ms. Hutter informs this office that the NSP does not have the information you seek in a tangible, discrete document. Files are not classified by race, so individual files would have to be individually reviewed to identify victims who are or may be Alaska Native/American Indian. Ms. Hutter further indicates that the NSP does not have a database of information that, with programming, could elicit the requested information.

DISCUSSION

In Nebraska, the basic rule for open public records is found at Neb. Rev. Stat. § 84-712 of the Nebraska Public Records Statutes. That statute provides, in pertinent part, that

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

² Op. Att'y Gen. No. 94092 (November 23, 1994); Op. Att'y Gen. No. 94035 (May 13, 1994); Op. Att'y Gen. No. 87104 (October 27, 1987).

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.

“Public records” are defined as

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). 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.

As noted above, Ms. Hutter relies on prior opinions of this office to support NSP’s determination that it has no responsive records. A brief summary of two of the opinions pertinent to this matter follows below:

Op. Att’y Gen. No. 87104

In Op. Att’y Gen. No. 87104 (October 27, 1987), the Attorney General considered whether the Department of Motor Vehicles (“DMV”) could compile and provide lists of driving records to private individuals. The Attorney General noted that while driver’s license records clearly fit the definition of public record in § 84-712.01, no statute required the production of such data lists. However, he also noted

that [§ 84-712] requires only that the record-keeping agencies provide access to records; the intent of LB 505, which altered § 84–712 to its present form, was “to guarantee that public records in the custody of a public officer of the state, county, or political subdivision of the state, will be available for examination by the press or any citizen interested in his government.” Committee Statement, Committee Records, LB 505, 1961. This does not require even the production of copies³ of the records, to say nothing of derivation of data lists from agency records.

³ Prior to 2000, the NPRS did not expressly provide that citizens and interested persons had a right to obtain copies of public records. That situation changed with the passage of 2000 Neb. Laws LB 628.

Id. at 1. The Attorney General noted the distinction between a statute which required the production of driving record abstracts for specific individuals with the purpose of § 84-712, which only required that the public have access to government records. He stated that “[n]either . . . statute[] requires nor specifically grants authority to produce data lists based on departmental records.” He did indicate, however, that the “statutes do not prohibit the [DMV] from providing public access to its records by means of statistical criteria.”⁴ *Id.* at 2.

Op. Att’y Gen. No. 94035

In Op. Att’y Gen. No. 94035 (May 13, 1994), the Attorney General determined, among other things, whether the State Department of Education was required, under a request made pursuant to § 84-712, to disclose a list of unsuccessful applicants for employment within the agency. The Attorney General generally noted that

[t]he Public Records Statutes . . . give interested parties in Nebraska a broad general right to view public documents at the governmental offices in possession of those documents during normal business hours, and to make notes or memoranda therefrom. The Public Records Statutes, on the other hand, do not require public officials to provide copies of public records, to answer questions, or to create documents which do not otherwise exist. In particular, the Public Records Statutes do not require agencies to create abstracts or lists in response to a public records request. Op. Att’y Gen. No. 87104 (October 27, 1987).

(Emphasis added.) With respect to the specific question about disclosing a list of unsuccessful applicants, the Attorney General stated that “we do not believe that the Department is required to prepare or disclose lists of unsuccessful applicants for the contract or permanent employee positions that it fills *unless such lists already exist*. *Id.* at 2 (emphasis added). The Attorney General went on to say that to the extent such lists do exist, they are public records which must be disclosed since it appeared no exception to disclosure in § 84-712.05 applied.⁵

NSP counsel has represented to this office that the NSP does not have the information you requested in an existing record. The information you seek would have to be culled from individual files and compiled to create a new record. In addition, the information you seek is not stored in a database, which could be retrieved, compiled and

⁴ Unlike the present case, it appeared that DMV records could be retrieved from a computer data base.

⁵ Subsequent amendments to § 84-712.05 of the NPRS now authorize a public body to withhold at its discretion job application materials of nonfinalists or priority candidates (as defined in Neb. Rev. Stat. § 85-106.06) who have applied for employment by any public governmental body. See subsection (15).

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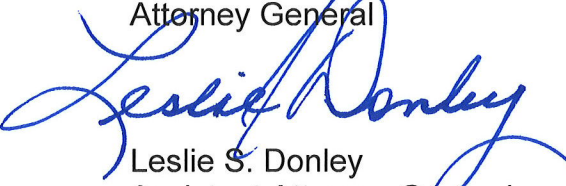
produced. See Neb. Rev. Stat. § 84-712(3)(b)(iii). Moreover, there is no statute that expressly requires the NSP to produce the requested data list from its files. As evidenced by the opinions discussed above, this office has through the years consistently taken the position that public bodies do not have to create records which do not already exist in response to a request for public records. We believe that the NSP's July 16 response to you was consistent with that position, and was appropriate under the circumstances presented.

CONCLUSION

Since the Nebraska State Patrol is not required under a request made pursuant to § 84-712 to create a record that does not already exist, you have not been denied access to public records. As a result, no further action by this office is necessary and we are closing this file. 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: Nicole Hutter

49-2043-29