



STATE OF NEBRASKA
Office of the Attorney General

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DOUGLAS J. PETERSON
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July 29, 2022

Via email at [REDACTED]
Kathleen M. Foster

RE: *File No. 22-R-136; Douglas County Sheriff; Kathleen M. Foster, Petitioner*

Dear Ms. Foster:

This letter is in response to your petition received by this office on July 14, 2022, in which you requested that we review the denial by the Douglas County Sheriff's Office ("DCSO") of your public records request submitted on June 22, 2022. In accordance with our normal procedures, we forwarded your petition to Deputy Douglas County Attorney William E. Rooney III, and we subsequently received a response from Mr. Rooney on behalf of the DCSO on July 28. We have considered this matter in accordance with the provisions of the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020, Supp. 2021), amended 2022 Neb. Laws LBs 876 and 1246. Our findings in this matter are set forth below.

FACTS

On June 22, 2022, you submitted a records request to the DCSO seeking the following:

Records of dates, times and content of telephone calls, texts, emails, and communications of any kind, including in-person visits between Deputy Michael Dechellis, S408, 402-444-5290 michael.dechellis@douglascountyne.gov and Andrea Wiggs and Neal Wiggs [REDACTED]

¹ We have redacted the address and personal phone numbers appearing in your request.

Also requesting production of any information, including videos, documentation, photos, and personal identifying information of third parties that was exchanged between the three parties.

Mr. Rooney responded on June 29, indicating that he would follow up with you on or by July 13. By letter dated July 13, Mr. Rooney denied you access to responsive records under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(5).

In your petition, you question the necessity for the delay to July 13 since your request was ultimately denied, and Mr. Rooney had made no objection to the production of the requested records in his June 29 response. You assert that the denial was made “without any specific information as to why.” You further assert that since a large part of the requested records are “communication between a complaining witness and investigative deputy with Douglas County,” you question why “such information is protected, as she is the source of the complaints.”

According to Mr. Rooney, the DCSO properly withheld records that “were developed or received by DCSO in connection with its investigation into various calls made to DCSO” and that the “. . . DCSO is charged with the duties of investigation of these types and the records located constitute a part of said investigation.”² Mr. Rooney indicates that the DCSO is in possession of other records (citations and an arrest record) which generally pertain to your public records request, and that the DCSO will make those noninvestigatory records available to you upon request.

DISCUSSION

The basic rule for access to public records is set out in § 84-712(1), which provides 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.

² Mr. Rooney informs us that the withheld records include: Eleven criminal case reports; one witness statement; two officer narrative reports; one non-criminal case report; and various email communications.

“Public records” in Nebraska “include all records and documents, regardless of physical form, of or belonging to” governmental entities in the state, “[e]xcept when any other statute expressly provides that particular information or records shall not be made public.” Neb. Rev. Stat. § 84-712.01(1) (2014). Thus, 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 § 84-712.05, there is no right of access. The NPRS “place[s] the burden of proof upon the public body to justify nondisclosure.” *State ex rel. BH Media Group v. Frakes*, 305 Neb. 780, 792, 943 N.W.2d 231, 242 (2020).

In his July 13, 2022, letter, Mr. Rooney informed you that responsive records were being withheld under § 84-712.05(5), and provided you the entire text of the exception on page 3 of his response. Section 84-712.05 currently contains twenty-five categories of public records that may be withheld at the discretion of a public body so long as those records have not been “publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties” The exception at issue here pertains to

[r]ecords 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 training³

This office has considered the propriety of law enforcement agencies withholding investigatory records under § 84-712.05(5) on multiple occasions through the years.⁴ We have consistently held that such withholding is permissible, relying in large part on the plain language of the exception,⁵ which expressly permits *law enforcement agencies* to withhold records developed or received by those agencies in the course of an

³ There are two exceptions to the exception: (1) records relating to the presence of drugs or alcohol in any body fluid of any person; and (2) records relating to the cause of death arising out employment once an investigation is concluded when requested by a family member of the deceased.

⁴ See, e.g., *File No. 21-R-141; Omaha Police Department; Amanda Coleman, Petitioner* (November 3, 2021); *File No. 21-R-139; Nebraska State Patrol; Chris Dunker, Lincoln Journal Star, Petitioner* (October 20, 2021); *File No. 21-R-115; Omaha Police Department; Christopher Fielding, Petitioner* (June 10, 2021); *File No. 19-R-130; City of Omaha Police Department; David Earl, KETV NewsWatch 7, Petitioner* (December 20, 2019); *File No. 19-R-106; Omaha Police Department; Reginald L. Young, Petitioner* (January 31, 2019); *File No. 18-R-106; Lincoln Police Department; Juanita Phillips, Petitioner* (March 22, 2018); and *File No. 17-R-133; Alliance Police Department; Cheryl Spencer, Petitioner* (July 18, 2017). 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. *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 123, 907 N.W.2d 301, 308 (2018).

investigation. We have no basis to conclude otherwise with respect to your request for records from the DCSO. Mr. Rooney represents to this office the records were developed and/or received by the DCSO—a law enforcement agency—and directly relate to the various calls for service and the subsequent investigation of those events. Consequently, since the requested records relate to DCSO investigations, those records may be properly withheld under § 84-712.05(5).

Finally, we will briefly address your assertion that the communication between “a complaining witness and investigative deputy” should not be “protected” since “she is the source of the complaints.” We could possibly see the plausibility of this argument if the complaining witness had requested the records at issue, and not a third party. But even then it would be irrelevant. Public bodies have the discretion to withhold public records that fall under the various categories in § 84-712.05 so long as those records have not been already publicly disclosed. The fact that the “complaining witness” is the “source of the complaints” does not make the records at issue here any less investigatory and in no way impacts the DCSO’s ability to withhold the records under § 84-712.05(5).⁶

CONCLUSION

Based on the foregoing, we conclude that the DCSO may withhold records responsive to your request that are investigatory in nature under the exception to disclosure in § 84-712.05(5). Since no further action by this office is necessary, we are closing this file. If you disagree with the conclusion reached in this disposition letter, you are free to pursue the other legal remedies available to you under Neb. Rev. Stat. § 84-712.03 of the NPRS.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: William E. Rooney III (via email only)
49-2993-30

⁶ While not relied on by the DCSO, we note that § 29-3506 of 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, Cum. Supp. 2020, Supp. 2021), specifically exempts “intelligence or investigative information” from the “criminal history record information” that must be disclosed by criminal justice agencies under the act.