

STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

JON BRUNING
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

June 2, 2011

Tony Secret, Special Investigator
United Heartland Insurance Company
P.O. Box 3026
Milwaukee, WI 53201-3026

RE: *File No. 11-R-119; Omaha Police Department; Petitioner Tony Secret,
United Heartland Insurance Company*

Dear Mr. Secret:

This letter is in response to your letter dated and received by us on May 18, 2011, in which you requested our assistance in obtaining certain public records belonging to the City of Omaha Police Department (the "Department"). As is our normal practice with such requests, we contacted the party against whom the complaint was made and requested a response. In this particular case, we contacted Paul Kratz, the Omaha City Attorney. On May 25, 2011, we received a response from Deputy City Attorney Thomas O. Mumgaard, who responded on behalf of Omaha Chief of Police Alex Hayes. We have now considered your letter and Mr. Mumgaard's response to your petition under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010) ("NPRS"). Our findings in this matter are set forth below.

FACTS

On March 14, 2011, you sent by facsimile a public records request to Police Chief Hayes under the Freedom of Information Act. Your letter indicated that you were a Special Investigator for United Heartland Insurance Company, an insurer for School District #17 of Douglas County, Nebraska [the Millard School District]. Specifically, you requested documents relating to OPD IR# 70136-Y, as follows:

[A]ll reports, including supplementals, reports to the file from other jurisdictions, statements, interviews, and documentative reports from scenes and/or locations involved with the crime and any subsequent OPD

investigation relevant to OPD IR# 70136-Y, photographs, video, and documentation of any kind and sort and all evidence of any kind and sort relevant to OPD IR# 70136-Y.

Furthermore, we are requesting access to and copies of any and all other or separate incident reports, including supplementals, reports to the file from other jurisdictions, statements, interviews, and documentative reports from scenes and/or locations involved with the crime and any subsequent OPD investigation relevant to OPD IR# 70136-Y, photographs, video, and documentation of any kind and sort and all evidence of any kind and sort that would reference or be relevant to OPD IR# 70136-Y. This would include autopsy reports, [sic]

Assistant City Attorney Michelle Peters responded to your request by letter dated April 6, 2011. Ms. Peters indicated that your request for records relating to OPD IR# 70136-Y was denied, and that "[t]he records you seek are exempt from disclosure under Neb. Rev. Stat. § 84-712.05(5)." Ms. Peters also indicated that the requested records "relate to an on-going open investigation both internally and externally." However, Ms. Peters did provide you a copy of the OPD incident report on this matter.

Subsequently, you filed your petition with our office. You indicate that your company has been handling two workers' compensation claims generated from the incident at issue. You also indicate that on March 14, 2011, you confirmed with the Department that its investigation was closed and that there were many records available to review. However, you were advised to submit your request in writing. You did so on March 14, 2011. You further indicate that between March 14, 2011, and April 8, 2011, you left numerous messages for Chief Hayes regarding the status of your request, without response. You then received Ms. Peters' letter on April 8, 2011.

On May 17, 2011, you indicate that you visited the Department and requested the records for review. You were advised that the investigation was closed and the records would be made available. You state that instead of presenting the records, you met with a command officer who again advised you that the case was closed, and that you had already received the only records available to the public, i.e., the incident reports.

You conclude your petition by stating:

Please note that, throughout the course of our investigation, we have asserted our interest as Insurer/Legal Subrogee, of the involved party, our Insured. Our investigative intent is to determine if culpability exists past the Decedent Suspect. We have not taken any legal action, to date, and

we have stood down, pending completion of active Law Enforcement investigation. . . .

In his response, Mr. Mumgaard asserts that the denial of records was proper under the authority of Neb. Rev. Stat. § 84-712.05(5). Mr. Mumgaard states that your request, your petition to us, and the incident reports which were provided to you, all document an investigation conducted by the Department of the shooting that occurred on January 5, 2011. Mr. Mumgaard further asserts that "the status of an investigation is irrelevant to whether section 84-712.05(5) allows Chief Hayes to deny access to records developed or maintained as part of the investigation." He states that the statute contains no time limit, and does not distinguish between "open" and "closed" investigations. Mr. Mumgaard also points out that your intended use for the requested records, i.e., to determine whether an employee's claim should be granted or denied, is also irrelevant. Finally, Mr. Mumgaard concedes that the City's response was not timely, and that you should have been informed of the delay which resulted from on-going communications between the Police Department command and the Department's attorneys.

ANALYSIS

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 confidentiality statute 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).

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). Section 84-712.05 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 Department has claimed the "investigatory records" exception, which provides in relevant part:

(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; . . .

Without question, the Department is a public body charged with the duty to investigate criminal matters generally, and in particular, the shooting which occurred on January 5, 2011. In that regard, the Department's reliance on Neb. Rev. Stat. § 84-712.05(5) is appropriate. While it is unfortunate that you received conflicting information as to the open and closed status of the Department's investigation into this matter, and the purported availability and nonavailability of the investigatory records, in the final analysis it is, as Mr. Mumgaard asserts, irrelevant. The statute makes no provision regarding the "status" of the investigation; there simply is no distinction between open and closed investigations, and whether records relating to a "closed" investigation necessitate disclosure by the public body. Consequently, we agree with the Department's position that the records at issue may be lawfully withheld under the exception set out in § 84-712.05(5).

We note further that your petition includes information as to why you are seeking the requested records from the Department. For your information, Neb. Rev. Stat. § 84-712 of the NPRS does not require any showing by a person requesting access to public records of the reason for his or her review of those records. See *State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993). Under Neb. Rev. Stat. § 84-712.03, our review is limited to whether a record may be withheld from public inspection or whether the public body has otherwise failed to comply with the Nebraska Public Records Statutes. The underlying reason for your public records request is not relevant in determining whether the Department has complied with these statutes, and we do not consider it in our analysis.

Finally, we will suggest to the Department, by sending a copy of this letter to Mr. Mumgaard that, in the future, a timely response must follow any request for public records. Further, the Department's response must fully comport with the requirements set out in Neb. Rev. Stat. § 84-712(4). And, in the event access to particular records is denied, that the Department include all of the components set out in § 84-712.04 in its denial letter.

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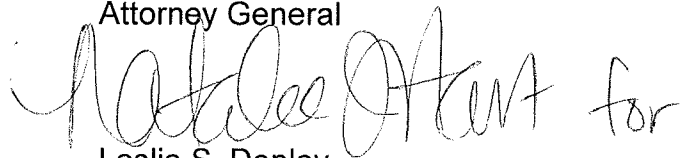
CONCLUSION

We believe that the requested documents belonging to the City of Omaha Police Department may be kept confidential under § 84-712.05(5). We further believe that the Department did not unlawfully deny your records request, and that no further action by this office is warranted. Accordingly, we are closing this records file.

If you disagree with our legal analysis set out herein, you may wish to consult with your attorney to 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

cc: Thomas O. Mumgaard, Esq.

49-615-30