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October 20, 2021

Via email to cdunker@journalstar.com
Chris Dunker
Lincoln Journal Star

RE: *File No. 21-R-139; Nebraska State Patrol; Chris Dunker, Lincoln Journal Star, Petitioner*

Dear Mr. Dunker:

This letter is in response to your petition received by this office on October 4, 2021, in which you challenge the partial denial of your September 28, 2021, public records request by the Nebraska State Patrol ("NSP"). Upon receipt of your petition, we forwarded it to NSP Superintendent Colonel John Bolduc, and advised him of the opportunity to provide this office a response. We received the NSP's response on October 8, 2021. Also, for the record, on October 19, the undersigned received written correspondence from the Lancaster County Attorney, Patrick Condon, regarding a criminal investigation involving some of the records at issue here. We have considered your petition and the NSP's response in accordance with the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020). Our findings in this matter are set forth below.

YOUR PUBLIC RECORDS REQUEST AND NSP'S DENIAL

On September 28, 2021, you requested the following records from the NSP:

1. Any annual audit of the Nebraska State Patrol Troop H Evidence Facility's inventory completed between 2015-2021.
2. Any quarterly report of the Nebraska State Patrol Troop H Evidence Facility's inventory completed between 2015-2021.
3. The most up-to-date policy or protocol training materials provided to evidence technicians employed at the Troop H Evidence Facility.

NSP attorney Jessica Forch responded to your request on October 1. Ms. Forch indicated that the audits were investigative in nature and were being withheld pursuant to the exception in Neb. Rev. Stat. § 84-712.05(5). With respect to the policy referenced in item no. 3, Ms. Forch partially denied your request, explaining that portions of the policy constituted “strategic or tactical information used in law enforcement training.” The 21-page policy, entitled “Property Management of In-Custody Evidence & Found/Recovered Property,” was redacted in its entirety under § 84-712.05(5), except for a portion of page one setting out the policy’s number, subject [name], effective and revision dates, purpose and policy.

YOUR PETITION

By way of background, you indicate that on September 24, 2021, the Lincoln Police Department (“LPD”) announced the arrest of a former NSP evidence technician who was accused of stealing \$1.2 million in drugs from the Troop H Evidence Facility. Your colleague, Andrew Wegley, interviewed Colonel Bolduc and public information officer Cody Thomas about the case on September 27, 2021. During the interview, Mr. Wegley requested a copy of an audit report of the facility. Colonel Bolduc recommended that Mr. Wegley file a public records request for the audits, indicating that “while some of those documents may currently be investigatory in nature, others could be available for release.” Thomas indicated that he anticipated that other requests would be filed for the audits or similar information, and that “Patrol leaders would work with the legal department to release them” Both men indicated that there *may* be some leeway in releasing previous audits; however, concerns over compromising LPD’s investigation were also raised.

As a result of the interviews, you requested, and were subsequently denied, the records listed above. You argue that

[section] 84-712.05(5) allows public entities to withhold records that “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.” The information requested – the audits of evidence storage facilities and the policies or procedures used by evidence technicians employed by the Patrol – do not relate to the investigation of any particular case, and would not identify any individuals, or could be lightly redacted to protect that information.

You further challenge the almost complete redaction of the policy under the language in § 84-712.05(5) pertaining to “strategic or tactical information used in law enforcement training.” You cite to *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009), where the Nebraska Supreme Court held that the statutory exemptions to disclosure must be narrowly construed. In this respect, you argue that

[t]he redaction seems to suggest that nearly all of the policies and procedures followed by evidence technicians employed by the Nebraska State Patrol are strategic or tactical in nature. The redaction does not narrowly construe the exemption granted in Neb. Rev. Stat. § 84-712.05(5). Moreover, the Nebraska Supreme Court has routinely endorsed reasonable redaction to facilitate disclosure of public records, such as in *Kimball*, and just last year in *State ex rel. BH Media Group, Inc. v. Frakes*. The redactions here amount to a refusal to comply with the law.

NSP'S RESPONSE

Ms. Forch represents that the audits have become investigative in nature due to the recent arrest of former employee Anna Idigima “for allegedly distributing drugs she had access to during the course and scope of her employment as an evidence technician.” She indicates that the LPD has and continues to investigate the matter. Part of that investigation involves collecting as evidence “all Troop H evidence-related documentation.”

Ms. Forch acknowledges that the NSP’s denial of the audits under § 84-712.05(5) is different from the “normal investigative records” the agency is allowed to withhold under the exception. However, she argues that withholding is appropriate based on the plain language of the statute, which allows law enforcement agencies to withhold records developed or received by agencies relating to the investigation of persons, institutions or businesses. In the present case, she states that “the documents—quarterly audits—were developed by NSP, a law enforcement agency, and relate to the investigation of Anna Idigima’s alleged distribution of items from NSP’s evidence facilities.” In addition, Ms. Forch asserts that since criminal charges have been filed against Ms. Idigima, the NSP “must be particularly mindful of criminal discovery rules, and not contribute to any attempt to circumvent those rules” Ms. Forch also asserts that any statements made by Colonel Bolduc regarding the possible release of the audits have no impact on the NSP’s ability to withhold those records once the written request was received by the NSP and an official determination as to the release of records was made.

The NSP’s response included an affidavit from NSP Lieutenant Cory Townsend, employed in the Professional Standards Division. Lt. Townsend oversees Policy and Accreditation and is familiar with NSP’s policies, including the NSP policy at issue here. Lt. Townsend states that “[m]uch of that policy is highly strategic and tactical in nature because public knowledge of such . . . information could undermine law enforcement operations related to the collection, transportation, storage and destruction of seized evidence.” He states that release of the policy could hinder NSP employees’ ability to conduct law enforcement operations relating to evidence and place employees in vulnerable positions. For example, the policy describes when and how large amounts of cash are to be deposited. It sets out the dollar amounts, the bank involved, how to conduct night deposits, and the number of staff present. Lt. Townsend states that “[p]ublic

knowledge of such strategic or tactical information could undermine law enforcement operations. . . . [I]f certain individuals had knowledge of NSP's process for transporting seized cash, they could use that information to attempt to intercept those deposits."

DISCUSSION

The basic rule for access to public records in Nebraska is set out in Neb. Rev. Stat. § 84-712(1) (2014). That provision states 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.

(Emphasis added.) "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, there is no absolute right to access public records in those instances where records are exempt from disclosure by statute. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009); *State ex rel. Nebraska Health Care Ass'n v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

It is the NSP's position that Neb. Rev. Stat. § 84-712.05(5) (Cum. Supp. 2020) provides an appropriate statutory basis to withhold the audits and redact the policy. This exception pertains, in pertinent part, 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 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

This office has concluded on multiple occasions that law enforcement agencies may rely on the exception in § 84-712.05(5) to withhold investigatory records developed or received by an agency in the course of its duties to investigate persons, institutions or businesses.¹ The conclusions reached in those files were based on the records at issue, the plain language of the exception and the Nebraska Supreme Court's definition of "investigatory record" set out in *Nebraska Health Care Ass'n*:

[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.

Nebraska Health Care Ass'n at 792, 587 N.W.2d at 106. However, "the investigatory exception does not apply to protect material compiled ancillary to an agency's routine administrative functions or oversight activities." *Evertson v. City of Kimball*, 278 Neb. 1, 15, 767 N.W.2d 751, 763 (2009).

You assert in your petition that the requested information "do[es] not relate to the investigation of any particular case, and would not identify any individuals, or could be lightly redacted to protect that information." In this regard, this office initially questioned whether § 84-712.05(5) provided a basis for the NSP to withhold the audits. There was nothing to indicate that the activity giving rise to the audits related to the NSP's duties of investigation. Rather, it appeared to us that annual audits of the evidence facility were conducted by the agency as a matter of routine and oversight.

However, there is no question that those records are now directly related to a criminal investigation involving Anna Idigima et al. Mr. Condon has confirmed to the undersigned that the audits of part of a criminal investigation. And according to reporting in your newspaper, "[t]he Lancaster County Attorney's Office said it is reviewing 105 cases that involve the now-former evidence technician dating back to 2010, and notifying defense attorneys."² While the audits may not have been investigatory in nature when

¹ E.g., *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 may be found at <https://ago.nebraska.gov/disposition-letters>.

² See https://journalstar.com/news/state-and-regional/crime-and-courts/fentanyl-laced-cocaine-that-caused-overdose-deaths-was-stolen-from-state-patrol-evidence-locker-officials/article_6a2a986f-4b7e-5036-9302-d7d3783dc808.html, published September 24, 2021.

created, they are certainly investigatory records now. Thus, we believe the NSP's withholding under § 84-712.05(5) was appropriate under the circumstances presented.

With respect to the redacted policy, we find support in our disposition to your petition challenging the NSP's withholding of policies "regarding the use of non-lethal or less-lethal weapons, including but not limited to, tear gas, pepper spray, flashbang grenades, foam or rubber bullets." See *File No. 20-R-123; Nebraska State Patrol, Chris Dunker*, Lincoln Journal Star, *Petitioner* (August 19, 2020). The NSP withheld the responsive policy under § 84-712.05(5) and, upon review, we agreed. We considered the plain meaning of the words "tactical" and "strategic"³ in conjunction with affidavits of NSP officials. We concluded that the policies contained strategic and tactical information about NSP operations, i.e., when certain types of law enforcement teams would be deployed, procedures for serving warrants, and situations where personnel or equipment would be authorized for use. In addition, the policy was used for purposes of law enforcement training.

While we do not believe that the redacted policy fits the definition of "tactical" *per se*, based on representations from Ms. Forch and Lieutenant Townsend, the policy appears to be highly strategic as to the disposition of evidence and seized items. For example, the policy addresses the types of evidence storage locations, the types of safes and boxes used, the location and duration of holding seized items, procedures for storing high value items, methods to transport seized evidence and the destruction and disposal of items. The policy is very specific and used for law enforcement training. Consequently, we believe that the redacted information appears to fall within the language of the exception and that the NSP has a sufficient statutory basis to continue to withhold it.

³ As stated in our disposition at 5-6:

"Tactical" is defined as "of or relating to combat tactics: such as . . . of or occurring at the battlefield" or "using or being weapons or forces employed at the battlefield" or "of or relating to tactics: such as . . . of or relating to small-scale actions serving a larger purpose" or "made or carried out with only a limited or immediate end in view" or "adroit in planning or maneuvering to accomplish a purpose." "Strategic" is defined as "of, relating to, or marked by strategy" or "necessary to or important in the initiation, conduct, or completion of a strategic plan" or "required for the conduct of war and not available in adequate quantities domestically" or "of great importance within an integrated whole or to a planned effect" or "designed or trained to strike an enemy at the sources of its military, economic, or political power." (Footnotes omitted.)

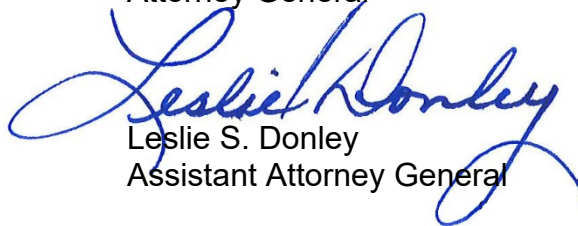
CONCLUSION

For the reasons explained above, we believe that the requested audits and the redacted information in the policy may be lawfully withheld under § 84-712.05(5). Since you have not been unlawfully denied access to public records, no further action by this office is necessary and we are closing our file.

If you disagree with the analysis we have set out above, you may wish to contact your private attorney to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Jessica Forch (via email)