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December 9, 2013

Emily Bazelon, Senior Editor
Slate Magazine
1350 Connecticut Avenue
Suite 400
Washington, DC 20036

RE: *File No. 13-R-139; City of Lincoln Police Department; Emily Bazelon,* Slate Magazine*, Petitioner*

Dear Ms. Bazelon:

We are writing in response to your e-mail sent to the Attorney General's records manager on November 22, 2013, in which you sought our assistance in obtaining certain public records belonging to the City of Lincoln Police Department ("LPD"). As is our normal practice with such requests, we contacted the party against whom the complaint was made and requested a response. In this case, we directed your correspondence to Tonya Peters, Police Legal Advisor for the City of Lincoln. We received Ms. Peters' response on behalf of LPD on December 4, 2013. We considered your correspondence to be a petition for access to records under Section 84-712.03 of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2012, Supp. 2013) ("NPRS"). Our findings in this matter are set forth below.

BACKGROUND

On November 12, 2013, you e-mailed a letter to John Cusano of the LPD, in which you requested the following:

> [A]ccess to and a copy of all reports, communications (including, but not limited to, email, memoranda, and letters), documents, and all other information and records related to: Case A2-105190, Case A4-063048, and Case A5-019140.

Ms. Peters responded by e-mail on November 15, 2013. According to her letter, Ms. Peters provided you copies of the LPD "public incident report and dispatch record" for the enumerated cases. Ms. Peters also indicated that a request had been made to the Emergency Communication Center to see if any 911 or CAD [computer-aided dispatch] records for the subject cases were available. She indicated that if there were such records, they would be forwarded to you by November 22, 2013. As to the balance of your request, Ms. Peters stated:

> The Lincoln Police Department does possess investigatory case records regarding the above cases which may include email, memoranda, and letters. The investigatory case files are being withheld pursuant to Neb. Rev. Stat. § 84-712.05(5), records developed by law enforcement agency which are part of investigation or strategic information, intelligence information, used for training; and/or intended to prevent or mitigate criminal acts; and/or were made pursuant to a citizen complaint and/or inquiry.

On November 20, 2013, Ms. Peters e-mailed you another letter to which she attached three pages of CAD records for the subject cases. She indicated that a local criminal history report would not be provided, but could be purchased online at http://lincoln.ne.gov/city/police/stats/chist.htm. She reiterated that the department was denying access to the other "investigatory case files" pursuant to the exception set out in § 84-712.05(5).

In your petition, you have raised several issues challenging the LPD's use of § 84-712.05(5) to withhold its investigatory records relating to Case Nos. A2-105190, A4-063048, and A5-019140. Among them is your assertion that the records at issue were developed in the course of "routine police department practices" and did not "focus[] with special intensity on a particular party." You also assert that the LPD's denial letter did not include an "index of the withheld documents." You also take issue with the fact that the "LPD has produced no evidence that production of these files would undermine an ongoing investigation."[1]

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[1] You also bring to our attention language in LPD's denial letter which asserts that records withheld under § 84-712.05(5) include those "intended to prevent or mitigate criminal acts . . . ." You correctly point out that this language actually appears in § 84-712.05(8). We note that the LPD did not attempt to use subsection (8) as a basis to withhold the requested records, so we are unclear as to how this language found its way into subsection (5). In any event, we will suggest to Ms. Peters that, in the future, any statutory exceptions claimed by the LPD to withhold public records be cited verbatim.

DISCUSSION

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 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).

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). Neb. Rev. Stat. § 84-712.05 of the NPRS 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, LPD has claimed the exception set out in subsection (5) as its basis for denying you access to the requested records. That subsection 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:
>
> (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;

In Nebraska, in the absence of anything to the contrary, 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. *Swift and Company v. Nebraska Department of Revenue*, 278 Neb. 763, 773 N.W.2d 381 (2009). The plain and ordinary reading of § 84-712.05(5) indicates that law enforcement agencies may withhold records they develop or receive which relate to

investigations which they have undertaken.[2] There is little question that the Lincoln Police Department is a law enforcement agency and has generated records as a result of investigations it conducted on the three criminal matters at issue. Consequently, we believe that the records sought to be withheld by the LPD fall squarely within the claimed exception. No further analysis is necessary.

Our conclusion in this regard is the same when we apply the standard set out by the Nebraska Supreme Court in *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 Nebraska Health Care Ass'n*, the court considered whether certain records generated by the Department of Health and Human Services in the course of its audits of nursing homes were "investigatory records," which could be withheld by the agency under § 84-712.05(5). To assist in its analysis, the court created the following standard where

> 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.

Id. at 792, 587 N.W.2d at 106; Evertson v. The City of Kimball, 278 Neb. 1, 14, 767 N.W.2d 751, 763 (2009). In *Evertson,* the court discussed the application of the investigatory records exception when a public body investigates its own employees. The court stated that investigation of a public body's employee is "for law enforcement purposes" if the alleged acts of the employee could result in civil or criminal sanctions. *Id.* at 16, 767 N.W.2d at 764. In addition, the investigatory records exception only applies to an investigation of a public body's employees if the investigation focuses on specifically alleged illegal acts, in this case racial profiling. *Id.* In the present case, the LPD is a public body charged with the duty of investigation, and it appears to us that its investigation into three discrete criminal matters involving rape, vandalism, and shoplifting is rational within the scope of matters that public body is authorized to investigate.

We have also considered your reliance on the holding in *Nebraska Health Care Ass'n*, which states:

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[2] The term "law enforcement" is defined as "1. The detection and punishment of violations of the law . . . [and] 3. Police officers and other members of the executive branch of government charged with carrying out and enforcing the criminal law." BLACK'S LAW DICTIONARY 714 (abridged 7th ed. 2000).

> If a document is compiled ancillary to an agency's administrative function, then it is not protected from disclosure; when, however, an inquiry by an administrative agency departs from the routine and focuses with special intensity on a particular party, an investigation is underway for purposes of the investigatory records exception to disclosure.

Id. at 792, 587 N.W.2d at 106-107; *Evertson* at 15, 767 N.W.2d at 763. However, we believe that the court's holding is distinguishable from the present case. Express language in § 84-712.05(5) allows "law enforcement agencies *and other public bodies charged with duties of investigation or examination*" to withhold certain investigatory records. (Emphasis added.) The respondents in *Nebraska Health Care Ass'n* and *Evertson* fall in the latter category, and involved a state agency (HHS) and a city of the second class (Kimball, Nebraska). Neither is a police department charged with enforcing the criminal law. In each case, the court analyzed the investigation giving rise to the records sought, and determined that the records could be lawfully withheld under § 84-712.05(5). Your argument that the LPD's investigations into the three criminal matters constituted *routine* police work disregards the fact that all three investigations focused on specific violations of law, involving certain individuals and unique facts and circumstances.

Finally, we have considered your last two assertions that no "index of withheld documents" was provided with the LPD's denial letter. The language in § 84-712.04 does not require that an index be prepared, only that "[a] description of the contents of the records withheld" be provided. In that regard, we believe that the LPD met the statutory requirement. Also, the investigatory records exception contains no language which distinguishes between open and closed investigatory files. The Nebraska Legislature has not made the "status" of an investigation a factor as to whether certain records made be lawfully withheld. Consequently, we do not consider it in our analysis.

CONCLUSION

For the reasons explained above, we believe that the requested documents belonging to the Lincoln Police Department may be kept confidential under § 84-712.05(5). We further believe that the Lincoln Police Department did not unlawfully deny your records requests, and that no further action by this office is warranted. Accordingly, we are closing this records 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,

JON BRUNING
Attorney General

Leslie S. Donley
Assistant Attorney General

c: Tonya Peters

49-1056-30