

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

DOUGLAS J. PETERSON
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

April 8, 2015

Cathy Beeler
Assignment Manager
KETV Newswatch 7
2665 Douglas Street
Omaha, NE 68131

RE: *File Nos. 15-R-110 and 15-R-112; Omaha Police Department; Cathy Beeler, KETV Newswatch 7, Petitioner*

Dear Ms. Beeler:

This letter is in response to your two petitions which we received on March 24 and 26, 2015, respectively, in which you requested our review of the denial of certain public records by the Omaha Police Department ("Department"). As is our normal practice with such requests, we contacted the public body against whom the petitions were made. In this case, we contacted Thomas O. Mumgaard, Deputy City Attorney, and requested a response to your petitions, which we received on April 2, 2015. We have now completed our analysis and have fully considered your petitions for access to records as well as the Department's response. We considered your petitions under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS"), and our findings are set forth below.

FACTS

Our understanding of the facts in these matters is based on your petitions and the information contained in the Department's response.

File No. 15-R-110

According to your March 24, 2015, petition, on March 13, 2015, you submitted a request for public records to Department Chief Todd Schmaderer. Specifically, you requested access to or copies of

Cathy Beeler
April 8, 2015
Page 2

all video from the Officer Involved Shooting at the Wendy's near 43rd and Dodge St. on August 26, 2014. Including but not limited to: cruiser camera video, body camera video, police crime lab video, video shared with Omaha Police by COPS photographers and the production company of the Officer Involved Shooting at the Wendy's near 43rd and Dodge St. on August 26, 2014.

By letter dated March 16, 2015, Mr. Mumgaard, responding on behalf of Chief Schmaderer, denied your request. In this regard, Mr. Mumgaard stated:

Any video recordings created during a police response to this incident were created as part of a law enforcement agency's investigation into a person's conduct. In addition, any recordings created by others that may be in the Police Department's possession were obtained as evidence during that criminal investigation. All recordings, regardless of form or source, are withheld pursuant to Neb. Rev. Stat. § 84-712.05(5). Any recordings document police activity and the scene of the police response and they contain no reasonably segregable public portions.

The Department's denial of your request precipitated your petition to this office. In your petition, you assert that Chief Schmaderer "exceeded his reach" by relying on Neb. Rev. Stat. § 84-712.05(5) as the basis to withhold the requested videos. You state that the matter is no longer being investigated in that the grand jury returned a decision on March 11, 2015. You also point out that Chief Schmaderer already released portions of the recordings during a news conference following the incident. You state that "[t]hese recordings are an eyewitness to the events that unfolded that day and should be deemed part of the public record. I feel the denial of this request violated the intent of the Public records law" You ask that we intervene.

File No. 15-R-112

Your second petition contests the denial of your public records request submitted to Chief Schmaderer on March 24, 2015. In this particular request, you sought access to or copies of

all video from the Officer Involved Shooting on February 23rd, outside the Family Dollar store located at 1725 South 13th Street. Including but not limited to: cruiser camera video, body camera video and police crime lab video.

Mr. Mumgaard denied your request the following day, stating in pertinent part:

Cathy Beeler
April 8, 2015
Page 3

Your request is denied. Any video recordings in the Department's possession were created as part of a law enforcement agency's investigation into a person's conduct, including the conduct of both Mr. Elrod and the involved officer. Any recordings were made or obtained as evidence during a criminal investigation. All recordings, regardless of form or source, are withheld pursuant to Neb. Rev. Stat. § 84-712.05(5). The recordings document a police response to an emergency call and the subsequent investigation of that event. They contain no reasonably segregable public portions.

Your second petition to us raises essentially the same issues raised in your earlier petition—i.e., that Chief Schmaderer overreached by applying Neb. Rev. Stat. § 84-712.05(5) to withhold the requested videos; that disclosure is warranted because the criminal matter was no longer under investigation since the grand jury had returned its decision on March 11, 2015; and that portions of the recordings had already been released by the chief during a news conference held sometime after the events of February 23. You further allege that the Internal Affairs division concluded its investigation of the incident on March 24, 2015.

In his response to us, Mr. Mumgaard states that pursuant to Neb. Rev. Stat. §§ 14-102(25) and 14-606 (2012), and Omaha Home Rule Charter § 3.11, “[t]he Omaha Police Department has the power to arrest persons for violations of the law and a corresponding duty to investigate persons’ conduct when enforcing the laws.” Consequently, the Department is a “law enforcement agency” as that term is contemplated in § 84-712.05(5). Mr. Mumgaard states that people were killed in the two incidents at issue here, and that “[t]here should be no issue about whether the incidents generated a law enforcement investigation of persons involved in conduct that could give rise to criminal prosecution.”

The Department's response also included the affidavits of Department Captain Kerry Neumann. Part of Captain Neumann's duties involves supervising police investigations into homicides, which includes the use of deadly force by Department officers. Captain Neumann describes the Department's investigations of the events of August 26, 2014, and February 23, 2015, and the videos which exist for each incident. Captain Neumann indicates that the videos at issue were booked into the Property Unit and are “retained for further investigation and as evidence for review by a grand jury and possible prosecution.” With respect to any alleged disclosure of the videos, Captain Neumann states that he assisted in preparing information to be publicly disclosed during the news media briefings held sometime on or around August 26, 2014, and February 23. Captain Neumann states that while a small number of screen shots from the various videos were displayed to the media, at no time were the retained videos publicly displayed “then or subsequently.”

In response to your allegation that the videos should be disclosed because the matters are no longer under investigation and a grand jury returned no indictments against the officers, Mr. Mumgaard asserts, among other things, that

the status of an investigation is irrelevant to whether section 84-712.05(5) allows Chief Schmaderer to deny access to records developed or received as part of the Department's investigations. The statute sets no time limit on the right to withhold the records and draws no distinction between "closed" or "open" investigations, if there really is any such distinction in how law enforcement investigations are conducted.

Mr. Mumgaard suggests that you are attempting to add a limitation to the exception that the Nebraska Legislature and our courts have not imposed. He asserts that "[t]he Public Records Act authorizes law enforcement agencies to withhold records from investigations without any express or implied time limit on this authority."

Mr. Mumgaard also refutes your assertion that Chief Schmaderer has constructively disclosed the videos by showing select screen shots during his news briefings. In support of his position, Mr. Mumgaard states that § 84-712.05 does not expressly address the "piecemeal" disclosure that occurred in the present case. Mr. Mumgaard states that when the chief created the screen shots, he created entirely new records—records which are available to the public and which are in the possession of KETV. Mr. Mumgaard also states that the statute allows public bodies to withhold records falling within the enumerated exceptions unless the records have already been publicly disclosed in court, an administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties. That disclosure did not occur here. Moreover, the language of the statute would suggest that it is only upon the disclosure of the complete record where the public body's use of the exception is completely lost. Mr. Mumgaard also brings to our attention the holding 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), where the Nebraska Supreme Court stated: "We conclude that records that have been 'disclosed' within the meaning of § 84-712.05 are only those records that a public body has, in its official capacity, already made available to the general public." *Id.* at 795.

Finally, Mr. Mumgaard states that the Nebraska Legislature has determined the public policy to be followed with respect to the investigatory records of law enforcement agencies, and "has established the amount of transparency required of police operations." Further, he states that this policy—that records compiled during a police investigation into a homicide need not be put out into the public domain—has remained unchanged for many years. He strongly urges that the policy remain unchanged, and suggests that the Attorney General does not have the ability to change it.

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).

Investigatory Records Exception

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, the Department has claimed the exception set out in subsection (5) as its basis for denying you access to the requested videos. 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.¹ There is little question that the Omaha Police Department is a law enforcement agency and that the videos at issue were generated as a result of its investigations into the robberies that occurred on August 26, 2014, and February 23, 2015. In our view, the video recordings fall squarely within the claimed exception, and we do not believe that Chief Schmaderer exceeded his authority by declining to provide you the requested videos.

We find additional guidance in the Nebraska Supreme Court case *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 Association*, the court considered whether certain records generated by the Department of Health and Human Services [DHHS] 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 aid in its analysis, the court created the following standard, concluding

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. The court found that DHHS was a public body charged with the duty to investigate nursing homes’ medicaid reimbursement claims, and that its auditing activities were “clearly and rationally related to the Department’s investigatory duty.” *Id.* However, it questioned whether DHHS’ auditing activities were “investigations or examinations within the meaning of § 84-712.05(5).” *Id.* In addressing this question, the court conceived another standard, stating:

It has generally been held that a distinction must be drawn between (1) routine administration or oversight activities and (2) focused inquiries into specific violations of law. . . . 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.

¹ 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).

Cathy Beeler
April 8, 2015
Page 7

Id. at 792, 587 N.W.2d at 106-107 (internal citations omitted). The court ultimately concluded that the DHHS' auditors had departed from the routine when they decided to make specific requests for further information to address particular deficiencies in the cost reports submitted by nursing homes. As a result, the court found that DHHS could lawfully withhold the requested documents under the exception in § 84-712.05(5).

Applying the standards set out in *Nebraska Health Care Association* to the circumstances here, it appears to us that the Department has established that (1) it is a public body charged with duties of investigation or examination of persons, institutions, or businesses; (2) the investigations into the two robberies, during which the videos were produced, were related to the Department's duties of investigation and examination; and (3) that the specific investigations were rationally related to the investigatory duties imposed on the Department by law. Finally, the Department has shown that the videos were not compiled ancillary to its administrative functions, but rather focused with special intensity on particular parties. Based on the foregoing, we believe that the requested videos do constitute "investigatory records" as contemplated in Neb. Rev. Stat. § 84-712.05(5).

"Closed" Investigations

We have also considered your argument that the videos should be disclosed because the "matter(s) [are] no longer under investigation." We have previously taken the position that, under the plain language of the § 84-712.05(5), there is no time limitation for application of the investigatory records exception.² In other words, there is no requirement that an investigation be open or ongoing. The Nebraska Legislature has not made the "status" of an investigation a factor as to whether certain records may be lawfully withheld. Consequently, we do not consider it in our analysis.

Disclosure of Videos

Your last argument relates to the release of "portions of these recordings" during Chief Schmaderer's news briefings which were held after each incident. The Nebraska Supreme Court has held that disclosure of records within the meaning of § 84-712.05 pertains to those records that a public body has made available to the *general public*. According to Captain Neumann's affidavits, Chief Schmaderer released four printed screen shots from the "COPS" production company video during the post-August 26, 2014, briefing, and three printed screen shots from the "cruiser" video and private security recordings during the February 2015 briefing. In our view, the release of these

² See Disposition Letter in File No. 11-R-124, Nebraska State Patrol, Scott Bledsoe, Petitioner (July 20, 2011); Disposition Letter in File No. 13-R-139, City of Lincoln Police Department, Emily Bazelon, Slate Magazine, Petitioner (December 9, 2013).

Cathy Beeler
April 8, 2015
Page 8

seven screen shots does not constitute a release of the videos to the general public. As a result, we believe that the Department may rely on the exception to withhold the requested videos.

CONCLUSION

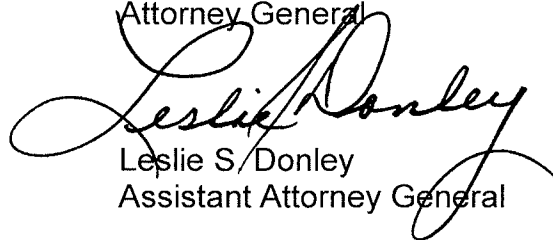
For the reasons explained above, we believe that the requested video recordings belonging to the Omaha Police Department may be lawfully withheld under § 84-712.05(5). We further believe that the Omaha Police Department did not unlawfully deny your records requests, and that no further action by this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

Our responsibility under Neb. Rev. Stat. § 84-712.03 is to determine whether a record may be withheld from public inspection or whether the public body is otherwise in compliance with the NPRS. Neb. Rev. Stat. § 84-712.05 provides that “[t]he following records . . . may be withheld from the public by the lawful custodian of the records.” (Emphasis added.) The exceptions to disclosure are not mandatory, and a public body has discretion to determine whether it will assert an exception. In the present case, we have determined that Chief Schmaderer was authorized to withhold disclosure of the videos under the investigatory records exception. We have no authority to direct a public body to change its policy with respect to the disclosure of public records when we have determined that the withholding is authorized.

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,

DOUG PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Thomas O. Mumgaard
Deputy City Attorney