

STATE OF NEBRASKA  
**Office of the Attorney General**

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February 8, 2016

Via email and regular U.S. Mail  
Diego Ibargüen, Counsel  
Hearst Corporation  
300 West 57<sup>th</sup> Street  
New York, NY 10019-3792

RE: *File No. 16-R-102; Omaha Police Department; KETV, Petitioner*

Dear Mr. Ibargüen:

This letter is in response to the petition you submitted on behalf of KETV and reporter David Earl, dated January 21, 2016, and received by this office on January 22, 2016. Specifically, you have requested our review of the denial by the Omaha Police Department ("Department"), of a copy of the dash camera video (with audio) relating to an officer involved shooting occurring near 50<sup>th</sup> and Hickory Streets on January 27, 2015. As is our normal practice with such requests, we contacted the public body against whom the petition was made. In this case, we contacted Bernard J. in den Bosch, Deputy City Attorney, and advised him of the opportunity to respond to any allegations raised in your petition. We received Mr. in den Bosch's reply on February 1, 2016. We have completed our analysis and have fully considered your petition for access to records as well as the Department's response. Our review was conducted in accordance with the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS"). Our findings in this matter are set forth below.

Before we begin, we must point out that in March 2015, KETV submitted two petitions to this office under § 84-712.03 of the NPRS, which are nearly identical to the petition submitted here. In the prior petitions, KETV sought video recordings (e.g., cruiser camera video, body camera video, police crime lab video, etc.) from the Omaha Police Department relating to two officer involved shootings occurring in August 2014 and February 2015. The Department withheld the requested video recordings based on the exception set out in Neb. Rev. Stat. § 84-712.05(5) and, upon review, we determined that such withholdings were appropriate. We note that there have been no amendments to the NPRS which would alter our opinion in this regard. We conclude then that our April 8, 2015 disposition letter is dispositive to the issues raised herein, and we will borrow liberally from our letter in this response.

## FACTS

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

According to your petition, on December 17, 2015, Mr. Earl emailed a public records request to Lt. Darci Tierney, with the Department's Public Information Office, with a copy to Omaha Police Chief Schmaderer, Mr. in den Bosch, Officer Michael Pecha, and Officer James Shade. Specifically, Mr. Earl requested

a copy of the dashcam video (with audio) captured by the cruisers that responded to the assault call near 50<sup>th</sup> and Hickory streets re: Tiffany Terry on January 27, 2015.

Officers' use of force was ruled justified and a grand jury found no wrongdoing at the end of its proceedings Wednesday, in our opinion effectively closing the case.

By letter dated December 21, 2015, Mr. in den Bosch, responding on behalf of Chief Schmaderer and Lt. Tierney, denied your request. Mr. in den Bosch stated, in pertinent part:

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 Ms. Terry and the involved officers. 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.

In your petition to this office, you assert that while no Nebraska court has determined the applicability of Neb. Rev. Stat. § 84-712.05(5) to police dash camera video, "it is evident that [the Department's] interpretation would expand the application of this discretionary exemption exponentially, permitting blanket withholding of public records regardless of their content." You further assert that "[s]uch arbitrary disclosure practices are inimical to the spirit of Nebraska's public records laws, and would keep the public uninformed as to the actions of its public servants, while effectively providing a shield against public scrutiny of those actions."

Mr. in den Bosch's response to this office indicates that the Department does not dispute that the videos in its possession are "records" within the scope of the NPRS.

However, he asserts that the Department's denial was proper under the authority granted to it by the exception in Neb. Rev. Stat. § 84-712.05(5). In this regard, Mr. in den Bosch refers us to Neb. Rev. Stat. §§ 14-102(25) and 14-606 (2012) and Omaha Home Rule Charter § 3.11, to establish that the Department is a "law enforcement agency," as that term is used in § 84-712.05(5). Mr. in den Bosch also states that the Mr. Earl's request and your petition seemingly acknowledge the fact that the requested records "document a police response to an assault which led to a shooting and subsequent investigation of that event," and that there should be no question that the event "generated a law enforcement investigation of persons involved in conduct that could give rise to criminal prosecution."

The Department's response also included the affidavit 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 investigation of the events of January 27, 2015, and recordings made at the crime scene. Captain Neumann indicates that audio and video recordings from the police cruisers' MVR (mobile video recorder) were downloaded and personally reviewed by him. He indicates that the video was booked into the OPD Property Unit and are "retained for further investigation and as evidence for review by a grand jury and possible prosecution." Captain Neumann concludes by stating: "The recordings booked into property will be retained indefinitely as evidence of criminal activity. If future events indicate a crime may have occurred during the police response, the recordings will be available as evidence to determine if prosecution should be initiated."

In response to Mr. Earl's assertion that the requested records should be made available since the grand jury found no wrongdoing, "effectively closing the case," Mr. in den Bosch states, in pertinent part:

[T]he 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. in den Bosch suggests that Mr. Earl was adding 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."

In response to your contention that the Department applied the exception so broadly as to result in a “blanket withholding of public records regardless of their content,” Mr. in den Bosch states that the only issue addressed in the denial letter was Mr. Earl’s request for the dash camera videos recorded on January 27, 2015. He further states that the City agrees that each request for public records must be reviewed based on its own merits. Mr. in den Bosch clarifies that the use of the terms “any” and “all” appearing in the City’s denial letter related only to this specific investigation.

Finally, Mr. in den Bosch 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.” 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 public policy remain unchanged, and asserts that the Attorney General does not have the ability to change it.

## DISCUSSION

The basic rule for open public records in Nebraska is found at Neb. Rev. Stat. § 84-712 of the Nebraska Public Records Statutes. That statute provides, in pertinent part:

*Except 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” are defined as follows:

*Except when any other statute expressly provides that particular information or records shall not be made public, public records shall include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public*

record in its original form shall remain a public record when maintained in computer files.

Neb. Rev. Stat. § 84-712.01(1) (2014) (emphasis added).

Section 84-712 expressly provides that the right to examine or obtain copies of public records exists “[e]xcept as otherwise provided by statute.” The definition of “public records” in § 84-712.01(1) provides an exception from that definition “when any other statute expressly provides that particular information or records shall not be made public . . . .” Thus, in those instances where records requested under the NPRS are excepted from disclosure by statute, there is no right of access. However, 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).

As noted above, since we have concluded that the analysis in the present case is identical to the analysis set out in our April 8, 2015 disposition letter, we will quote from it at length below:

#### 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.<sup>1</sup> 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 24, 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

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<sup>1</sup> 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 7<sup>th</sup> ed. 2000).

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.

*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 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.<sup>2</sup> 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.

Finally, we will briefly address your contention that the application of the investigatory records exception in the present case was overly expansive and/or arbitrary. To the contrary, we believe that the request was handled appropriately by the Department. Mr. in den Bosch clarified that his use of the terms “any” or “all” in the City’s denial letter related only to the specific request for the dash camera video recordings, and he affirmatively states that each public records request must be evaluated on its own merits. We also note that, while exceptions to disclosure must be narrowly construed, see *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009), the investigatory records exception itself is broad, particularly as it relates to law enforcement agencies, like the Omaha Police Department. We conclude the City did not act arbitrarily in denying the records sought by KETV.

### 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). Therefore, we conclude 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 this file.

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<sup>2</sup> 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).

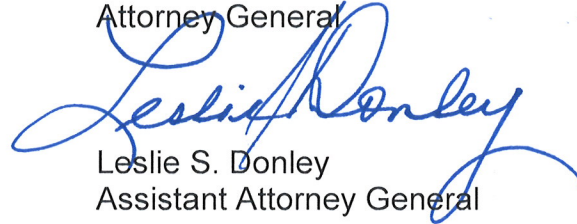


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If you disagree with the analysis we have set out above, you may wish to contact your private attorney to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General



Leslie S. Donley  
Assistant Attorney General

c: Bernard J. in den Bosch  
Deputy City Attorney

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