



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

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**DOUGLAS J. PETERSON**  
ATTORNEY GENERAL

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July 18, 2017

Cheryl Spencer  
[REDACTED]

RE: *File No. 17-R-133; Alliance Police Department; Cheryl Spencer, Petitioner*

Dear Ms. Spencer:

This letter is in response to your correspondence dated June 26, 2017, and received by this office on July 3, 2017, in which you seek our assistance in obtaining certain records in the possession of the Alliance Police Department ("Department"). We considered your correspondence to be a petition for review under Neb. Rev. Stat. § 84-712.03 of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2016) ("NPRS"). Our findings in this matter are set forth below.

### **FACTS**

According to your petition, your husband, Jimmy Spencer, was killed in a work-related accident on March 21, 2016. Since that time, you indicate that you have collected all the information you can about the accident. In that regard, on June 1, 2017, you submitted a public records request to Department Chief John Kiss.<sup>1</sup> Specifically, you requested the following records:

[I] am requesting an opportunity to obtain copies of public records that apply to construction accident on March 21, 2016, located at 2812 Toluca Ave.

\* \* \*

I am submitting this FOIA request asking that you please forward copies/disk with the complete report and pictures.

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<sup>1</sup> We note that your petition contains additional correspondence between Chief Kiss and Jim Morris, a reporter with The Center for Public Integrity. For example, in an email sent May 31, 2017, Mr. Morris asks Chief Kiss to "[p]lease let me know how I or Mrs. Spencer could obtain a copy of the police report and the photos. I'm happy to file a formal request if necessary . . . ." However, our disposition in this matter is solely based on your public records request submitted to the Department, the email you received from a city attorney denying you access to the requested records, and your petition to this office.

Later that same day, assistant city attorney Leslie Shaver, with the Simmons Olsen Law Firm, responded on behalf of the Department, stating, in pertinent part:

I understand that Chief Kiss is able and willing to provide the title page,<sup>2</sup> which is the portion of the record that is subject to your request. The remaining portion of the request is exempt from production pursuant to 84-712.05(5), as they are records developed and received by the City of Alliance Police Department, the Police Department was charged with duties of investigation and examination, and the records constituted a part of the investigation and examination.

You subsequently filed your petition with this office. You indicate that the Department "will not release the information to me, saying this is their policy." You question the applicability of the provisions in § 84-712.05 to the report and pictures requested. You indicate that you wish to receive all of the information relating to the accident from the entity involved.

#### DISCUSSION

Neb. Rev. Stat. § 84-712 sets out the basic rule for access to public records in Nebraska. 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*

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<sup>2</sup> The undersigned contacted Ms. Shaver to inquire about the "title page" referenced in the Department's response. Ms. Shaver advises that you met with Lieutenant Tjaden with the Department regarding your records request. We understand that Lieutenant Tjaden offered to provide you a copy of the Department's "Incident Report" relating to the accident. However, you declined to accept it.

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). Thus, in those instances where records requested under the NPRS are exempt from disclosure by statute, there is no right of access.

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). As you noted in your petition, Neb. Rev. Stat. § 84-712.05 of the NPRS contains several different categories of records that may be kept confidential from the public at the discretion of the public agency involved. 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).

In the present case, the Alliance Police Department has claimed the exception set out in *subsection (5)* of § 84-712.05 as its basis for denying you access to the requested police report and pictures. 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 . . . .

This office has considered numerous petitions submitted under § 84-712.03 in which the records sought consisted of the investigatory records of law enforcement agencies.<sup>3</sup> In each instance, this office determined that the agencies involved could properly withhold the requested records under the exception in § 84-712.05(5). For the reasons discussed below, your petition warrants a similar result.

As in our previous reviews, we considered the language of the exception in conjunction with the records sought. 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 meaning of § 84-712.05(5) indicates that law enforcement agencies may withhold records developed or received by those agencies when the records relate to investigations of persons, institutions or businesses. 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). Under this definition, the Department qualifies as a law enforcement agency. In addition, the Department prepared the report at issue in the course of its investigation of the March 21, 2016 accident. Consequently, based on the plain language of the statute, the Department’s report, and any pictures contained in that report, would fall squarely within the claimed exception.<sup>4</sup>

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<sup>3</sup> See, e.g., File No. 17-R-121, *Wymore Police Department, Wayne and Sandi Gridley, Petitioners* (April 20, 2017); File No. 16-R-134, *University of Nebraska-Lincoln [Police Department], Ralph W. Edwards, Petitioner* (September 28, 2016); File No. 16-R-102, *Omaha Police Department, KETV, Petitioner* (February 8, 2016); File No. 15-R-145, *Nebraska State Patrol, Joshua Renth, Petitioner* (November 2, 2015); File No. 15-R-130, *City of Omaha Police and Fire Departments, General Electric Railcar Services Corp., Petitioner* (August 3, 2015); and File Nos. 15-R-110 and 15-R-112, *Omaha Police Department, Cathy Beeler, KETV Newswatch 7, Petitioner* (April 8, 2015).

<sup>4</sup> 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), the Nebraska Supreme Court articulated standards to determine whether records generated by the department in the course of audits of nursing homes were “investigatory records” which could be lawfully withheld under § 84-712.05(5). However, we believe additional analysis is unnecessary when the facts presented involve a police department and a report produced by the department as a result of its investigation into a crime or, as in the present case, a death investigation.

## CONCLUSION

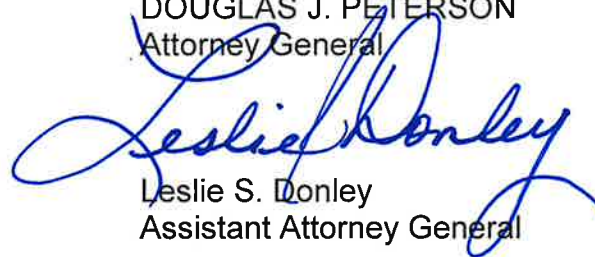
For the reasons explained above, we believe that the requested report and pictures resulting from the Alliance Police Department's investigation of the March 21, 2016 accident may be lawfully withheld under the exception to disclosure in subsection (5) of § 84-712.05. Since we have concluded that the Alliance Police Department did not unlawfully deny your records request, no further action by this office is necessary. Accordingly, we are closing this 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.

Finally, in the event you would now like to receive a copy of the Department's Incident Report relating to the accident for your files, please contact the undersigned.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General



Leslie S. Donley  
Assistant Attorney General

c: Leslie Shaver