



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

NATALEE J. HART
ASSISTANT ATTORNEY GENERAL

March 14, 2018

John F. Zabriskie
Foley & Lardner LLP
321 North Clark Street, Suite 2800
Chicago, IL 60654-5313
jzabriskie@foley.com

RE: *File No. 18-R-105; University of Nebraska; Steve Kolowich, Petitioner*

Dear Mr. Zabriskie:

We are writing in response to a correspondence received by this office in which your client, Steve Kolowich, petitioned for our review of the response to his request for certain public records belonging to the University of Nebraska ("University") under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2014, Cum. Supp. 2016) ("NPRS"). Mr. Kolowich's initial petition was submitted on February 15, 2018. You subsequently supplemented that petition on February 27, 2018. As is our normal practice with such requests, we contacted the public body named in the correspondence and asked for a response to that petition. In this case, we provided the petition and supplement to Erin Busch, Associate General Counsel and Director of Records for the University, and she provided a response to us on March 7, 2018. We have now completed our analysis of this matter and our findings are set forth below.

RELEVANT FACTS

Our understanding of the facts in this matter is based on Mr. Kolowich's petition, your supplement, and the response we received from the University. On February 1, 2018, Mr. Kolowich emailed Ms. Busch at the University and made the following request for records under the NPRS:

1. Security footage from cameras outside the Nebraska Union on Aug. 25, 2017. Specifically, I am requesting footage of an incident that occurred that afternoon on Union Plaza. The footage I am seeking shows a protest and a confrontation between persons on the plaza. The relevant clip was kept by university police and circulated among university officials in the weeks after the incident.

2. All documents pertaining to a Nov. 16, 2017 meeting between university officials and State Senators Tom Brewer, Steve Erdman, and Steve Halloran, including but not limited to: all messages pertaining to the meeting, the senators, or the Nebraska legislature sent or received by President Hank Bounds, Phil Bakken, Carmen Maurer, James Linder, and Marjorie Kostelnik between Oct. 1, 2017 and Dec. 1, 2017; all notes and summaries (typewritten or handwritten) pertaining to the meeting.
3. All materials relating to the university's efforts to gauge the political climate of the campus and ascertain whether conservative students feel unsafe, unwelcome, or silenced, including but not limited to: all surveys, questionnaires, raw data and results from those efforts including but not limited to results of the survey President Bounds said he would commission from Gallup in his Nov. 17 letter to the Nebraska legislature.

On February 7, 2018, Ms. Busch emailed Mr. Kolowich to inform him that the University was gathering documents responsive to his request and would provide him with a response on or before February 14, 2018. On February 14, 2018, the University provided its response. As to the first request for security footage, the response stated:

Your request is denied. The records responsive to this request may be withheld pursuant to Neb. Rev. Stat. § 84-712.05(5) because the records are developed by a law enforcement agency or public body charged with duties of investigation or examination of persons and institutions and the records constitute a part of the examination or investigation. The records may also be withheld because they contain "[i]nformation solely pertaining to protection of the security of public property and persons on or within public property" See Neb. Rev. Stat. Sec. 84-712.05(8). The records responsive to your request are protected from disclosure by Neb. Rev. Stat. § 84-712.05(1) because they contain personally identifiable student information that is not public directory information. The records responsive to your request also constitute personal information in records regarding personnel of the University that is not routine directory information. Accordingly, such records are withheld pursuant to Neb. Rev. Stat. § 84-712.05(7).

As to Mr. Kolowich's second request for documents pertaining to a meeting between the University and certain state senators, the University produced responsive records, but withheld one email under the attorney-client privilege. In response to the third request, the University provided a link to a Gallup contract and indicated that it would supplement its response once further documents were gathered from all University campuses.

Mr. Kolowich subsequently petitioned this office for review of the University's response to his public records request, particularly the responses to requests one and two. You supplemented that petition with legal arguments supporting Mr. Kolowich's petition, focusing on the denial of the request for security footage maintained by the University. The University subsequently responded, denying it has improperly denied Mr. Kolowich access to public records. We have reviewed all of these materials and have reached the conclusions set forth below.

DISCUSSION

The NPRS generally allow interested persons the right to examine public records in the possession of public agencies in Nebraska during normal agency business hours, to make memoranda and abstracts from those records, and to obtain copies of records in certain circumstances. 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). 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 NPRS provide for access to public documents, they are not absolute and 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 is comprised of twenty categories of documents which may be kept confidential from the public at the discretion of the agency involved. In the present case, the University has claimed a number of different provisions of Neb. Rev. Stat. § 84-712.05 as its basis for denying Mr. Kolowich access to the requested records.

Denial of access to security footage

First, as to the security footage, the University has cited to § 84-712.05 (1), (5), (7), and (8) in order to withhold such footage. The University primarily relied upon § 84-712.05(5) in denying Mr. Kolowich access to the security footage he seeks, and we will begin our analysis with whether that subsection allows the University to withhold the footage. That subsection provides as follows:

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 its response to this office, the University details its reliance on this subsection to withhold this record. Specifically, the University states:

On August 25, 2017, the University of Nebraska-Lincoln Police (“UNL PD”) received a report of a disturbance outside of Nebraska Union. Police responded to the scene. . . . UNL PD investigated to determine whether a criminal offense occurred related to an incident involving an undergraduate student, a graduate student, and a faculty member. As a part of this investigation, UNL PD officers reviewed the security camera footage of the area outside of Nebraska Union where the incident occurred. The security camera footage reviewed by UNL PD officers as a part of their investigation is the same footage that was requested by Mr. Kolowich. UNL PD officers are sworn police officers commissioned by the Nebraska State Patrol and therefore fall within the definition of “law enforcement agencies and other public bodies with duties of investigation or examination” under the Act. UNL PD manages all security cameras at the University of Nebraska-Lincoln, monitors the security cameras through its dispatch, and maintains the security camera footage as a part of its records. In this instance, UNL PD reviewed and used the security camera footage of the incident in order to investigate whether a criminal offense occurred.

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 a law enforcement agency may withhold records it develops or receives in the course of its investigations. The University of Nebraska-Lincoln Police Department is a law enforcement agency and

the security camera footage in this instance was maintained and utilized during the investigation of a specific incident which occurred on the University of Nebraska-Lincoln campus, in the jurisdiction of the University Police Department.

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 this case, 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 formulated 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 University has established that UNL PD is charged with investigating incidents which occur on its campus and there is a rational relationship between the investigation which occurred and the University’s duty to

investigate. Additionally, that investigation departed from the routine and focused on particular individuals and whether any criminal activity had occurred, which qualifies the footage for exclusion from public record requests at the discretion of the University. See also *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009). Based on the foregoing, we believe that the requested video constitutes an “investigatory record” as contemplated in Neb. Rev. Stat. § 84-712.05(5).

Your letter to us indicates that you believe that once the investigation has concluded, the investigatory records provision no longer applies. While the University indicates to us that the investigation is now closed, under the plain language of Neb. Rev. Stat. § 84-712.05(5), the NPRS do not limit the time during which a public body is permitted to withhold an investigatory record and there is no requirement to release the record upon conclusion of the investigation. 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.

It appears to us that the footage requested by Mr. Kolowich may be withheld by the University pursuant to Neb. Rev. Stat. § 84-712.05(5). As the University may properly assert this subsection as to the security footage requested, it is not necessary for us to determine whether there are additional valid provisions of § 84-712.05 under which the University may also withhold this record. We do not believe Mr. Kolowich has been improperly denied access to the security footage he has requested.

Denial of access to attorney-client communications

Mr. Kolowich’s petition also seeks our review of the University’s partial denial of his second request for documents under the attorney-client privilege. The University has claimed the attorney-client privilege, pursuant to Neb. Rev. Stat. § 84-712.05(4), on one e-mail which would be responsive to Mr. Kolowich’s second enumerated request for records. In its response to us, the University states that the withheld email was sent by President Hank Bounds to Joel Pedersen, Vice President and General Counsel for the University, for the purpose of obtaining legal advice.

Neb. Rev. Stat. § 84-712.05(4) provides that a custodian may withhold public records “which represent the work product of an attorney and the public body involved which are related to preparation for litigation, labor negotiations, or claims made by or against the public body or which are confidential communications as defined in section 27-503.” Neb. Rev. Stat. § 27-503 (2008) codifies the “attorney-client privilege.”

The relationship between the administration of the University and its attorneys, whether in-house legal counsel employed directly by the University or outside counsel hired to assist the University, fits squarely in the definition of lawyer and client, and an opinion from the attorney to the client may be held in confidence. We have no reason to

John F. Zabriskie
March 14, 2018
Page 7

believe that the University does not have the authority to assert this privilege as to the email withheld from disclosure. As a result, we believe the University may withhold the requested document under the NPRS.

The University's response and Neb. Rev. Stat. § 84-712.04

As a final matter, your supplement to Mr. Kolowich's petition alleges that the University's denial does not meet the requirements set forth in Neb. Rev. Stat. § 84-712.04(1), which provides:

Any person denied any rights granted by sections 84-712 to 84-712.03 shall receive in written form from the public body which denied the request for records at least the following information:

- (a) A description of the contents of the records withheld and a statement of the specific reasons for the denial, correlating specific portions of the records to specific reasons for the denial, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial;
- (b) The name of the public official or employee responsible for the decision to deny the request; and
- (c) Notification to the requester of any administrative or judicial right of review under section 84-712.03.

The University asserts that its denial meets the above requirements. We agree that the denial provided by the University to Mr. Kolowich satisfied its obligations under Neb. Rev. Stat. § 84-712.04. We do not agree with you that the University was deficient in its response under this statute.

John F. Zabriskie
March 14, 2018
Page 8

CONCLUSION

For the reasons explained above, we conclude that the University has not violated the NPRS with respect to Mr. Kolowich's request for records, and that no further action by this office is warranted. Accordingly, we are closing this file. If you or Mr. Kolowich disagree with the analysis we have set out above, you may wish to determine what additional remedies may be available to Mr. Kolowich under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Erin Busch

02-681-29