



STATE OF NEBRASKA
Office of the Attorney General

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March 27, 2018

Jeffrey Calhoun
[REDACTED]

RE: *File No. 18-R-107; Thurston County Attorney; Petitioner Jeffrey Calhoun*

Dear Mr. Calhoun:

This letter is in response to your correspondence received by us on March 9, 2018, in which you requested our review of a response to a public records request made by you to the Thurston County Attorney ("County Attorney") for records of that office. We consider your letter to be a petition for access to records under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2016). Following your initial contact, we sought further information from you, which you provided on March 13, 2018. As is our normal practice with such requests, we then contacted the party against whom the complaint was made. In this case, we spoke to Tammy Maul-Bodlak on March 14, 2018 and received copies of the relevant public records requests and responses from her on that date. Ms. Maul-Bodlak also provided us with a written response to your petition on March 19, 2018. We have now considered your complaint and our findings are set forth below.

FACTS

Our understanding of the facts in this matter is based on your public records requests, the responses of Ms. Maul-Bodlak, your petition submitted to this office, and the response of the County Attorney to your petition.

As an initial matter, you made your request under the Federal Freedom of Information Act. The Freedom of Information Act, or FOIA, is a federal law, codified at 5 USC § 552, which generally provides that any person has the right to request access to *federal* agency records and information. You are seeking information from the County Attorney, an agency of Thurston County, Nebraska. FOIA does not apply to county agencies. The Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 ("NPRS"), govern access to records of and belonging to the County Attorney and provides this office certain investigatory powers. Our office has no authority under FOIA. Consequently, our analysis will be related only to the NPRS and not to FOIA.

Additionally, your petition seeks our assistance in receiving records from the Winnebago Police Department and the United States Bureau of Indian Affairs. However, neither of these two agencies fall within the purview of this office or the NPRS, as the records of these agencies are not "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." The Winnebago Police Department is an agency of the sovereign Winnebago Nation and the United State Bureau of Indian Affairs is a federal agency. Any complaints regarding the ability to obtain records from either of these two agencies will need to be directed elsewhere.

Your petition as to the County Attorney involves the following facts. In November 2017, you were involved in an incident on the Winnebago Reservation. From your various communications with this office and the County Attorney, we understand that the Winnebago Police Department responded to the incident and was assisted by the Thurston County Sheriff. Those involved in the incident included you and a father and son, against whom you wish to file a police report. Consequently, you are seeking information related to this incident. You made a request on November 7, 2018 to the County Attorney for a copy of a report filed by the Thurston County Deputy Sheriff. On November 9, 2017, you were advised by phone that the County Attorney did not possess any reports or statements. On December 12, 2017, you made a request for the following:

1. The report filed by [Thurston County Sheriff] Deputy Derek Utemark,
2. Copy of the statement written by the father,
3. Copy of the statement written by the son,
4. Transcripts of all phone calls the father made to the Winnebago police dispatch,
5. Transcripts of all phone calls between officer Gordon Rave of the BIA and the father, and
6. Copy of the video from the body cam of deputy Utemark.

The Thurston County Sheriff had not provided any records to the County Attorney as of the date of your request, as the Sheriff had not requested any charges be filed by the County Attorney. Notwithstanding that the County Attorney was not the custodian of Thurston County records sought by you as of December 12, 2017, the County Attorney reached out to the Thurston County Sheriff in order to assist in your quest for records. The County Attorney responded to you on December 15, 2017 enclosing the report from Deputy Utemark in response to your first request and indicating that the body cam video had been requested from the deputy in order to respond to request six, and any video obtained from him would be provided to you upon receipt. As to your requests two through five, the County Attorney indicated to you that her office had no documents responsive to these requests and, additionally, to her knowledge, no documents existed in response to requests two and three.

Following the County Attorney's December 15 response, you made an additional request for the names and addresses of the father and son involved in the November incident. The County Attorney responded on December 22, 2017 providing you with a copy of the body cam pursuant to your December 12 request and indicating that she has no records responsive to your request for the names and addresses of the two individuals. Your petition to this office followed in March 2018.

ANALYSIS

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. See Neb. Rev. Stat. § 84-712.01(1).

The basic rule for open public records in Nebraska is found at Neb. Rev. Stat. § 84-712 (2014). That statute provides:

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.

"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). Neb. Rev. Stat. § 84-712 does not require a public agency to review documents and create abstracts or other lists, to answer questions or to create documents which do not otherwise exist. Op. Att'y Gen. No.

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94092 (November 22, 1994); Op. Att'y Gen. No. 94035 (May 11, 1994); Op. Att'y Gen. No. 87104 (October 27, 1987). This means the requestor is entitled only to make a request for specific documents or records, and the custodian is required only to provide documents or records responsive to the records request, if they exist. The requestor is not entitled to ask, and the custodian is not required to answer, any questions in the request. The custodian is also not required to create documents that do not exist, or to interpret a public records request to determine what records are being requested.

As to the six requests made by you on December 12, 2017, the County Attorney has provided you with all records of the County as to requests one (report of the Sheriff's Deputy) and six (body cam video of Sheriff's Deputy). The County Attorney has indicated that her office has no records responsive to requests two (statement by the father), three (statement by the son), four (transcripts of calls to Winnebago PD), and five (transcripts of calls between BIA and father). Additionally, the County Attorney is not the custodian of records responsive to requests four and five. Your additional request for the names and addresses of the father and son involved in the November incident is a question posed to the County Attorney, and a public body is not required to respond to questions under the guise of a public records request. The County Attorney has stated that her office has no records responsive to your request for the names and addresses you seek; the County Attorney is not required to create documents that do not otherwise exist in order to respond to a public records request. The County Attorney has assured this office that you have been provided with all records of or belonging to the County Attorney which relate to the November incident in which you were involved. There are simply no further documents with which you could be provided. The County Attorney is not in violation of the NPRS.

CONCLUSION

For the reasons stated above, we do not believe you have been improperly denied access to public records. If you disagree with our analysis under the Public Records Statutes set out above, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under those statutes

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Tammy Maul-Bodlak