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Office of the Attorney General

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DOUGLAS J. PETERSON
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January 31, 2019

Via email at reggie@youngandyounglaw.net
Reginald L. Young
Young & Young
1603 Farnam Street
Omaha, NE 68102

RE: *File No. 19-R-106; Omaha Police Department; Reginald L. Young, Petitioner*

Dear Mr. Young:

This letter is in response to your petition received by this office on January 16, 2019, in which you sought our review of the denial of your public records request by the Omaha Police Department ("OPD"). Upon receipt of your petition, we contacted Assistant City Attorney Michelle Peters to discuss your underlying public records request and the Department's response to your request. We considered your petition in accordance with § 84-712.03(1)(b) of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018) ("NPRS"). Our findings in this matter are set forth below.

RELEVANT FACTS

On January 10, 2019, you submitted a public records request to OPD seeking "a copy of the incident report and all supplemental reports for the incident documented under RB#AK37675" relating to the daughter of a client. On January 11, 2019, OPD Deputy Chief Michele Bang denied your request, stating in part that

[t]he only public record in this case is the Incident Report. Incident Reports may be obtained through our Records Unit. A copy of a report is \$5.00 per report. More information about how to obtain a copy of an incident report may be found at the following link: <https://police.cityofomaha.org/services/request-a-police-report>.

All other records are part of the investigation of the Omaha Police Department into this incident and are considered police investigative

records. Investigative records are records developed as part of a law enforcement agency's investigation and constitute part of the investigation and are withheld pursuant to Neb. Rev. Stat. § 84-712.05(5) (Reissue 2014).

Your petition challenges the OPD's denial on the ground that § 84-712.05 is permissive, and only "states that such records **may** be withheld from the public." (Emphasis in original.) You argue that "[t]here is no state statutory provision requiring that such records not be provided to the requesting individual, especially under the foregoing circumstances." You note that OPD's denial "negatively impacts" your client and her family.

DISCUSSION

Your statement that Neb. Rev. Stat. § 84-712.05 (Cum. Supp. 2018) is permissive in nature is correct. The language in the statute expressly provides that

[t]he 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**

(Emphasis added.) The Attorney General has concluded that the categories of records in § 84-712.05 fall within the definition of "public record" in Neb. Rev. Stat. § 84-712.01 (2014). "They are, however, specifically made subject to a provision under which the custodian of such records may withhold them from public viewing." Op. Att'y Gen. No. 94080 (October 14, 1994) at 1 (emphasis in original). The NPRS are "entirely aimed at requiring disclosure and permitting nondisclosure; it does not foresee nor authorize the prohibiting of disclosure." *Burlington Northern R. Co. v. Omaha Public Power Dist.*, 703 F. Supp. 826, 829 (D. Neb. 1988); *aff'd*, 888 F.2d 1228 (8th Cir. 1989).

Here, OPD is relying on the exception to disclosure in § 84-712.05(5) as its basis to deny you access to the supplemental reports. This exception pertains to

[r]ecords 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 training¹

¹ There are two exceptions to the exception, i.e., (1) records relating to the presence of drugs or alcohol in any body fluid of any person; and (2) records relating to the cause of death arising out employment once an investigation is concluded when requested by a family member of the deceased.

In multiple disposition letters written over the years, this office has taken the position that law enforcement agencies may withhold their investigatory records under the exception in § 84-712.05(5).² Our position is based in large part on the plain language of the exception,³ which expressly permits “law enforcement agencies” to withhold records developed or received by the agencies which relate to investigations of persons, institutions or businesses. There is no basis to conclude otherwise with respect to your request for investigatory records from OPD.

According to Ms. Peters, it is the policy of the OPD not to disclose investigatory records. There are no exceptions. Moreover, there is no statutory basis for the Attorney General to compel disclosure of public records when we find that the public body’s statutory basis to withhold the records at issue is appropriate. We find that to be the case here.⁴

CONCLUSION

For the reasons discussed above, the Omaha Police Department may continue to withhold any investigatory records pertaining to the incident mentioned in your petition under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(5). Since no further action by this office is warranted, we are closing our file. If you disagree with our analysis

² See, e.g., File No. 18-R-106; Lincoln Police Department; Juanita Phillips, Petitioner (March 22, 2018); File No. 17-R-133; Alliance Police Department; Cheryl Spencer, Petitioner (July 18, 2017); 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); and File No. 13-R-139; City of Lincoln Police Department; Emily Bazelon, Slate Magazine, Petitioner (December 9, 2013). Copies of our disposition letters relating to these files are accessible at <https://ago.nebraska.gov/disposition-letters>.

³ 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. See *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 123, 907 N.W.2d 301, 308 (2018); *Farmers Cooperative v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017).

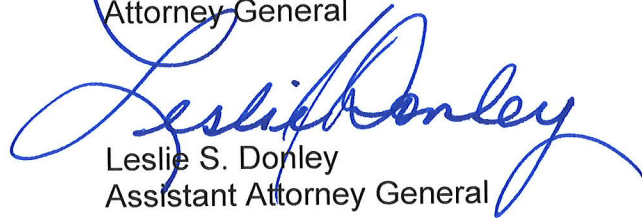
⁴ Although not relied on by OPD, we note that § 29-3506 of the Security, Privacy, and Dissemination of Criminal History Information Act, Neb. Rev. Stat. §§ 29-209, 29-210, 29-3501 to 29-3528, and 81-1423 (2016, Cum. Supp. 2018), expressly excludes “intelligence or investigative information” from the definition of “criminal history record information,” which is considered a public record open to inspection and copying. See Neb. Rev. Stat. § 29-3520 (2016).

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under the NPRS, you may wish to review the judicial remedies available to you and your client under § 84-712.03.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Michelle Peters

49-2152-29