

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

**LESLIE S. DONLEY**  
ASSISTANT ATTORNEY GENERAL

December 20, 2019

David Earl  
KETV NewsWatch 7  
2665 Douglas Street  
Omaha, NE 68131

RE: *File No. 19-R-130; City of Omaha Police Department; David Earl, KETV NewsWatch 7, Petitioner*

Dear Mr. Earl:

This letter is in response to your request for our opinion on the denial by the City of Omaha Police Department (“Department”) of your recent public records request. We construed your request to be a petition for review under Neb. Rev. Stat. § 84-712.03(1)(b) of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018, Supp. 2019) (“NPRS”). Upon receipt of your petition, we contacted Bernard in den Bosch, Deputy City Attorney, and advised him of the opportunity to supplement the Department’s basis for denying you access to the requested records. We received Mr. in den Bosch’s response on December 18, 2019. We have carefully considered the Department’s response in accordance with the provisions of the NPRS, and our findings in this matter are set forth below.

### **RELEVANT FACTS**

On December 2, 2019, Sarah Fili, an individual with your organization, submitted a public records request to the City of Omaha. Ms. Fili’s request stated: “I’m looking for the outside consultant Oliver Enterprises inspection report for the City of Omaha police department’s air support unit detailing an investigation into two incidents, April 16 and August 16 2019.” On December 5, 2019, Mr. in den Bosch denied the request. He indicated that the Department possessed a report from Oliver Enterprises entitled “Aviation Program Evaluation” (hereinafter, “Report”), which contained an investigation of the two incidents referenced in the request. However, the Report also contained specific analysis as to the Department’s air support unit (“Unit”) personnel; operational information (methods, procedures and Department usage); and recommendations for changes. Consequently, the Department relied on the exceptions to disclosure in Neb. Rev. Stat. § 84-712.05(5) and (7) as its bases to withhold the Report. You immediately contacted

David Earl  
December 20, 2019  
Page 2

our office to review the Department's denial. We note that your petition contained no specific objection with respect to the Department's denial of your request.

In his response to this office, Mr. in den Bosch clarified that "[t]he primary focus of the evaluation was strategic and tactical and concerned how the City of Omaha Air Support Unit has been operated and recommendations about how it should be operated." His response included the affidavit of Department Deputy Chief Kerry Neumann, who currently oversees the Department's Police Services Bureau, which includes the Unit. Deputy Chief Neumann states that on or about August 18, 2019, the Department requested that Oliver Enterprises evaluate the Unit, i.e., specifically "analyze 'any systemic issues that may have led to two recent department helicopter accidents. The process will include a thorough evaluation of all major components of the Aviation Department and determine the mission readiness, pilot abilities, and overall safety.'" Neumann Affidavit at 1. He states that the purpose of the Report was to evaluate the Unit as a whole, not to directly investigate the two incidents although the Report does "address the strengths and deficiencies of individual pilots that created the circumstances that allowed the accidents to occur." *Id.* at 2. The Report contained a "thorough review" of the Unit's organizational structure, including a comprehensive review of the standard operating procedures in the "Unit Manual." The Report contained suggestions for "significant tactical and strategic changes to the Unit Manual including changing how the Unit was organized, trained and implemented." *Id.* Deputy Chief Neumann states that "[t]hese standard operating procedures include tactical and strategic information which if made available to the public would make the Unit vulnerable and negatively affect the ability of the Air Support Unit to provide service." *Id.*

Deputy Chief Neumann further states that the Report contained an evaluation of current staff, "includ[ing] positive and negative feedback about individual staff members, their capabilities and training." *Id.* While some individuals were not specifically identified by name in some instances, the Report contains enough detailed information to allow anyone with working knowledge of the Unit to identify the employee being discussed. The Report provided a mechanism for future staff training and testing, and recommendations as to how the Unit should function and interact with the public. The Report contained an investigation and analysis of the strengths and weaknesses of the Unit, including the security of the facilities and the Unit's security measures. The Report also evaluated the maintenance system and process, which "exposed potential weaknesses." Deputy Chief Neumann states that "[i]t is my concern that should the Report be publicly released that it will provide insight into the strategic and tactical operations of the City of Omaha Air Support Unit" and "may be used by individuals . . . to undermine the Unit." *Id.* at 3.

## DISCUSSION

The basic rule for access to public records in Nebraska is set out in Neb. Rev. Stat. § 84-712(1) (2014). That provision states that

*[e]xcept 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” in Nebraska “include all records and documents, regardless of physical form, of or belonging to” governmental entities in the state, “[e]xcept when any other statute expressly provides that particular information or records shall not be made public.” Neb. Rev. Stat. § 84-712.01(1) (2014). Thus, there is no absolute right to access public records in those instances where records are exempt from disclosure by statute. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009); *State ex rel. Nebraska Health Care Ass’n v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

The Department does not dispute that the Report is a public record as defined under the NPRS. However, the Department believes two particular exceptions in Neb. Rev. Stat. § 84-712.05 (Supp. 2019) provide a basis for the Department to withhold the Report. Section 84-712.05 is a compilation of twenty-three categories of public records that may be withheld at the discretion of the records custodian “unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties . . . .” We will address each exception asserted by the Department separately below.

I. Neb. Rev. Stat. § 84-712.05(5)

Section 84-712.05(5) pertains, in pertinent part, 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 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 concluded on multiple occasions that law enforcement agencies may rely on the exception in § 84-712.05(5) to withhold investigatory records developed or received by an agency in the course of its duties to investigate persons, institutions or businesses.<sup>1</sup> The conclusions reached in those files were based on the records at issue, the plain language of the exception and the Nebraska Supreme Court's definition of "investigatory record" set out in *Nebraska Health Care Ass'n*:

[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.

*Nebraska Health Care Ass'n* at 792, 587 N.W.2d at 106. However, "the investigatory exception does not apply to protect material compiled ancillary to an agency's routine administrative functions or oversight activities." *Evertson v. City of Kimball*, 278 Neb. 1, 15, 767 N.W.2d 751, 763 (2009).

We initially questioned whether subsection (5) applied to the requested Report since the activity giving rise to the Report did not relate to the Department's duties of investigation, but appeared to involve the Department's oversight activities of the Unit. However, the Neumann affidavit makes clear that while there may have been an "investigation" into the two incidents referenced in the request, the Report is, in effect, a comprehensive analysis of the operations of the Unit, the disclosure of which would compromise the security of the Unit and its personnel. Consequently, we believe that the portion of the exception relating to "strategic or tactical information used in law enforcement training" provides a sufficient basis to withhold the Report.

II. Neb. Rev. Stat. § 84-712.05(7)

The exception in Neb. Rev. Stat. § 84-712.05(7) applies to

[p]ersonal information in records regarding personnel of public bodies other than salaries and routine directory information . . . .

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. *Farmers Cooperative v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017). The plain and ordinary reading of § 84-712.05(7) indicates that public bodies may lawfully withhold

---

<sup>1</sup> See, e.g., *File No. 19-R-106; Omaha Police Department; Reginald L. Young, Petitioner* (January 31, 2019); *File No. 18-R-106; Lincoln Police Department; Juanita Phillips, Petitioner* (March 22, 2018); and *File No. 17-R-133; Alliance Police Department; Cheryl Spencer, Petitioner* (July 18, 2017). Copies of our disposition letters relating to these files may be found at <https://ago.nebraska.gov/disposition-letters>.

*personal information* regarding its personnel, except for salary and routine directory information.<sup>2</sup> In this context, Webster's New Universal Abridged Dictionary 1338 (2<sup>nd</sup> ed. 1983) defines "personal" as "2. private; individual; affecting individuals; peculiar or proper to a certain person or to private actions or character . . . ." As noted above, the Report contains significant information about Unit personnel—their strengths, weaknesses, capabilities, and training. Deputy Chief Neumann further represents that the Report contains "several very direct evaluations of the ability and/or lack of ability of the pilots and other staff of the Omaha Police Department which if released would create embarrassment to those individuals." Neumann Affidavit at 3. There is little question that this information is personal in nature about Department personnel, and does not include salaries or routine directory information.

In addition, the Nebraska Supreme Court has interpreted the scope of the personal information exception in *Steckelberg v. Nebraska State Patrol*, 294 Neb. 842, 885 N.W.2d 44 (2016). The plaintiff in *Steckelberg* was a State Patrol trooper who sought access to records relating to the interview and selection process (e.g., score sheets, recommendations, notes) for an "Executive Protection Trooper" position within the State Patrol—a position he interviewed for but did not receive. In determining that the State Patrol could rely on § 84-712.05(7) to withhold the requested records, the court stated:

[Section] 84-712.05(7) exempts "[p]ersonal information in records regarding personnel." The district court found that the information in the records sought did contain personal information. And the information was about employees, otherwise known as personnel, of the State Patrol. There is no requirement in § 84-712.05(7) that in order to be exempt, the records must be kept within an employee's personnel record, as used as a term of art; *the records need only be personal information about personnel, defined as persons employed by an organization.*

*Steckelberg*, 294 Neb. at 849-850, 885 N.W.2d at 50 (internal footnotes omitted) (emphasis added). In light of the plain language of the exception, and the court's straightforward construction set out above, we believe the Department may rely on the personal information exception in § 84-712.05(7) as an additional basis to withhold the Report.

Finally, please keep in mind that although Neb. Rev. Stat. § 84-712.03 creates enforcement responsibilities for this office, there is no statutory mechanism for an *in camera* review of the Report by the Attorney General. Under § 84-712.03(2), that procedure is left for the courts. Consequently, we will rely on representations from Mr. in

---

<sup>2</sup> This office has construed "routine directory information" to include an employee's name, job title, work telephone number and address and dates of hire and separation. See the Classified System Personnel Rules—Chapter 12 – Personnel Records, Title 273, *Nebraska Administrative Code*, Chapter 12, § 001.01 (October 30, 2006).

David Earl  
December 20, 2019  
Page 6

den Bosch and Deputy Chief Neumann's sworn testimony that the Report is what they say it is, and the exceptions have been properly identified and asserted.

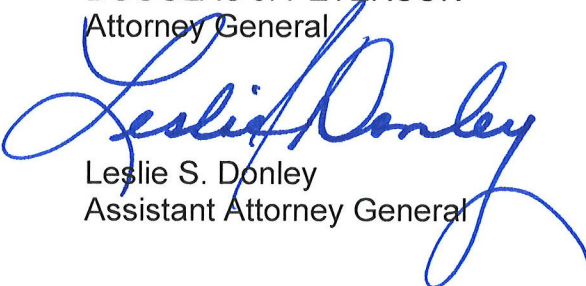
### CONCLUSION

For the reasons explained above, we believe that the requested Report belonging to the Department may be lawfully withheld under § 84-712.05(5) and (7). Since you have not been unlawfully denied access to public records, no further action by this office is necessary and we are closing our 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.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General



Leslie S. Donley  
Assistant Attorney General

c: Bernard in den Bosch

49-2339-29