



STATE OF NEBRASKA
Office of the Attorney General

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September 13, 2021

Via email at [REDACTED]
Harry N. MacLean, Esq.

[REDACTED]
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RE: *File No. 21-R-131; Nebraska State Patrol; Harry N. MacLean, Petitioner*

Dear Mr. MacLean:

We are writing in response to your correspondence received by this office on August 27, 2021, in which you requested our assistance in obtaining certain public records belonging to the Nebraska State Patrol (“NSP”). On September 13, 2021, the undersigned spoke to NSP attorney Jessica Forch about your correspondence and underlying public records request. We considered your correspondence to be a petition under Neb. Rev. Stat. § 84-712.03(1)(b) of the Nebraska Public Records Statutes (“NPRS”), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020). Our findings in this matter are set forth below.

RELEVANT FACTS

On May 26, 2021, you submitted a public records request to the NSP, requesting “[c]opies of any documents relating to the investigation and prosecution of Charles Starkweather and Caril Fugate for murder in 1958.” NSP attorney Jessica Forch responded to your request on August 13, 2021, stating, in part:

Please log in to the Public Records Center at the following link to retrieve the appropriate responsive documents.

The Nebraska State Patrol is **partially** denying your request because we have redacted information that is investigative in nature, this is pursuant to Neb. Rev. Stat. § 84-712.05 subsection (5). Under a public records request we will not be releasing the autopsy report(s) or body photos. Please contact the Coroner and/or County Attorney for that information. . . . (Emphasis in original.)

You are challenging the NSP's denial on two grounds. First, you state that the investigation at issue took place approximately 63 years ago, and that "[t]here can be no valid public policy reason, such as compromising investigative or intelligence gathering techniques, for withholding such records at this point in time." Second, you assert that since the NSP produced other investigative reports and photos to you, "this constitutes a waiver of an objection based on the investigative exemption set forth in 84-712.05(5)."

According to your petition, you are researching a book on the Starkweather/Fugate crimes, and have received information that certain autopsy photos show injuries which are inconsistent with injuries described in reports or were testified to in court. You indicate that your only interest in seeing the requested photos and documents is to determine if these injuries exist. For your information, "[t]he public records statutes apply 'equally to all persons without regard to the purpose for which the information is sought.' As a general rule, citizens are not required to explain why they seek public information." *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 801, 943 N.W.2d 231, 247 (2020) ["*BH Media*"]. Accordingly, we do not consider the reason or purpose for a records request when making our determination under § 84-712.03(1)(b).

DISCUSSION

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

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" 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. *BH Media*, 305 Neb. at 788, 943 N.W.2d at 240 (2020) ; *Aksamit Resource Mgmt. LLC v. Neb. Pub. Power Dist.*, 299 Neb. 114, 123, 907 N.W.2d 301, 308 (2018).

The NSP is relying on the exception to disclosure in § 84-712.05(5) as its basis to deny you access to the autopsy reports and photos. 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 training

“Statutory interpretation begins with the text, and the text is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of words which are plain, direct, and unambiguous.” *State ex rel. Peterson v. Shively*, 310 Neb. 1, 14, ___ N.W.2d ___ (2021). 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. It appears to us that autopsy reports and photos held by a law enforcement agency fit squarely within the parameters of § 84-712.05(5), and we have indicated as much in the past.¹

We have considered your argument that any Starkweather investigation is at least sixty-three years old and, therefore, there can be no valid public policy reason to continue withholding the records at issue. In this respect, this office has taken the position that the status of an investigation has no bearing on a public body’s ability to withhold investigatory records under § 84-712.05(5). The exception contains no language which distinguishes between active and closed investigations. Nor does the exception preclude a public body from withholding investigatory records after a prescribed number of years. Consequently, NSP may rely on the exception despite the historical nature of the records at issue.

We have also considered your argument that the NSP waived its ability to withhold the autopsy reports and photos because it produced other investigatory records to you in response to your records request. Section 84-712.05 allows public bodies to withhold certain records unless those records have been “publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties” “Disclosure, within the meaning of the public records statutes, refers to the exposure of documents to public view.” *BH Media*, 305 Neb. at 795, 943 N.W.2d at 244. According to Ms. Forch, it is the policy of the NSP not to disclose autopsy reports and photos. There are no exceptions. Since these *particular* records have not been publicly disclosed by the NSP, the agency has not waived its ability to withhold them under § 84-712.05(5).

Finally, you argue that the case cited by Ms. Forch, *Boppre v. Overman*, No. A-15-1135, 2016 WL 6872978 (Neb. Ct. App. Nov. 22, 2016), does not support a finding that

¹ See *File No. 08-R-152; Pierce County Attorney; Thomas Buttolph, Petitioner* (December 16, 2008).

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autopsy records are exempt from disclosure under § 84-712.05(5). You assert “that the Court upheld the denial of release of the photos *either* because they were investigative records or the plaintiff had another adequate remedy.” (Your emphasis.) Our reading of the case indicates that the district court found that autopsy records were investigatory, and the Court of Appeals found no clear error with respect to this finding. However, the court found that records relating to the cost of the autopsies were not investigatory since they involved the expenditure of public funds, and that another adequate remedy was available to Boppre relating to his requests for these particular records “via the coroner’s office.” *Id.* at 11-13.

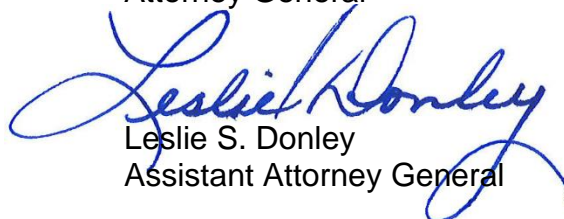
CONCLUSION

For the reasons explained above, we conclude that the autopsy reports and photos of or belonging to the NSP may be lawfully withheld under Neb. Rev. Stat. § 84-712.05(5). Since the NSP did not unlawfully deny your records requests, no further action by this office is warranted. Accordingly, we are closing this file.

If you disagree with our analysis under the NPRS, you may wish to review the judicial remedies available to you under § 84-712.03.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Jessica Forch

49-2773-29