



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

March 25, 2022

Via email at [REDACTED]
W. Fletcher Reel
14344 Y Street
Omaha, NE 68137

RE: *File No. 22-R-116; City of Bellevue; W. Fletcher Reel, Nebraska Sunrise News, Petitioner*

Dear Mr. Reel:

This letter is in response to your petition in which you requested our assistance in obtaining certain public records from the City of Bellevue ("City"). We received your petition on March 9, 2022, and, at our request, you supplemented your petition the following day. On March 11, we forwarded your petition to City Attorney Bree Robbins, informing her of the opportunity to respond. We subsequently received a response from Ms. Robbins on March 14. We considered your petition and the City's response in accordance with the provisions of the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020, Supp. 2021). Our findings in this matter are set forth below.

RELEVANT FACTS

On March 4, 2022, Joe Herring, chief investigative reporter for *Nebraska Sunrise News*, emailed a public records request to City Police Captain Andy Jashinske, requesting the following records:

Transcript of the officer candidate interview board minutes regarding Police Chief applicant, Greg Gonzalez, and the background investigation for Police Chief applicant Greg Gonzalez, including any conducted by the Bellevue Police Department, or provided to the Bellevue Police Department (or their assigns) by the FBI or other investigatory agencies.

Ms. Robbins responded to Mr. Herring on March 8, indicating that the City had no transcript to produce. With respect to the request for “background investigation,” Ms. Robbins stated that “the City is denying this request pursuant to Neb. Rev. Stat. 84-712.05(7) and (5). The content of the records withheld (as requested) would be Mr. Gonzalez’s background investigation that the City of Bellevue is in possession of.”

In your petition, you indicate that your publication has received “credible information” about Mr. Gonzalez being investigated by federal and local authorities, which has resulted in Mr. Gonzalez “being passed over for employment with the Bellevue Police Department and also, his dismissal from the Omaha Police Department.” You state that since “Mr. Gonzalez is a candidate for Douglas County Sheriff, we believe there is ample reason and precedent for his background check records to be released to the public.” You further state that

[w]e believe both the law and the public interest support ordering Mr. Gonzalez’ background check be made available. Several years ago, when David Friend and Mike Cavanaugh ran for political office, their personnel files were made public, including background check results. We believe this situation is no different. If Mr. Gonzalez is to be the next Sheriff of Douglas County, the people have a right to know if there is anything in his background that would render him unfit to serve.¹

According to Ms. Robbins, the City determined that the requested background investigation, “which was conducted by a law enforcement agency and other public bodies,” constituted an investigatory record that could be withheld under Neb. Rev. Stat. § 84-712.05(5). She indicates that the City relied on *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) [“*NE Health Care Ass’n*”]; *Boppre v. Overman*, No. A-15-1135, 2016 WL 6872978 (Neb. App. Nov. 22, 2016); and Op. Att’y Gen. No. 00037 (Oct. 20, 2000)² to reach its conclusion. Ms. Robbins further indicated that the exception in Neb. Rev. Stat. § 84-712.05(7) (“[p]ersonal information in records regarding personnel of public bodies other than salaries and routine directory information”) also provided a basis to

¹ Please note that “[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 Group*”] (quoting *State ex rel. Sileven v. Spire*, 243 Neb. 451, 457, 500 N.W.2d 179, 183 (1993)). Accordingly, this office does not consider the reason or purpose for a records request when making our determination under § 84-712.03(1)(b).

² In this opinion, the Attorney General indicated that records received by the State Department of Education pursuant to its duties of examining persons for the purpose of issuing teaching and administrative certificates to qualified applicants could be kept confidential under § 84-712.05(5). The Attorney General stated that the application records at issue were records developed or received as a part of an “examination,” and distinguished those records from the investigatory records at issue in *NE Health Care Ass’n*.

withhold the requested background investigation. She also distinguished the records sought in your request with the job applications materials that may be withheld under Neb. Rev. Stat. § 84-712.05(17).

DISCUSSION

The basic rule for access to public records is set out in Neb. Rev. Stat. § 84-712(1) (2014). This provision generally states that “[e]xcept as otherwise expressly provided by statute,” all Nebraska citizens and other interested persons have 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. Neb. Rev. Stat. § 84-712(1) (2014) (emphasis added). “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) (emphasis added). Thus, in those instances where the Legislature has provided that a particular record shall be confidential or may be withheld at the discretion of the records custodian under § 84-712.05, there is no right of access. The NPRS “place[s] the burden of proof upon the public body to justify nondisclosure.” *BH Media Group*, 305 Neb. at 792, 943 N.W.2d at 242.

The City asserts that the exceptions in § 84-712.05(5) and (7) (Supp. 2021) provide a basis to withhold the requested background investigation. This section currently contains twenty-three categories of public records that may be withheld at the discretion of the records custodian so long as those records have not been “publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties” Under § 84-712.05(5), a public body may withhold

[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 training³

³ Section 84-712.05(5) carves out two exceptions: (1) records relating to the presence of and amount

As noted above, the City relied on *NE Health Care Ass'n* in its determination to withhold the requested records. In *NE Health Care Ass'n*, the Nebraska Supreme Court considered whether certain records created by the Department of Health and Human Services (“DHHS”) in the course of its audits of nursing homes were “investigatory records” that could be withheld by the agency under § 84-712.05(5). To aid its analysis, the court created the following standard, derived from federal courts interpreting a similar provision in the federal Freedom of Information Act:

[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, the court questioned whether DHHS’ auditing activities were “investigations or examinations within the meaning of § 84-712.05(5).” *Id.* In addressing this question, the court conceived another standard, i.e.:

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 concluded that the DHHS’ auditors had departed from the routine when they decided to make specific requests for additional information to address deficiencies in the cost reports submitted by nursing homes. Consequently, the court found that DHHS could lawfully withhold the requested documents under the exception in § 84-712.05(5).

With respect to the application of § 84-712.05(5) to the records at issue here, the City further asserts that

or concentration of alcohol or drugs in any individual’s body fluids; and (2) records relating to the cause of or circumstances surrounding the death of an employee arising out of employment when requested by a family member of the deceased employee after an investigation is concluded.

the background investigation/examination into Mr. Gonzalez was conducted by a law enforcement agency and public body, focused specifically on Mr. Gonzalez with special intensity for a specific purpose of conducting a confidential background investigation to determine his qualifications for a position with the City. The Bellevue Police Department had a duty to investigate and examine Mr. Gonzalez and exercised that duty when conducting the background investigation. The duty to conduct the specific investigation and examination into Mr. Gonzalez was rationally related to determining his qualifications for the Chief of Police position.

We have carefully considered whether the background investigation you seek falls within the exception in § 84-712.05(5). Applying the standards set out in *NE Health Care Ass'n* to the circumstances presented here, it appears to us that the City has established that (1) the entities involved are public bodies charged with duties of investigation or examination of persons, institutions, or businesses; (2) that the investigation of Mr. Gonzalez was related to these entities' duties of investigation and examination; and (3) that the specific investigation was rationally related to the investigatory duties imposed on these entities by law. Finally, the background investigation was not compiled ancillary to any administrative function, but rather focused with special intensity on a particular individual for the purpose of determining his qualifications to hold the position of chief of police. Based on the foregoing, we conclude that the requested records constitute an "investigatory record" as contemplated in § 84-712.05(5), and that the City may continue to withhold the record at its discretion.

Finally, since we have determined that § 84-712.05(5) provides a basis to withhold the requested records, it is not necessary for us to determine whether the exception in § 84-712.05(7) would also apply.

CONCLUSION

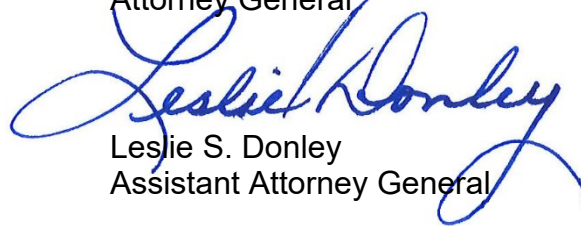
Based on the foregoing, the City of Bellevue may continue to rely on the exception in § 84-712.05(5) to deny you access to the background investigation. Since we believe that the application of the exception is appropriate under the circumstances presented, no further action is warranted and we are closing our file.

W. Fletcher Reel
March 25, 2022
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If you disagree with our analysis of this matter, you may wish to consider the other remedies available to you under the NPRS.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Bree Robbins (via email only)
Joe Herring (via email only)

49-2907-30