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January 7, 2011

Mr. Andrew Shelden
1325 Rose St.
Lincoln, NE 68502

Re: *File No. 10-R-147; Stanton County Sheriff; Shelden*

Dear Mr. Shelden:

This letter is in response to undated correspondence from you which we received on December 23, 2010. In your correspondence, you raised a number of issues regarding compliance with the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010), by the Stanton County Sheriff (the "Sheriff") and the Stanton County Attorney. We considered your correspondence as a petition for access to records under § 84-712.03. Our response to your petition is set out below.

Our understanding of the facts surrounding your petition is based upon your letter and the materials you provided to us with it, along with our discussions with the Stanton County Attorney. You presented two written requests for records to the Sheriff. We will discuss each request separately.

Records Request No. 1

On September 9, 2010, you sent a written records request to Stanton County Sheriff Mike Unger. You requested copies of two sets of records: 1. "any and all reports generated on or about August 29, 2010, covering you and your deputies' dealings with Ashley Titus, Sundae Mcknown, and Stephen Schrader," and 2. "reports from any and all incidents in the past 12 months regarding you and or your deputies discharging firearms, outside of training programs, especially any and all discharges that resulted in injury or death of any person or animal." Sheriff Unger received your records request on September 10, 2010. On September 16, 2010, the Sheriff responded to your records request with a three sentence letter. He indicated that your request for reports "was received and forwarded to the Stanton County Attorney for his review." He also indicated that he was returning your check for copies of public records to you after voiding it so that it could not be cashed.

Stanton County Attorney W. Bert Lammli ultimately responded to your initial records request with three separate letters. In one letter dated October 14, 2010, Mr. Lammli provided you with a copy of "the report on the dog call in Woodland Park, per your request." That letter asked you to "remit $10.50 to the Stanton County Clerk for postage, copies and time involved." In a second letter dated October 14, 2010, the County Attorney referenced an incident report regarding Ashley J. Titus dated 9-29-10. Mr. Lammli indicated that the report in question was excepted from disclosure for civil purposes by Neb. Rev. Stat. § 84-712.05. Finally, in a letter dated October 15, 2010, Mr. Lammli referenced your letter of September 9 and your request for reports in cases where firearms were discharged. Mr. Lammli indicated that "[w]e can find no such reports." Mr. Lammli concluded by again requesting payment of $10.50 for the "time spent on your request."

With respect to your initial records request, you complain that: 1. the responses from the Sheriff and the County Attorney were not timely under the Public Records Statutes, 2. the content of the responses from those officials did not comport with the relevant statutes, 3. the amount charged for the records at issue, $10.50, was beyond the actual cost of the records and too high, and 4. you received no reports regarding the discharge of firearms by employees of the Sheriff's office.

Under § 84-712 (4), a public official who receives a written request for copies of public records in Nebraska has four business days to either provide copies of the records, deny access to the records under 84-712.04, or issue what this office has, on occasion, characterized as a "delay letter." The content of the "delay letter" is proscribed in § 84-712 (4), and it must include a written explanation as to why the entire records request cannot with reasonable good faith efforts be fulfilled in four business days, a statement of the earliest practicable date for fulfilling the request, an estimate of the expected cost of any copies, and an opportunity for the requester to modify or prioritize the items within the request.

Your initial records request was received by the Sheriff on September 10, and he responded to you on September 16. It appears to us that the Sheriff's response occurred within four business days and was timely. However, assuming that the Sheriff's response was a "delay letter," it obviously did not contain the information required by § 84-712 (4). As a result, we will suggest to the Sheriff, by providing him with a copy of this letter, that in the future, delay letters responsive to public records requests must include the information required by § 84-712 (4). And, we will point out that the Sheriff is ultimately the public officer responsible for the response to a public records request directed to his office, not the county attorney.

Once the custodian of public records issues a delay letter under § 84-712 (4), then the custodian has a reasonable time to complete the search for and production of the public records at issue, including the time necessary to determine if there is any

basis to keep any portions of the records confidential. The County Attorney responded to your initial records request on October 14 and 15, and we cannot say that the time frame for that response was unreasonable under the circumstances. However, Mr. Lammli denied you access to certain documents. While we agree with his conclusion that the incident report regarding Ashley J. Titus could be kept confidential under § 84-712.05 (5) as an investigatory record, we will note that his denial letter did not contain all the information required by § 84-712.04. We will remind the County Attorney of the requirements of that statute by providing him with a copy of this letter.

With respect to charges for public records, you contend that the $10.50 which you were charged in connection with the production of records for your first document request was excessive. In our Op. Att'y Gen. No. 01029 (August 2, 2001), we indicated that the actual costs which may be charged for photocopies of public records include the cost of copy paper, toner, copy machine rental, etc. *plus* an appropriate amount for the staff time of public employees involved in locating the records, making copies, and returning the records to the proper files, not to exceed the amount of time reasonably needed to perform those tasks in a particular case. We have also indicated in the past that we will not look behind a charge of $.25 per page for copy paper, toner, machine rental, etc.

In the present case, you were charged $10.50 for the records provided in response to your initial request. That amount apparently included charges for 7 pages of reports at $.25 per page, $1.05 for postage and $7.70 for the time involved in finding the records and making copies. We do not believe those charges were excessive.

Finally, you complain that you did not receive any records in response to the second part of your initial records request seeking repots of incidents where employees of the Sheriff's office discharged firearms. However, the County Attorney's letter to you dated October 15, 2010, indicated that the Sheriff and the County Attorney could "find no such reports." Absent some direct evidence to the contrary, we must assume that public officials act in good faith, and that they have no records in response to a particular public records request if they state that is the case. *Cf. Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009). Consequently, we do not believe that the County Attorney's response of October 15 constitutes an improper denial of access to records.

Records Request No. 2

Your second records request to the Stanton County Sheriff's Office was sent on October 5, 2010, and received by that office on October 6, 2010. You requested "any and all reports [and videotapes] generated by you or your deputies in October, 2006, related to a motor vehicle pursuit in which Joseph D. Lenser was arrested on U.S. Highway 275," and "any and all reports and videos generated by you or your deputies

from the December 5, 2006, incident that resulted in the arrest of Bruce Hogan." Sheriff Unger responded to this request in a letter dated October 15, 2010. He indicated in his response that he had made copies of the materials you requested, and that he had forwarded them to the Stanton County Attorney for a determination as to "if and what information you will be sent."

The Stanton County Attorney provided you with the two reports or files from Sheriff Unger on October 18, 2010. Those files apparently included 94 pages of materials, and the County Attorney charged you $48.50 for the copies. The charges again included $.25 per page in coping fees plus $25.00 for the time involved by public officials in finding the documents, making copies, reviewing the materials for confidentiality and returning the files to the proper folder.

With respect to your second records request, you complain that: 1. the production of records was not timely, 2. you were sent documents which you did not request, and charged for them, 3. the charges for copies were excessive, and 4. certain records which should have been a part of the files provided to you were not present in the materials produced by the County Attorney.

In this instance, it appears to us that the Sheriff's "delay letter" was sent to you more than four business days after receipt of your records request. Therefore, it was not timely under the applicable statutes. In addition, the Sheriff's letter did not contain the information required by § 84-712 (4). As a result, we will again inform the Sheriff that, in the future, he must respond, in some fashion, to a public records request directed to his office *within four business days* after receipt of the written request. Moreover, If he chooses to send a delay letter or to deny access to particular records, he must generate correspondence which includes the information required under §§ 84-712 and 84-712.04.

You also complain that the County Attorney sent you a number of documents which you did not ask for in connection with your second records request, and then charged you for those copies. In that regard, we believe that the language of your second records request did not make it entirely clear exactly what documents you were seeking. And, the County Attorney obviously sent you copies of the entire file in connection with the individuals which were the subject of your request rather than only the investigatory reports from those files.[1] Under those circumstances, we suggest that you multiply the number of pages of nonresponsive records by $.25 per page, and then reduce your payment for the copies at issue by that amount.

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[1] You also question whether some of the records provided to you should have been made available due to confidentiality concerns. However, our focus under the Public Records Statutes is access to public records. Those statutes do not contain provisions which require confidentiality.

With respect to the amount that you were charged for the records at issue, we believe, as discussed previously, that the Sheriff and the County Attorney could charge you $.25 per page for the records you requested *plus* a reasonable amount for their time and the time of their staff in finding the records, making copies, returning the records to the proper file and reviewing the records for confidentiality issues. In that regard, it does not appear to us that a charge of $25.00 in connection with the production of 94 pages of documents in this instance is clearly unreasonable.

Finally, you complain that the records provided to you regarding the arrest of Joseph Lenser in 2006 do not include a report that *you* wrote regarding the incident. The County Attorney has represented to us that he gave you all the records which exist in the Lenser file and that he has not withheld a report that you prepared. The Sheriff made a similar representation to the County Attorney. Given those representations, the fact that the records at issue are four years old, and our presumption, as discussed above, that public officials act in good faith, it does not appear that you were denied access to records in connection with the Lenser file. We would also note that a report in the file from the Sheriff regarding the Lenser arrest makes mention of the fact that the Sheriff used his shotgun butt to push Mr. Lenser to the ground. That fact, in the context of your inquiry, supports the conclusion that Stanton County officials are not withholding records.

For the various reasons discussed above, we do not believe that you were improperly denied access to public records and we plan no further action regarding this file. If you disagree with our analysis, you may wish to discuss this matter with your private attorney to determine what, if any, additional remedies might be available to you.

Sincerely,

JON BRUNING
Attorney General

Dale A. Comer
Assistant Attorney General
Chief, Legal Services Bureau

cc. Sheriff Mike Unger
W. Bert Lammli, Stanton County Attorney

05-236-30