

STATE OF NEBRASKA
Office of the Attorney General

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October 30, 2012

Mr. Ryan Ross
Ross Investigators, P.C.
2150 Curtis St., Suite 205
Denver, CO 80205

Re: *File No. 12-R-137; Keith County Attorney; Ross*

Dear Mr. Ross:

This letter is in response to your correspondence dated October 10, 2012, regarding various public records generated as a result of a boating accident in Keith County, Nebraska, which took the life of Richard Caroselli on September 2, 2012. We received your correspondence on October 15, 2012, and we considered that correspondence to be a petition for access to public records under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010, Supp. 2011), and § 84-712.03 in particular. Our response to your petition is set out below.

FACTS

Our understanding of the facts in this instance is based upon your correspondence and the materials you provided to us with it. We also discussed this matter with personnel at the Nebraska Game & Parks Commission ("GPC") and with the Keith County Attorney, Mr. Randy Fair.

Richard Caroselli was killed in a boating accident at Lake McConaughy in Keith County, Nebraska, on September 2, 2012. You have been retained by the Denver law firm of Bachus & Schanker, LLC, to assist that firm regarding the accident. Bachus & Schanker LLC represents Angela Lubahn, Mr. Caroselli's daughter.

On September 18, 2012, you submitted an email request to Roger Thompson and Scott Eveland at GPC in which you requested "all records in the custody of the NE game and parks commission pertaining to the 9/2 incident at Lake Mac in which Richard Caroselli was killed." That request for records was referred to the Boating Law

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Administrator at GPC, Herb Angell, who denied it at the direction of the Keith County Attorney. You then presented your records request to Mr. Fair, and narrowed that request to include only a copy of the accident report prepared by the GPC officers for the accident in question. At this point, you have received no records from GPC. We also understand that the GPC officers who were at the accident site in Keith County prepared narrative investigatory reports and completed a Nebraska Boating Accident Report – Officer Investigation form. The narrative investigatory reports were forwarded to the Keith County Attorney and are no longer in the possession of GPC. The Boating Accident Report – Officer Investigation form was provided to the Nebraska State Patrol.

You also submitted an email records request to Harold “Pete” Peterson of the Keith County Emergency Operations Center seeking a copy of the 911 recording and dispatch log pertaining to the accident. Mr. Peterson refused to provide you with copies of those records on the advice of Mr. Fair.

ANALYSIS

You argue strenuously in the materials which you provided to us that accident reports prepared by boating officers at GPC are accident reports which must be open to public inspection under Neb. Rev. Stat. § 60-699 (2010). We disagree. Section 60-699 in a part of the Nebraska Rules of the Road, and the reports referenced in that section, when it is read in context, are reports required of and prepared by peace officers who investigate *traffic* accidents which occur on *Nebraska highways*. The accident at issue in your records request involved a *boating accident* which occurred on *Lake McConaughy*. If anything, it is subject to the rules set out in the Nebraska State Boat Act, Neb. Rev. Stat. §§ 37-1201 through 37-12,110 (2008, Cum. Supp. 2010, Supp. 2011). For those reasons, we do not believe that § 60-699 applies. Nor does our opinion reported at 1979-80 Rep. Att’y Gen. 422 (Opinion No. 293, dated May 22, 1980), for the same reasons.

Apart from the Nebraska Rules of the Road, the Nebraska Public Records Statutes generally allow interested persons in Nebraska the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts therefrom, and to obtain copies of records in certain circumstances. However, while the Nebraska Public Records Statutes do provide for access to public documents, they are not absolute, and they also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). For example, § 84-712.05 sets out a number of categories of documents which may be kept confidential from the public at the discretion of the agency involved. As a result, we must determine if, in this instance, there are Nebraska statutes which allow the various documents which you seek to be kept confidential.

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Section 84-712.05 (5) allows investigatory agencies in Nebraska to keep the following category of records confidential:

records 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, and informant identification, or strategic or tactical information used in law enforcement training

As you pointed out in your correspondence, GPC is a law enforcement agency for the purpose of enforcement of state laws in state parks, and boating safety officers are commissioned law enforcement officers. Consequently, GPC may keep the records at issue in this case confidential if they are part of an investigation conducted by that agency. We believe that the narrative investigatory reports prepared by the GPC officers are clearly part of the Commission's investigation. In addition, we have examined the Nebraska Boating Accident Report – Officer Investigation form prepared in this case, and we believe that document is a part of the investigation as well. Therefore, we conclude that both the narrative investigatory reports and the Boating Accident Report/Investigation forms may be kept confidential under § 84-712.05 (5).

There is one exception to that determination. We note that one line of Page 2 of the Nebraska Boating Accident Report – Officer Investigation form contains blood alcohol test information. Section 84-712.05 (5) specifically provides that such information may not be kept confidential. Therefore, it is our understanding that GPC will provide you with a copy of page 2 of the Nebraska Boating Accident Report – Officer Investigation form with that information available and other information redacted.

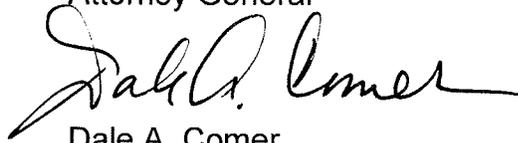
Your records petition also involves an email records request to Harold "Pete" Peterson of the Keith County Emergency Operations Center seeking a copy of the 911 recording and dispatch log pertaining to the accident. We have previously taken the position that there is no basis to keep 911 recordings confidential under the Public Records Statutes. In addition, we believe that a dispatch log is likely an original record of entry which is a public record under the Security, Privacy, and Dissemination of Criminal History Information Act, Neb. Rev. Stat. §§ 29-209, 29-210, 29-3501 through 29-3528 and 81-1423. For those reasons, we have asked the Keith County Attorney to provide you with copies of those materials to the extent that they exist and the county has equipment available to produce copies. He has agreed to do so. The Keith County Attorney has also indicated that he is willing to provide you with copies of all the records at issue in your records petition at some point in the future when the investigation and prosecution of matters growing out of the boating accident have progressed to the point where it is appropriate to do so.

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Based upon the discussion above, it appears that you will receive part of the records which you seek, and that you have not been improperly denied access to the remainder. As a result, we are closing this file. If you disagree with our analysis, you may wish to review the Public Records Statutes to determine what additional remedies, if any, are available to you.

Sincerely,

JON BRUNING
Attorney General

A handwritten signature in black ink, appearing to read "Dale A. Comer". The signature is fluid and cursive, with a long horizontal stroke at the end.

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

cc. Randy Fair
Keith County Attorney

05-425-30