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

NATALEE J. HART
ASSISTANT ATTORNEY GENERAL

April 8, 2015

Tim Shirley
406 N. 22nd St.
Nebraska City, NE 68410

RE: *File No. 15-R-109; Cass County Attorney and Cass County Sheriff; Petitioner Tim Shirley*

Dear Mr. Shirley:

This letter is in response to your correspondence received by us on March 23, 2015, in which you requested our assistance in obtaining certain public records belonging to the Cass County Sheriff's Office ("Sheriff.") We consider your letter to be a petition for access to records under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014). Your letter and its documentation also include a request made by you to the Cass County Attorney ("County Attorney") for the same records you have sought from the Sheriff. As is our normal practice with such requests, we contacted the parties against whom the complaints were made. In this case, we spoke to the County Attorney, Nathan Cox, and provided your complaint via e-mail to the Sheriff. We have now considered your complaint and the responses of the County Attorney and Sheriff and our findings are set forth below.

FACTS

Our understanding of the facts in this case is based on your public records request addressed to the County Attorney and the Sheriff on January 28, 2015; Mr. Cox's response on behalf of both the Sheriff and the County Attorney of February 2, 2015; a second public records request dated February 8, 2014; Mr. Cox's response on behalf of the County Attorney dated February 11, 2015; your Public Records Petition; and the response of the Sheriff dated March 27, 2015.

You made a request on or about January 28, 2015 to the Sheriff and the County Attorney under the Freedom of Information Act for a number of records including copies of a phone call made by you, a copy of "cad call" dispatching officer information, dispatch records, and law enforcement staffing records.

Mr. Cox responded on February 2, 2015 stating that neither he nor the Sheriff is subject to the Freedom of Information Act and that your request would need to be made under the Nebraska Public Records Statutes.

Initially, you made your request under the Federal Freedom of Information Act ("FOIA.") The Freedom of Information Act, or FOIA, is a federal law, codified at 5 USC § 552, which generally provides that any person has the right to request access to *federal* agency records and information. You are seeking information from the Cass County Sheriff, a county office in the State of Nebraska. In this particular context, FOIA does not apply and the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 ("NPRS"), govern access to records of and belonging the Sheriff. Consequently, our analysis will be related only to the NPRS and not to FOIA; Mr. Cox's letter of February 2, 2015 was correct in its assertions that the County Attorney and the Sheriff are not subject to a request under FOIA.

On February 8, 2015, you made your request again under the "Nebraska Open Records Act (AKA) Freedom of Information Act" for records of September 24, 2014, relating to you and a possible inquiry made into you in a law enforcement database. Specifically, you requested:

(1) A copy of your phone call requesting information;
(2) A copy of the CAD call dispatching officer information;
(3) A copy of the law enforcement ID for the officer who requested your information on that date; and
(4) A copy of dispatch recordings, phone calls, phone logs, audio, written and computerized documentation regarding "the call" listed by exact date and time.

On February 11, 2015, Mr. Cox responded that the office of the County Attorney does not maintain any records responsive to your records request; the County Attorney is not the custodian of the records sought by you. He further stated that if he did have any records, they would be withheld under Neb. Rev. Stat. § 84-712.05 (5), law enforcement investigatory records, and the attorney-client and work product privileges.

As of the date of your petition, you had not yet received a written response from the Sheriff, although I understand that he had contacted you by telephone regarding your request. The Sheriff responded to your request, in writing, on or about March 27, 2015.

ANALYSIS

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 from those records, and to obtain copies of records in certain circumstances. Under those statutes, every record "of or belonging to" a public body is a public record which individuals may obtain a copy of unless the custodian of the record can point to a specific statute which allows the record to be kept confidential. See, Neb. Rev. Stat. § 84-712.01 (1).

This office has previously stated that Neb. Rev. Stat. § 84-712 (2014) does not require a public agency to review documents and create abstracts or other lists, to answer questions or to create documents which do not otherwise exist. Op. Att'y Gen. No. 94092 (November 22, 1994); Op. Att'y Gen. No. 94035 (May 11, 1994); Op. Att'y Gen. No. 87104 (October 27, 1987). This means the requestor is entitled only to make a request for specific documents or records, and the custodian is required only to provide documents or records responsive to the records request, if they exist. The requestor is not entitled to ask, and the custodian is not required to answer, any questions in the request. The custodian is also not required to create documents that do not exist, or to interpret a public records request to determine what records are being requested. We interpret some of your public records request to be a request that the Sheriff and/or the County Attorney answer questions posed by you. They are not required to do so.

Response of the County Attorney

The NPRS allow for access of a record "of or belonging to" a public body. The records you seek are law enforcement records – records of calls, dispatch records, and records relating to the personnel of a law enforcement agency. These records are "of or belonging" to the Sheriff's Office. We agree with Mr. Cox that the records you seek are not "of or belonging to" his office. We have no information that would suggest that there is a prosecution related to these records or that they were otherwise turned over to the County Attorney for action. As such, Mr. Cox is not the custodian of the records and his February 11, 2015 response to you was appropriate. We do not believe you have been improperly denied access to public records by the County Attorney.

Response of the Sheriff

Neb. Rev. Stat. § 84-712 (2014) states:

> (4) Upon receipt of a written request for access to or copies of a public record, the custodian of such record shall provide to the requester as soon as is practicable and without delay, but not more than four business days after actual receipt of the request, an estimate of the expected cost of the copies and either (a) access to or, if copying equipment is reasonably

> available, copies of the public record, (b) if there is a legal basis for denial of access or copies, a written denial of the request together with the information specified in section 84-712.04, or (c) if the entire request cannot with reasonable good faith efforts be fulfilled within four business days after actual receipt of the request due to the significant difficulty or the extensiveness of the request, a written explanation, including 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. The requester shall have ten business days to review the estimated costs, including any special service charge, and request the custodian to fulfill the original request, negotiate with the custodian to narrow or simplify the request, or withdraw the request. If the requester does not respond to the custodian within ten business days, the custodian shall not proceed to fulfill the request. The four business days shall be computed by excluding the day the request is received, after which the designated period of time begins to run. Business day does not include a Saturday, a Sunday, or a day during which the offices of the custodian of the public records are closed.

Neb. Rev. Stat. § 84-712 (4) requires the custodian of the records to reply within four business days of the receipt of a written request for records. The Sheriff's office did not respond to your public records request of February 8, 2015 in writing within four business days. We understand he did speak with you on the phone, but we will remind the Sheriff, through a copy of this letter, that all public records requests must be responded to *in writing* within four business days. The Sheriff did not comply with the Public Records Statutes in this respect. The Sheriff did reply to your request, in writing, in a letter dated March 27, 2015. He provided you the records responsive to your records request. He indicated in his response that some of the records you seek do not exist; the Sheriff is not required to create documents which do not otherwise already exist. Additionally, the Sheriff explained the situation regarding the running of your name through the law enforcement database, although he was not required to do so under a public records request.

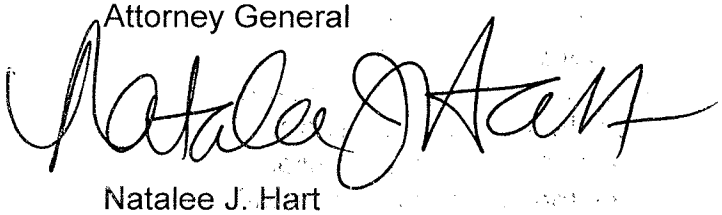
When we receive petitions under Neb. Rev. Stat. § 84-712.03, our main focus is to ensure that citizens have not been improperly denied public records. Since the Sheriff has now provided the records which are responsive to your public records request, we see no basis for further action by this office and we are closing this file.

CONCLUSION

For the reasons stated above, we do not believe you have been improperly denied access to public records. If you disagree with our analysis under the Public Records Statutes set out above, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under those statutes.

Sincerely,

DOUG PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Nathan Cox
Sheriff Bruggemann

02-484-29