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May 21, 2015

Gregory C. Lauby
312 North 10th Street
Wymore, NE 68466

RE: *File No. 15-R-121; Nebraska State Patrol; Gregory C. Lauby, Petitioner*

Dear Mr. Lauby:

This letter is in response to your petition which we received on May 6, 2015, in which you requested our "review of the sufficiency and compliance" of the responses given by the Nebraska State Patrol ("NSP") with respect to your requests for public records. As is our normal practice with such requests, we contacted the public body named in the petition. In this case, we contacted Wendy Wussow, NSP Chief Legal Counsel, and requested a response to your petition, which we received on May 12, 2015. We have now completed our analysis and have fully considered your petition for access to records as well as the NSP's response. We considered your petition under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS"), and our findings are set forth below.

FACTS

Our understanding of the facts in these matters is based on your petition and the information contained in the NSP's response.

According to your petition, by letter dated March 10, 2015, you submitted a request for public records to the NSP. Specifically, you requested the following:

> (1) All policies, standards, procedures, training materials or other forms of descriptions setting forth the recommended procedures and limitations for conducting a traffic stop of a vehicle, not in flight, for a traffic infraction and the following investigation by a Nebraska State Patrol Officer;
>
> (2) All policies, standards, procedure, training materials or other forms of descriptions setting forth the factors to be considered by a State Patrol

> Officer to determine whether to issue a citation or a warning ticket for a traffic infraction;
>
> (3) The policies, standards, procedures, training materials or other forms of descriptions detailing the basis for and the procedure followed by the Nebraska State Patrol Officials determine [sic] the registration period of a sex offender;
>
> (4) The name and address of the keeper of the aforestated public records; and
>
> (5) Copies of all letters of denial of previous requests for the aforestated records, or any portion thereof.

The NSP responded to your request by letter dated March 16, 2015. The NSP indicated that it could not fulfill your request within the time frame set out in § 84-712, and advised that the earliest practicable date for fulfilling your request would be April 10, 2015. Subsequently, sometime on or around March 30, 2015, the NSP provided you a copy of Patrol Operations Number 07-18-01, "Guidelines for Traffic Enforcement Arrests." Per the NSP, this document was partially redacted pursuant to the exception to disclosure set out in Neb. Rev. Stat. § 84-712.05(5) ("strategic or tactical information used in law enforcement training"). With respect to your request relating to determining the registration period of a sex offender, the NSP directed you to applicable sections of the *Nebraska Administrative Code* [Title 272 NAC Ch. 19, §§ 004-005] available on the Secretary of State's website. The NSP further indicated that if you did not have access to the Internet, copies of the regulations would be provided to you for $9.25.

With respect to your request for "[c]opies of all letters of denial of previous requests for the aforestated records, or any portion thereof," the NSP indicated that it would need to "hand search" its denial letters to produce any responsive records. The NSP estimated that the cost do so would be $300.00. This amount was based on ten hours of search time, minus four hours per § 84-712(3)(c), multiplied by $50/hour.

You responded by letter dated April 3. You modified your request as to item one above by requesting specifically "training material." You further assert that the cited regulations did not address your original request set out in item (3), and you modified that item by requesting records relating to "the right of any administrative or judicial appeal, and the contents of the notice sent to a sex offender regarding the registration period."

The NSP responded by letter dated April 8, and denied your request for training materials pursuant to § 84-712.05(5). With respect to your modified request item (3),

the NSP directed you to 272 NAC 19, § 003.07 and §§ 29-4005 and 29-4001.01. The NSP indicated that there were no "training materials" responsive to this particular request.

DISCUSSION

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. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *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).

You have asked this office to determine the "sufficiency and compliance" of the NSP's handling of your public records requests. However, you have not alleged in your petition any violations of the NPRS or noncompliance by the NSP. We have nonetheless analyzed your petition in the context of § 84-712.03, which requires the Attorney General "to determine whether a record may be withheld from public inspection or whether the public body that is custodian of such record has otherwise failed to comply with such sections, including whether the fees estimated or charged by the custodian are actual added costs or special service charges as provided under section 84-712."

Although the Nebraska Public Records Statutes provide for access to public documents, they are not absolute. The NPRS also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). Neb. Rev. Stat. § 84-712.05 of the NPRS is comprised of eighteen categories of documents which may be kept confidential from the public at the discretion of the agency involved. In the present case, the NSP has claimed the exception set out in subsection (5) as its basis for denying you access to certain training materials. That subsection provides, in pertinent part:

> The following records, unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties, may be withheld from the public by the lawful custodian of the records:

> (5) 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, informant identification, ***or strategic or tactical information used in law enforcement training***, except that this subdivision shall not apply to records so developed or received relating to the presence of and amount or concentration of alcohol or drugs in any body fluid of any person . . . . (Emphasis added.)

In Nebraska, in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Swift and Company v. Nebraska Department of Revenue*, 278 Neb. 763, 773 N.W.2d 381 (2009). The plain and ordinary reading of § 84-712.05(5) indicates that law enforcement agencies may withhold records relating to strategic or tactical information used in law enforcement training. There is little question that the NSP is a law enforcement agency, and that you sought materials detailing the "recommended procedures and limitations for conducting a traffic stop of a vehicle . . . ." It appears to us that the records you have requested are both strategic and tactical in nature. As a result, we believe your particular request fell squarely within the claimed exception, and we do not believe that the NSP exceeded its authority by declining to provide you the requested training materials.

With respect to your request for materials relating to item (3), the NSP directed you to the statutes and regulations that were responsive to your request. Because these materials are available on the Internet, NSP was authorized under § 84-712(3)(a) to merely advise you of their location. However, also pursuant to § 84-712(3)(a), the NSP advised that if you did not have access to the Internet, it would provide you a copy of the regulations for $9.25, at $.25/page. In this regard, it has been the longstanding enforcement policy of this office not to question copying charges of up to 25 cents per page for copies of public records, in addition to the other allowable charges discussed in § 84-712. Since the copy charges quoted by the NSP are consistent with our enforcement policy, we do not believe that the NSP has violated the NPRS. Moreover, the NSP has represented that there are no other records responsive to your request, and in the absence of any information from you to the contrary, we have no reason to question the NSP in this regard.

The last matter we will address is whether the costs estimated to conduct a search of denial letters was appropriate. According to Ms. Wussow, the NSP has notebooks of denial letters and processes approximately 200 requests per year. She indicated that there would be no way to know whether there were any responsive

records without reviewing each denial letter. Additionally, the reference to "clerk time" does not indicate whether one or more individuals would be searching the documents. However, in any event, we do not believe that $300 is an excessive amount considering the volume of material to be reviewed. Finally, we note that the NSP has offered to give you access to the denial letters for examination if you so choose.

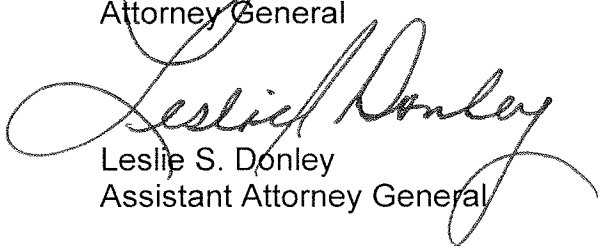
CONCLUSION

In sum, it appears to us that the NSP fully complied with the Nebraska Public Records Statutes with respect to your requests, i.e., responses were timely made, responsive documents were produced, certain records were appropriately withheld, references to records on the Internet were made in accordance with statute, and charges for copies and service were not excessive. Since the Nebraska State Patrol did not unlawfully deny you access to public records, no further action by this office is warranted. Accordingly, we are closing this file.

If you disagree with the analysis we have set out above, you may wish to contact your private attorney to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



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Assistant Attorney General

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