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JON BRUNING
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

May 17, 2013

Denis Lyons
308 Reed Street
Crawford, NE 69339

RE: *File No. 13-R-107; Jeff Franklin, Clay County Sheriff; Denis Lyons, Petitioner*

Dear Mr. Lyons:

This letter is in response to your petition received by us on May 2, 2013, in which you requested our assistance in obtaining certain records belonging to the office of the Clay County Sheriff, Jeff Franklin. As is our normal practice with such requests, we contacted the party against whom the complaint was made and requested a response to the petition. In this case, we contacted Sheriff Franklin, and requested that a response be submitted to this office by May 16, 2013. On May 15, 2013, Sheriff Franklin contacted our office and spoke with Assistant Attorney General Dale Comer about your petition and the requirements of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2008 & Cum. Supp. 2012). We have now considered your petition for access to records under Neb. Rev. Stat. § 84-712.03, and our findings in this matter are set forth below.

FACTS

You indicate that you mailed a letter to Sheriff Franklin in August 2012. The letter is dated August 13, 2012. In your letter, you stated the following:

> Deputy Sheriff Paul Kimminau a previous Crawford Police Officer was successful in gaining employment with your agency therefore his job application, resumes, letters of recommendations, certifications etc, are available for the public to review and or make copies. So in accordance with Nebraska Public Records Laws, I

> am asking to receive copies of all such documents plus his hiring date with your department.

You indicate you received no response to your letter from the sheriff. You reiterated your request by sending another letter to Sheriff Franklin, on or about August 31, 2012. You received no response to this letter either.

You indicate that on April 29, 2013, you telephoned Sheriff Franklin, and left a message. He returned your call later that day. You state that Sheriff Franklin called you a "radical," and stated that he had checked you out and knew all about you. You then state: [Sheriff Franklin] went on to inform me via the phone today that Paul Kimminau was talking to a lawyer and he did this to intimidate me!" You have asked this office to "compel Sutton [sic] County Sheriff Franklin to provide me with the public documents that I requested from him in 2012, and since Sheriff Franklin tape recorded me on the 29th, please secure a copy of that tape recording!"

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 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). The burden of showing that a confidentiality statute applies to 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).

It is our understanding that Sheriff Franklin will be providing you a written response to your public records request as soon as possible. As indicated above, there are provisions in the Nebraska Public Records Statutes that allow a custodian to withhold certain public records from disclosure. For example, Neb. Rev. Stat. § 84-712.05(7) allows a custodian of public records to withhold "[p]ersonal information in records regarding personnel of public bodies other than salaries and routine directory information." We believe that the records that you have requested here fall within this category and could be, at the discretion of Sheriff Franklin, properly withheld.

In addition to the records sought in your public records request(s), you have asked this office to secure for you a copy of the purported recording of the April 29, 2013, telephone call with Sheriff Franklin. However, it does not appear, nor have you indicated in your petition, that you requested a copy of the recording from Sheriff Franklin in writing. Under the express provisions in Neb. Rev. Stat. § 84-712(4), you are required to do so before Sheriff Franklin is required to provide it.

Finally, while it appears that your request for access to records has been resolved, we are concerned that this resolution required the involvement of this office. Through a copy of this letter, we will suggest to Sheriff Franklin that, in the future, a *timely response* must follow any request for public records. There is no option to ignore a proper written request, and the underlying purpose for the records request does not matter. Nor does it matter how the person seeking the records is viewed by the public body or public official. Further, in the event access to particular records is denied, Sheriff Franklin is required to include all of the components set out in Neb. Rev. Stat. § 84-712.04 in his denial letter.[1]

CONCLUSION

We believe that the requested documents belonging to the Clay County Sheriff's Office may be disclosed to you or, in the alternative, kept confidential under § 84-712.05(7). Since this matter appears to have been resolved based on assurances from Sheriff Franklin that he will provide you a written response to your petition immediately, no further action by this office is warranted. Accordingly, we are closing this records file.

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[1] Neb. Rev. Stat. § 84-712.04 (Reissue 2008) provides, in pertinent part: (1) Any person denied any rights granted by sections 84-712 to 84-712.03 shall receive in written form from the public body which denied the request for records at least the following information:

(a) A description of the contents of the records withheld and a statement of the specific reasons for the denial, correlating specific portions of the records to specific reasons for the denial, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial;

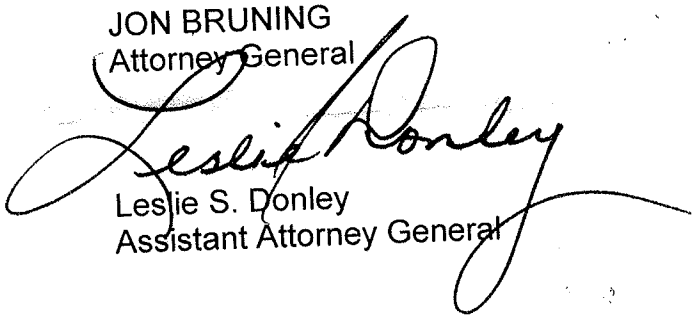
(b) The name of the public official or employee responsible for the decision to deny the request; and

(c) Notification to the requester of any administrative or judicial right of review under section 84-712.03.

If you disagree with our legal analysis set out herein, you may wish to consult with your attorney to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

JON BRUNING
Attorney General



Leslie S. Donley
Assistant Attorney General

cc: Sheriff Jeff Franklin
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49-982-30