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October 19, 2023

VIA EMAIL

Elizabeth L. Schilken  
Brooke A. Harms

[REDACTED]

RE: *File No. 23-R-130; Nebraska Public Service Commission; Matthew Hoffmann/KTIV, Petitioner*

Dear Ms. Schilken and Ms. Harms:

This letter is in response to the petition you submitted on behalf of Matthew Hoffmann and KTIV, a television station in Sioux City, Iowa, on October 4, 2023. You have requested the Attorney General's review of the denial by the Nebraska Public Service Commission (PSC) of your request for public records relating to 911 outages in Nebraska occurring on August 31, 2023 through September 1, 2023. In response to our request, PSC legal counsel, Sallie Dietrich, provided this office a response to your petition on October 17. We have now considered your petition and the PSC's response in accordance with the Nebraska Public Records Statutes (NPRS), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2022). Our findings in this matter are set forth below.

**RELEVANT FACTS**

On September 17, 2023,<sup>1</sup> Mr. Hoffmann emailed a public records request to the PSC seeking the following records:

- Any documents or other materials that indicate which counties suffered a total or partial 911 outage from the August 31, 2023 at 7:05 p.m. incident

<sup>1</sup> We note that Mr. Hoffmann's request is dated "9/5/23."

- Any emails, texts or other correspondence to or from Nebraska Public Service Commission personnel regarding the 911 outages

After initial communication acknowledging the request and the date of receipt for purposes of responding, PSC staff denied Mr. Hoffmann's request on September 22, 2023. Staff identified the records deemed responsive<sup>2</sup> and indicated that "[t]he events referenced in the Request are the subject of an active investigation that is underway pursuant to the Commission's regulatory and investigatory duties. See, e.g., Neb. Rev. Stat. §§ 75-111 & 86-1002." Accordingly, staff indicated that all responsive records would be withheld under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(5).

Ms. Harms responded to the denial by letter dated September 28, 2023, addressed to PSC executive director Thomas W. Golden. Ms. Harms asserted that the PSC's decision to withhold all records responsive to the request was based on an overly broad reading of the exception discussed in *State ex rel. Nebraska Health Care Ass'n v. Dept. of Health & Human Serv. Fin. & Support*, 255 Neb. 784, 587 N.W.2d 100 (1998) ("Health Care Ass'n"). In *Health Care Ass'n*, the Nebraska Supreme Court found that records compiled ancillary to an agency's administrative functions could not be withheld under § 84-712.05(5). "[H]owever, [when] an inquiry by an administrative agency departs from the routine and focuses with special intensity on a particular party, an investigation is underway for purposes of the investigatory records exception." *Id.* at 792, 587 N.W.2d at 106-107. In this respect, Ms. Harms argued that "the Commission's position that no portion of its routine administrative functions involves collecting information about 911 outages is not reasonable." Harms Letter at 2.

In support of her position, Ms. Harms asserted that communications from 911 call centers, Public Safety Answering Points (PSAPs), and other third parties notifying the PSC of "service disruptions" in real time were not received as part of an investigation. Since the PSC is charged with administratively supporting PSAPs and communications providers, any notifications of service disruptions would be made "as a matter of course in performing its administrative functions." *Id.* Ms. Harms further pointed out that the PSC "did not formally open the investigation in the Lumen and Windstream outages until September 12." *Id.* Thus, the records indicating which counties suffered 911 outages would fall outside the scope of the exception.

Ms. Harms also argued that the exception is unavailable to the extent the records were "publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties . . ." Neb. Rev. Stat. § 84-712.05. In this respect, "[i]f the content of the Commission's records—in particular the

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<sup>2</sup> Such records include texts, emails and other communications sent to or from Commission personnel, public officials, local 911 authorities, and commercial entities, including Lumen and its subcontractors. Such records also include written documents, spreadsheets and maps."

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location of service disruptions—was communicated to the public while the outages were occurring, it serves no purpose and contravenes the policy behind the Public Records Law to withhold the records.” [Footnote omitted.] *Id.* at 3. The letter concludes by asking the PSC to produce responsive records no later than October 2, 2023.

In your petition, you further allege that Ms. Dietrich’s anticipated response date of October 12 to allow the PSC’s legal department to conduct a further review and “provide a more detailed response” to the request constituted “an unreasonable delay, as KTIV’s news coverage of the 911 outages represents a matter of the highest public interest.”<sup>3</sup>

By way of background, Ms. Dietrich informs us that the PSC is the “statewide coordinating authority for the implementation of the 911 service system,” and is “responsible for statewide planning, implementation, coordination, funding assistance, deployment, and management and maintenance of the 911 service system to ensure that coordinated 911 service is provided to all residents of the state at a consistent level of service in a cost-effective manner . . . .” Neb. Rev. Stat. § 86-1025(1) and (2) (Cum. Supp. 2022). Consistent with these duties, the PSC investigates instances of 911 system outages, including the outage presented here. Ms. Dietrich acknowledges that under *Health Care Ass’n*, records compiled by agencies ancillary to routine administrative duties are not investigatory records. However, when an “agency departs from the routine and focuses with special intensity on a particular party,” the investigatory records exception applies. *Id.* at 792, 587 N.W.2d at 106-107.

Ms. Dietrich confirms that in no way were the PSC’s actions relating to the August 31, 2023, outage routine in nature. Ms. Dietrich represents that the 911 Department immediately began its response to the August 31, 2023, outage upon receiving notice at approximately 7:08 p.m. on that date. She states that 911 Department staff worked through the night “to try to determine the cause of the issue and resolve it.” During this response, 911 Department staff created both internal and external communications that would be considered responsive to your request. However, due to the nature and scope of the investigation, the PSC “believes that these records can and should be withheld as investigatory records so that the [PSC] may effectively complete its investigation of the Outage.”

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<sup>3</sup> For your information, “[t]he public records statutes apply ‘equally to all persons without regard to the purpose for which the information is sought.’ As a general rule, citizens are not required to explain why they seek public information.” *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 801, 943 N.W.2d 231, 247 (2020) [“BH Media Group”]. Accordingly, we do not consider the reason or purpose for a records request when making our determination under § 84-712.03(1)(b).

## DISCUSSION

In Nebraska, “public records . . . include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing.” Neb. Rev. Stat. § 84-712.01(1) (2014). However, while access to public records is broad, it is not absolute. The NPRS allow access “[e]xcept as otherwise expressly provided by statute” (§ 84-712(1)) or “[e]xcept when any other statute expressly provides that particular information or records shall not be made public” (§ 84-712.01(1)). Consequently, individuals have no right to access public records in those instances where the Legislature has made the records expressly confidential or subject to withholding under § 84-712.05.<sup>4</sup> The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

The PSC is relying on § 84-712.05(5) to withhold its records pertaining to the 911 outage identified in Mr. Hoffmann’s request. This exception pertains to

[r]ecords 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 . . .<sup>5</sup>

There is no question that the PSC is a public body charged with duties of investigation or examination, see § 86-1025, and that the records at issue here arise from its investigation of the 911 outage. It is your position, however, that the PSC’s application of § 84-712.05(5) to withhold all responsive records relating to the 911 outage is overly broad to the extent some of those records may have been received as part of its routine administrative duties. We disagree.

PSC counsel has represented to this office that an investigation was undertaken *immediately* upon notification of the 911 outage, and that 911 Department recognized the outage was “unusual and high priority.” There was nothing routine about the event or the

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<sup>4</sup> Section 84-712.05 currently contains twenty-five categories of public records that may be withheld at the discretion of a public body so long as those records have not been “publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties . . .”

<sup>5</sup> There are two exceptions to the exception: (1) records relating to the presence of drugs or alcohol in any body fluid of any person; and (2) records relating to the cause of death arising out employment once an investigation is concluded when requested by a family member of the deceased.

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PSC's response. Records received or developed by the 911 Department became part of the investigation from the onset, which we understand was and is currently focused with special intensity on particular parties.<sup>6</sup>

With respect to the other matters alleged in your September 28 letter and petition, there is no evidence showing that the PSC records Mr. Hoffmann seeks were generally disclosed to the public thereby waiving its ability to withhold the records under § 84-712.05. As to the anticipated October 12 response date, the PSC had already responded to Mr. Hoffmann's request in accordance with § 84-712(4), and was willing to conduct another review to see if any records could be released. Since there is no statutory deadline at issue, we fail to see how October 12, ten days from your own imposed deadline, was unreasonable.

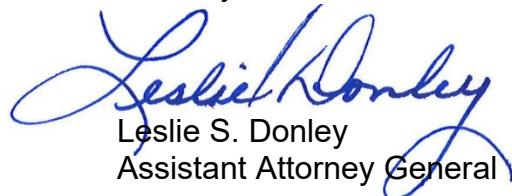
## CONCLUSION

Based on the foregoing, we are satisfied that the PSC's investigation into the 911 outage began immediately upon notification. Consequently, all records received or developed by the PSC relating to its investigation fall within the scope of the exception in § 84-712.05(5). Since Mr. Hoffmann has not been unlawfully denied access to public records, no further action by this office is necessary and we are closing our file.

If you disagree with the analysis we have set out above, you may wish to consider the other remedies available to you under the Nebraska Public Records Statutes.

Sincerely,

MIKE HILGERS  
Attorney General



Leslie S. Donley  
Assistant Attorney General

c: Sallie M. Dietrich (via email only)  
49-3364-30

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<sup>6</sup> This office has also taken the position that records that may have been developed by an agency pursuant to routine administrative duties may become an investigatory record under certain conditions. See, e.g., *File No. 21-R-139; Nebraska State Patrol; Chris Dunker, Lincoln Journal Star, Petitioner* (dated October 20, 2021) (concluding that audit reports of Nebraska State Patrol evidence facility were properly withheld as investigatory records upon arrest of a former evidence technician accused of stealing \$1.2 million in drugs from the facility).