

STATE OF NEBRASKA
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November 29, 2010

Mr. Charles D. Tobin
Holland & Knight, LLP
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20006

Re: *File No. 10-R-141; Omaha Police Dept.; Gray Television – WOWT-TV.*

Dear Mr. Tobin:

This letter is in response to your correspondence dated November 11, 2010, on behalf of Gray Television station WOWT-TV ("WOWT"). We received your correspondence on November 12, 2010. In it, you petitioned this office under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010), and more particularly § 84-712.03, to review a denial of access to public records by the City of Omaha (the "City"). Our response to your petition is set out below.

FACTS

Brian Mastre, a reporter with WOWT, sent Jo Cavel, a Deputy City Attorney for the City of Omaha, an email in August, 2010, in which he requested copies of the "personnel file" for Officer Frank Platt of the Omaha Police Department ("OPD"). Officer Platt, who retired from OPD in August, 2010, based upon disabilities, has been the subject of a number of news reports regarding his conduct while employed by OPD. Among other things, Officer Platt was apparently suspended from OPD due to allegations that he and other officers had discussed planting marijuana in a suspect's garbage during an investigation. The focus of the records request by Mr. Mastre and WOWT seems to be the disciplinary records contained in Officer Platt's personnel file.

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Ms. Cavel responded to the records request from Mr. Mastre by offering to provide certain records regarding Officer Platt including his employment application materials and his employee benefit elections forms. However, Ms. Cavel denied the bulk of the records request from WOWT based upon Neb. Rev. Stat. § 84-712.05 (7).

You wrote to Ms. Cavel on September 1 and September 2, 2010, and asked her to reconsider her denial of access to the disciplinary records in Officer Platt's file based upon several arguments, including the assertion that the City had released similar information regarding a retired police officer on previous occasions. Ms. Cavel responded to your letters on September 8, 2010, and again refused to provide disciplinary records regarding Officer Platt on the basis of § 84-712.05 (7). That second denial precipitated your petition to this office under § 84-712.03 (2). You maintain that the disciplinary records which you seek do not fall under the exemption to disclosure found in § 84-712.05(7).

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). 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, and one such category is set out at § 84-712.05 (7):

Personal information in records regarding personnel of public bodies other than salaries and routine directory information.

Section 84-712.05 (7) is the exception to disclosure at issue in your public records petition.

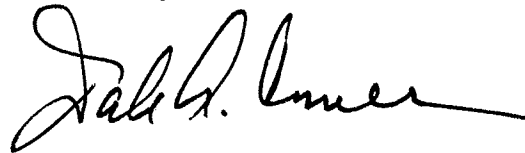
We have carefully reviewed your letter and the authorities which you cited, along with the analysis and authorities provided in the letter response from Deputy City Attorney Cavel. We find Ms. Cavel's argument persuasive, and consistent with the position taken by this office over time in connection with § 84-712.05 (7). In addition, we have also taken the position over time that production of particular records which might be kept confidential under some portion of § 84-712.05 in one instance does not require the public body to

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produce similar records in another, subsequent instance. Our position in that regard is based, in part, upon the fact that the exceptions listed in § 84-712.05 simply permit nondisclosure; they do not require confidentiality for those categories of records. *Burlington Northern Railroad Company v. Omaha Public Power District*, 703 F. Supp. 826 (D. Neb. 1988); *aff'd Burlington Northern Railroad Company v. Omaha Public Power District*, 888 F.2d 1228 (8th Cir. 1989). As a result, assertion of confidentiality in any one case is at the discretion of the public agency.

For those various reasons, we believe that the City and OPD may keep the disciplinary records and personnel file at issue in this case confidential under § 84-712.05 (7). If you disagree with our analysis under the Public Records Statutes, you may wish to review the judicial remedies available to you and your client under § 84-712.03.

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