

Comer, Dale

From: Comer, Dale
Sent: Thursday, September 27, 2012 3:51 PM
To: 'Joe Jordan'
Cc: Wussow, Wendy
Subject: Public Records File No. 129; Nebraska State Patrol; Jordan

Joe Jordan
Managing Editor/Investigative Reporter
Nebraska Watchdog

Mr. Jordan:

This email is in response to your email correspondence of September 12, 2012, regarding access to records of the Nebraska State Patrol ("NSP") under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010, Supp. 2011). We received your email correspondence on September 12, 2012, and we considered that correspondence to be a petition for access to public records under § 84-712.03. Our response to your petition is set out below.

FACTS

Our understanding of the facts in this case is based upon your email along with the materials which you attached to it. We also discussed this matter with attorney Wendy Wussow, Agency Legal Counsel for the NSP.

On September 7, 2012, you sent an email to Kari Schmidt of the NSP in which you made an official request for information under the Public Records Statutes. You requested "a video copy of a DUI arrest that was captured on a state trooper's 'cruiser cam' and according to court records is available on DVD." The arrest at issue involved Morgan T. Fisher, and occurred on May 25, 2011, south of Valentine, Nebraska on Highway 83. The DUI case was subsequently adjudicated in Cherry County Court, and Mr. Fisher apparently pled guilty to the DUI charge.

Ms. Schmidt responded to your records request in a letter dated September 11, 2012. At the direction of Ms. Wussow, the NSP denied your request for a copy of the DUI video involving Mr. Fisher on the basis of § 84-712.05 (5) pertaining to investigatory records of law enforcement agencies. That denial led to your petition to our office.

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, set out at § 84-712.05 (5), is at issue in this instance:

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, and informant identification, or strategic or tactical information used in law enforcement training . . .

It is our understanding that the cruiser video cameras for the videotape at issue were turned on at the time that the state trooper involved turned on his red lights to stop Mr. Fisher and began his investigation of possible DUI. We also understand that NSP videotapes prepared as a result of such circumstances are made available and

provided to county attorneys in Nebraska in connection with their charging decisions and as possible evidence in court proceedings. Under those circumstances, we believe that the videotape involving Mr. Fisher is an investigatory record under § 84-712.05 (5), and the NSP may deny access to it.

As you point out in your email to us, your request for a copy of the videotape involving Mr. Fisher comes after the court case regarding the matter was finalized and no legal proceedings in the case remain. However, we have consistently taken the position over time that, under the plain language of § 84-712.05 (5), there is no time limitation for application of the investigatory records exception, i.e., there is no requirement that an investigation be open or ongoing. Therefore, while the fact that the investigation and legal proceedings involving Mr. Fisher are concluded might provide a reason for you to assert to the NSP that it should exercise its discretion and provide you with the videotape, it is not required to do so.

Consequently, we believe that the Patrol's refusal to provide you with a copy of the videotape at issue did not violate the Public Records Statutes, and you have not improperly been denied access to public records. On that basis, we plan no further action regarding this matter, and we are closing this file. If you disagree with our analysis under the Public Records Statutes, 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.

During our discussions with Ms. Wussow, she also indicated to us that the NSP might be willing to share police reports prepared as a result of the traffic stop involving Mr. Fisher with you inasmuch as those apparently have been provided to others by the NSP previously. You may also wish to explore that possibility with Ms. Wussow if you seek more information.

-- D. Comer

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From: Joe Jordan [<mailto:joe@nebraskawatchdog.org>]
Sent: Wednesday, September 12, 2012 11:04 AM
To: Comer, Dale
Subject: News Media Request re: Public Records Denial

Mr. Comer-

Please let this email serve as an official request of your office to review the public records request by Nebraska Watchdog which was denied by the Nebraska State Patrol (see the attached). I would respectfully note that the request in question (in-car camera DVD video of a DUI arrest) comes well after the court case was finalized and no legal proceedings in the case remain.

Given that It would appear that NSP's claim that the DVD we seek is "investigatory in nature" and therefore excluded from the public records law is both broad and overreaching and violates the spirit if not the intent of the open records law.

Given that the DVD in question is part of a time sensitive news gathering process I would appreciate your immediate attention to this matter.

My contact information is below.

Thank you.

Sincerely,

-Joe Jordan

Joe Jordan

Managing Editor/Investigative Reporter

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402-215-3000

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