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Office of the Attorney General

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September 28, 2016

Via email and regular U.S. Mail
Ralph W. Edwards



RE: *File No. 16-R-134; University of Nebraska-Lincoln; Ralph W. Edwards, Petitioner*

Dear Mr. Edwards:

This letter is in response to your correspondence dated September 8, 2016, and received by this office on September 13, 2016, in which you challenge the denial of your public records request by the University of Nebraska-Lincoln ("UNL"). Specifically, you seek to appeal the decision of UNL Police Chief Owen Yardley with respect to a transcript of a telephone conversation between you and UNL Investigations Sergeant Kristy Beitler occurring on or around May 5, 2016.¹ When we receive petitions of this nature, our normal practice is to contact the entity involved and advise it of the opportunity to provide a response to this office. In the present case, we contacted Chief Yardley and advised him accordingly. On September 22, 2016, we received a response to your petition from Erin E. Busch, Director of University Records/Associate General Counsel, who responded on his behalf. We have construed your correspondence to be a petition for review under Neb. Rev. Stat. § 84-712.03 of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS"). Our findings in this matter are set forth below.

Before we begin, we note that your petition includes documentation pertaining to an incident involving you and a University faculty member occurring in April 2016. You were subsequently contacted by Sergeant Beitler as a result of this incident. Your correspondence raises serious allegations of misconduct by this faculty member, and you also question the propriety of Sergeant Beitler's actions with respect to her telephone conversation with you on May 2, 2016. In this regard, you state: "The request is made because Chief Yardley and me disagree on the content, tone, and purpose of the

¹ According to documentation received from the University, it appears that the telephone call in question occurred on May 2, 2016.

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conversation. The transcript will show that the call was made in response to my exercise of free speech and to intimidate. I am helpless to show the violation of my civil rights without the transcript.”

Pursuant to Neb. Rev. Stat. § 84-712.03, our review is limited to determining (1) whether a record may be withheld from public inspection or (2) whether the public body that is the custodian of such record has otherwise failed to comply with the provisions of the NPRS. Please note that the underlying reason for any public records request is not relevant to this office in determining whether a public body is in compliance with the NPRS, and we do not consider it in our analysis. See *State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993) (Neb. Rev. Stat. § 84-712 of the Public Records Statutes does not require any showing by a person requesting access to public records of the reason for his or her review of those records).

RELEVANT FACTS

Our understanding of the facts in this matter is based solely on your correspondence and the response and documentation we received from Ms. Busch.

In a letter dated August 15, 2016, addressed to UNL Chancellor Ronnie Green and Chief Yardley, you requested “a copy of the recording of the conversation with Investigator Beitler.” Your letter concludes: “I look forward to a copy of the transcript.” It appears that you did not receive a response.² As a result, you sent another letter to Chancellor Green and Chief Yardley, dated August 31, 2016, in which you stated: “In several correspondences with you both, I requested a copy of the transcript of the May 5, 2016 telephone conversation with UNL Investigations Sergeant Kristy Beitler. It is disappointing that the University has not responded.” This letter also included “a formal request for a copy of the transcript,” which stated, in pertinent part:

I am requesting a transcript of the telephone conversation between me, Ralph Edwards, and UNL Investigations Sergeant Kristy Beitler between the dates of May 1, 2016 and May 15, 2016, specifically May 5, 2016. Transcript of any other conversations regarding Ralph Edwards during that period are requested as well.³

In an email sent to you on September 2, 2016, Chief Yardley denied your request for the requested transcript. He indicated that a *recording* responsive to your request was being withheld based on the exception in Neb. Rev. Stat. § 84-712.05(5) “because it is an investigation record that contains information developed or received by law enforcement.”

² While you indicate in your August 15 letter that you had previously requested the recording from the University, this office received no request(s) made earlier than August 15.

³ We note for the record that the University provided us a copy of your August 31, 2016 correspondence.

In her response to this office, Ms. Busch indicates that during the telephone call on May 2, 2016, “. . . Sgt. Beitler conducted an interview as a part of an investigation of a disturbance between Mr. Edwards and a UNL faculty member.” She indicates that the disturbance had been reported to the Lincoln Police Department at an earlier date. Ms. Busch states that Sergeant Beitler made an audio recording of this interview. She further represents that “[t]he only record responsive to Mr. Edwards’ request is the audio recording of Sgt. Beitler’s interview of Mr. Edwards. There is no written transcript of the interview.” Ms. Busch asserts that the University is entitled to withhold the interview recording since it is part of an investigation conducted by the UNL Police Department with respect to this disturbance, and that the recording fits squarely within the claimed exception.

DISCUSSION

The basic rule for open public records in Nebraska is found at Neb. Rev. Stat. § 84-712 of the Nebraska Public Records Statutes. That statute provides, in pertinent part:

Except as otherwise expressly provided by statute, all citizens of this state and all other persons interested in the examination of the public records as defined in section 84-712.01 are hereby fully empowered and authorized to (a) examine such records, and make memoranda, copies using their own copying or photocopying equipment in accordance with subsection (2) of this section, and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business and (b) except if federal copyright law otherwise provides, obtain copies of public records in accordance with subsection (3) of this section during the hours the respective offices may be kept open for the ordinary transaction of business.

(Emphasis added.) "Public records" are defined as follows:

Except when any other statute expressly provides that particular information or records shall not be made public, public records shall 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. Data which is a public record in its original form shall remain a public record when maintained in computer files.

Neb. Rev. Stat. § 84-712.01(1) (2014) (emphasis added).

Section 84-712 expressly provides that the right to examine or obtain copies of public records exists “[e]xcept as otherwise provided by statute.” The definition of “public records” in § 84-712.01(1) provides an exception from that definition “when any other statute expressly provides that particular information or records shall not be made public” Thus, in those instances where the custodian of records can point to particular statute which provides an exception from disclosure, there is no right of access. 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).

Initially, we will point out that there appears to be some confusion as to what records you were actually seeking. As noted above, in your correspondence dated August 15, you requested a copy of the recording of the telephone conversation between you and Sergeant Beitler, as well as a transcript. In your subsequent requests, you asked University officials to provide you just a transcript. In this regard, Neb. Rev. Stat. § 84-712(3)(e) (2014) of the NPRS states that “[t]his section shall not be construed to require a public body or custodian of a public record to produce or generate any public record in a new or different form or format modified from that of the original public record.” Since there is no transcript of the telephone interview, the University could have merely informed you that no responsive record existed. However, the University denied your request on the basis of the investigatory records exception in § 84-712.05(5), the propriety of which we will briefly discuss below.

Investigatory Records Exception

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 twenty categories of documents which may be kept confidential from the public at the discretion of the agency involved. In the present case, the University has claimed the exception set out in subsection (5) as its basis for denying you access to the requested records. 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

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 they develop or receive which relate to investigations which they have undertaken.⁴ We believe that the University Police Department is a law enforcement agency as contemplated in the statute.⁵ The recording at issue was created by an officer in the police department as part of an investigation into the incident involving you and a faculty member. In our view, the recorded interview falls squarely within the claimed exception. Thus, we believe that Chief Yardley's denial of your request under the investigatory records exception set out in § 84-712.05(5) was appropriate under these circumstances.

Finally, we would point out that under Neb. Rev. Stat. § 84-712(4) (2014), requests for public records must be submitted in writing. The public body which is the custodian of the records then has four business days after actual receipt of the request to respond to the requester in some fashion as provided in the statute. Upon review, in light of your August 15th request, we do not believe that the University's response to you was made in a timely fashion. However, we also do not believe that the manner in which you submitted your public records request was clear either. While there are no special words, forms or formats that citizens must use to request public records, there should be some indication that the correspondence is for the purpose of *obtaining public records*. In this regard, your August 15th request was part of extensive, ongoing correspondence between you and University officials, and your request may have been overlooked. In any event, we would remind the University that a response to a request for public records must be made within the statutory timeframe as noted above.

⁴ The term "law enforcement" is defined as "1. The detection and punishment of violations of the law . . . [and] 3. Police officers and other members of the executive branch of government charged with carrying out and enforcing the criminal law." BLACK'S LAW DICTIONARY 714 (abridged 7th ed. 2000).

⁵ According to the University Police Department's website, the department has achieved national accreditation as recognized by the Commission on Accreditation for Law Enforcement Agencies Incorporated. See generally <http://police.unl.edu/compliance-accreditation#calea>.

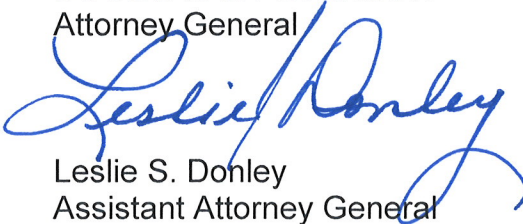
CONCLUSION

For the reasons explained above, we believe that to the extent you were seeking a copy of the *transcript* of the telephone interview between you and Sergeant Beitler, that record does not exist, and the University has no obligation under § 84-712(3)(e) to create one for you. We further believe that any recording of the telephone interview may be lawfully withheld under the investigatory records exception in § 84-712.05(5). Since we have concluded that Chief Yardley and his department did not unlawfully deny your records request, 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



Leslie S. Donley
Assistant Attorney General

c: Erin E. Busch