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Office of the Attorney General

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February 21, 2017

Vincent Valentino, Esq.
130 South 13th St, Ste. 300
Lincoln, NE 68508

RE: *File No. 17-R-108; Lincoln Police Department; Vincent Valentino,
Petitioner*

Dear Mr. Valentino:

We are writing in response to your correspondence received by this office on February 6, 2017, in which you petitioned for our review of the response to your request for certain public records belonging to the Lincoln Police Department ("LPD") under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2014, Cum. Supp. 2016). As is our normal practice with such requests, we contacted the public body named in your correspondence. In this case, we provided your petition and its supporting materials to Tonya Peters, legal counsel for the LPD, and requested a response. We have now completed our analysis of this matter and our findings are set forth below.

RELEVANT FACTS

Our understanding of the facts in this matter is based on your petition, its supporting documentation, and the response we received from the LPD. LPD's response includes its complete responses to your public records request and the audio of a phone call on January 10, 2017 between you and Ms. Peters concerning your public records request.

In a letter dated December 30, 2016 and received by the LPD on January 4, 2017, you made requests for a number of categories of documents related to the "National Suppression of Johns Initiative" ("NSJI") conducted by LPD in conjunction with other police departments across the county and coordinated by authorities in Cook County, Illinois. You request, *inter alia*, communications between LPD and the Cook County Sheriff, policies, training materials, procedures, and records related to arrests made

during the pendency of the initiative until the date of your records request. The LPD's response on January 10, 2017 provided some documents, withheld others, and informed you of the necessity of a search for any remaining documents, at a cost. The LPD also supplemented its initial response on January 19, 2017 with additional materials which later became available. On January 18, 2017, you objected to the hourly rate for the search for additional documents, to which the LPD responded on January 25, 2017 explaining the reasons for the rate given. It is also our understanding that you had a phone conversation on January 10, 2017 with Ms. Peters during which she advised you of the ability to modify or prioritize your request to reduce search time and cost.

On January 20 and 23, 2017 you sent additional requests to the LPD related to your initial request made on December 20, 2016, clarifying your request for demographic information and requesting such information for other operations conducted by LPD with respect to the NSJI. Ms. Peters advised this office on February 13, 2017 in a phone call that she had not previously received those emails from you, but would respond to the request found therein. On February 14, 2017, we received LPD's response to your petition and were copied on the LPD response to your January 20 and 23 requests.

You have asked for our review of the LPD's January 10, 2017 response to your public records request, and for us to examine whether the LPD's fee for searching for additional records is excessive. You also request we determine whether the LPD improperly failed to respond to your correspondence of January 20 and 23, 2017. Our analysis of each of these issues is below.

DISCUSSION

The Nebraska Public Records Statutes ("NPRS") 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 from those records, and to obtain copies of records in certain circumstances. 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). Under those statutes, every record "of or belonging to" a public body is a public record which individuals may obtain a copy of unless the custodian of the record can point to a specific statute which allows the record to be kept confidential. 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).

The NPRS do not require a public agency to review documents and create abstracts or other lists, to answer questions or to create documents which do not otherwise exist. Neb. Rev. Stat. § 84-712; Op. Att’y Gen. No. 94092 (November 22, 1994); Op. Att’y Gen. No. 94035 (May 11, 1994); Op. Att’y Gen. No. 87104 (October 27, 1987). This means the requestor is entitled only to make a request for specific documents or records, and the custodian is required only to provide documents or records responsive to the records request, if they exist. The requestor is not entitled to ask, and the custodian is not required to answer, any questions in the request. The custodian is also not required to interpret a public records request to determine what records are being requested.

General review of December 30, 2016 request and January 10, 2017 response

You first ask this office to “review the responses made to the Public [Records] Requests contained herein for their reasonableness,” but make no specific allegations regarding the January 10, 2017 response of the LPD, other than the costs associated with the search for additional records. As a result, we will review the response of the LPD only for general compliance with the NPRS.

Four business days requirement

First, your request was dated December 30, 2016 and the response of the LPD dated January 10, 2017. On its face, this raises a concern as to whether the LPD responded to your request within four business days. The NPRS require a public body to respond within four business days after the “actual receipt” of a written request for records. Neb. Rev. Stat. § 84-712(4). However, we must consider that your request was mailed shortly before the New Year’s Holiday. Due to the holiday, the LPD did not receive your request until January 4, 2017. January 10, 2017 is the fourth business day following the “actual receipt” of your request by the custodian of records. We do not believe LPD was out of compliance with the requirement of Neb. Rev. Stat. § 84-712(4) to respond within four business days.

Lack of responsive records

Second, the LPD’s response to three of your requests for records informed you that it does not have records responsive to these requests, or does not know of any records responsive to your request. Such a response is acceptable under the NPRS. A public body is only required to provide documents or records responsive to the records request, if they exist. It is not required to create a record that does not already exist in order to fulfill a public records request. The LPD has not violated the NPRS in responding that they do not have records responsive to several of your requests.

You have expressed to this office that you believe that there are emails between LPD and Cook County providing the demographic information you have requested. You believe the LPD has not been forthcoming in providing these emails. However, Ms. Peters explained to you in the aforementioned January 10, 2017 phone call, at least twice, that the LPD does not provide the demographic information to Cook County via email. This information is provided to Cook County by an employee of the LPD logging in to a computer database set up by Cook County and directly inputting LPD demographic information. The LPD cannot provide emails which do not exist.

Additionally, your petition appears to allege that the LPD has somehow claimed that they are not the custodian of certain records. However, we see no such assertion by the LPD. Your belief that certain records exist and “should be in the hands” of the LPD is directly contradicted by the response of the LPD that they do not possess a number of categories of records you seek. It is not a violation of the NPRS to not have records responsive to a request. We are very familiar with *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009) and do not see that this case is at all implicated in your request or the LPD’s response. Additionally, Ms. Peters has represented to us, and to you on January 10, 2017, that she contacted Cook County in order to determine if any records existed responsive to your records request, such as an MOU or training materials, which were not in the physical custody of the LPD. We understand that there were none.

Denial of records as investigatory

Third, the LPD has withheld documents under two of your requests, specifically emails concerning the NSJI operation with which it was involved. The denials were made under Neb. Rev. Stat. § 84-712.05(5).

Although the NPRS 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 is comprised of eighteen categories of documents which may be kept confidential from the public at the discretion of the agency involved. In the present case, the LPD has claimed the exception set out in subsection (5) as its basis for denying you access to the requested record. 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 a law enforcement agency may withhold records it develops or receives in the course of its investigations. In the present case, there is little question that the LPD is a law enforcement agency, and that the records at issue were created in relation to the NSJI operation. Consequently, we believe that the records at issue fall squarely within the claimed exception.

Supplementation of response

You appear to allege that the supplementation of the response by the LPD on January 19, 2017 is somehow in violation of the NPRS. We are unclear as to your precise assertion, but will address it nonetheless. Your initial request was made on December 30, 2017 and the LPD responded within four business days. There was some additional correspondence between you and the LPD, all of which related back to the initial request. We do not view the additional correspondence as being new public records requests, but clarification of your initial request and attempting to discern what may be available from the LPD. The four business day requirement did not attach to each follow-up communication made by you. The LPD's initial response of January 10, 2017 indicated supplemental materials would be provided. As those documents became available from individual LPD employees, the LPD's response was properly supplemented on January 19, 2017. We see no violation of the NPRS with respect to the supplement.

Fee for search for records

You have alleged that the fee quoted by the LPD to search for additional records which may be responsive to your request is excessive and have asked for our review thereof. The LPD has stated that its internal information technology personnel would not perform the search for documents, as you appear to assume. Instead, the LPD would utilize the City's Information Services ("IS") personnel to perform the search of LPD email, at a cost to the LPD of \$80 per hour, for an estimated 28 hours. Additional costs would be incurred by the LPD for the review of the records generated by the search, in order to determine if any records could or should be withheld under the NPRS. You believe this to be excessive and do not believe you should be charged for a search which may result in the withholding of any of the records located.

Neb Rev. Stat. § 84-712(4) specifies that the custodian of records may provide the requestor of records, due to "significant difficulty or the extensiveness of the request," an estimate of the expected cost of fulfilling the request. The requestor may then choose to modify or prioritize his or her request within ten business days. Neb. Rev. Stat. § 84-712(3) provides guidelines for the assessment of a fee for providing records:

(b) Except as otherwise provided by statute, the public body, public entity, or public official which is the custodian of a public record may charge a fee for providing copies of such public record pursuant to subdivision (1)(b) of this section, which fee shall not exceed the actual added cost of making the copies available. For purposes of this subdivision, (i) for photocopies, the actual added cost of making the copies available shall not exceed the amount of the reasonably calculated actual added cost of the photocopies, which may include a reasonably apportioned cost of the supplies, such as paper, toner, and equipment, used in preparing the copies, as well as any additional payment obligation of the custodian for time of contractors necessarily incurred to comply with the request for copies, (ii) for printouts of computerized data on paper, the actual added cost of making the copies available shall include the reasonably calculated actual added cost of computer run time and the cost of materials for making the copy, and (iii) for electronic data, the actual added cost of making the copies available shall include the reasonably calculated actual added cost of the computer run time, any necessary analysis and programming by the public body, public entity, public official, or third-party information technology services company contracted to provide computer services to the public body, public entity, or public official, and the production of the report in the form furnished to the requester.

(c) The actual added cost used as the basis for the calculation of a fee for records shall not include any charge for the existing salary or pay obligation to the public officers or employees with respect to the first four cumulative hours of searching, identifying, physically redacting, or copying. A special service charge reflecting the calculated labor cost may be included in the fee for time required in excess of four cumulative hours, since that large a request may cause some delay or disruption of the other responsibilities of the custodian's office, except that the fee for records shall not include any charge for the services of an attorney to review the requested public records seeking a legal basis to withhold the public records from the public.

* * *

(f) If copies requested in accordance with subdivision (1)(b) of this section are estimated by the custodian of such public records to cost more than fifty dollars, the custodian may require the requester to furnish a deposit prior to fulfilling such request.

LPD provided you an estimate of costs of \$2,240 for the search of records, and advised you that the estimate could increase with the necessary review of any documents found in the search. We understand that during your January 10, 2017 phone conversation with Ms. Peters, she advised you that you could modify or prioritize your request to limit the costs associated with the search. She also advised you that the request as written was broad and suggested ways in which to narrow your request. You formally objected to the search cost on January 18, 2017, as the hourly fee exceeds the salary of LPD technology employees, but did not modify or prioritize your request. On January 20, 2017, LPD responded that the costs quoted to you were the costs that would be charged to LPD by the City's IS department. LPD does not control the fees charged by the City's IS and would only be passing along any charges related to searching for records related to your request. Additionally, not only would the City's IS need to search a current email system, it would be required to search a prior email system to fulfill your records request. Based upon these facts, we do not believe LPD's estimated charges to be excessive.

You also appear to believe that you should not be charged for the search for any records which may be ultimately withheld. However, a search for records necessitates that all records related to the request will be found, and some of those records may ultimately be withheld, particularly when the request is made to a law enforcement body. The costs associated with the search for records will relate to the search for all records, some of which may be properly withheld under Neb. Rev. Stat. § 84-712.05.

Requests dated January 20 and 23, 2017.

Your petition contains emails purportedly sent to Ms. Peters on January 20 and 23, 2017 requesting clarification of LPD's response and inquiring as to whether additional documentation was available concerning past NSJI operations. However, Ms. Peters advises this office that she did not receive these two emails. Additionally, Ms. Peters advises that City IS personnel searched all incoming emails from January 19 through January 24 and did not locate these two emails on City servers. We trust that the LPD is accurately representing that these emails were not received by anyone at the LPD and were not received until your public records petition was provided by this office to the LPD for its response. On February 14, 2017, LPD responded to these latest two emails. When we receive petitions under Neb. Rev. Stat. § 84-712.03, our focus is to ensure that citizens have not been improperly denied public records. Since the LPD has now responded to these two emails, and your sole complaint regarding these emails was the lack of a response, we will take no further action with respect to this portion of your petition.

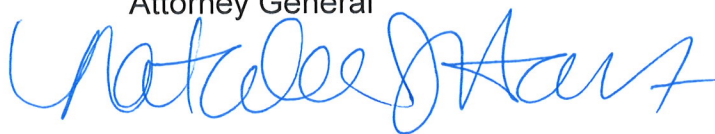
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CONCLUSION

For the reasons explained above, we do not believe the LPD has violated the NPRS with respect to your request for records, and that 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 consider what additional remedies may be available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Tonya Peters

02-651-29