



STATE OF NEBRASKA  
**Office of the Attorney General**

2115 STATE CAPITOL BUILDING  
LINCOLN, NE 68509-8920  
(402) 471-2682  
TDD (402) 471-2682  
FAX (402) 471-3297 or (402) 471-4725

**DOUGLAS J. PETERSON**  
ATTORNEY GENERAL

**NATALEE J. HART**  
ASSISTANT ATTORNEY GENERAL

November 9, 2017

Donald J. Drillien  
Kathryn E. Musso  
VIA E-MAIL ONLY to:



RE: *File No. 17-R-143; Dundy County Attorney and Dundy County Sheriff's Office; Donald Drillien and Kathryn Musso, Petitioners*

Dear Mr. Drillien and Ms. Musso:

We are writing in response to your email received by this office on October 6, 2017 in which you petitioned for our review of the response to your request for certain public records belonging to the Dundy County Attorney and the Dundy County Sheriff ("County") 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 to the Dundy County Attorney, Gary Burke, and the Dundy County Sheriff, Justin Nichols. Mr. Burke responded on behalf of both county agencies. 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 and the response we received from the County. Your initial correspondence to this office on October 6, 2017 contained a string of emails between you and the County Attorney. However, we were unable to locate a specific public records request, or a response thereto, in those communications. In order to clarify your petition, we suggested you make a written public records request for the records being sought by you, which you emailed to the County Attorney and the County Sheriff on October 12, 2017. You then renewed your public records petition with our office on October 24, 2017. We subsequently contacted the County and requested a response to your petition. The records you seek are the autopsy, toxicology, and investigative reports relating to the death of your son, Gregory Drillien, in May 2017.

On October 25, the undersigned had a phone conversation with the Dundy County Attorney, Mr. Burke, who informed us that on July 11, 2017, he had provided you with copies of all investigatory files of the County related to the death of your son. This pertinent information was omitted from your petition to this office, despite other contemporaneous communications between you and the County Attorney submitted to us as part of your petition. At that time, Mr. Burke withheld the autopsy and toxicology reports as medical records used in a police investigation. While Mr. Burke's July 11, 2017 letter does not specifically cite Neb. Rev. Stat. § 84-712.05(2), our conversation with him made clear that is the statutory provision on which he relied to withhold both the autopsy and the toxicology report.

On November 2, 2017,<sup>1</sup> Mr. Burke again wrote to you, in response to your renewed public records request and again withheld the autopsy report under Neb. Rev. Stat. § 84-712.05(2) and released the toxicology report to you.

### DISCUSSION

The Nebraska Public Records Statutes ("NPRS") generally allow interested persons the right to examine public records in the possession of public agencies in Nebraska 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).

---

<sup>1</sup> While the County's response on this date was not within four business days following your renewed public records request dated October 12, 2017, the County reasonably believed it had fully responded to your public records request in July 2017 and was not required to respond further. Had this office been made aware by you in your initial petition that Mr. Burke had previously responded to your request for records and disclosed all investigatory materials, only withholding the autopsy and toxicology report, we would not have suggested you submit an additional request for records in October 2017.

Your petition concerns the availability of records of the County relating to the death of your son and the subsequent investigation. All investigatory records were provided to you in July 2017. The toxicology report you seek was released to you on November 2, 2017. The remaining record requested by you which had been withheld by the County is the autopsy report, which has been denied under Neb. Rev. Stat. § 84-712.05(2). 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 distinct categories of documents which may be kept confidential from the public at the discretion of the agency involved. In the present case, the County has claimed the exception set out in subsection (2) as the 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:

(2) Medical records, other than records of births and deaths and except as provided in subdivision (5) of this section, in any form concerning any person; records of elections filed under section 44-2821; and patient safety work product under the Patient Safety Improvement Act.

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(2) indicates that a medical record, other than birth or death records and, by reference to subsection (5), records relating to the presence of and amount or concentration of alcohol or drugs in any body fluid, may be withheld. An autopsy report is a medical record and may properly be withheld under this statutory provision. The County is not required to release the autopsy report you seek under the NPRS. However, we understand that the County has, or will soon be, providing you with a copy of the autopsy report. Additionally, the County has previously released to you all remaining records related to the death of Gregory Drillien in its possession. As a result, we do not believe you have been improperly denied access to public records.

While not part of your complaint, we would also point out that neither the County's July 11 or November 2 letters met the requirements of the Open Meetings Act for denial letters, as found in Neb. Rev. Stat. § 84-712.04. If records sought by a public records request are denied, the correspondence withholding those records must contain all of the following information:

- (a) A description of the contents of the records withheld and a statement of the specific reasons for the denial, correlating specific portions of the records to specific reasons for the denial, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial;
- (b) The name of the public official or employee responsible for the decision to deny the request; and
- (c) Notification to the requester of any administrative or judicial right of review under section 84-712.03.

Neb. Rev. Stat. § 84-712.04(1). The County's July 11, 2017 letter did not contain any of these three pieces of information. The November 2, 2017 letter only added information in compliance with Section (1)(a). We would remind the County, through a copy of this letter, of these requirements for future denial letters.

#### CONCLUSION

For the reasons explained above, we conclude that the County has not improperly withheld records pursuant to your public records request 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 consult an attorney to determine 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: Gary Burke

02-673-29