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October 2, 2019

Gregory C. Damman
Blevens & Damman
129 North 5th Street
PO Box 98
Seward, NE 68434

RE: *File No. 19-R-124; Seward County Sheriff's Office; Gregory Damman,
Petitioner*

Dear Mr. Damman:

We are writing in response to correspondence received by this office in which you petitioned for our review of the response to your request for certain public records belonging to the Seward County Sheriff ("Sheriff") under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2014, Cum. Supp. 2018) ("NPRS"). As is our normal practice with such complaints, we contacted the party against whom the complaint was made and we subsequently received a response from Wendy Elston, Seward County Attorney, on behalf of the Sheriff. We have now considered your petition under the NPRS and our findings in this matter are set forth below.

FACTS

Our understanding of the facts in this case is based on your public record request, the denial letter from the Sheriff, and the response we received from the County Attorney as to your petition. You made a request on September 11, 2019 to the Sheriff for the following records:

copies of all job application materials submitted by Blake Swicord when he sought employment by the Seward County Sheriff's Department, including, but not limited to, his job application, resume, reference letters, school transcripts, personal and professional references, criminal history and arrest record, and law enforcement training certification status.

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On September 15, 2019, the Sheriff responded, denying access to all records requested by you, stating that “your request is not subject to disclosure under the Nebraska Public Records Act,” citing Neb. Rev. Stat. § 84-712.05(7) (“personal information in records regarding personnel of public bodies other than salaries and routine directory information”) and (17) (job application materials submitted by applicants, other than finalists . . .) as the reasons the records were being withheld.

You sought review of this denial by our office. In your correspondence to us, you state that “Mr. Swicord was clearly a ‘finalist,’ because he ultimately was hired by Seward County” and that the ability to withhold records under § 84-712.05(17) “does not apply because, as noted above, Mr. Swicord was a finalist for the deputy position for which he was hired.”

The County Attorney, on behalf of the Sheriff replied:

The information requested, while not specifically excluded in § 84-712.05(15) (sic), contains within it personal information that is not a public record and can be withheld (§ 84-712.05(7)). The records of the Sheriff’s Office contain a candidate sheet/application. The candidate sheet prepared by the applicant, specifically requests “personal information.” The personal information includes: date of birth, driver’s license numbers, information regarding drug usage, addresses, criminal history information, personal email addresses, personal phone numbers, etc. The information is alleged to be personal and can be withheld pursuant to a reading of Steckelberg v. Nebraska State Patrol, 294 Neb. 842 (2016). Given the extensive personal information found in the candidate sheet it would circumvent the privacy rights of § 84-712.05(7) of a public employee to release said information. Since there is not a standard job application within the State, the different applications themselves may contain personal information that another application would not contain. Law Enforcement Agencies generally require more personal information on applications due to public safety requirements. Public policy also protects law enforcement from disclosure of personal information, including address and photos, given the higher need for personal security and safety. If the information is to be released, then the personal information should be redacted for public policy reasons and pursuant to § 84-712.05(7).

We believe that the majority of the records you have requested must be disclosed by the Sheriff, with some allowable redactions, but that other records you have requested fall outside the specific categories of documents which are defined as “job application materials” which must be disclosed.

ANALYSIS

The 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. Under those statutes, every record “of or belonging to” a public body is a public record of which individuals may obtain a copy 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 confidentiality statute applies to 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).

Although the NPRS provide for access to public documents, they are not absolute and 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 twenty-three categories of documents which may be kept confidential from the public at the discretion of the agency involved. In the present case, the Sheriff has claimed that the records you have requested may be withheld under the following subsections:

(7) Personal information in records regarding personnel of public bodies other than salaries and routine directory information; and

(17) Job application materials submitted by applicants, other than finalists . . . who have applied for employment by any public body as defined in section 84-1409. For purposes of this subdivision, (a) job application materials means employment applications, resumes, reference letters, and school transcripts and (b) finalist means any applicant . . . (i) who reaches the final pool of applicants, numbering four or more, from which the successful applicant is to be selected, (ii) who is an original applicant when the final pool of applicants numbers less than four, or (iii) who is an original applicant and there are four or fewer original applicants.

You have requested “all job application materials . . . including, but not limited to, his job application, resume, reference letters school transcripts, personal and professional references, criminal history and arrest record, and law enforcement training certification status.” Section 84-712.05(17), however, has a more limited definition of job application materials, restricting access to “employment applications, resumes, reference letters, and school transcripts” of job finalists. All other materials submitted by a finalist for a position may be withheld under this section. Some of what you have requested appears to fall squarely within the job application materials as found in Neb. Rev. Stat. § 84-712.05(17) for a finalist for a position with the Sheriff. As the applicant

for whom you seek records was ultimately hired by the Sheriff, we agree that he fits within the definition of "finalist," the Sheriff has not argued that Mr. Swicord was not a "finalist" under the NPRS.

The Sheriff has claimed that Neb. Rev. Stat. § 84-712.05(7) allows that agency to withhold the application materials you seek as "personal information in records regarding personnel of public bodies" other than salaries and routine directory information. However, this provision is not appropriate for withholding the full scope of documents you seek when another section of the same statute specifically mandates disclosure of the "job application materials" of finalists. Section 84-712.05(17) clearly defines what application materials must be produced upon request, and as to which applicants.

Consequently, we believe some the application materials of the job finalist you have requested are subject to disclosure under Neb. Rev. Stat. § 84-712.05(17). As a result, the Sheriff must disclose those documents in its possession which fall within the definition of "job application materials": the employment application, resume, reference letters, and school transcripts of Mr. Swicord. Anything requested by you and maintained by the Sheriff beyond these specific categories of documents, including the "criminal history" and "arrest record and law enforcement training certification status," may be withheld under Neb. Rev. Stat. § 84-712.05(17), if submitted with the application, or Neb. Rev. Stat. § 84-712.05(7) if collected by the Sheriff after Mr. Swicord began his employment. We agree with the County Attorney that certain information may be redacted from the job application materials, as the applicant is a current employee of the Sheriff. The Sheriff may redact information such as Mr. Swicord's home address and telephone numbers, birth date, driver's license information, personal email address, and other such personal information on the documents which must be disclosed.

CONCLUSION

For the reasons stated above, we believe the Sheriff is required to disclose certain records in response to your public records request. We have provided guidance herein for production of the requested documents. We trust that the Sheriff will undertake this in good faith, thus, no further action will be taken by this office with respect to this complaint.

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If you disagree with our analysis under the Public Records Statutes set out above, you may wish to determine what additional remedies, if any, are available to you under those statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Wendy Elston

02-745-29