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August 19, 2020

Via email at cdunker@journalstar.com
Chris Dunker
Lincoln Journal Star
926 P Street
Lincoln, NE 68508

RE: *File No. 20-R-123; Nebraska State Patrol; Chris Dunker, Lincoln Journal Star, Petitioner*

Dear Mr. Dunker:

This letter is in response to your correspondence dated August 4, 2020, in which you seek our assistance in obtaining records from the Nebraska State Patrol ("NSP"). On August 6, 2020, we contacted NSP Attorney Jessica Forch, who handled your request, and advised her of the opportunity to provide this office a response to the petition. We received Ms. Forch's response on August 14, 2020, as well as additional information on August 18, 2020. We have now had the opportunity to fully consider your petition and the NSP's response in accordance with the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018, Supp. 2019) ("NPRS"). Our findings in this matter are set forth below.

FACTS

Our understanding of the facts in this matter is based upon your petition, the documentation you provided this office, and the response and information we received from Ms. Forch.

On July 6, 2020, you made a public records request to the NSP. Specifically, you sought the following records: (1) "The Nebraska State Patrol's use of force or use of control policy effective May 31, 2020," (2) "Any use of force or use of control report completed by an officer with the Nebraska State Patrol during law enforcement activities in Lincoln on May 31, 2020," and (3) "Any communication between or among NSP staff regarding use of force or use of control during law enforcement's response to protests/riots in or around the area of the County-City Building and Nebraska State Capitol on May 30-31, 2020." On July 17, 2020, the NSP partially denied your request. The NSP provided a document titled "Law Enforcement Role, Responsibilities, &

Relationships” which was responsive to Request No. 1. The NSP did not provide any documents responsive to Request Nos. 2 and 3. The NSP stated it was not providing any documents responsive to Request No. 3 because it “considered this information to be investigative and tactical in nature, pursuant to Neb. Rev. Stat. § 84-712.05 subsection (5).” On July 23, 2020, you made a second public records request to the NSP. Specifically, you requested “[a]ny Nebraska State Patrol policy regarding the use of non-lethal or less-lethal weapons, including but not limited to, tear gas, pepper spray, flashbang grenades, foam or rubber bullets.” On July 27, 2020, NSP fully denied your request, stating that the information requested was strategic or tactical information used in law enforcement training pursuant to Neb. Rev. Stat. § 84-712.05(5).

On August 4, 2020, you sent a letter to our office asking us to review the NSP’s refusal to produce certain requested records. We note that your letter does not challenge the denial of any records you requested on July 6, 2020. Your letter only asks us to review the denial of records you requested on July 23, 2020 which sought “[a]ny Nebraska State Patrol policy regarding the use of non-lethal or less-lethal weapons, including but not limited to, tear gas, pepper spray, flashbang grenades, foam or rubber bullets.”

The NSP’s response to the petition states that the records requested on July 23, 2020 are highly tactical and strategic in nature and that releasing such documents could make the agency and its employees vulnerable in situations where lives are at stake. NSP further states that releasing such documents would hinder the agency’s ability to conduct law enforcement operations, take law enforcement actions, and could be used to undermine official law enforcement actions. Lastly, NSP represents that the requested documents are used extensively in training within the agency.

In support of these positions, NSP provided the affidavits of Lieutenant Colonel Andrew Duis and Captain Jason Scott of the NSP. Lieutenant Colonel Duis avers that the documents responsive to your request are used by the agency on a daily basis and in training exercises. Duis Affidavit at 1. He states that the records are “highly strategic and tactical in nature.” *Id.* He expands by stating that responsive records include topics such as “covert operations, operations for the Special Weapons and Tactics (SWAT) program, raid planning, civil disorder plan, and operations for the Mobile Field Force program.” *Id.* at 2. Further, he states that “[r]eleasing such documents could put our employees in vulnerable positions which could hinder their ability to conduct law enforcement operations and take law enforcement actions.” *Id.* at 1. Lastly, he states that public knowledge of this information could undermine law enforcement operations. *Id.* Captain Scott avers that the requested documents are highly strategic and tactical in nature because people study and develop their counter tactics based on what they believe they will encounter from law enforcement. Scott Affidavit at 1.

Captain Scott further states that having an element of surprise keeps police officers safe and that releasing these documents could put employees in vulnerable positions and hinder law enforcement’s operations. *Id.* For example, he avers that, if people know what criteria are required to utilize a SWAT or tactical team, it could lead to incidents of

“SWATing” or sending tactical teams to an unsuspecting person’s house. *Id.* at 1-2. Captain Scott states that releasing this information would allow “the public to equip themselves with certain items that can make our less lethal options ineffective.” *Id.* at 2. Lastly, he states that the requested documents are used in law enforcement training in the following ways: “Having a clear understanding of what tactics can be used, safety considerations when planning warrants service, equipment that is authorized, outside resources to be used or considered, [and] criteria for using particular units or equipment.” *Id.*

DISCUSSION

Neb. Rev. Stat. § 84-712 sets out the basic rule for access to public records in Nebraska. 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) (emphasis added). Thus, in those instances where records requested under the NPRS are exempt from disclosure by statute, there is no right of access.

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-three categories of

records that may be kept confidential from the public at the discretion of the agency involved. 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 NSP does not dispute that the records requested are public records as defined under the NPRS. However, the NSP asserts the exception in subsection (5) of § 84-712.05 provides a basis to withhold the 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*. (emphasis added.)

“In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.” *Piska v. Nebraska Dep’t of Social Services*, 252 Neb. 589, 594, 567 N.W.2d 544, 547 (1997). “[A]n appellate court must look to the statute’s purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.” *Henery v. City of Omaha*, 263 Neb. 700, 705, 641 N.W.2d 644, 648 (2002). “Statutory language is to be given its plain and ordinary meaning in the absence of anything indicating to the contrary.” *PSB Credit Services, Inc. v. Rich*, 251 Neb. 474, 477, 558 N.W.2d 295, 297 (1997).

“Tactical” is defined as “of or relating to combat tactics: such as . . . of or occurring at the battlefield” or “using or being weapons or forces employed at the battlefield” or “of or relating to tactics: such as . . . of or relating to small-scale actions serving a larger purpose” or “made or carried out with only a limited or immediate end in view” or “adroit in planning or maneuvering to accomplish a purpose.”¹ “Strategic” is defined as “of, relating to, or marked by strategy” or “necessary to or important in the initiation, conduct, or completion of a strategic plan” or “required for the conduct of war and not available in adequate quantities domestically” or “of great importance within an integrated whole or to

¹ MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/tactical>.

Chris Dunker
August 19, 2020
Page 5

a planned effect” or “designed or trained to strike an enemy at the sources of its military, economic, or political power.”²

A review of the affidavits of Lieutenant Colonel Duis and Captain Scott shows that the information sought fits within the definition of tactical and strategic information. Also, both affiants state that the requested documents are in fact used in law enforcement training. Captain Scott’s affidavit states the documents sought discuss when certain types of law enforcement teams will be deployed. Further, he explains that the documents discuss procedures when serving warrants as well as situations when certain law enforcement units or equipment will be authorized for use. This information is tactical and strategic in nature.

Finally, please keep in mind that although Neb. Rev. Stat. § 84-712.03 creates enforcement responsibilities for this office, there is no statutory mechanism for an *in camera* review of the records requested. Thus, we do not have access to the records you seek. Consequently, we will rely on representations from Ms. Forch and the sworn testimony of Lieutenant Colonel Duis and Captain Scott that the records at issue are in fact strategic or tactical information used in law enforcement training.

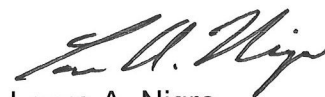
CONCLUSION

For the reasons explained above, we conclude that the requested records belonging to the NSP may be lawfully withheld under § 84-712.05(5). Since you have not been unlawfully denied access to public records, no further action by this office is necessary and we are closing our 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



Laura A. Nigro
Assistant Attorney General

cc: Jessica Forch

35-104-29

² MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/strategic>.