

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

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

January 19, 2021

Sherman Johnson
Reg. # 29590-047
FCI Lompoc
3600 Guard Road
Lompoc, CA 93436

RE: *File No. 21-R-101; Lancaster County Sheriff's Office; Sherman Johnson, Petitioner*

Dear Mr. Johnson:

This letter is in response to your petition received by this office on January 4, 2021, in which you requested that we review the denial of your public records request by the Lancaster County Sheriff's Office ("LCSO"). On January 5, 2021, we mailed a copy of your petition to Kristine Hulse, LCSO Records System Supervisor, advising her of the opportunity to supplement or revise her office's basis for denying you access to certain records in your request. Her office declined to submit additional documentation. We considered your petition under the provisions of the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020). Our initial findings in this matter are set forth below.

RELEVANT FACTS

Our understanding of the facts in this matter is based solely on your petition and Ms. Hulse's November 24, 2020, response to your public records request.

You are seeking records from the LCSO pertaining to an April 16, 2016, traffic stop on Interstate 80, occurring between 1:30 p.m. and 2 p.m. You indicate that you were the motorist. At issue here is your request for "a full copy of the dispatch report and all related recordings for the above traffic stop. Please include all related written records."¹

In her response to this particular item, Ms. Hulse indicated that

¹ Your request also sought "body-worn camera and patrol car camera recordings" relating to the April 16, 2016, traffic stop. According to Ms. Hulse, the LCSO has no such records.

[o]ur Office is partially denying your request as our Office is withholding the “related written records” requested as we may withhold the following information from public disclosure: “[r]ecords developed . . . by law enforcement agencies . . . 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. . . .” Neb. Rev. Stat. § 84-712.05(5).

You have asked that this office conduct an administrative review of LCSO’s denial. You reiterate that you are seeking “[a] full copy of all written records and audio dispatch recordings of a traffic stop from April 16, 2016 between 1:30 pm to 2 pm, on Eastbound Interstate 80, by Sgt. Jason Mayo and the other responding officers who were present.” You have asked us to “provide all dispatch reports, officer naratives [*sic*], and all other available records.” You further assert that “no applicable exclusions . . . prevent the release of these records.”

DISCUSSION

Under express provisions set out in Neb. Rev. Stat. § 84-712.04(1) (2014), public bodies must provide the following information to any person denied any rights granted under §§ 84-712 to 84-712.03:

- (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.

We note that Ms. Hulse cited the investigatory records exception in Neb. Rev. Stat. § 84-712.05(5) as the statutory basis to withhold “related written records.” However, her response contains no “description of the contents of the records withheld.” As a result, this office is unable to make a determination as to whether this exception applies to some or all of the records that the LCSO has identified as being responsive to your request.²

² We would further note that Ms. Hulse did not list the name of the public official who made the decision to deny your records request, as required under § 84-712.04(1)(b).

We will also point out that provisions in the Security, Privacy, and Dissemination of Criminal History Information Act ("CHIA"), Neb. Rev. Stat. §§ 29-209, 29-210, 29-3501 to 29-3528, and 81-1423 (2016, Cum. Supp. 2020), require the disclosure of certain information in the possession of law enforcement agencies. In this regard, Neb. Rev. Stat. § 29-3520 (2016), provides that

[c]omplete criminal history record information maintained by a criminal justice agency shall be a public record open to inspection and copying by any person during normal business hours and at such other times as may be established by the agency maintaining the record. Criminal justice agencies may adopt such regulations with regard to inspection and copying of records as are reasonably necessary for the physical protection of the records and the prevention of unnecessary interference with the discharge of the duties of the agency.

"Criminal history record information" is defined as

information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of issuance of arrest warrants, arrests, detentions, indictments, charges by information, and other formal criminal charges, and any disposition arising from such arrests, charges, sentencing, correctional supervision, and release. Criminal history record information shall include any judgment against or settlement with the state as a result of a wrongful conviction pursuant to the Nebraska Claims for Wrongful Conviction and Imprisonment Act. Criminal history record information shall not include intelligence or investigative information.

Neb. Rev. Stat. § 29-3506 (2016) (emphasis added). Neb. Rev. Stat. § 29-3521 (2016) further states:

In addition to public records under section 29-3520, information consisting of the following classifications shall be considered public record for purposes of dissemination: (1) Posters, announcements, lists for identifying or apprehending fugitives or wanted persons, or photographs taken in conjunction with an arrest for purposes of identification of the arrested person; (2) original records of entry such as police blotters, offense reports, or incident reports maintained by criminal justice agencies; (3) court records of any judicial proceeding; and (4) records of traffic offenses maintained by the Department of Motor Vehicles for the purpose of regulating the issuance, suspension, revocation, or renewal of driver's or other operator's licenses.

(Emphasis added.)

In view of the requirements in Neb. Rev. Stat. § 84-712.04(1)(a) and the CHIA provisions discussed above, we will request that Ms. Hulse provide this office with the

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following: (1) a description of the contents of the records withheld by the LCSO; (2) confirmation as to whether her office has "the dispatch report and all related recordings for the . . . traffic stop," referenced in item number 2 of her response; and (3) any regulations adopted by the LCSO relating to the inspection and copying of criminal history records. We would ask that Ms. Hulse provide us this information no later than the close of business on January 28, 2021. Once we receive this information, this office will make a determination as to whether the LCSO has properly withheld these records under the appropriate statutes.

Finally, 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 withheld documents by the Attorney General. Under § 84-712.03(2), that procedure is left for the courts. Consequently, we must rely on representations from governmental agencies and officials as to content of the records at issue.

Sincerely,

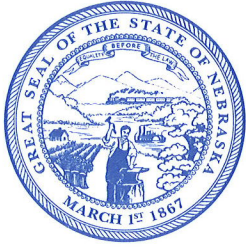
DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Kristine Hulse

49-2622-29



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LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

March 11, 2021

Sherman Johnson
Reg. # 29590-047
FCI Lompoc
3600 Guard Road
Lompoc, CA 93436

RE: *File No. 21-R-101; Lancaster County Sheriff's Office; Sherman Johnson, Petitioner*

Dear Mr. Johnson:

This letter is our final response to your petition received by this office on January 4, 2021. In our response to you dated January 19, 2021, we indicated that we were unable to make a determination regarding your petition since Ms. Hulse failed to provide a "description of the contents of the records withheld" required under Neb. Rev. Stat. § 84-712.04(1)(a) of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 to 84-712.09 (2014, Cum. Supp. 2020). We requested that Ms. Hulse provide us, among other things, a description of the records withheld and confirmation that her office had the records referenced in item number 2 of her November 24, 2020, response.¹

We subsequently received a response to our request from Captain Trotter of the Lancaster County Sheriff's Office ("LCSO") on February 18, 2021. Captain Trotter represented that the LCSO had two records responsive to your request, i.e., the dispatch record and a "written report drafted by the deputy involved" He reiterated that both the dispatch report and the written report were withheld under the exception in Neb. Rev. Stat. § 84-712.05(5). Captain Trotter also confirmed that the LCSO had no other records responsive to your request.

Our findings regarding this matter are set forth below.

¹ Item number 2 stated: "I want a full copy of the dispatch report and all related recordings for the above traffic stop. Please include all related written records."

ANALYSIS

Neb. Rev. Stat. § 84-712(1) (2014) generally allows Nebraska citizens and other interested persons the right to examine public records in the possession of public agencies during normal agency business hours and to obtain copies of records in certain circumstances. Neb. Rev. Stat. § 84-712.01(1) defines “public records” to 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. . . .” However, access to public records is not absolute. In those instances where the Nebraska Legislature has provided that a particular record is confidential or may be withheld at the discretion of the records custodian under Neb. Rev. Stat. § 84-712.05 (Cum. Supp. 2020) or Neb. Rev. Stat. § 84-712.08 (2014), 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).

In the present case, the LCSO is relying on the exception to disclosure in § 84-712.05(5) as its basis to deny you access to the dispatch record and written report. This exception pertains to

[r]ecords 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 training²

In multiple disposition letters written over the years, this office has taken the position that law enforcement agencies may withhold their investigatory records under the exception in § 84-712.05(5).³ Our position is based in large part on the plain language

² There are two exceptions to the exception, i.e., (1) records relating to the presence of drugs or alcohol in any body fluid of any person; and (2) records relating to the cause of death arising out employment once an investigation is concluded when requested by a family member of the deceased.

³ E.g., *File No. 19-R-106; Omaha Police Department; Reginald Young, Petitioner* (January 31, 2019); *File No. 18-R-106; Lincoln Police Department; Juanita Phillips, Petitioner* (March 22, 2018); *File No. 17-R-133; Alliance Police Department; Cheryl Spencer, Petitioner* (July 18, 2017); *File No. 17-R-121, Wymore Police Department, Wayne and Sandi Gridley, Petitioners* (April 20, 2017); *File No. 16-R-134, University of Nebraska-Lincoln [Police Department], Ralph W. Edwards, Petitioner* (September 28, 2016); *File No. 16-R-102, Omaha Police Department, KETV, Petitioner* (February 8, 2016); *File No. 15-R-145, Nebraska State Patrol, Joshua Renth, Petitioner* (November 2, 2015). Copies of our disposition letters relating to these files are accessible at <https://ago.nebraska.gov/disposition-letters>.

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of the exception,⁴ which expressly permits “law enforcement agencies” to withhold records developed or received by the agencies which relate to investigations of persons, institutions or businesses. Consequently, the LCSO may keep the records at issue in this case confidential if they are part of an investigation conducted by that agency. It appears to us that the written report prepared by the deputy involved would fall within the exception.

Our conclusion in this regard is further supported by Neb. Rev. Stat. § 29-3506 of the Security, Privacy, and Dissemination of Criminal History Information Act (“CHIA”), Neb. Rev. Stat. §§ 29-209, 29-210, 29-3501 to 29-3528, and 81-1423 (2016, Cum. Supp. 2020), which specifically exempts “intelligence or investigative information” from the “criminal history record information” which must be disclosed under CHIA. See Neb. Rev. Stat. § 29-3520 (2016). However, as we pointed out in our January 19 letter, public records under CHIA also include “(2) original records of entry such as police blotters, offense reports, or incident reports maintained by criminal justice agencies” Neb. Rev. Stat. § 29-3521 (2016). This office has previously taken the position that a dispatch record is likely an original record of entry under the provision set out above. See *File No. 19-R-103; North Platte Police Department; Erik W. Fern on behalf of Mark Charron, Petitioner* (January 22, 2019); *File No. 12-R-137; Keith County Attorney; Ryan Ross, Petitioner* (October 30, 2012). Accordingly, we will request that the LCSO provide you a copy of the dispatch record at its earliest possible convenience, but in no event later than **March 26, 2021**.

Based on the discussion above, it appears that you will receive part of the records which you seek, and that you have not been improperly denied access to the remainder. As a result, we are closing this file. If you disagree with our analysis, you may wish to review the NPRS to determine what additional remedies, if any, are available to you.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Captain Tommy Trotter
Kristine Hulse

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⁴ 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. See *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 123, 907 N.W.2d 301, 308 (2018); *Farmers Cooperative v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017).