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March 17, 2011

Jarvis Young
3416 Dewey Ave, Apt 2
Omaha, NE 68105

RE: *File No 11-R-107; City of Omaha Police Department and Douglas County Department of Corrections; Jarvis Young*

Dear Mr. Young:

This letter is in response to your Public Records complaint received by us on February 23, 2011, in which you requested our review of a request for records by you to the Omaha Police Department ("OPD") and the Douglas County Department of Corrections ("DOC") for certain records relating to an inmate of the DOC. As is our normal procedure, we provided your complaint to the OPD and the DOC and received responses from both agencies. We have carefully reviewed your request under the Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2008, Cum Supp. 2010) and our findings in this matter are set forth below.

FACTS

Our understanding of the facts in this case is based on your Public Records Request and the responses to that request from the OPD and DOC. While it is unclear from your correspondence exactly what records you requested from these agencies, the DOC interpreted your request to be one for the recordings of the phone calls of a certain inmate. Whether it is the actual recordings, or any written records that may be maintained of phone calls from the DOC, our analysis, and the result, are the same.

You claim to have made a public records request for these records first on June 24, 2010. However, the letter you enclosed to this office is not addressed to anyone, and we cannot verify that it was sent to the OPD or DOC. Therefore, we will only consider your requests of January 28, 2011, which have been addressed to employees at the OPD and the DOC.

Your public records request of January 28, 2011 described phone calls you claim to have received from an inmate of the DOC on August 8, 2009 and requests "the records." We will assume for the purposes of this letter that "the records" are recordings of those phone calls.

The OPD responded on February 3, 2011, explaining that the records you seek are not the records of the OPD. If such records are in the possession of the OPD, they are investigatory records. The DOC responded on February 8, 2011 denying your request for the reason that "inmate phone records are not public records."

ANALYSIS

The Nebraska Public Records Statutes are found at Neb. Rev. Stat. §§ 84-712 through 84-712.09. Neb. Rev. Stat. § 84-712 (2008) provides:

> (1) 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 the same, 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.

"Public records" are defined as "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." Neb. Rev. Stat. § 84-712.01 (2008). The Public Records Act, Neb. Rev. Stat. § 84-712.05 (2010), however, does provide for some categories of records which may be withheld from public disclosure by the custodian of those records.

Omaha Police Department

As to your request to the OPD, the operative portion of the definition of "public record" is whether the records you seek are records "of or belonging to" the OPD. The OPD states that the records you seek are not "of or belonging to" the OPD, as they are records that are generated while an inmate is in the custody of the DOC. If the OPD is not the custodian of the records, it cannot turn them over in a public records request. We see no reason to dispute that they are not the custodian of the records you seek. It seems clear that if any public agency is the custodian of phone recordings of calls

placed from the DOC, the custodian would be the DOC.

The OPD also states, both in their initial response to you and their supplemental response of March 7, 2011, that if they do have the phone recordings or other records relating to the phone calls you reference in their possession, they received them in connection with an investigation and may withhold them pursuant to the Public Records Statutes, Neb. Rev. Stat. § 84-712.05(5). This section states "Records developed or received by law enforcement agencies . . . charged with duties of investigation . . . when the records constitute a part of the examination (or) investigation" may be withheld from disclosure under the Public Records Statutes. The records of the OPD certainly qualify as investigatory records of a law enforcement agency. The OPD may choose to withhold any such records, including those requested by you regarding the phone calls of August 8, 2009. You have been provided certain information by the OPD documenting telephone harassment complaints you made against Mr. Ricky Lyncook. These are the only reports which are publically available from the OPD. The OPD has described the rest of its records, as required by the Public Records Act. The OPD may withhold the remainder of their investigatory files concerning your complaints and the phone calls to you by Ricky Lyncook under Neb. Rev. Stat. § 84-712.05(5).

Therefore, we conclude that you have not been denied access to public records by the OPD.

Douglas County Department of Corrections

From the information gathered by our office, it is not entirely clear to whom the records you have sought belong. The DOC states that phone records are found in the inmate's file, which is not public record, implying that the record does not belong to the DOC but to the inmate. However, we think that an argument can also be made that the DOC is the custodian of the record, as they require that phone calls be recorded and then maintain those recordings. Therefore, the records at issue may be the DOC's record, or it may be the inmate's record. Either way, the DOC has not improperly withheld this record from disclosure.

The DOC has denied your request for the reason that the recordings you seek are not public records, but are instead part of the inmate file. An inmate's file is confidential under the Jail Standards Board Standards for Jail Facilities, which is found in NAC 81, Chapter 3, 003. Rules and regulations, once adopted, have the force of statutory law. The Public Records Statutes prohibit the disclosure of records that are protected by other statutes. Neb. Rev. Stat. § 84-712(1) (2008). If the record belongs to the inmate, then based upon the Jail Standard Board Standards for Jail Facilities, the DOC must keep the recordings you seek confidential.

In the alternative, if the record belongs to the DOC, the DOC may still withhold the phone records you have requested. The sole reason that the DOC maintains these records is for the safety and security of the facility. Under Neb. Rev. Stat. § 84-712.05(8), information pertaining to the security of public property and persons on or within public property may be withheld under the Public Records Statutes. We believe the records you seek fall within this category of records which may be lawfully withheld from public disclosure by the custodian.

Therefore, you have not been improperly denied access to public records by the DOC.

Responses by Designees

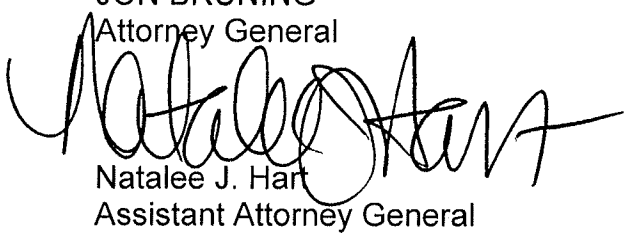
You also complain that the individual to whom you directed your public records request at both the OPD and DOC did not respond directly to you. It is not a violation of the Public Records Statutes for an agency to designate someone other than the addressee to respond to a public records request. Therefore, Mr. Mumgaard's response is on behalf of the entire OPD, including the Police Chief and Patrick Rowland. Mr. Roland is not required to provide you with an additional response. Additionally, Mr. Foxall has responded on behalf of the Douglas County Department of Corrections, and individual responses from Ms. MacGarvery and Mr. Beiterman are not necessary.

CONCLUSION

For the reasons stated above, we do not believe that you have been denied access to public records. Our file on this matter is now closed. If you disagree with our analysis under the Public Records Statutes set out above, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under those statutes.

Sincerely,

JON BRUNING
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Thomas Mumgaard
Diane Carlson

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