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September 8, 2015

Shawn D. Renner
Cline Williams
233 South 13th Street
1900 US Bank Building
Lincoln, NE 68508-2095

RE: *File No 15-R-119; City of Blair Police Department; Blair Enterprise, Petitioner*

Dear Mr. Renner:

This letter is in response to your Public Records petition in which you seek our review of a response to a request made by your client, the Blair Enterprise newspaper, to the City of Blair Police Department ("City" or "Police Department") for certain records belonging to that department. We provided a response to your petition on May 19, 2015 in which we instructed the Police Department to provide the Blair Enterprise with a response that fulfilled its obligations under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2014). The Police Department provided the Blair Enterprise with an amended response on June 1. You have sought our continued review of the response of the Police Department. On June 17, 2015, we indicated to you that our response to your supplemental Public Record petition would be delayed, as it required additional legal research. We have now had an opportunity to review your supplemental petition, the responses of the Police Department to the Blair Enterprise and to this office, and the legal framework that is applicable to your petition. Our findings in this matter are set forth below.

FACTS

Our understanding of the facts in this matter is based on your Public Record petition, your supplemental petition, the responses of the City to the public records requests made by the Blair Enterprise and the response of the City to this office in response to your initial petition. While we recounted much of this in our letter of May 19, 2015, we will do so again here for completeness. On February 27, 2015, the Blair Enterprise made a public records request to the Police Department under the Nebraska Public Records Statutes and Neb. Rev. Stat. § 29-3521 (2003) for "original records of

entry such as police blotters, offense reports, or incident reports maintained by the Blair Police Department from February 13, 2015, through February 27, 2015." Neb. Rev. Stat. § 29-3521 states that such records are public records. On March 4, 2015, the City Attorney responded on behalf of the Police Department, stating that the City required a ten day extension to respond to the public records request. Thereafter, on March 13, 2015, the Chief of the Police Department, Joseph Lager, responded stating: "[a]ll requested information that fall (sic) within the guidelines of public records, have been posted on our website. You have access to this information 24/7 at blairpolice.org." The Blair Enterprise responded on March 17, 2015 advising that it did not believe that its public records request had been appropriately responded to, as the Blair Police website does not contain the entirety of the records requested. The Blair Police website does contain weekly "Activity Summaries," which you state are similar to police blotters. However, offense reports and incident reports, as requested on February 27, are not available on the Blair Police website. Additionally, the Blair Enterprise objected to the redaction of the names of juveniles on the Activity Summary sheets. On March 19, 2015, the City Attorney responded to the Blair Enterprise in general terms. The City Attorney advised that "any reports and incident information from the Blair Police Department on any criminal matter that is considered a public record" are available to view at the Blair Police offices. The City Attorney also generally advised the Blair Enterprise that the Blair Police Department may be able to withhold certain records under Neb. Rev. Stat. § 84-712.05(5) and/or may withhold juvenile proceedings under Neb. Rev. Stat. §§ 43-2,108(3) and 43-248.02. However, the City Attorney did not specifically apply any of these provisions to the request of the Blair Enterprise or the specific records sought on February 27, 2015.

Our office conducted a review of these facts and determined that as an initial matter, the Police Department did not provide the Blair Enterprise with an adequate response under the Nebraska Public Records Statutes. On May 19, 2015, we instructed the Police Department "that it must provide an appropriate response to the February 27, 2015 request of the Blair Enterprise which meets the requirements of the Nebraska Public Record Statutes." The Police Department substantially complied with that directive on or about June 1, 2015. The Blair Enterprise received copies of a spreadsheet for incidents during the requested time frame, which indicates the incident number, time and date, incident type and whether the incident report was enclosed with the Police Department's response or withheld under the Nebraska Public Records Statutes. The Police Department also furnished a number of Incident Data Sheet Reports to the Blair Enterprise. You provided this office with copies of certain of those Incident Data Sheet Reports, which contained redacted information concerning juveniles. Presumably, the Blair Enterprise was satisfied with the remainder of the Incident Data Sheet Reports supplied to it by the Police Department on June 1.

The Police Department has replied through the City Attorney, Mr. Tripp, both to the initial request of the Blair Enterprise, and to this office in response to your initial petition. In response to the Blair Enterprise in March 2015, the City Attorney cited Neb. Rev. Stat. § 84-712.05(5) and stated that "police reports and incident information from

the Blair Police Department on any pending criminal matter either in this office or the Office of the Washington County Attorney during the time frame requested may lawfully be withheld." He also stated that:

> Juvenile Court and proceedings relating to juvenile delinquency are considered civil (not criminal) in Nebraska, and thus not included within the scope of Nebraska Security, Privacy, and Dissemination of Criminal History and Information Act. The statutes clearly intend for the record to be sealed, identification of juveniles protected and the proceedings to be closed. Please refer to the statutes relating to confidentiality of juvenile records and proceedings such as Neb. Rev. Stat. § 43-2,108(3) or disclosure of a juvenile citation in Neb. Rev. Stat. § 43-248.02[1].

In the City's response to this office on May 12, 2015, the City Attorney cited the same statutes as reasons for withholding the identity and other information relating to juveniles found in the Police Department's incident reports.

The Blair Police Department Policies and Procedures, provided by you to this office state that the following information "WILL NOT be released: . . .(a)(iii) Law enforcement officers may not disclose the identity of any juvenile in releasing information to the general public as to the arrest, investigation or disposition of any case involving a juvenile. . ." (emphasis in original).

You seek a review of the denial by the Police Department on June 1 by this office and of the Police Department's policy to not release any juvenile information contained in incident reports. You complain that seventeen incident reports were withheld under Neb. Rev. Stat. §§ 84-712.05(3) and (5) and that information related to juveniles was redacted from five of the incident reports which were provided. As we explained in our May 19 correspondence, we are unable to provide you with an opinion as to the Police Department's policy, in general, as we are authorized to give Attorney General opinions only to state officers, state agencies, the Nebraska Legislature, and to county attorneys only under certain circumstances as found in Op. Att'y Gen. No. 88024 (March 17, 1988). We will, however, address each denial of records made by the Blair Police Department as to the Blair Enterprise's February request.

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[1] This statute applies only to counties containing a city of the metropolitan class. At this time, the only county fitting that description is Douglas County. The City of Blair is located in Washington County. Consequently, Neb. Rev. Stat. § 43-248.02 does not apply to Blair. Additionally, this statute makes no mention of whether a juvenile citation is a public record, or the disclosure thereof, and has no impact on this analysis.

ANALYSIS

Incident Reports withheld in their entirety

The Nebraska Public Records Statutes ("NPRS") are found at Neb. Rev. Stat. §§ 84-712 through 84-712.09. 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 eighteen categories of documents which may be kept confidential from the public at the discretion of the agency involved. The burden of showing that an exception applies to the 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 Police Department has claimed the exception set out in Neb. Rev. Stat. § 84-712.05(5) as its basis for denying the Blair Enterprise access to certain incident reports, in their entirety, for the time period requested. 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, except that this subdivision shall not apply to records so developed or received relating to the presence of and amount or concentration of alcohol or drugs in any body fluid of any person.

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(5) indicates that law enforcement agencies may withhold records they develop or receive which relate to investigations which they have undertaken. There is little question that the Blair Police Department is a law enforcement agency. The incident reports prepared by the Blair Police Department which are the subject of further investigation by the Police Department, as opposed to simple traffic accident reports or matters which required no

further investigation following initial contact with the parties involved and the writing of the incident report, are "records developed" by the Police Department as part of an investigation. We believe that the seventeen incident reports withheld in their entirety by the Police Department on June 1, as "referred to County Attorney," "Referred to City Attorney," or "Active Police Investigation" falls squarely within the claimed exception, and we do not believe that the Police Department violated the NPRS by denying access to these particular Incident Reports.

The Police Department also cites to Neb. Rev. Stat. § 84-712.05(3) in withholding certain incident reports labeled as "Mental Health Record." We believe the Police Department intended to cite Neb. Rev. Stat. § 84-712.02(2) in its denial, which allows the public body to withhold medical records "in any form concerning any person," under which definition a "mental health record" of the Police Department would apply. Those records were concurrently withheld under Neb. Rev. Stat. § 84-712.05(5). We believe that the Police Department may properly withhold the mental health records indicated under either provision of the NPRS and has not violated those statutes with respect to those several incident reports.

Incident Reports containing redacted juvenile information

The crux of your petition concerns the withholding of any and all information related to juveniles in the incident reports provided by the Police Department, regardless of the type of contact made by the Police Department with the juvenile and the outcome of that contact. Upon our review of the NPRS and the statutes related to juvenile records, including Neb. Rev. Stat. §§ 43-245, 43-246.01, 43-247, 43-248, 43-249, 43-280, and 43-2,108 through 43-2,108.05 (Reissue 2008, Cum. Supp. 2014) we believe that the Police Department may be able to properly withhold some information related to juveniles with which it makes contact, but not all information.

The Police Department relies heavily on the provisions of law that allow juvenile records to be sealed in order to withhold all records of any contact made with juveniles regardless of the circumstances. We believe that such a bright-line rule is not consistent with the NPRS or the statutes relating to juvenile records. As an initial matter, we believe Neb. Rev. Stat. § 84-712.05(5) applies equally to records involving juveniles as it would to those involving adults. If an incident report concerns a juvenile regarding whom the Police Department is conducting or has conducted an investigation, or who the Police Department has referred for prosecution to the City or County Attorney, those records qualify as "investigatory records" of the Police Department and may be withheld under Neb. Rev. Stat. § 84-712.05(5) without an analysis of whether any juvenile statutes apply. Whether the incident report is investigatory does not hinge on whether the subject of that report is a juvenile or an adult. However, the Police Department is withholding information contained in certain Incident Reports concerning juveniles, which the Police Department has not claimed are investigatory records under Neb. Rev. Stat. § 84-715.05(5), solely because they reference juveniles. The Police Department provided the Blair Enterprise with certain incident reports which, but for the

inclusion of a juvenile, would have been produced in their entirety.

The Nebraska juvenile courts have certain jurisdiction over juveniles, as found in Neb. Rev. Stat. § 43-246.01 (2014). The NPRS provide that other statutes may "expressly provide" that certain information is not subject to disclosure under the NPRS. Neb. Rev. Stat. § 84-712(1). Our reading of the statutes relating to juvenile courts and offenders indicates that some of the information withheld in the five incident reports redacted by the Police Department was improperly withheld, but that other information was likely not. We believe there are distinctions to be made amongst these five incident reports, which are more fully explained below.

The juvenile courts have exclusive or concurrent jurisdiction over juveniles for a myriad of reasons, including most criminal offenses, traffic offenses, juveniles who are not properly cared for by parents, those who are uncontrolled by parents or guardians, habitually truant from home or school, or are mentally ill and dangerous. Neb. Rev. Stat. §§ 43-246.01, 43-247 (2014). A juvenile taken into temporary custody is not considered to have been arrested. Neb. Rev. Stat. § 43-249 (2003). Adjudications by the juvenile court are not to be deemed convictions. Neb. Rev. Stat. § 43-280 (2003). Juvenile court proceedings are more civil in nature than criminal; the handling of a juvenile is clearly different than that of an adult offender. When a court file is opened in the juvenile court, it contains a variety of information about the juvenile subject to the court's jurisdiction, more so than may be contained in an adult offender's court file. Neb. Rev. Stat. § 43-2,108 (2014). Most of that information, other than pleadings filed with the court, is confidential and access is granted only in certain circumstances. Neb. Rev. Stat. § 43-2,108(3). Records of the juvenile courts may be sealed, if the requirements found in Neb. Rev. Stat. §§ 43-2,108.01 through 43-2,108.05 (2014) are met. Law enforcement records in the custody of the agency, including the citation, arrest record, and record of custody are sealed immediately in the case of a juvenile who was taken into custody, arrested, cited in lieu of arrest, or referred for prosecution without citation and against whom the prosecution declined to file a juvenile petition or criminal complaint, who agreed to pretrial diversion, or whose charges were filed but dismissed. Neb. Rev. Stat. § 43-2,108.03 (2014). In other instances, the court and law enforcement records are sealed after a successful application to seal is made with the court by the juvenile or his or her parent. *See*, Neb. Rev. Stat. § 43-2,108.02, 43-2,108.04 (2014). "The effect of having a record sealed under section 43-2,108.04 is that thereafter no person is allowed to release any information concerning such record . . . A government agency and any other public office or agency shall reply to any public inquiry that no information exists regarding a sealed record." Neb. Rev. Stat. § 43-2,108.05(2) (2014). We understand a record can be sealed at any time during the juvenile proceedings, and may occur immediately upon the juvenile court's exercise of jurisdiction.

We will discuss each of the five redacted incident reports containing juvenile information redacted by the Police Department in turn.

The Police Department has provided the Blair Enterprise with two incident reports concerning traffic accidents in which the juvenile involved was not cited. Incident IDs 20150000109 and 20150000139 withhold the names of the juvenile driver, juvenile witnesses, and/or juvenile passengers involved in the traffic accident. However, in the case of a traffic offense in which no juvenile was cited, no court, including the juvenile court, would have jurisdiction. Neb. Rev. Stat. § 43-246.01. The juveniles involved in these two traffic accidents are not subject to prosecution or control by the juvenile court. Additionally, these traffic accidents required no further investigation by the Police Department or referral of the juvenile(s) to the City or County Attorney. As to these two incident reports, the Police Department improperly withheld the information it redacted. The entirety of Incident IDs 20150000109 and 20150000139 should have been provided to the Blair Enterprise and the Police Department violated the NPRS by failing to provide the complete report, with no redactions.

Incident ID 20150000142 relates to a traffic accident in which the juvenile driver was cited with a traffic infraction of following too close. This citation is of the type that may be waived, i.e., the juvenile may mail in a fine and costs in lieu of appearing in court. Neb. Ct. R. Ch. 6, Art. 14, Appendix 6. The Police Department withheld the identifying information of the juvenile. While the juvenile court has jurisdiction over this juvenile, pursuant to Neb. Rev. Stat. § 43-247, he or she was not subject to a court appearance or any supervision by the court. The court record for a traffic infraction that may be waived is also not of the type that may be sealed by the court. Neb. Rev. Stat. § 43-2,108.01(5). As a result, the Police Department's argument that it may withhold juvenile information in incident reports because such information is subject to being sealed in the future does not apply to this incident report. We are unaware of any other provisions which would allow the Police Department to redact information in this incident report. As a result, we do not believe it was proper for the Police Department to withhold any portion of the report for Incident ID 20150000142.

As to the remaining two records, Incident ID 20150000113 concerns a juvenile runaway and Incident ID 20150000140 concerns an uncontrolled juvenile. We believe these two incident reports may be treated differently than the incident reports relating to minor traffic offenses. We understand the policy underlying the juvenile court statutes is to maintain confidentiality regarding those under the jurisdiction of the juvenile court. Based upon our reading of Neb. Rev. Stat. §§ 43-249 and 43-280 (2003), along with Neb. Rev. Stat. § 29-3521 and the NPRS, we believe that it is questionable whether Neb. Rev. Stat. § 29-3521 applies to the incident reports of juvenile offenders. Juvenile offenders, unless they are referred to District Court for prosecution as an adult, are treated differently in all aspects of juvenile proceedings than an adult would be. A juvenile proceeding is more akin to a civil proceeding than a criminal adjudication. Juveniles are not considered to have been arrested, even when they are taken into the custody of law enforcement, nor are juvenile adjudications considered "convictions." *See*, Neb. Rev. Stat. §§ 43-249, 43-280. Consequently, the provisions of the Security, Privacy, and Dissemination of Criminal History Information Act, Neb. Rev. Stat.

§§ 29-209, 29-210, 29-3501 to 29-3528, and 81-1423, including Neb. Rev. Stat. § 29-3521, may not apply to incident reports concerning juveniles. The statues that make up that Act refer to "criminal offender record keeping," "criminal offenders," "criminal history record information," and "criminal justice," terms which are not in keeping with the provisions of the juvenile statutes. We believe it is a rational conclusion that the protection afforded juveniles as to the confidentiality of juvenile proceedings extends to the incident reports at issue here. Reading all the relevant statutes together, we do not believe that it is clear that the two incident reports here should be released in their entirety. Nor do we believe it is clear that the Police Department must withhold these two incident reports. We believe, on balance, it is reasonable to conclude that the Police Department may withhold or redact these incident reports. Since this matter is not clear, we will err on the side of protecting the juveniles named in the incident reports unless the Nebraska Legislature clearly expresses its intent to make incident reports involving juveniles which fall within the juvenile court's jurisdiction public records. We do not believe it is unreasonable for the Police Department to redact identifying information concerning juveniles, or information that could reasonably lead to the discovery of the identity of the juveniles, in these records[2]. As a result, we cannot find that the Police Department has improperly withheld information pertaining to juveniles in these two incident reports and we will not order them to produce unredacted versions.

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[2] Our office believes that there may be a middle ground between denying a public records request in its entirety because it contains identifying information of a juvenile, and releasing an unredacted incident report. The West Virginia Supreme Court, relying on that state's juvenile statutes, held that there must be a balance between the right of the public and press to access incident reports and the public policy in favor of withholding information regarding juveniles who have committed a crime. Ultimately, the court determined

> [o]ur goal is reasonable disclosure within the limits imposed by the State's interest in preserving the anonymity of juveniles. When incidents affecting public safety and welfare can be publicized without revealing the identities of juveniles involved by means other than the application of a blanket rule of nondisclosure, an incident report should be released to the press with the names of any juveniles (along with any information that could reasonably lead to the discovery of the identity of the juveniles) redacted; redaction offers the least intrusive means of protecting the identity of juveniles, while respecting the right of the public under the West Virginia Freedom of Information Act.

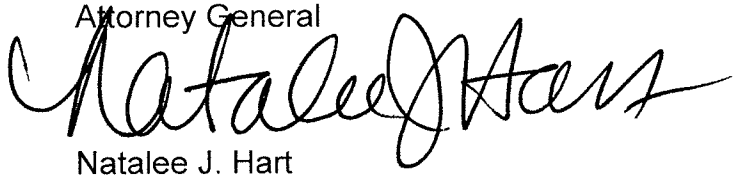
Ogden Newspapers, Inc. v. City of Williamstown, 192 W.Va. 648, 655, 453 S.E.2d 631, 638 (1994). The court further noted that "a properly redacted incident report does not rise to the level of a 'juvenile record' protected from disclosure (absent court order) by the confidentiality statutes. Therefore, allowing access to these reports will not impede any law enforcement function, nor will it compromise juvenile confidentiality." *Id.* at 656, 453 S.E.2d at 639.

CONCLUSION

For the reasons stated above, we believe the Blair Police Department has improperly denied access to certain records requested by the Blair Enterprise. We will direct the Police Department, through a copy of this letter to the City Attorney, to take immediate action to provide the Blair Enterprise with the records we believe to have been improperly withheld, which in this instance constitutes the entirety of the Incident Data Sheet Reports for Incident IDs 20150000109, 20150000139 and 20150000142. We decline to direct the Police Department to take any further action with respect to Incident IDs 20150000113 and 20150000140. We trust the Police Department will undertake this in good faith, thus, no further action will be taken by this office with respect to this complaint at this time.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



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cc: Adam Tripp

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