

STATE OF NEBRASKA  
**Office of the Attorney General**

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**JON BRUNING**  
ATTORNEY GENERAL

**LESLIE S. DONLEY**  
ASSISTANT ATTORNEY GENERAL

July 8, 2011

Dan Larsen, Director of Operations  
Evidence, Inc.  
P.O. Box 540995  
Omaha, NE 68154-8995

RE: *File No. 11-R-123; Fremont Police Department: Petitioner Dan Larsen, Evidence, Inc.*

Dear Mr. Larsen:

This letter is in response to your letter dated June 20, 2011, and received by us on June 23, 2011, in which you requested our assistance in obtaining certain public records belonging to the Fremont Police Department (the "Department"). As is our normal practice with such requests, we contacted the party against whom the complaint was made and requested a response. In this particular case, we contacted Chief of Police Timothy Mullen. On June 30, 2011, we received a response from Deputy Chief Jeff Elliott, who responded on behalf of the Department. On July 8, 2011, we contacted the Department, and requested the denial letter which we understand was sent to you on or around June 29, 2011. We have now considered your letter, Deputy Chief Elliott's response to your petition, and his denial letter to you under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010) ("NPRS"). Our findings in this matter are set forth below.

### FACTS

On June 15, 2011, you hand delivered a request for public records to Deputy Chief Elliott at the Department offices. Specifically, you requested

access to and copies of any and all records, reports, photographs, incident reports, etc. containing the names of Jan Mengedoht, (Jan Major Mengedoht), and Brenda Kalasek (or Brenda Kalasec) regarding an incident or incidents that may have occurred [sic] at the HyVee Grocery store on or about Valentines Day (February), 2010 or 2011.

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You indicate in your petition that your request was not complied with and that you did not receive "any written communication under the law" from the Department.

According to Deputy Chief Elliott, approximately one day after you requested the police report, he called you and left a message on your voicemail, indicating that the Department could not release the report, and to call him if you had any questions. Deputy Chief Elliott informs us that he was unaware that the Department's denial of the requested records had to be in writing. However, once learned, Deputy Chief Elliott sent you the following written response:

Your request for the release of a report concerning your client Jan Mengedoht is denied based on Neb. Rev. Stat §§ 84-712.05 § 5.

The report is considered an investigative report and the release of this report would hamper any further investigation into the matter and has the potential to cause harm to the victim.

### ANALYSIS

The Nebraska Public Records Statutes 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 which individuals may obtain a copy of 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 statutory exception to disclosure 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 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). Section 84-712.05 is comprised of eighteen categories of documents which may be kept confidential from the public at the discretion of the agency involved. In the present case, the Department has claimed the "investigatory records" exception, which provides in relevant part:

(5) Records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of

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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; . . .

Without question, the Department is a law enforcement agency, and the requested record was generated as a result of its investigation of a citizen complaint. In that regard, we believe the Department's reliance on Neb. Rev. Stat. § 84-712.05(5) is appropriate.

However, we must point out that while the legal basis for denial may have been proper, the technical aspects relating to the denial were not. In that regard, Neb. Rev. Stat. § 84-712.04 requires that when any person is denied any rights under §§ 84-712 to 84-712.03, the person so aggrieved shall receive in writing the following information:

- (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.

As a result, we would suggest to the Department, by sending a copy of our response to Deputy Chief Elliott, that in the future any denial of public records by it must be accompanied by the information required under § 84-712.04.

### **CONCLUSION**

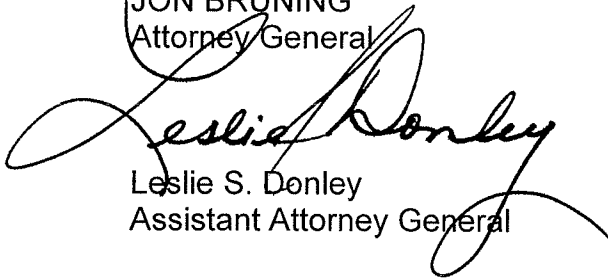
We believe that the requested documents belonging to the Fremont Police Department may be kept confidential under § 84-712.05(5). We further believe that the Department did not unlawfully deny your records request, and that no further action by this office is warranted. Accordingly, we are closing this records file.

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If you disagree with our legal analysis set out herein, you may wish to consult with your attorney to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

JON BRUNING  
Attorney General

A handwritten signature in black ink, appearing to read "Leslie S. Donley". The signature is written in a cursive style with a large, looping initial "L".

Leslie S. Donley  
Assistant Attorney General

cc: Deputy Chief Jeff Elliott

49-624-30