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DOUGLAS J. PETERSON
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June 10, 2021

Via email at [REDACTED]
Christopher Fielding

RE: *File No. 21-R-115; Omaha Police Department; Christopher Fielding, Petitioner*

Dear Mr. Fielding:

This letter is in response to your petition emailed to this office on May 22, 2021, and supplemented at our request on May 25. You are seeking our review of the denial of your public records request by the Omaha Police Department (“OPD”) submitted on or around April 3, 2021. Upon receipt of your petition, we forwarded it to Assistant City Attorney Bernard J. in den Bosch, and requested a response. We received OPD’s response on June 4, 2021. We considered your petition and OPD’s response in accordance with § 84-712.03(1)(b) of the Nebraska Public Records Statutes (“NPRS”), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020). Our findings in this matter are set forth below.

For your information, our review of this matter is limited to whether OPD may withhold the records in your request. We note that your petition contains a number of allegations unrelated to the incident in your request, including claims of human trafficking and other criminal activity occurring outside of the State of Nebraska. However, those allegations have no bearing on the propriety of OPD’s denial of your records request, and we did not consider them in our analysis.

RELEVANT FACTS

On April 3, 2021, you submitted a public records request to OPD seeking body cam footage, police report(s), 911 calls, and “dash cam” relating to an incident occurring on April 1, 2021, at 740 N. 14th Street, in Omaha, Nebraska. Your request indicated three OPD officers (Canterbury, Martin, and Kinnaman) were involved. On April 9, 2021, OPD Deputy Chief Anna Colón partially denied your request. She indicated that certain requested items would be withheld under the investigatory records exception in Neb. Rev.

Stat. § 84-712.05(5). With respect to the 911 calls, Deputy Chief Colón indicated that the Douglas County Sheriff maintained those records, but she would forward your request to that office for its consideration.

OPD'S RESPONSE

Mr. in den Bosch informs us that OPD does not contest that the requested video and police reports are “records’ within the terms of the [NPRS].” However, it is OPD’s position that your public records request was properly denied under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(5). He states that OPD “has the power to arrest persons for violations of law and a corresponding duty to investigate persons’ conduct when enforcing the laws,” citing Neb. Rev. Stat. §§ 14-102(25) and 14-606 (2012), as well as Home Rule Charter § 3.11. As a result, OPD is a “law enforcement agency” as referenced in § 84-712.05(5).

The OPD response includes an affidavit from Deputy Chief Colón, in which she describes the events occurring on April 1. Deputy Chief Colón informs us that there is no dash cam video since the interactions between the officers and the individuals involved in the incident did not take place around their cruiser. Officers were equipped with body cameras, and activated those cameras for their interaction with you and for other portions of the investigation. There were two investigative reports prepared as a result of your call for police service. She states that “[t]hese reports contain the summary of the investigation of the officers involved including personal information including phone numbers, dates of birth, etc. This information is not available to any member of the public even when purporting to be a victim of a crime.” Colón Affidavit at 5.

DISCUSSION

The basic rule for access to public records is set out in Neb. Rev. Stat. § 84-712(1) (2014). That provision states:

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.

“Public records” in Nebraska “include all records and documents, regardless of physical form, of or belonging to” governmental entities in the state, “[e]xcept when any other

statute expressly provides that particular information or records shall not be made public.” Neb. Rev. Stat. § 84-712.01(1) (2014). Thus, there is no absolute right to access public records in those instances where records are exempt from disclosure by statute. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 788, 943 N.W.2d 231, 240 (2020); *Aksamit Resource Mgmt. LLC v. Neb. Pub. Power Dist.*, 299 Neb. 114, 123, 907 N.W.2d 301, 308 (2018).

OPD is relying on the exception to disclosure in § 84-712.05(5) as its basis to deny you access to the body camera video and police reports. 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 training¹

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).² Our position is based in large part on the plain language of the exception,³ which expressly permits *law enforcement agencies* to withhold records developed or received by the agencies which relate to investigations of persons, institutions or businesses. There is no basis to conclude otherwise with respect to your request for investigatory records from OPD. Deputy Chief Colón states in her affidavit that the body camera video and reports were developed by OPD in response to your call for police service. Since the records are part of OPD’s investigation of the events occurring on April 1, 2021, those records may be properly withheld under § 84-712.05(5).

¹ There are two exceptions to the exception: (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.

² See, e.g., *File No. 19-R-106; Omaha Police Department; Reginald L. 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); and *File No. 16-R-102; Omaha Police Department; KETV, Petitioner* (February 8, 2016). Copies of our disposition letters relating to these files are accessible at <https://ago.nebraska.gov/disposition-letters>.

³ 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*, 299 Neb. at 123, 907 N.W.2d at 308; *Farmers Cooperative v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017).


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CONCLUSION

For the reasons discussed above, the Omaha Police Department may continue to withhold any investigatory records pertaining to the incident referenced in your request under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(5). Since no further action by this office is warranted, we are closing our file. If you disagree with our analysis under the NPRS, you may wish to review the judicial remedies available to you under § 84-712.03.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Bernard J. in den Bosch (via email only)

49-2715-29