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DOUGLAS J. PETERSON
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November 21, 2022

Via email at [REDACTED]
Kevin Rohde
2176 K Avenue
Hubbard, NE 68741

RE: *File No. 22-R-153; Dakota County Sheriff's Office; Kevin Rohde, Petitioner*

Dear Mr. Rohde:

This letter is in response to your public records petition received by this office on September 28, 2022, in which you sought our assistance in obtaining certain records from the Dakota County Sheriff's Office ("DCSO"). We considered your petition under the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2022). In accordance with our normal practice, we forwarded a copy of your petition to Dakota County Sheriff Chris Kleinberg, and requested a response from his office. We received correspondence from Sheriff Kleinberg on October 17, 18, 19, and 20, 2022, and a response from Dakota County Attorney Kim Watson on November 7, 2022. We have now completed our review of your petition and the DCSO's responses. Our findings in this matter are set forth below.

RECORDS REQUESTS

On August 1, 2022, you submitted two public records requests to Sheriff Kleinberg via the email address currently listed for him on the Dakota County website, ckleinberg@southsiouxcity.org. The first request read, in pertinent part, as follows:

I am requesting all documents relating to: the Personnel File of Brian Ellinger, all documents relating to any investigation into Brian Ellinger, all e-mail, hand-written, audio, video, or other documents (to include interactions between the ranks of Sheriff-Deputy) relating to any investigation into Brian Ellinger to include investigations for internal discipline.

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I am requesting that these documents are from the beginning of Brian Ellinger's employment until today's date.

The second request read, in pertinent part, as follows:

I am requesting all documents relating to: the Personnel File of Kevin W. Rohde, all documents relating to any investigation into Kevin W. Rohde, all documents relating to any investigation into Kevin W. Rohde regarding the Change of Status form filed by Chris Kleinberg, all e-mail, hand-written, audio, video, or other documents (to include interactions between the ranks of Sheriff-Deputy) relating to any investigation into Kevin W. Rohde to include investigations for internal discipline.

I am requesting that these documents are from the beginning of Kevin W. Rohde's employment until today's date.

You did not receive a response to either of these requests.

On August 11, you emailed the two requests recited above to Sheriff Kleinberg via the email addresses ckleinberg@dakotacosheriff.com and ckleinberg@southsiouxcity.org. You also delivered the two requests to the DCSO on the same date. You handed them to DCSO employee Mardi Schnee and informed her that they were for Sheriff Kleinberg. You did not receive a response to either of these requests.

On August 22, you once again delivered the two requests to the DCSO. You handed them to DCSO employee Mardi Schnee and informed her that they were for Sheriff Kleinberg. You did not receive a response to either of these requests. When you did not receive a response after submitting each request three times, over the course of three weeks, you filed the instant petition.

DCSO RESPONSE

This office initially had some difficulty obtaining a response from the DCSO as well. We forwarded a copy of your petition to Sheriff Kleinberg via U.S. mail and the email address listed for the Sheriff on the Dakota County website, ckleinberg@southsiouxcity.org, on September 29 and asked that a response be provided to our office by October 6. When we received no response by the requested date, we called the DCSO on October 11 and were informed that Sheriff Kleinberg was out of the office. We spoke with Deputy Walsh who informed us that he is the DCSO employee who usually handles public records requests. He stated that he was not aware of our office's previous request for a response. This office forwarded your petition to Deputy Walsh and asked that he provide a response by October 18. We had no further contact with Deputy Walsh.

On October 17, we received an email from Sheriff Kleinberg via email address ckleinberg@dakotacounty.ne.gov, indicating that he had been out of the office since September 29. He wrote in part:

I apologize for the delay, but did not get this letter until this morning (10/17). Also, I may have caught it via email but the email you have for me is incorrect. ckleinberg@southsiouxcity.org changed more than 6 years ago. ckleinberg@dakotacosheriff.com is my active email. Try as I have, not able to get the state to change it, I gave up years ago. . . .

Regarding his Open Records Request, I will not give anyone the personal files on a current Deputy without a court order.

On October 18, we received an email from Sheriff Kleinberg that indicated he found our original email which was sent to ckleinberg@southsiouxcity.org on September 29.

On October 19, we requested that the DCSO provide a more detailed response to the allegations in your petition. Sheriff Kleinberg stated that he had not received any of the emailed or hand-delivered records requests and repeated his position that he would not release the records without a court order. Despite our repeated requests, Sheriff Kleinberg did not identify under which section(s) of Neb. Rev. Stat § 84-712.05 the records were withheld.

On November 7, we received a response from Dakota County Attorney Kim Watson. Ms. Watson conceded that Sheriff Kleinberg's response to our office was "incomplete." She explained that the DCSO relied on Neb. Rev. Stat. § 84-712.05(2) and (8) to withhold the personnel records of Brian Ellinger. She provided a description of the documents included in Mr. Ellinger's personnel file and asserted that each of the documents could be withheld either because it was "personal" in nature under subsection (8) or a "work-related medical record" under subsection (2). Ms. Watson informed us that "[p]resently, Kevin Rohde's personnel file cannot be located" and that the file "cannot be reproduced unless the file is found or returned to the Sheriff." However, she asserted that "the same exemptions to disclosure identified above as relates to Mr. Ellinger's file likely apply to Mr. Rohde's personnel file contents."

Ms. Watson further stated that

. . . Sheriff Kleinberg reports he is not aware of any past or present "investigation into" either Kevin Rohde or Brian Ellinger by his office, nor any written "complaints filed against" either of them. To the extent either Mr. Rohde or Mr. Ellinger was subject to internal discipline during their employment with Dakota County, and to the extent there was any "investigation" to [sic] such a matter, any related performance documents would have been placed in the employee's personnel

file(s) and would be exempt from disclosure under Neb. Rev. Stat. § 84-712.05(8), to the extent they still exist.

Finally, Ms. Watson indicated that the DCSO is in possession of a Change in Status Form submitted to the Nebraska Law Enforcement Training Center ("NLETC") regarding your separation from employment as well as a document created at the request of the NLETC in connection to that form. The DCSO is willing to produce those records unless the NLETC requires them to be withheld as part of an investigation.

DISCUSSION

1. Failure to Respond

You allege that the DCSO violated the NPRS by failing to respond to your records requests. The NPRS provide that, upon receiving a request for records, the custodian of the public records must provide a timely response. Specifically, Neb. Rev. Stat. § 84-712(4) provides:

Upon receipt of written request for access to or copies of a public record, the custodian of such record shall provide to the requester as soon as is practicable and without delay, but not more than four business days after actual receipt of the request, an estimate of the expected cost of the copies and either (a) access to or, if copying equipment is reasonably available, copies of the public record, (b) if there is a legal basis for denial of access or copies, a written denial of the request together with the information specified in section 84-712.04, or (c) if the entire request cannot with reasonable good faith efforts be fulfilled within four business days after actual receipt of the request due to the significant difficulty or the extensiveness of the request, a written explanation, including the earliest practicable date for fulfilling the request, an estimate of the expected cost of any copies, and an opportunity for the requester to modify or prioritize the items within the request. . . . The four business days shall be computed by excluding the day the request is received, after which the designated period of time begins to run. Business day does not include a Saturday, a Sunday, or a day during which the offices of the custodian of the public records are closed.

If access to public records is denied, Neb. Rev. Stat. § 84-712.04(1) requires the agency to provide to the requestor a written denial that includes the following:

(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.

Sheriff Kleinberg claims that the DCSO's duty to respond was never triggered because he did not receive any of your multiple emailed or hand-delivered records requests. There has been some confusion over whether the emailed requests were sent to the correct email address. Our office is in receipt of the record request emails sent by you to Sheriff Kleinberg's various email accounts. The first set was sent to Sheriff Kleinberg via the email address listed on the Dakota County website, ckleinberg@southsiouxcity.org. Sheriff Kleinberg stated, in his correspondence with us on October 17, that the ckleinberg@southsiouxcity.org was an "incorrect" email address. However, he appears to continue to have access to that account because he notified us on October 18 that he was able to locate the email we sent to that address. The second set of requests were emailed to that address and ckleinberg@dakotacosheriff.com. Sheriff Kleinberg indicated to us, in his October 17 correspondence, that ckleinberg@dakotacosheriff.com is his active email address. We conclude that, whether or not he viewed them, Sheriff Kleinberg was in receipt of your first set of requests on August 1 and your second set of requests on August 11. The failure of the DCSO to respond to either set of requests within four days is a violation of the NPRS.

Sheriff Kleinberg also states that he did not receive the records requests you claim to have hand delivered to DCSO employee Mardi Schnee at DCSO offices on August 11 and 22. We have no reason to disbelieve your account of events and can only assume that your records requests, once delivered to the DCSO, were somehow misrouted or misplaced before they reached Sheriff Kleinberg. Nonetheless, the DCSO's duty to respond under the NPRS was triggered when the records requests were hand delivered to the DCSO on August 11 and 22. The failure of the DCSO to respond to either set of requests within four days is a violation of NPRS.

While we find the DCSO's handling of your requests concerning, we do not have evidence that the failure to respond in this case was willful. Nonetheless, we will remind the DCSO, by sending a copy of this letter sent to Sheriff Kleinberg and Ms. Watson, that its duty to provide a response is triggered when a public records request is received by DCSO. All responses must strictly comply with Neb. Rev. Stat. § 84-712(4). We strongly encourage the DCSO to review its procedures for handling public records requests received by both U.S. mail and email so that response deadlines are not missed in the future.

2. Withholding Requested Records

You allege that the DCSO violated the NPRS by failing to provide the records you requested. The NPRS provide that persons are permitted to review public records “except as otherwise expressly provided by statute.” Neb. Rev. Stat. § 84-712(1). The types of public records which may be withheld from the public are enumerated in Neb. Rev. Stat. § 84-712.05. In this instance, the DCSO did not provide you a reason why the records were withheld.

In her response to this office, Ms. Watson explained that Mr. Ellinger’s personnel file was withheld pursuant to Neb. Rev. Stat. § 84-712.05(2) and (8). Section 84-712.05(2) provides that medical records may be lawfully withheld from the public. In addition, Neb. Rev. Stat. § 84-712.05(8) provides that “[p]ersonal information in records regarding personnel of public bodies other than salaries and routine directory information” may also be withheld.¹ Ms. Watson provided this office an itemized list of the types of documents contained within Mr. Ellinger’s personnel file and we conclude that all items fall within one of the above listed exceptions. Except for the salary and routine directory information, if such information is contained therein, the DCSO may lawfully withhold these records.²

Ms. Watson indicated that the DCSO has lost your personnel file. She asserted that it is very likely that your file, if found, would contain the same types of documents as Mr. Ellinger’s and that the records could be withheld for the same reasons. While it is concerning that your file cannot be located, we agree that, if it were to be located, the DCSO would most likely be able to withhold the documents contained therein pursuant to Neb. Rev. Stat. § 84-712.05(2) and (8). This office has previously determined that records may be withheld pursuant to Neb. Rev. Stat. § 84-712.05(8) even when the personal information they contain is personal to the requestor.³

¹ In fact, the Nebraska Supreme Court in *Steckelberg v Nebraska State Patrol*, 294 Neb. 842, 885 N.W.2d 44 (2016), found that it was unnecessary, to assert the exception, that records be kept in a personnel file. “[T]he records need only be personal information about personnel, defined as persons employed by an organization.” *Id.* at 850, 885 N.W.2d at 50.

² See, e.g., *File No. 22-R-141; City of Omaha; Sheriff Tim Dunning, Petitioner*, dated August 26, 2022 (concluding that the City of Omaha’s reliance on § 84-712.05(8) as a basis to withhold records pertaining to former police officers’ retirement, employee misconduct, and disciplinary matters was appropriate.).

³ See, e.g., *File No. 22-R-101; Department of Health and Human Services; Lisa Leick, Petitioner*, January 18, 2022; and *File No. 18-R-102; Nebraska Department of Revenue; Grace Willnerd, Petitioner*, January 18, 2018.

Finally, Sheriff Kleinberg “reports that he is not aware of any present or past ‘investigation into’ either Kevin Rohde or Brian Ellinger by his office, nor any written ‘complaints filed against’ either of them.” In addition, Ms. Watson indicated that

[t]o the extent either Mr. Rohde or Mr. Ellinger was subject to internal discipline during their employment with Dakota County, and to the extent there was any “investigation” to [*sic*] such a matter, any related performance documents would have been placed in the employee’s personnel file(s) and would be exempt from disclosure under Neb. Rev. Stat. § 84-712.05(8), to the extent they exist.

We agree that internal discipline records may be withheld as records containing personal information regarding personnel pursuant to § 84-712.05(8). With regard to your Change in Status Form and the related document produced at the request of the NLETC, such documents may be lawfully withheld as part of an NLETC investigation pursuant to Neb. Rev. Stat. § 84-712.05(5).

CONCLUSION

For the reasons stated above, we conclude that the Dakota County Sheriff’s Office failed to properly respond to your records requests in violation of the NPRS. However, we find that the documents you requested may be lawfully withheld pursuant to Neb. Rev. Stat. § 84-712.05(2), (5), and (8).

We will take this opportunity to remind the Dakota County Sheriff’s Office, through a copy of this letter, of its duty to provide a written response to all public records requests no later than four business days following receipt. The failure of the DCSO to respond to your three separate records requests is concerning and we strongly recommend that the DCSO review its procedures for processing public records requests received through both email and U.S. mail so that it does not miss deadlines in the future. As for the DCSO’s failure to provide a response sufficient to comply with Neb. Rev. Stat. § 84-712.04(1) after it was contacted by this office, Ms. Watson has assured us that the “Sheriff has now been instructed on the requirements in Neb. Rev. Stat. § 84-712.04 so that he understands these requirements and will follow them in the future.”

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Finally, we do not believe that further action by this office is necessary at this time and we are closing this file. If you disagree with our analysis, you may wish to discuss this matter with a private attorney to determine what additional remedies, if any, are available under the NPRS.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

A handwritten signature in blue ink that reads "Elizabeth Gau". The signature is written in a cursive, flowing style.

Elizabeth O. Gau
Assistant Attorney General

CC:
Kim Watson, Dakota County Attorney
Chris Kleinberg, Dakota County Sheriff

03-056-30