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October 7, 2022

Matthew Pitzer, 31209-047
Unit C
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Sandstone, MN 55072

RE: *File No. 22-R-151; Douglas County Attorney's Office; Matthew Pitzer, Petitioner*

Dear Mr. Pitzer:

This letter is in response to your public records petition received by this office on September 22, 2022, in which you sought our assistance in obtaining certain records from the Douglas County Attorney's Office ("DCAO"). We considered your petition under the provisions of the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020, Supp. 2021), amended 2022 Neb. Laws LB 876 and LB 1246. In accordance with our normal practice, we forwarded a copy of your petition to Deputy County Attorney William E. Rooney III, and requested a response from his office. We received Mr. Rooney's response on September 30. We have now completed our review of your petition and the DCAO's response. Our findings in this matter are set forth below.

By letter dated April 25, 2022, you requested the following records from the DCAO:

[Y]our list of law enforcement officers who you do not call as witnesses in a criminal trial, due to previous credibility issues as witnesses. These are known as your "law enforcement integrity list" or better known as "Brady List," after *Brady v. Maryland* 373 U.S. 83 (1983)[sic] please provide, where possible: Officer's name, agency, rank and date added to the list.

Matthew Pitzer
October 7, 2022
Page 2

Alternatively, you stated: "If you do not release your list please indicate if your office maintains a "Brady List" or "law enforcement integrity list" and if local law enforcement officers are on the list."

Mr. Rooney denied your request for his office's Brady List by letter dated May 27, stating that

[a]ny "Brady Lists" utilized by DCAO would be records developed as part of a law enforcement agency's investigation and constitute part of the investigation and/or would be records which include personal information regarding personnel. Therefore, the DCAO withholds the requested information pursuant to Nebraska Revised Statutes sections 84-712(1), 84-712.01(1), and 84-712.05, subparts (5) and (7).

The complete texts of § 84-712.05(5) and (7) were enclosed with Mr. Rooney's response.

You claim that the exception in § 84-712.05(5) relating to investigatory records should not apply because "[s]uch lists are not developed in the course of a particular investigation, but are maintained by either the Prosecution or Law enforcement agency" You also assert that "[t]he public has a right to know if an officer is NOT considered reliable to testify" (your emphasis) or why they are still employed or conducting investigations. You state that "the list should not be exempted from a citizen's right to see the records under Neb. Rev. Stat. 84-712.01 et seq.," and that this "position does not comport with the letter or spirit of the openness intended under the law and violates my right to access the documents." You further state:

It appears from the Attorney's Office response that there is no case law, or decisions to support the D.A.'s opinion (as they cited none) and this is a matter that your office (the Attorney General) should rule on.¹

Mr. Rooney informs us that pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Giglio*, 405 U.S. 150 (1972), prosecutors in his office "have a duty in criminal cases to investigate whether any law enforcement officers involved in matters giving rise to a given criminal prosecution have a history of, among other things, untruthfulness, criminal convictions, candor issues, or other types of issues placing their credibility into question." He states that the DCAO relies on the investigations and information provided by the other law enforcement agencies in Douglas County "so the prosecutor may, in turn, produce any such evidence through discovery to defense counsel." Mr. Rooney asserts that the requested list is a product of those investigations and the manner in which the DCAO complies with its obligations under *Brady* and *Giglio*. He further asserts that the DCAO is a law enforcement agency with a duty of investigation,

¹ To be clear, public bodies are not required to cite to "case law" or "decisions" to support their decisions to deny a requester access to public records, so long as they can provide, in accordance with § 84-712.04, a statutory basis to do so.

thus meeting required elements in § 84-712.05(5). Because the Brady/Giglio list in question constitutes part of an investigation, Mr. Rooney contends that his office properly withheld the records under § 84-712.05(5).

With respect to withholding the Brady/Giglio list under the exception in § 84-712.05(8)² (personal information of personnel of public bodies), Mr. Rooney states that “the conduct in question of any given law enforcement officer on the *Brady/Giglio* list, in most, if not all cases, occurred while the individual was in uniform and likely resulted in discipline.” He represents that this is the case for the two Douglas County Sheriff employees on the list. In this respect, Mr. Rooney asserts that § 84-712.05(8) provides a basis to withhold any records documenting the disciplinary action imposed since that information is personal to the officer involved, and does not constitute salary or routine directory information.

DISCUSSION

The basic rule for access to public records is set out in Neb. Rev. Stat. § 84-712(1) (2014). This provision generally states that “[e]xcept as otherwise expressly provided by statute,” all Nebraska citizens and other interested persons have 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. Neb. Rev. Stat. § 84-712(1) (2014) (emphasis added). “Public records” are defined as follows:

Except when any other statute expressly provides that particular information or records shall not be made public, public records shall include 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, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form shall remain a public record when maintained in computer files.

Neb. Rev. Stat. § 84-712.01(1) (2014) (emphasis added). Thus, in those instances where the Legislature has provided that a particular record shall be confidential or may be withheld at the discretion of the records custodian under § 84-712.05, there is no right of access.

As noted above, the DCAO is relying on the exceptions to disclosure in Neb. Rev. Stat. § 84-712.05(5) and (8) as its basis to withhold the requested Brady/Giglio list. Those exceptions pertain to:

² Renumbered as subsection (8) as a result of the enactment of 2022 Neb. Laws LB 1246, § 5 (effective July 21, 2022).

(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 training³

and

(8) Personal information in records regarding personnel of public bodies other than salaries and routine directory information

Upon review, we find that the DCAO has provided sufficient information to demonstrate the applicability of both exceptions. The DCAO is a law enforcement agency charged with duties of investigation of persons, institutions and businesses. The prosecutors in the DCAO have a duty to investigate whether any law enforcement officers involved in a criminal prosecution have exhibited certain conduct that would place their credibility at issue. The DCAO receives and relies on investigatory records from other law enforcement agencies for purposes of meeting its duties under *Brady* and *Giglio*. Thus, the *Brady/Giglio* list is an investigatory record developed by the DCAO in conjunction with investigatory records received from other law enforcement agencies. Also, to the extent the *Brady/Giglio* list contains any information of a personal nature relating to law enforcement officials (e.g., disciplinary action imposed), § 84-712.05(8) provides a further basis to withhold.

Lastly, your right to access public records in Nebraska is not absolute. There is no Nebraska law that requires disclosure of a *Brady/Giglio* list. Moreover, legislation introduced during the 2022 legislative session of the Nebraska Legislature that sought to make a “*Brady and Giglio list*” a “public document” and subject to posting on city, county and state websites was unsuccessful. Your access to information contained in a *Brady/Giglio* list is determined on a case-by-case basis in the context of a criminal prosecution, not through a request made under § 84-712 of the NPRS.

³ 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.

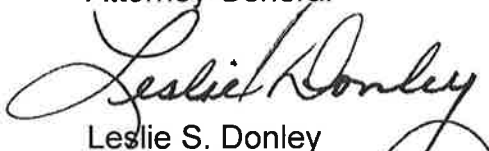
Matthew Pitzer
October 7, 2022
Page 5

CONCLUSION

Based on the foregoing, we conclude that the DCAO may continue to withhold its Brady/Giglio list under the exceptions set out in § 84-712.05(5) and (8). Since no further action by this office is necessary, we are closing this file. If you disagree with the conclusion reached above, you may wish to consider the additional remedies available to you under the NPRS.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: William E. Rooney III

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