



STATE OF NEBRASKA
Office of the Attorney General

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MIKE HILGERS
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April 5, 2023

Via email at [REDACTED]
Robert A. Scott, Jr.

RE: *Public Records Matter Involving the Scottsbluff Police Department and the
Scottsbluff County Attorney*
Our File No. 20231028

Dear Mr. Scott:

This letter is in response to your correspondence emailed and received by this office on March 21, 2023, in which you requested our assistance in obtaining certain “body cam footage” from the Scottsbluff Police Department (“SPD”) and the Scottsbluff County Attorney (“SCA”). We construed your correspondence to be a petition for review under § 84-712.03(1)(b) of the Nebraska Public Records Statutes (“NPRS”), Neb. Rev. Stat. §§ 84-712 to 84-712.09 (2014, Cum. Supp. 2022). Our findings in this matter are set forth below.

DISCUSSION

This matter involves two public records requests¹ submitted to the SPD and the SCA on March 14, 2023. Both requests sought public records of “Officer Johnathan Weitzel,” “Sgt. Eckerburg #121,” and “Office[r] Weber #132,” pertaining to “[b]ody cam footage on 09/25/2022 at 01:30 until 02:30 that records the time these officers was at 2027 Ave E, Scottsbluff, NE 69361.”

¹ We note that you made your requests under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), as well as the NPRS. Please note that FOIA is a federal law that generally provides the right to access records from federal agencies. FOIA does not provide a basis for you to access records of state or local governmental entities or officials in Nebraska.

Robert A. Scott, Jr.
April 5, 2023
Page 2

SPD Captain Brian Wasson and SCA Dave Eubanks responded to your requests by letter dated March 15. Both denied you access to the requested video under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(5). Mr. Eubanks' response indicated that the SPD is the custodian of the requested records.

You state in your correspondence to this office that your request "was refused by both agencies."

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. In addition, Neb. Rev. Stat. § 84-712.05 contains twenty-five categories of public records that may be withheld at the discretion of the public body so long as those records have not been "disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties" The burden of showing that a statutory exception applies to disclosure of particular records rests upon the public body opposing disclosure. *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).

Captain Wasson and Mr. Eubanks are relying on the exception to disclosure in § 84-712.05(5) as the basis to deny you access to the body cam footage. 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 training

This office has previously considered the propriety of withholding body camera video under the exception to disclosure in § 84-712.05(5). For example, in *File No. 21-R-115; Omaha Police Department; Christopher Fielding, Petitioner* (June 10, 2021), the petitioner sought body camera video of his interactions with police officers whom he had called for assistance. The Omaha Police Department (“OPD”) represented that the officers activated the cameras at the scene, and the video was part of two investigations relating to petitioner’s calls for service. We concluded that the OPD could withhold the video based in large part on the plain language of the exception,² which expressly allows *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 body cam footage developed by the SPD on September 25, 2022. Captain Wasson’s response confirms that the requested records “constitute part of an examination or investigation by the [SPD] following a citizen complaint” The incident report included with your petition indicates that “[o]fficers were dispatched to 2027 Avenue E in reference to a disturbance” and that an investigation took place which ultimately resulted in your arrest.³ Consequently, since the body cam footage is a record developed by the SPD relating to its duty of investigation, those records may be properly withheld under § 84-712.05(5).⁴ We further find that county attorneys have the ability to withhold investigatory records received from law enforcement agencies, like the body cam footage at issue here, under the exception.

² 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).

³ Our disposition only addresses your ability to obtain the body cam footage under the NPRS. We express no view as to whether you have other avenues to obtain such information.

⁴ Other files in which the Attorney General concluded that the law enforcement agency involved could withhold investigatory records under § 84-712.05(5) include: *File No. 22-R-136; Douglas County Sheriff; Kathleen M. Foster, Petitioner* (July 29, 2022); *File No. 21-R-142; Hastings Police Department; Steven Stec, Petitioner* (December 17, 2021); *File No. 21-R-141; Omaha Police Department; Amanda Coleman, Petitioner* (November 3, 2021); *File No. 21-R-139; Nebraska State Patrol; Chris Dunker, Lincoln Journal Star, Petitioner* (October 20, 2021); *File No. 19-R-130; City of Omaha Police Department; David Earl, KETV NewsWatch 7, Petitioner* (December 20, 2019); *File No. 19-R-106; Omaha Police Department; Reginald L. Young, Petitioner* (January 31, 2019); and *File No. 18-R-106; Lincoln Police Department; Juanita Phillips, Petitioner* (March 22, 2018). Copies of our disposition letters relating to these files are accessible at <https://ago.nebraska.gov/disposition-letters>.

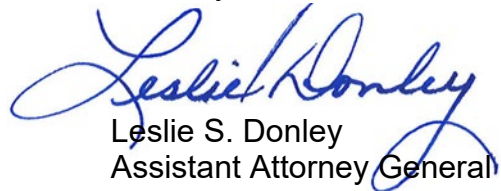
Robert A. Scott, Jr.
April 5, 2023
Page 4

CONCLUSION

For the reasons discussed above, the SPD and the SCA may continue to withhold any body cam footage pertaining to the September 25, 2022, incident 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 set forth above, you may wish to review the judicial remedies available to you under § 84-712.03.

Sincerely,

MIKE HILGERS
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Captain Brian Wasson (via email only)
Dave Eubanks (via email only)

49-3190-30