



STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

MIKE HILGERS
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

November 29, 2023

Via email at [REDACTED]
Paul J. Hansen

[REDACTED]
[REDACTED]

RE: *Public Record Matter Involving the Nebraska State Patrol*
Our File No. 20231174

Dear Mr. Hansen:

This letter is in response to correspondence received by this office on October 30, 2023, in which you requested our review of the denial of your records request by the Nebraska State Patrol (NSP). Upon receipt, we forward your correspondence to NSP legal counsel, Jessica Forch, and requested a response. We received Ms. Forch's response on November 14. We subsequently wrote to you indicating that we had conducted a preliminary investigation of your petition but needed additional time to finalize our response. We have now completed our review in accordance with the provisions 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.

RELEVANTS FACTS

By letter dated June 23, 2023, addressed to the NSP's "Central Repository for Nebraska Criminal History Records," you requested the following information "[p]ursuant to Nebraska Revised Statute 84-712.01, and or – 5 U.S.C. § 552, per the 'Supremacy Clause'":

1. All searches that were activated to gain access to the criminal history/public records of me that are of record from the date of my birth to the present date.

2. Basically, I am seeking information associated with, like searches. [sic] such as when I am pulled over, or detained, for any reason, and an officer calls in a search to see if a US, or county, court ordered warrant is existing for my arrest, or outstanding tickets and such.
3. **criminal** background check, criminal record, arrest records.
4. confidential criminal records.
5. If possible, I wish to have the list of who, when, how, and what info was ascertained, as to each individual inquirer, that was made over the many years.

(Your emphasis.) Ms. Forch responded to your request on October 6. She indicated that the NSP considered the requested information to be investigative in nature and thus was denying you access to it under Neb. Rev. Stat. § 84-712.05(5).

You indicate in your petition that you requested “all records as to all arrests . . . includ[ing] all court ordered warrants, and all city, county, or state, officer initiated ‘come to a rest’ (traffic stops) so associated with, that are archived in any city, county, or state record, of the STATE OF NEBRASKA. (Your emphasis.) You assert that it is “implausible” that the arrest information falls under the “statutory exemptions” in § 84-712.05(5), i.e., “examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training” Thus, you argue that the NSP cannot rely on the exception as its basis to withhold the requested records.

According to Ms. Forch, the NSP construed your request to encompass “all the records that show when [your] information was ‘run’ in our systems or when an electronic search was conducted about [you].” She indicated that the NSP has records that show your name was searched in the NSP database. However, the NSP considers these searches to be part of the investigative process and, therefore, subject to withholding under § 84-712.05(5). The NSP asserts that you did not request a criminal history check, but rather wanted “to know ‘who, when, how, and what info was ascertained,’ during searches of him during his lifetime.” Ms. Forch states that your “criminal history, arrest record, warrants, etc. were not what was requested and, therefore, were not withheld. The information regarding who searched [your] criminal history and in what capacity is what was denied as investigative.”

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; *Aksamit Resource Mgmt. LLC v. Neb. Pub. Power Dist.*, 299 Neb. 114, 123, 907 N.W.2d 301, 308 (2018).

The NSP is relying on § 84-712.05(5) as its basis to deny you access to its search records. This exception allows the following records to be withheld at the discretion of the public body unless publicly disclosed in an open court, administrative proceeding, or meeting or disclosed by a public entity pursuant to its duties:

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 training¹

There is no question that the NSP is a law enforcement agency charged with duties of investigation. In this respect, Neb. Rev. Stat. § 81-2004 (2014) states that “[t]he Nebraska State Patrol, its subordinate officers such as lieutenant colonel, majors, captains, lieutenants, sergeants, corporals, patrolmen, and other employees shall be used primarily for the enforcement of the traffic and motor vehicle laws of the State of Nebraska and the handling of traffic within the state.” In addition, Neb. Rev. Stat. § 81-2005 (2014) states in part that

the Superintendent of Law Enforcement and Public Safety and all officers of the Nebraska State Patrol, except all carrier enforcement officers assigned to the carrier enforcement division, shall have the power:

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.

- (1) Of peace officers for the purpose of enforcing the Motor Vehicle Operator's License Act, the Motor Vehicle Registration Act, the Nebraska Rules of the Road, and any other law regulating the registration or operation of vehicles or the use of the highways;
- (2) To make arrests upon view and without warrant for any violation committed in their presence of any of the provisions of the Motor Vehicle Operator's License Act, the Motor Vehicle Registration Act, the Nebraska Rules of the Road, or any other law regulating the operation of vehicles or the use of the highways, if and when designated or called upon to do so as provided by law;
- (3) To make arrests upon view and without warrant for any violation committed in their presence of any provision of the laws of the state relating to misdemeanors or felonies, if and when designated or called upon to do so as provided by law[.]

Consequently, any search records developed by the NSP relating to its duty to enforce the state's traffic laws, misdemeanors and felonies, and investigate violations of those laws, may be properly withheld under § 84-712.05(5).

However, while you may not be able to obtain the NSP's search records, you have the ability to access your criminal history by requesting a criminal history check. The dissemination of this information² is governed by the Security, Privacy, and Dissemination of Criminal History Information Act, Neb. Rev. Stat. §§ 29-209, 29-210, 29-3501 to 29-3528, and 81-1423 (2016, Cum. Supp. 2022), not the NPRS or provisions of the U.S. Code. Information pertaining to requesting your criminal history may be found on the NSP's website at <https://statepatrol.nebraska.gov/services/criminal-history-record-requests>.

CONCLUSION

We conclude that the NSP may lawfully withhold its search records under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(5). You have the ability to request your criminal history by following the process outlined on the webpage referenced above. Since the NSP did not unlawfully deny you access to public records, no further action by this office is warranted. Accordingly, we are closing this file.

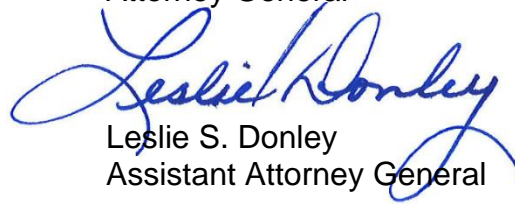
² Neb. Rev. Stat. § 29-3506 (2016) defines "criminal history record information" as "information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of issuance of arrest warrants, arrests, detentions, indictments, charges by information, and other formal criminal charges, and any disposition arising from such arrests, charges, sentencing, correctional supervision, and release. Criminal history record information shall include any judgment against or settlement with the state as a result of a wrongful conviction pursuant to the Nebraska Claims for Wrongful Conviction and Imprisonment Act. Criminal history record information shall not include intelligence or investigative information."

Paul J. Hansen
November 29, 2023
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If you disagree with our analysis, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, may be available to you under the NPRS.

Sincerely,

MIKE HILGERS
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Jessica Forch (via email only)

49-3394-30