



STATE OF NEBRASKA
Office of the Attorney General

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December 12, 2023

Via email to [REDACTED]
Lee Rood

[REDACTED]

RE: *Public Record Matter Involving the Boys Town Police Department*
Our File No. 20231184

Dear Ms. Rood:

This letter is in response to your petition received by this office on November 27, 2023, in which you requested our assistance in obtaining certain records from the Boys Town Police Department (BTPD). We forwarded your petition to Chief of Police William Clark upon receipt, who subsequently provided us your public records requests and the Department's responses to those requests. We have completed our review of your petition and those materials under 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.

As an initial matter, you indicate in your petition that you made repeated requests to the Boys Town's spokesperson, Kara Neuverth, as well as Chief Clark, to obtain records. However, we understand that two separate entities are implicated: "Boys Town," a nonprofit organization, and the Village of Boys Town, a governmental entity. Chief Clark clarified to this office that he does not work for the nonprofit, the BTPD does not have a spokesperson, and Chief Clark has no independent knowledge of your discussions with Ms. Neuverth. Also, as a general rule, nonprofit organizations have no legal obligation to produce records under § 84-712. Consequently, this letter will focus solely on the BTPD's denials of your record requests.

RELEVANTS FACTS

Your petition involves three requests made to the BTPD. The first request, submitted on August 8, 2023, sought "FBI Crime Reports, 2020, 2021, 2022." Chief Clark responded by letter dated the same day, indicating that the BTPD had no responsive records. He suggested that you try accessing the FBI statistics online.

Your second request, dated September 21 and received by the BTPD on September 25, sought the following:

[T]he basic Boys Town Police Department incident reports (names redacted) related to any report [*sic*] rape offenses logged by the department from Jan. 1, 2018 until today. These reports would include dates and basic facts and circumstances of the alleged offenses.

Records from the FBI's uniform crime report and the Nebraska Crime Commission show your department documented at least 12 over the last five years.

You also asked Chief Clark "to explain as a public servant" the number of alleged rape offenses referred or rejected for prosecution and tried in the criminal court system.

Chief Clark responded to your request on September 29. He denied you access to the records under the investigatory records exception in § 84-712.05(5). Chief Clark informed you that § 84-712 does not require him to answer questions, among other things, citing opinions of the Attorney General in support. He further stated that "[t]he requested records were developed and/or received by law enforcement and are part of numerous ongoing investigations. There are no reasonably segregable public portions of the requested records. See § 84-712.06."

On November 4, you emailed Chief Clark renewing your previous records request. This time you cited to Neb. Rev. Stat. § 29-3521 of 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), as authority to compel disclosure. This statute provides, in part, that "original records of entry such as police blotters, offense reports, or incident reports maintained by criminal justice agencies" are public records subject to dissemination.

In his response, Chief Clark agreed that § 29-3521 makes incident reports public records. However, he noted that § 84-712 provides exceptions for the disclosure of public records, and that BTPD was relying on the exception in § 84-712.05(5) to withhold the reports. He noted further that there were no time restrictions in the exception. With respect to § 29-3521, Chief Clark advised that "Nebraska courts and [this] office "have opined that law enforcement agencies may withhold investigative records, including offense and incident reports, under § 84-712.05(5)." Chief Clark also noted that in

Fourcloud v. City of Fremont, 1993 WL 259351 (Neb. Ct. App. 1993), the Court of Appeals held that offense reports and incident reports, while public records, “may still be withheld from the public if they are part of intelligence or investigative information under Neb. Rev. Stat. § 84-712.05(5).”

DISCUSSION

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

[e]xcept 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.

(Emphasis added.) “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. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009); *State ex rel. Nebraska Health Care Ass’n v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

The BTPD is relying on § 84-712.05(5) as its basis to withhold the requested incident reports. This exception is one of twenty-five categories of records that may be withheld at the discretion of the records custodian so long as those records have not been “publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties” This specific category 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

Neb. Rev. Stat. § 84-712.05(5) (Cum. Supp. 2022).

Chief Clark represents to this office that the sexual assault reports/investigation “information generally comes in from HHS as a CAN [Child Abuse Neglect] report directly to Law Enforcement requesting an Investigation concerning the Allegation or a report to law Enforcement from a mandatory reporter.” He stated that the victim’s information is kept confidential in accordance with state and federal law. In addition, student information is protected since “our campus is comprised of students who live on campus and reside with staff who many of the times are the Mandatory reporter.” Chief Clark considers all of this information to be investigative. He further represents that the BTPD “is charged with the duties of investigation of these types of criminal cases and the records requested constitute a part of those investigative records.”

We have considered your position that, based on § 29-3521, “Nebraska law seems clear that incident reports are intended to be accessible to the public.” In fact, you indicate that you have received “similar reports” in another county where Boys Town operates an alternative school. You concede that while it may be necessary to withhold records pending prosecution, “the press and public have every right in a democracy to see what offenses are reported in their communities, including basic facts and circumstances, as well as understand how a taxpayer-supported government agency¹ responded to a report.” However, as Chief Clark informed you in his November 9, 2023, letter, access to incident reports is not absolute. As stated by the Nebraska Court of Appeals:

Although the trial court found that criminal history did not include intelligence and investigative information, that finding is not dispositive of the case. Section 29-3521 states that “offense reports” or “incident reports” maintained by criminal justice agencies are “public record for purposes of dissemination.” Section 84-712.05 provides that certain records may be withheld “when the records constitute a part of the examination, investigation, intelligence information.” We think a logical and consistent interpretation of both statutes supports the conclusion that in appropriate circumstances, offense reports and incident reports may be withheld by the City if and when such reports are part of intelligence or investigative information, pursuant to § 84–712.05(5).

Fourcloud v. City of Fremont, 1993 WL 259351 *3.

Finally, this office has considered the propriety of law enforcement agencies withholding investigatory records under § 84-712.05(5) on multiple occasions through the years. We have consistently held that such withholding is permissible, relying in large part on the plain language of the exception, which expressly permits law enforcement agencies to withhold records developed or received by those agencies in the course of

¹ Chief Clark advises that the village has no tax base and is not supported by taxpayers.

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an investigation. We have no basis to conclude otherwise with respect to your particular request.

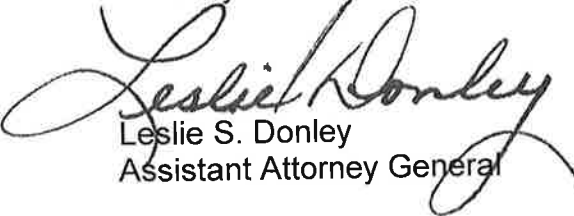
CONCLUSION

Based on the foregoing, we conclude that requested incident reports may be withheld by the BTPD under the exception to disclosure in § 84-712.05(5). Since you have not been unlawfully denied access to public records, no further action by this office is necessary and we are closing our file.

If you disagree with the analysis we have set out above, you may wish to contact your private attorney to determine what additional remedies, if any, are available to you under the NPRS.

Sincerely,

MIKE HILGERS
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Chief William Clark (via email only)

49-3405-30