



STATE OF NEBRASKA
Office of the Attorney General

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MIKE HILGERS
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April 19, 2024

Via email at [REDACTED]
Rosellen A. Vogel

RE: *Public Records Matter Involving the Nebraska State Patrol*
Our File No. 20241067

Dear Ms. Vogel:

This letter is in response to your correspondence dated April 2, 2024, and received by this office on April 5. You have requested our assistance in obtaining access to records of the Nebraska State Patrol (NSP) pertaining to the shooting of your brother, John A. Vogel, on August 14, 2021. On April 9, we discussed this matter with NSP general counsel, Mark Boyer. At our request, Mr. Boyer provided us copies of your public records request and the response you received from the NSP. We construed your correspondence to be a petition under § 84-712.03(1)(b) of the Nebraska Public Records Statutes (NPRS), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2022), amended 2024 Neb. Laws LB 43. Our findings in this matter are set forth below.

RELEVANT FACTS

On November 26, 2023, you submitted a public records request to the NSP seeking “[a]ll records regarding this incident [C49PR210000036] regarding John A Vogel being shot by trooper Luke Kelly.” Following a brief delay, NSP attorney Sara Hulac responded to your request on December 4, 2023. She denied your request under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(5) of the NPRS “because this information is considered investigative in nature.” Her response also included the remedies available to you as a result of the agency’s denial, and a suggestion that you contact “the county attorney to see if you are able to obtain testimony from the grand jury regarding this case.”

Your petition describes the grief and anguish you and your family are experiencing because of the shooting, and the frustration in not being able to see the NSP's records. You state that “[b]eing allowed to do this would provide answers to a lot of our questions.”

DISCUSSION

The NPRS generally allow Nebraska citizens and other interested persons 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. However, while the NPRS do provide access to public documents, they are not absolute, and they also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). For example, Neb. Rev. Stat. § 84-712.05 sets out twenty-six categories of public records which may be kept confidential from the public at the discretion of the agency involved. In the present case, the NSP is relying on § 84-712.05(5) as its basis to withhold records regarding the shooting incident. This 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 [or] investigation”

“Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.” *Aksamit Resource Management LLC v. Neb. Pub. Power. Dist.*, 299 Neb. 114, 123, 907 N.W.2d 301, 308 (2018). The Nebraska Supreme Court has affirmed that “records developed or received by law enforcement agencies as part of an investigation” “fall within the plain and ordinary meaning of the language of the exceptions in § 84-712.05(5)” *State ex rel. Sileven v. Spire*, 243 Neb. 451, 456, 500 N.W.2d 179, 182 (1993). The NSP is a law enforcement agency under § 84-712.05(5) and we believe that the records you seek are investigatory records which fit squarely within the parameters of that statute.

Our office has considered the propriety of law enforcement agencies withholding investigatory records under § 84-712.05(5) on multiple occasions through the years.¹ Upon review, there is no basis to conclude otherwise with respect to your request for

¹ See, e.g., *File No. 23-R-124; City of Fremont/Police Department; Jeff Forward, The Fremont Tribune, Petitioner* (July 10, 2023); *File No. 22-R-136; Douglas County Sheriff; Kathleen Foster, Petitioner* (July 29, 2022); *File No. 21-R-142; Hastings Police Department; Steve 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. 21-R-115; Omaha Police Department; Christopher Fielding, Petitioner* (June 10, 2021); *File No. 19-R-130; City of Omaha Police Department; David Earl, KETV NewsWatch 7, Petitioner* (December 20, 2019); and *File No. 19-R-106; Omaha Police Department; Reginald L. Young, Petitioner* (January 31, 2019). You may access the disposition letters for these files at <https://ago.nebraska.gov/disposition-letters>.

NSP's records pertaining to the shooting incident. Consequently, we believe the NSP's reliance on § 84-712.05(5) is appropriate.

However, while you may not be entitled to access the NSP's records, there is information pertaining to the incident available to you. During our discussion with Mr. Boyer, he informed us that the grand jury convened in this matter returned a "no true bill." In this event, Neb. Rev. Stat. § 29-1406(2)(g)(i) and (ii) (Cum. Supp. 2022) require the following:

- (i) The grand jury shall create a grand jury report with the assistance of the prosecuting attorney. The grand jury report shall briefly provide an explanation of the grand jury's findings and any recommendations the grand jury determines to be appropriate based upon the grand jury's investigation and deliberations; and
- (ii) The no true bill and the grand jury report shall be filed with the court, where they shall be available for public review, along with the grand jury transcript provided for in subsection (3) of section 29-1407.01.

(Emphasis added.) Neb. Rev. Stat. § 29-1407.01(3) (Cum. Supp. 2022) provides, in relevant part:

- (b) A transcript, including any exhibits of the grand jury proceedings, and a copy of such transcript and copies of such exhibits shall be prepared at court expense and shall be filed with the court. Such transcript shall not include the names of grand jurors or their deliberations.
- (c) If the grand jury returns a no true bill, a copy of the transcript, including a copy of any exhibits, shall be available for public review upon written request to the clerk of the district court. Such review shall be made at a reasonable time set by the clerk of the district court. Except as otherwise provided in this subdivision, no copies of such transcript or exhibits shall be made available.

(Emphasis added.) Our office has confirmed that the Clerk of the District Court for Howard County has grand jury records related to the incident. Accordingly, we would encourage you to send a written request to the clerk to set up an appropriate time to review the grand jury records outlined above. A link to the Howard County District Court is provided below for your convenience:

<https://supremecourt.nebraska.gov/courts/howard-district-court>

CONCLUSION

Based on the foregoing, we conclude that the records developed or received by the NSP pertaining to its investigation of the shooting incident may be withheld 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. Finally, grand jury records pertaining to the shooting incident are available and may be reviewed by sending a written request to the Howard County Clerk of the District Court.

Sincerely,

MIKE HILGERS
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Mark Boyer (via email only)

49-3526-30