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November 6, 2024

Via email to [REDACTED]
Alex Vargas

[REDACTED]
[REDACTED]

RE: *Public Records Matter Involving the Nebraska State Patrol*
File No. 20241204

Dear Mr. Vargas:

This letter is in response to the public records petition you filed with this office on October 22, 2024. You have requested our review of the denial of your October 21, 2024, records request by the Nebraska State Patrol (NSP). We forwarded your petition to NSP attorney Michael Wehling upon receipt and requested a response. We received the NSP's response on October 24. The undersigned also discussed this matter with Agency Legal Counsel Mark L. Boyer on November 5. We considered your petition and the information we received from the NSP under the provisions of the Nebraska Public Records Statutes (NPRS), Neb. Rev. Stat. §§ 84-712 to 84-712.09 (2014, Cum. Supp. 2022), amended 2024 Neb. Laws LB 43 and LB 1204. Our findings are set forth below.

RELEVANT FACTS

On October 21, 2024, you submitted the following request to the NSP:

I'm requesting correspondence sent to or from employees of the Nebraska State Patrol's human resources department that references or concerns the topic of cheating or impropriety on a sergeant exam between 2022 and 2024. In addition to the request about correspondence, I would also like to receive any memorandum or information sent out to the State Patrol regarding a sergeant exam between 2022 and 2024.

NSP attorney Michael Wehling denied your request on October 22, stating the denial is pursuant to Neb. Rev. Stat. § 84-712.05(5) (investigatory records) and Neb. Rev. Stat. § 84-712.05(8) (personal information in records regarding personnel of public bodies other than routine directory information and salaries).

You state in your petition that you are seeking information as to if and how this matter occurred, and what actions were taken by the NSP in response. You claim you are “not seeking any personal records from any trooper.” You cite to the Nebraska Supreme Court case *Evertson v. City of Kimball*, 278 Neb. 1, 16, 767 N.W.2d 751, 764 (2009) [“*Evertson*”], which held, *inter alia*, that the exception in “§ 84-712.05(5) should only apply to an investigation of a public body’s employees if the investigation focuses on specifically alleged illegal acts.” You further assert:

Cheating or any other impropriety done by any law enforcement officer during, before, or after an exam is not criminal. Therefore, the State Patrol’s statement that they could not provide the documents because they are an investigatory record should not be sufficient reasoning to deny the request since no illegal acts were alleged, and it concerns the public body’s employees.

Finally, you exhort this office to “not allow the constant use of investigatory reasoning to deny public records requests.”

Mr. Boyer confirmed that the NSP conducted an “investigation surrounding cheating/impropriety on a Sergeant’s exam administered by the [NSP] in 2024.” Contrary to your assertion that cheating on an exam “is not criminal,” Mr. Boyer states that the NSP Internal Affairs Division considered pursuing criminal charges against the individuals involved, specifically Misuse of official information (Neb. Rev. Stat. § 28-925),¹ in the course of its investigation. Mr. Boyer thus asserts that the NSP’s withholding was consistent with *Evertson* where the court “agree[d] that an investigation of a public body’s employee is ‘for law enforcement purposes’ if the alleged acts could result in a civil or criminal sanction.” *Id.* at 16, 767 N.W.2d at 764.

¹ This statute provides:

- (1) Any public servant, in contemplation of official action by himself or by a governmental unit with which he is associated, or in reliance on information to which he has access in his official capacity and which has not been made public, commits misuse of official information if he:
 - (a) Acquires pecuniary interest in any property, transaction, or enterprise which may be affected by such information or official action; or
 - (b) Speculates or wagers on the basis of such information or official action; or
 - (c) Aids, advises, or encourages another to do any of the foregoing with intent to confer on any person a special pecuniary benefit.
- (2) Misuse of official information is a Class III misdemeanor.

DISCUSSION

In Nebraska, “public records . . . 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.” Neb. Rev. Stat. § 84-712.01(1). However, while access to public records is broad, it is not absolute. The NPRS allow access “[e]xcept as otherwise expressly provided by statute” (§ 84-712(1)) or “[e]xcept when any other statute expressly provides that particular information or records shall not be made public” (§ 84-712.01(1)). Consequently, you have no right to access public records in those instances where the Legislature has made the records expressly confidential or subject to withholding under § 84-712.05² or § 84-712.08.

The NSP withheld the records of the Internal Affairs Division’s investigation under the exceptions in § 84-712.05(5) and (8). Subsection (5) pertains to, in relevant part:

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, complaints or inquiries from residents of this state or other interested persons, informant identification, or strategic or tactical information used in law enforcement training

In *Evertson*, the court considered whether this exception applied to records developed during an investigation into alleged racial profiling by city police officers. Relying on cases construing the law enforcement exemption (no. 7) in the Freedom of Information Act, 5 U.S.C. § 552, the court found that exempting all internal auditing or monitoring of employees “from disclosure would permit the exemption to defeat the purpose of the public records laws—to provide public access to information concerning the Government’s own activities.” *Id.* at 15, 767 N.W.2d at 763. For the exception to apply, “[t]he government must therefore show that the agency compiled the investigatory records for adjudicatory or enforcement purposes and not general agency monitoring of its programs and employees.” *Id.* Acknowledging that a broad reading of § 84-712.05(5) would be inconsistent with the Legislature’s “strong public policy for disclosure,”³ the court held that the exception “should only apply to an investigation of a public body’s employees if the investigation focuses on specifically alleged illegal acts.” *Id.* at 16, 767 N.W.2d at 764.

² Section 84-712.05 currently contains twenty-six categories of public records that may be withheld at the discretion of a public body 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”

³ See *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 122, 907 N.W.2d 301, 308 (2018).

As to the investigatory records at issue in *Evertson*, the court acknowledged that while Neb. Rev. Stat. § 20-502 prohibited racial profiling by law enforcement agencies, there was no criminal sanction for § 20-502 and no authority for any state agency to investigate such allegations. Consequently, the only way the city could enforce the statute was through the mayor's supervisory authority to investigate the police officers' job performances. In concluding that § 84-712.05(5) provided a basis to withhold the records, the court stated:

Although [the mayor's] investigation overlapped with his supervisory powers, the City was not monitoring its employees. The investigation concentrated on racial profiling and specifically zeroed in on allegations of racial profiling by Lewis. These allegations, if proved, would constitute a violation of law. We concede that the investigation could not have resulted in civil or criminal sanctions because the Legislature has not enacted enforcement provisions for racial profiling. But we conclude that the mayor's purpose in initiating the investigation was nonetheless for enforcement of the law. Because the statutes charged the mayor as the City's representative to ensure that the City complied with governing laws, we determine that the court erred in concluding that the investigatory records exemption under § 84-712.05(5) did not apply.⁴

Id. at 16-17, 767 N.W.2d at 764.

You assert in your petition that § 84-712.05(5) does not apply in the present case because the investigation involved the NSP's own employees and no illegal acts were alleged. However, Mr. Boyer represents to this office that the Internal Affairs Division conducted an investigation into a sergeant's exam issued earlier this year and that misdemeanor charges involving the misuse of official information were considered against the individuals implicated. See fn 1. It is also apparent that the records were not the result of a general internal audit or monitoring of NSP employees, but rather were based on an inquiry that "depart[ed] from the routine and focus[ed] with special intensity on a particular party."⁵ And unlike *Evertson*, where the court conceded that the investigation could not have resulted in any criminal or civil sanctions but still found the exception applied, there is no question that the investigation here involved both criminal and civil sanctions. Based on the information presented, we believe the NSP has met the

⁴ The city also alleged that the exceptions pertaining to attorney-client confidential communications and attorney work product (§ 84-712.05(4)) and personal information of personnel of public bodies except salary and routine directory information (§ 84-712.05(8)) also provided a basis to withhold the records. Having found that § 84-712.05(5) exempted the records from disclosure, the court declined to decide whether the other exceptions also applied.

⁵ See *State ex rel. Nebraska Health Care Ass'n v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 792, 587 N.W.2d 100, 106-07 (1998).

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criteria set out in *Evertson* and that any records pertaining to the NSP Internal Affairs Division's investigation may be withheld under § 84-712.05(5).

Finally, we note that the NSP also relied on § 84-712.05(8) as another basis to withhold the requested records. Although it appears that the exception would apply, we will decline to consider it in view of our conclusion that § 84-712.05(5) provides an adequate basis to withhold.

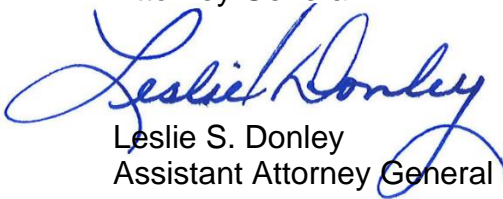
CONCLUSION

For the reasons explained above, we believe that the NSP may lawfully withhold any records relating to its investigation concerning cheating/impropriety on a 2024 sergeant's exam 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 discuss with your private attorney the other remedies available to you under the NPRS.

Sincerely,

MIKE HILGERS
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Mark L. Boyer (via email only)

49-3673-31