



STATE OF NEBRASKA
Office of the Attorney General

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MIKE HILGERS
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

November 14, 2024

Via email to [REDACTED]
Michelle Millenbach

RE: *Public Records Matter Involving the Nebraska State Patrol*
Our File No. 20241213

Dear Ms. Millenbach:

This letter is in response to your correspondence received by this office on October 30, 2024, in which you requested the “assistance of the AG for multiple matters pertaining to an arrest which occurred in Kimball County and the opposition/obstruction of my rights to records” Your email included the response you received from Nebraska State Patrol (NSP) attorney Michael Wehling in response to a public records request you submitted to the NSP on October 29, 2024. On November 5, we forwarded your correspondence to NSP legal counsel Mark L. Boyer and requested a response, which we received on November 8. We construed your email to be a petition under the provisions 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 and LB 1204. We have completed our review of your petition and Mr. Boyer’s response and our findings in this matter are set forth below.

As noted above, you have requested this office to advise you of your “recourse as a United States citizen” on a number of matters, including “pursuing damages for emotional trauma of the arrest and incarceration which never should have happened” Please note that the Attorney General and the attorneys in the Nebraska Department of Justice represent the State of Nebraska, its agencies, departments, and officials. Neb. Rev. Stat. § 84-202 (2014). We do not represent or provide legal advice to private citizens. To the extent this office has any authority over local governmental entities, it is through express provisions requiring us to enforce the NPRS and the Open Meetings Act. Consequently, this office is only authorized to address the public records portion of your correspondence and, as presented here, only pertaining to the NSP. If you wish to petition this office to review a public records matter involving Kimball and/or

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Scottsbluff County, please provide us a copy of your public records request(s) and any documentation you received from county officials in response. Further, as to your request to obtain certain records from state and county entities, e.g., “body cam footage (audio and visual) in an electronic format,” Neb. Rev. Stat. § 84-712(4) requires that requests for public records be directed in writing to the records *custodian*.

RELEVANTS FACTS

From Mr. Wehling’s response, we understand you requested the following records from the NSP:

[P]olice records of arrest charged with assault 3rd degree menacing between hours of 10:00 pm and 11:59 pm on Friday night October 25th. Case dismissed and I was released from jail on Monday 10/28/2024. Kimball county provided a document which states citation # EFZ7500683, time and date 1:35 am on October 26th.

Mr. Wehling responded to your request on October 30, stating in part:

Please note that reports and investigation take time to complete. As this incident occurred less than a week ago, not all reports may be completed yet.

For reports that have been completed, the Nebraska State Patrol is denying your request for the information regarding the matter referenced above. This includes citations and CAD calls. This denial is pursuant to Neb. Rev. Stat. § 84-712.05 subsection (5) because this information constitutes an investigative record.

You state in your petition that you are “deeply concerned by [the NSP’s] statement that I am denied access.” You requested that we inform you as to “the normal time it takes to complete the police report for an arrest and to better understand *what factors influence that timeline. I do not want information tampered with by a delayed process of preparing reports.*” (Your emphasis.)

Mr. Boyer informs us that he personally viewed the video of your arrest and confirms that “[t]here is no question that all of the records Ms. Millenbach has requested in her October 29, 2024 public records petition constitute investigatory records stemming from a criminal arrest of Ms. Millenbach.” He further asserts that “Nebraska law unquestionably allows the [NSP] the authority to lawfully withhold these records from release under a public records request.”

DISCUSSION

Public records in Nebraska “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) (2014). 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 §§ 84-712.05 or 84-712.08. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *BH Media Group v. Frakes*, 305 Neb. 780, 788, 943 N.W.2d 231, 240 (2020).

The NSP based its denial to produce the requested records on an exception in § 84-712.05, which allows the records custodian to withhold certain categories of records at its discretion unless publicly disclosed in an open court, administrative proceeding, or meeting or disclosed by a public entity pursuant to its duties. The specific exception in § 84-712.05(5) 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, complaints or inquiries from residents of this state or other interested persons, informant identification, or strategic or tactical information used in law enforcement training

This office has considered the propriety of law enforcement agencies withholding investigatory records under § 84-712.05(5) on multiple occasions through the years.¹ We have consistently concluded 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 an investigation of persons, institutions, or businesses. 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) provides 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

¹ See, e.g., File No. 20241145, *Public Records Matter Involving the Omaha Police Department* (August 7, 2024); File No. 20241112, *Public Records Matter Involving the Omaha Police Department* (June 24, 2024); File No. 20241100, *Public Records Matter Involving the Lincoln Police Department* (June 12, 2024); File No. 20241067, *Public Records Matter Involving the Nebraska State Patrol* (April 19, 2024); 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); and File No. 21-R-139; *Nebraska State Patrol; Chris Dunker, Lincoln Journal Star, Petitioner* (October 20, 2021). You may access the disposition letters for these files at <https://ago.nebraska.gov/disposition-letters>.

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 all NSP officers

shall have the power:

- (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 arrest 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).²

Finally, we acknowledge you requested records pertaining to your own arrest and your general assertion that you should be able to access the records as a result. Public bodies have the discretion to withhold public records that fall under the various categories in § 84-712.05 so long as those records have not been already publicly disclosed. The fact that the records pertain to you does not make the records any less investigatory and in no way impacts the NSP's ability to withhold the records under § 84-712.05(5).³

² Although not relied on by the NSP as a basis to withhold the records, its position to do so is further supported by language in Neb. Rev. Stat. § 29-3506 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), which specifically exempts “intelligence or investigative information” from the definition of “criminal history record information”—information which must be disclosed by criminal justice agencies pursuant to the act.

³ See, e.g., *File No. 22-R-136; Douglas County Sheriff; Kathleen M. Foster, Petitioner*, dated July 29, 2022.

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CONCLUSION

For the reasons explained above, we conclude that the NSP's records relating to your arrest on October 25, 2024, may be withheld under Neb. Rev. Stat. § 84-712.05(5). Since the NSP did not unlawfully deny your records request, no further action by this office is warranted and we are closing this file. 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: Mark L. Boyer (via email only)

49-3675-31