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December 4, 2024

Via email: [REDACTED]

Elizabeth Klingelhoefner
[REDACTED]

RE: *Public Records Matter Involving the Nebraska State Patrol*
Our File No. 20241222

Dear Ms. Klingelhoefner:

This letter is in response to your correspondence received by this office on November 19, 2024, in which you sought our assistance regarding your public records request submitted to the Nebraska State Patrol ("NSP") on October 31, 2024. We considered your petition in accordance with the Nebraska Public Records Statutes ("NPRS") as set forth in Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2022), amended by 2024 Neb. Laws LB 43 and LB 1204. Our conclusions are set forth below.

RELEVANT FACTS

This matter concerns your public records request submitted to the NSP on October 31, 2024, in which you sought "cop[ies] of each and every subpoena, FOIA request, or document which purports to be a subpoena or FOIA request" from various individuals and entities as well as "each and every document that was provided" in response to such subpoenas or FOIA requests as related to a motor vehicle accident occurring on April 22, 2024, in Saline County, Nebraska.¹

¹ We note that your petition indicates you requested these documents pursuant to the Freedom of Information Act ("FOIA"), codified at 5 U.S.C. § 552. FOIA generally provides the right to request access to

Following its receipt of your request, the NSP issued its response via email dated November 5, 2024, in which it partially denied your records request. In its denial, the NSP stated that it was withholding “copies of subpoenas received and the documents released under subpoenas” under subsections (4) and (5) of § 84-712.05 “at the direction of Michael Wehling, Attorney III, for the Nebraska State Patrol.”

You thereafter petitioned our office and generally contest the NSP’s withholding of the records requested. Specifically, you assert that the documents requested are not excepted from production because they constitute neither work product nor investigative records. Following our receipt of your petition, we contacted legal counsel for the NSP, Mark Boyer, for additional information regarding your records request. Our findings, based on your petition, the materials attached thereto, and our communications with Mr. Boyer are set forth in the Discussion below.

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.” § 84-712.01. While the NPRS broadly authorize public access to public records, they are not absolute. Section 84-712.05 lists several categories of public records that may be withheld at the discretion of the custodian of such records. Two exceptions, codified at § 84-712.05(4) and (5) are relevant to this matter. We will first discuss each exception before individually addressing their applicability to the records withheld.

Sections 84-712.05(4) and (5) provide in pertinent part that

[t]he following records, unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties, may be withheld from the public by the lawful custodian of the records:

. . .

federal agency records or information, as opposed to the right to access records of or belonging to Nebraska governmental entities such as the NSP. Requests for records of Nebraska governmental entities are governed by the NPRS.

We also observe that your petition discusses your role as the legal representative for the company and semi-truck driver involved in the motor vehicle accident. Please note “[t]he public records statutes apply ‘equally to all persons without regard to the purpose for which the information is sought.’ As a general rule, citizens are not required to explain why they seek public information.” *BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 801, 943 N.W.2d 231, 247 (2020). Accordingly, this office does not consider the reason or purpose for a records request when making our determination under § 84-712.03(1)(b).

(4) Records which represent the work product of an attorney and the public body involved which are related to preparation for litigation, labor negotiations, or claims made by or against the public body or which are confidential communications as defined in section 27-503; [and]

(5) 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, except that this subdivision shall not apply to records so developed and received:

(a) Relating to the presence of and amount or concentration of alcohol or drugs in any body fluid of any person; or

(b) Relating to the cause of or circumstances surrounding the death of an employee arising from or related to his or her employment

With respect to the investigatory exception at § 84-712.05(5), this office has considered the propriety of law enforcement agencies withholding investigatory records under § 84-712.05(5) on multiple occasions through the years.² We have consistently held that the withholding of investigatory records 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 during an investigation.

1. Subpoenas Received by NSP

As stated in your petition, you sought “copies of any subpoena received by [the NSP] that related to the April 22, 2024, accident” The NSP withheld any such subpoenas in its possession on the basis that any subpoena constituted attorney work product or an investigatory record of the NSP.

We first address the NSP’s contention that any subpoena it received in connection with this matter constituted attorney work product. Under the plain language of subsection (4), the NPRS permit public bodies to withhold documents that are created by a public body and its counsel in connection with “preparation for litigation . . . or claims made by or against the public body.” § 84-712.05(4). The subpoena in this matter was neither the

² 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); and *File No. 21-R-139; Nebraska State Patrol; Chris Dunker, Lincoln Journal Star, Petitioner* (October 20, 2021).

product of the NSP and its counsel nor was it created in preparation for litigation or other claims by or against the NSP. See *id.* Consequently, any subpoena received by the NSP cannot be withheld under subsection (4).

We turn next to the applicability of the investigatory records exception at § 84-712.05(5). As a preliminary matter, there is no question that the NSP is a law enforcement agency charged with duties of investigation of persons, institutions, and businesses. As relevant to the present matter, Neb. Rev. Stat. § 81-2004 (2014) provides that the NSP and its “subordinate officers . . . 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.” Further, Neb. Rev. Stat. § 81-2005 (2014) states in part that

[t]he 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) 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 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; [and]
- (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.

Based on our review and the statutory language found in the NPRS, we conclude that the NSP may not rely on the investigatory records exception to withhold any subpoena received in this matter. The plain language of subsection (5) demonstrates that only records constituting a part of an examination or investigation by a public body charged with such duties may be withheld under the investigatory exception. See § 84-712.05(5). It is clear that any subpoena received by the NSP was not connected to its investigation into the matters identified in the records request, as the NSP was in fact the target of any subpoena it received subsequent to its investigation into the accident.

In light of the foregoing, the withholding of any subpoena received by the NSP relating to the April 22, 2024, accident in Saline County, Nebraska, was improper.

Accordingly, we will request the NSP, by providing a copy of this letter to Mr. Wehling, to produce any subpoenas it has received that are the subject of this petition. We would ask counsel to produce these documents no later than December 11, 2024.

2. Documents Produced by NSP in Response to Subpoena

We turn next to your request for the documents produced by the NSP in response to the subpoena it received. We note that in an email from Mr. Boyer, he asserted that the NSP's "putting these documents together pursuant to a court ordered subpoena is unquestionably a 'work product' of this office and should not be subject to a public records request." We disagree with Mr. Boyer's assessment. As discussed above, to fall within the attorney work product exception, the documents in question must relate to the "preparation for litigation . . . or claims made by or against the public body." See § 84-712.05(4). Because the documents produced by the NSP in response to any subpoena do not relate to litigation preparation by the NSP, the work product exception cannot apply in these circumstances.

Although the attorney work product exception is not applicable to the documents produced by the NSP in response to a subpoena, we conclude that these documents may be withheld under the investigatory records exception. Your petition and the NSP's response to your records request indicate that the documents produced by the NSP in response to a subpoena were developed in connection with the NSP's investigation into the motor vehicle accident occurring on April 22, 2024, in Saline County, Nebraska. These materials therefore fall under the investigatory records exception set forth in § 84-712.05(5), as the NSP is charged with statutory duties of traffic investigation as set forth in §§ 81-2004 and 81-2005. Consequently, the NSP may withhold these materials at its discretion.³

CONCLUSION

Based on the foregoing, we conclude that the NSP improperly withheld the subpoena issued in connection with the subject motor vehicle accident, and we direct the NSP to produce any subpoena responsive to your request by December 11, 2024. Further, the NSP was permitted to withhold the documents produced in response to a subpoena at its discretion under the investigatory records exception. If you disagree with

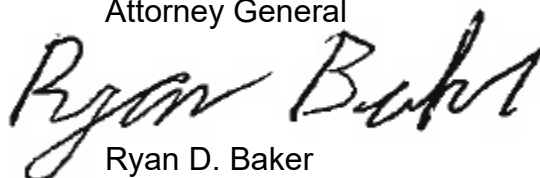
³ The fact that NSP produced the requested documents to another attorney pursuant to a court order does not alter our analysis, as there is no indication that these documents were "publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties." See § 84-712.05.

Elizabeth Klingelhofer
December 4, 2024
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our findings in this letter, you may pursue the other remedies that may be available to you under the Nebraska Public Records Statutes.

Sincerely,

MIKE HILGERS
Attorney General

A handwritten signature in black ink that reads "Ryan Baker". The signature is written in a cursive, flowing style.

Ryan D. Baker
Assistant Attorney General

c: Michael Wehling (via email only)
Mark Boyer (via email only)

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