



STATE OF NEBRASKA
Office of the Attorney General

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March 10, 2016

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RE: *File No. 16-R-109; Cedar County Attorney, Cedar County Sheriff; David Domina o/b/o Estate of Frank Potts, Jr., Petitioner*

Dear Mr. Domina and Mr. Williams:

This letter is in response to your petition which we received on February 24, 2016 in which you requested our review of the denial of certain public records by the Cedar County Attorney and the Special Acting Cedar County Attorney on behalf of the offices of the Cedar County Attorney and the Cedar County Sheriff (collectively the "County"). As is our normal practice with such requests, we contacted the public body against whom the petition was made. In this case, we contacted George L. Hirschbach, Cedar County Attorney and John Thomas, Knox County Attorney and Special Acting County Attorney for Cedar County, and requested a response to your petition, which we received on March 3, 2016. We have now completed our analysis and have fully considered your petition for access to records as well as the County's responses. We considered your petition under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS"), and our findings are set forth below.

FACTS

Our understanding of the facts in this matter is based on your petition and the information contained in the County's responses to your public record requests and your petition. You submitted public records requests to the Knox County Attorney, John Thomas, who was the Special Acting Cedar County Attorney, on or about December 2, 2015 and the Cedar County Attorney, George Hirschbach, on February 10, 2016.¹ Each request made

¹ Your public record petition references a January 27, 2016 public record request made to the Cedar County Attorney and lists out specific information requested on that date. However, your office provided us with copies of a request made on February 5, 2016 to the Cedar County Attorney and one made December 2, 2015 to the Knox County Attorney, which request many of the same documents, but in more general terms. We are unclear as to your exact public records request and the date on which it was made. The denial letters sent by the County provide the content of all records withheld. As the County is detailed in its responses as to the

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essentially the same requests for records related to Mr. Frank Potts, on behalf of the estate of Mr. Potts:

1. All publicly available information including all reports.
2. Autopsy report.
3. Sheriff's report of initial investigation.
4. Witness statements.
5. Photographs of scene.
6. Photographs of Mr. Potts.
7. Arrest record and record of booking and incarceration during the hours prior to the death.
8. Post-death investigation of circumstances of the death itself.
9. Identities of personnel working at the jail between the time when Mr. Potts arrived and the death occurred and their duties.

Both Mr. Hirschbach and Mr. Thomas responded to your public record requests. Each provided you with copies of: the Jail Division Log from August 17, 2015; the Radio Communication Division Log from August 17, 2015; a certification by the County Coroner; a Motion for Special Prosecutor; the Order Appointing Special Prosecutor; the "Cedar County Sheriff Press Release re: Frank Potts, Jr., Age 52;" the Cedar County Sheriff Jail Policy; and the Cedar County Sheriff Suicide Policy.

The remainder of the documents found in the County's files were withheld. Those documents withheld by the County are: Incident Reports prepared by Cedar County Sheriff deputies, Dakota County Sheriff's Department, and State Patrol Investigators as to the initial stop of Mr. Potts and the investigation into his death; in-car camera video of the stop and arrest of Mr. Potts; Mr. Potts' motor vehicle and prior criminal history compiled by law enforcement in response to the traffic stop of Mr. Potts; the autopsy exam, photographs, toxicology, and report related to the post-mortem exam of Mr. Potts; Mr. Potts' death certificate; statements of Cedar County Jail employees related to the booking of Mr. Potts; ambulance records for Mr. Potts; the statements of EMTs who transported Mr. Potts; photographs and video taken by the Nebraska State Patrol and Dakota County Sheriff; and a cell phone and cell phone records. Most of these records were withheld under Neb. Rev. Stat. §§ 84-712.05(2) and (5) of the NPRS. You have asked us to determine if it was proper for these records to be withheld as investigatory records of a law enforcement agency. Your position is that the records which were withheld by the County were improperly withheld, as they constitute "administrative" records of the law enforcement agencies, and not records related to an investigation. The County disagrees. Our conclusions are set forth below.

documents which have been withheld, and you do not appear to allege that the County has not been forthcoming as to disclosure of the types of documents it maintains, we will focus on the documents withheld rather than on your particular requests.

DISCUSSION

The NPRS generally allow interested persons in Nebraska 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. Under those statutes, every record "of or belonging to" a public body is a public record which individuals may obtain a copy of unless the custodian of the record can point to a specific statute which allows the record to be kept confidential. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

Investigatory Records Exception

Although the NPRS provide for access to public documents, they are not absolute. The NPRS also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). Neb. Rev. Stat. § 84-712.05 of the NPRS is comprised of eighteen categories of documents which may be kept confidential from the public at the discretion of the agency involved. In the present case, the County has claimed the exception set out in subsection (5) as its primary basis for denying you access to the requested records. That subsection provides, in pertinent part:

The 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:

(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, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training, except that this subdivision shall not apply to records so developed or received relating to the presence of and amount or concentration of alcohol or drugs in any body fluid of any person.

In Nebraska, in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Swift and Company v. Nebraska Department of Revenue*, 278 Neb. 763, 773 N.W.2d 381 (2009). The plain and ordinary reading of § 84-712.05(5) indicates that law enforcement agencies may withhold records they develop or receive which relate to investigations which they have

undertaken.²

We also find guidance in the Nebraska Supreme Court case *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998). In *Nebraska Health Care Association*, the court considered whether certain records generated by the Department of Health and Human Services [DHHS] in the course of its audits of nursing homes were “investigatory records,” which could be withheld by the agency under § 84-712.05(5). To aid in its analysis, the court created the following standard, concluding

a public record is an investigatory record where (1) the activity giving rise to the document sought is related to the duty of investigation or examination with which the public body is charged and (2) the relationship between the investigation or examination and that public body’s duty to investigate or examine supports a colorable claim of rationality.

Id. at 792, 587 N.W.2d at 106. The court found that DHHS was a public body charged with the duty to investigate nursing homes’ medicaid reimbursement claims, and that its auditing activities were “clearly and rationally related to the Department’s investigatory duty.” *Id.* However, it questioned whether DHHS’ auditing activities were “investigations or examinations within the meaning of § 84-712.05(5).” *Id.* In addressing this question, the court conceived another standard, stating:

It has generally been held that a distinction must be drawn between (1) routine administration or oversight activities and (2) focused inquiries into specific violations of law. . . . If a document is compiled ancillary to an agency’s administrative function, then it is not protected from disclosure; when, however, an inquiry by an administrative agency departs from the routine and focuses with special intensity on a particular party, an investigation is underway for purposes of the investigatory records exception.

Id. at 792, 587 N.W.2d at 106-107 (internal citations omitted). The court ultimately concluded that the DHHS’ auditors had departed from the routine when they decided to make specific requests for further information to address particular deficiencies in the cost reports submitted by nursing homes. As a result, the court found that DHHS could lawfully withhold the requested documents under the exception in § 84-712.05(5).

There is little question that the Cedar County Sheriff, the Dakota County Sheriff, and

² The term “law enforcement” is defined as “1. The detection and punishment of violations of the law . . . [and] 3. Police officers and other members of the executive branch of government charged with carrying out and enforcing the criminal law.” BLACK’S LAW DICTIONARY 714 (abridged 7th ed. 2000).

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the Nebraska State Patrol are law enforcement agencies. Mr. Potts was the subject of a traffic stop and was detained by the Cedar County Sheriff. During his detention in the Cedar County Jail, Mr. Potts died. We believe that the records created by the County with respect to Mr. Potts's initial traffic stop to have been created as a result of that traffic stop and the resultant investigation into Mr. Potts' alleged driving under the influence. Those records include any incident reports created, criminal history compiled in response to the traffic stop, and the in-car camera video of the traffic stop and continued contact with Mr. Potts. In our view, these records fall squarely within the claimed exception.

You have also requested records related to the death of Mr. Potts, its discovery, and investigation. We believe these records to also have been created in response to a specific incident, the death of Mr. Potts, and the investigation thereof. These records include investigatory reports from the Cedar County Sheriff, Nebraska State Patrol, and Dakota County Sheriff. Related records would include photographs or video of the jail cell or of Mr. Potts, statements given by employees or EMTs who were in contact with Mr. Potts or transported him, all autopsy records and photographs, and records related to Mr. Potts' cell phone. Again, we believe these records may be withheld by the custodian, as they fall within the claimed exception.

Applying the standards set out in *Nebraska Health Care Association* to the circumstances here, it appears to us that the County has established that the records withheld are those of (1) a public body charged with duties of investigation or examination of persons, institutions, or businesses; (2) the investigations into Mr. Potts initial stop and his death, were related to the duties of investigation and examination; and (3) that the specific investigations were rationally related to the investigatory duties imposed by law. Finally, we do not believe that the records withheld were compiled ancillary to its administrative functions, but rather focused with special intensity on a particular party. Each of the withheld records focused either on the initial traffic stop and arrest of Mr. Potts, or the investigation into his death. Based on the foregoing, we believe that the requested records do constitute "investigatory records" as contemplated in Neb. Rev. Stat. § 84-712.05(5). We believe the County has provided those records which do constitute "administrative" records under *Nebraska Health Care Association*, the jail and communication logs, the Cedar County Sheriff Jail Policy, and the Cedar County Sheriff Suicide Policy. We do not believe the remainder of the records you have requested have been improperly withheld under the NPRS.

Medical Records and Death Certificate

The County also withheld some of the records requested under Neb. Rev. Stat. § 84-712.05(2), "medical records, other than records of births and deaths and except as provided in subdivision (5) of this section, in any form concerning any person. . ." Your petition does not mention that you seek our review of the denial of these records under this

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subsection. However, for completeness, we will address these records briefly. The records withheld under this section were related to the ambulance and EMT services provided to Mr. Potts and the autopsy and toxicology reports of Mr. Potts. We believe that the records withheld under Neb. Rev. Stat. § 84-712.05(2) fall within this exception and could be properly withheld by the County.

Finally, the death certificate of Mr. Potts was withheld under Neb. Rev. Stat. §§ 71-602 and 71-602.01, in addition to Neb. Rev. Stat. § 84-712.05(5). Those statutes make confidential “[a]ll information designated by the department [of Health and Human Services] on all certificates as being for health data and statistical research.” *Id.* While these statutes do not apply to the death certificate in its entirety, the copy of the certificate received by the law enforcement agencies was related to the investigation into Mr. Potts’ death and it may be withheld under Neb. Rev. Stat. § 84-712.05(5).³

CONCLUSION

For the reasons explained above, we believe that the requested records belonging to the Cedar County Attorney, the Special Acting Cedar County Attorney, and the Cedar County Sheriff may be lawfully withheld under § 84-712.05(5). We further believe that the County did not unlawfully deny your records requests, and that no further action by this office is warranted. Accordingly, we are closing this file. If you disagree with the analysis we have set out above, you may wish to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: John Thomas, Knox County Attorney
George Hirschbach, Cedar County Attorney

02-612-29

³ A copy of the death certificate may be requested by the Estate of Mr. Potts directly from the custodian of the record, the Department of Health and Human Services.