



STATE OF NEBRASKA  
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June 21, 2019

Erik W. Fern  
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6940 O Street, Suite 400  
Lincoln, NE 68510

RE: *File No. 19-R-118; Douglas County Department of Corrections; Alysha Curtis, Petitioner*

Dear Mr. Fern:

We are writing in response to correspondence received by this office in which you petitioned, on behalf of your client Alysha Curtis, for our review of the response to your request for certain public records belonging to the Douglas County Department of Corrections ("County" or "DCDC") under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2014, Cum. Supp. 2018) ("NPRS"). As is our normal practice with such requests, we contacted the public body named in the correspondence and asked for a response to that petition. In this case, we provided the petition to Shane Strong, Deputy Douglas County Attorney, and he subsequently provided a response to us. We have now completed our analysis of this matter and our findings are set forth below.

### **RELEVANT FACTS**

Our understanding of the facts in this matter is based on your petition and the response we received from the County. On April 4, 2019<sup>1</sup>, you sent a letter to DCDC on behalf of Ms. Curtis requesting "a copy of all reports, logs, or other documents in relation to Alysha M. Curtis, including all audio/video recordings of Alysha M. Curtis, and any other related documents, data, or information from the detention of Alysha M. Curtis on or about March 3, 2019." Mr. Strong, on behalf of DCDC, responded on May 14, 2019, disclosing the contents of Ms. Curtis' inmate file, but withholding, pursuant to Neb. Rev. Stat. § 84-712.05(5) and (8), "[r]edacted portions of the police incident report, and [s]ecurity camera footage from the Incident." We understand that the "incident" to which this refers

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<sup>1</sup> The County advises this office that your public records request was received on April 12, 2019. An initial response was provided to you on April 15, 2019, seeking additional time in which to respond.

was a use of force against Ms. Curtis during her incarceration on March 3, 2019 under the custody of DCDC.

Your petition followed this partial denial of records. Your petition does not seek our review of the denial of the redacted portions of the police incident report. You seek our review only as to the County's denial of your request for the security camera footage. The County has responded to your petition, arguing that the denial under Neb. Rev. Stat. § 84-712.05(5) and (8) is permissible under the NPRS. We have reviewed both your correspondence, and that of Mr. Strong, and have reached the conclusions set forth below.

### DISCUSSION

The NPRS generally allow interested persons the right to examine public records in the possession of public agencies in Nebraska during normal agency business hours, to make memoranda and abstracts from those records, and to obtain copies of records in certain circumstances. Except when any other statute expressly provides that particular information or records shall not be made public, public records shall 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. Data which is a public record in its original form shall remain a public record when maintained in computer files. Neb. Rev. Stat. § 84-712.01(1). 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).

Although the NPRS provide for access to public documents, they are not absolute and 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 is comprised of twenty-one 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 that subsections (5) and (8) of Neb. Rev. Stat. § 84-712.05 allow it to deny you and Ms. Curtis access to the security camera footage requested.

We will begin our analysis with whether Neb. Rev. Stat. § 84-712.05(5), the "investigatory records" provision, allows the County to withhold the security camera footage you seek. This provision of the NPRS provides as follows:

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 its response to this office, the County details its reliance on this subsection to withhold this record. Specifically, the County states:

The security camera footage is a security protocol predicated upon use of footage in investigative proceedings. In this particular instance, Ms. Curtis was subject to a use of force. Pursuant to the DCDC [Use of Force ("UOF")] Policy (1.3.124, III, A, 14 (August 2, 2017 thru (sic) present)), DCDC performs an investigation following each UOF. This policy is drafted in compliance with the America Correctional Association ("ACA") and the Community Justice Center ("CJC") national accreditation standards (Adult Local Detention Facilities ("ALDF") 2B-07 and Adult Community Residential Services (ACRS)-2B-01). DCDC policies are compliant with ACA and CJC standards in accordance with the Nebraska Jail Standards Act. Neb. Rev. Stat. § 83-4,126(2).

An investigation occurred following Ms. Curtis's UOF. The footage from the Incident was produced as potential product of an investigation. The footage was preserved pursuant to an investigation. Douglas County, in its partial production to Ms. Curtis, included the UOF report and medical records from the Incident. Ms. Curtis has documentation of the Incident. Douglas County has produced as much information from the investigation as it can without compromising the security of the facility.

Nonetheless, the footage in question includes materials recorded in the event of an investigation, and because the footage was used as part of an investigation, this permissive exemption applies. *Evertson v. Kimball*, 278 Neb. 1 (2009).

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 a law enforcement agency may withhold records it develops or receives in the course of its investigations. DCDC is a law enforcement agency and the security camera footage in this instance was maintained and utilized during the investigation of a specific incident which occurred in a DCDC facility, in the jurisdiction of the DCDC.

We find additional 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 this case, 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 formulated 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).

Applying the standards set out in *Nebraska Health Care Association* to the circumstances here, it appears to us that the County has established that DCDC is



Erik Fern  
June 21, 2019  
Page 5

charged with investigating incidents which occur in its correctional facilities and there is a rational relationship between the UOF incident involving Ms. Curtis, the investigation which then occurred into that UOF, and the County's duty to investigate that UOF incident. Additionally, that investigation departed from the routine and focused on particular individuals and whether the UOF complied with the County's policies and standards, which qualifies the footage for exclusion from public record requests at the discretion of the County. *See also Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009). *See also California Borough v. Rothey*, 185 A.3d 456 (2018) (Surveillance video from jail cell properly withheld as investigatory when used to investigate whether the use of force against the inmate was proper.) Based on the foregoing, we believe that the requested video constitutes an "investigatory record" as contemplated in Neb. Rev. Stat. § 84-712.05(5).

It appears to us that the footage requested by you and Ms. Curtis may be withheld by the County pursuant to Neb. Rev. Stat. § 84-712.05(5). As the County may properly assert this subsection as to the security footage requested, it is not necessary for us to determine whether there are additional valid provisions of § 84-712.05 under which the County may also withhold this record. We do not believe Ms. Curtis has been improperly denied access to the security footage she has requested.

**CONCLUSION**

For the reasons explained above, we conclude that the County has not violated the NPRS with respect to Ms. Curtis's request for records, and that no further action by this office is warranted. Accordingly, we are closing this file. If you or Ms. Curtis disagree with the analysis we have set out above, you may wish to determine what additional remedies may be available to Ms. Curtis under the NPRS or other Nebraska laws.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General



Natalee J. Hart  
Assistant Attorney General

cc: Shane Eben Strong