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Office of the Attorney General

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November 3, 2021

Via email at amanda@thevanishedpodcast.com
Amanda Coleman

RE: *File No. 21-R-141; Omaha Police Department; Amanda Coleman, Petitioner*

Dear Ms. Coleman:

This letter is in response to your petition emailed to this office on October 19, 2021. You have requested the Attorney General's review of decisions made by the Omaha Police Department ("OPD") with respect to a series of public records requests you made to OPD beginning in May 2020. Upon receipt of your petition, we forwarded it to Deputy City Attorney Bernard J. in den Bosch, and requested a response. We received Mr. in den Bosch's response on behalf of OPD on October 28, 2021. We considered your petition and OPD's response in accordance with § 84-712.03(1)(b) of the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020). Our findings in this matter are set forth below.

RELEVANT FACTS

Your petition involves three public records requests to the OPD, summarized as follows:

I. On or about September 14, 2020, you requested "a copy of any and all records related to the disappearance of then 14-year old Marialice Clark from Omaha, Nebraska on or about August 20, 1972." Responsive records consisting of "the public records portion of the missing person investigation related to Marialice Clark . . . documented under RB# 45523F" were provided to you on September 15. OPD denied you access to "[t]he supplemental investigative reports contain[ing] investigative information, police tactics" under "Neb. Rev. Stat. § 84-712.05."

II. On or about April 28, 2021, you requested "a copy of the reports involving Marialice Clark, under incident report numbers 0587E, 02653E, 38379E, and 22987F."

Responsive records consisting of “[t]he public record portions of the Incident Reports” were made available to you on May 5. OPD provided no statutory basis for denying you access to any other records that may have been responsive to your request.

III. On or about October 11, 2021, you requested “a copy of the missing persons report on Marialice Clark.” On October 12, OPD denied your request, indicating that the “[d]epartment does not release Missing Persons Reports as they are considered investigative in nature. These reports do not fall under the reports we do release under NEB. REV. STAT. § 84-712(4). Therefore, your request is denied.”

It appears from your documentation that OPD provided you another response to the October 11 request minutes after sending its first response. Other than your name, request date, and reference number, the response contains no additional information relating to your request. It appears to us that this response was sent to you inadvertently, and was not intended to represent an official response to your records request.

OPD’S RESPONSE

Mr. in den Bosch states your correspondence “seem[s] to acknowledge that these records document a police response to a call for service and the subsequent investigation of that event.” He states that OPD provided you “the public information” in the missing person report documented as RB#45523F, but that other supplemental investigative reports, including the 2016 missing person report, are investigative in nature. He states that the OPD properly denied your request(s) under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(5).¹

The OPD response includes an affidavit from Deputy Chief Anna Colón. Deputy Chief Colón states that a search of OPD records reveals four reports relating to Marialice Clark. Deputy Chief Colón describes those reports in her affidavit as follows:

1. [A] missing person’s report dated June 20, 1970 under RB No. 0587E [C]ontains investigative information about who she was riding with, employment information and other information found in the investigation into this missing person’s report that occurred two years prior to Ms. Clark’s ultimate disappearance
2. [A] missing person’s report dated May 28, 1972 under RB No. 22987F [I]ncludes investigative information as to potential suspects, description of those suspects, their vehicle and specific information about witnesses who were present and threats of inappropriate sexual contact.

¹ Mr. in den Bosch noted that while the responses indicate that withheld records were investigative in nature, the citations to the applicable statutes were in error in some instances. He indicated that he would work with the OPD to correct this clerical error.

3. [A] missing person's report under RB No. 45523F which appears to be the last missing person's report since Ms. Clark has been seen. [C]ontains investigative information about the last time she was identified, information about people of interest and potential suspect vehicles and details about interviews of individuals potentially involved. This two page report did not ultimately lead to any potential criminal charges. [Deputy Chief Colón notes that you received the non-investigative portion of this report on September 15, 2020.]

4. The last set of reports . . . are 35 pages of reports and documents . . . characterized under RB No. AH61130. These reports include the initial missing person's reports and a missing person's report filed by Ed Clark on or about March 9, 2016 and various investigative efforts taken by the [OPD] to follow up on information that was provided when the reports were made or when the report was made by Mr. Clark. Each of these reports contains information including identification information for potential witnesses, contains summaries of conversations with various police departments in other jurisdictions and also includes significant information about Ms. Clark's brother Ed who reported the incident and his criminal history. The report also includes various information from National Criminal Databases including historical address information, etc.

Deputy Chief Colón states that she reviewed the reports withheld by OPD and can attest that the reports contain investigative material. Release of the reports "could prove embarrassing to individuals, could lead to discovery of law enforcement techniques and would undermine potential investigations in the future because of the access to some information which is generally not publicly known." Finally, Deputy Chief Colón states that it is the policy of the OPD to release non-investigative OPD reports and criminal history records information unless sealed. Under the same policy, "investigative records will not be provided as the release of those records has the potential to undermine ongoing and future investigations."

Mr. in den Bosch informs us that OPD "does not contest that the police reports in its possession are 'records' within the terms of the [NPRS]." He states that OPD "has the power to arrest persons for violations of law and a corresponding duty to investigate persons' conduct when enforcing the laws," citing Neb. Rev. Stat. §§ 14-102(25) and 14-606 (2012), as well as Omaha Rule Charter § 3.11. As a result, OPD is a "law enforcement agency" as referenced in § 84-712.05(5). He further states that the reports at issue "were developed by a law enforcement agency with duties of investigation of persons and that the records constitute part of the investigation." Thus, based on the representations in the Colón affidavit, he asserts that OPD has met its burden with respect to the withholding of the requested records.²

² See *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 792, 587 N.W.2d 100, 106 (1998) ("[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

YOUR PETITION

You subsequently filed your petition with our office. You assert in correspondence directed at OPD officials that there is no ongoing investigation, that it is in the public's interest for OPD to release records that are nearly 50 years old, and that there is no law or department policy barring the release of the records at issue.

DISCUSSION

The basic rule for access to public records is set out in Neb. Rev. Stat. § 84-712(1) (2014). That provision states:

Except as otherwise expressly provided by statute, all citizens of this state and all other persons interested in the examination of the public records as defined in section 84-712.01 are hereby fully empowered and authorized to (a) examine such records, and make memoranda, copies using their own copying or photocopying equipment in accordance with subsection (2) of this section, and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business and (b) except if federal copyright law otherwise provides, obtain copies of public records in accordance with subsection (3) of this section during the hours the respective offices may be kept open for the ordinary transaction of business.

“Public records” in Nebraska “include all records and documents, regardless of physical form, of or belonging to” governmental entities in the state, “[e]xcept when any other statute expressly provides that particular information or records shall not be made public.” Neb. Rev. Stat. § 84-712.01(1) (2014). Thus, there is no absolute right to access public records in those instances where records are exempt from disclosure by statute. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 788, 943 N.W.2d 231, 240 (2020); *Aksamit Resource Mgmt. LLC v. Neb. Pub. Power Dist.*, 299 Neb. 114, 123, 907 N.W.2d 301, 308 (2018).

While there are no statutes barring OPD from releasing the records, there are statutory provisions that allow public bodies to withhold certain enumerated records at its discretion. The provision at issue here—§ 84-712.05(5)—pertains to the ability to withhold

[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, citizen complaints

examination and that public body's duty to investigate or examine supports a colorable claim of rationality.”).

or inquiries, informant identification, or strategic or tactical information used in law enforcement training³

This office has considered the propriety of law enforcement agencies withholding investigatory records under § 84-712.05(5) on multiple occasions through the years.⁴ We have consistently held that such withholding is permissible, relying in large part on the plain language of the exception,⁵ which expressly permits *law enforcement agencies* to withhold records developed or received by the agencies which relate to investigations of persons, institutions or businesses. We have no basis to conclude otherwise with respect to your request for records from OPD relating to Ms. Clark. There is no question that the Omaha Police Department is a law enforcement agency as that term is used in the exception. Deputy Chief Colón states in her affidavit that she has reviewed the records at issue and believes them to be investigatory in nature. The descriptions provided in her affidavit, which we summarized above, support this conclusion. Consequently, since the records relate to OPD's investigation of Ms. Clark, those records may be properly withheld under § 84-712.05(5).

We have also considered your argument that it would be in the public's interest to release reports that are almost 50 years old. In this respect, we recently considered whether the Nebraska State Patrol ("NSP") could withhold autopsy photos and reports "relating to the investigation and prosecution of Charles Starkweather and Caril Fugate for murder in 1958." In File No. 21-R-131 (September 13, 2021), the petitioner argued that any Starkweather investigation would be at least sixty-three years old and, therefore, there could be no valid public policy reason to continue withholding the records at issue. In response, we noted that the status of an investigation has no bearing on a public body's ability to withhold investigatory records under § 84-712.05(5). The exception contains no

³ There are two exceptions to the exception: (1) records relating to the presence of drugs or alcohol in any body fluid of any person; and (2) records relating to the cause of death arising out employment once an investigation is concluded when requested by a family member of the deceased.

⁴ See, e.g., *File No. 21-R-139; Nebraska State Patrol; Chris Dunker, Lincoln Journal Star, Petitioner* (October 20, 2021); *File No. 21-R-115; Omaha Police Department; Christopher Fielding, Petitioner* (June 10, 2021); *File No. 19-R-130; City of Omaha Police Department; David Earl, KETV NewsWatch 7, Petitioner* (December 20, 2019); *File No. 19-R-106; Omaha Police Department; Reginald L. Young, Petitioner* (January 31, 2019); *File No. 18-R-106; Lincoln Police Department; Juanita Phillips, Petitioner* (March 22, 2018); *File No. 17-R-133; Alliance Police Department; Cheryl Spencer, Petitioner* (July 18, 2017); *File No. 17-R-121; Wymore Police Department; Wayne and Sandi Gridley, Petitioners* (April 20, 2017); *File No. 16-R-134; University of Nebraska-Lincoln [Police Department]; Ralph W. Edwards, Petitioner* (September 28, 2016); and *File No. 16-R-102; Omaha Police Department; KETV, Petitioner* (February 8, 2016). Copies of our disposition letters relating to these files are accessible at <https://ago.nebraska.gov/disposition-letters>.

⁵ 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. See *Aksamit*, 299 Neb. at 123, 907 N.W.2d at 308; *Farmers Cooperative v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017).

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language which distinguishes between active and closed investigations. Nor does the exception preclude a public body from withholding investigatory records after a prescribed number of years. We concluded that the NSP could rely on the exception despite the historical nature of the records at issue. Again, there is no basis to conclude otherwise in the present case.


Finally, although Neb. Rev. Stat. § 84-712.03 creates enforcement responsibilities for this office, there is no statutory mechanism for an *in camera* review of the documents by the Attorney General. Under § 84-712.03(2), that procedure is left for the courts. Consequently, we will rely on the representations from Mr. in den Bosch and Deputy Chief Colón that the requested records constitute investigatory records of the OPD and, as a result, fall within the exception in § 84-712.05(5).

CONCLUSION

For the reasons discussed above, the Omaha Police Department may continue to withhold any investigatory records pertaining to your requests for records relating to Marialice Clark under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(5). Since no further action by this office is warranted, we are closing our file. If you disagree with our analysis under the NPRS, you may wish to review the judicial remedies available to you under § 84-712.03.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Bernard J. in den Bosch (via email only)

49-2812-29