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July 6, 2023

Via email to [REDACTED]
Jeff Forward
News Reporter
The Fremont Tribune

RE: *File No. 23-R-123; City of Fremont/Police Department; Jeff Forward, The Fremont Tribune, Petitioner*

Dear Mr. Forward:

This letter is in response to your correspondence sent to the Attorney General's Communications Director, Suzanne Gage, on June 21, 2023. You have requested our review of the denial by the City of Fremont ("City") of your request for the Fremont Police Department's pursuit policy. We construed your correspondence to be a petition 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. 2022). Our findings in this matter are set forth below.

YOUR PUBLIC RECORDS REQUEST AND THE CITY'S DENIAL

On June 16, 2023, you requested the following record from the City:

The Fremont Police Department's state-mandated high-speed pursuit/spike strip/chase policy document/protocols. This document is mandated by state law in Nebraska and is a public document. We at Tribune are seeking the entirety of the policy document regarding FPD pursuits, chases, spike strips or any other associated actions that are required under state law.

Molly J. Miller with the City Attorney's Office responded to your request by letter dated June 21. Ms. Miller indicated that "[t]he records sought, in the request set forth above, are being withheld by the City of Fremont pursuant to Neb. Rev. Stat. § 84-

712.05(5), as those records are an exception to production of documents requested under the Nebraska Public Records statute.”

YOUR PETITION

You state in your petition that a pursuit policy, mandated by the Nebraska Legislature in Neb. Rev. Stat. § 29-211, “is clearly a public record.” You assert that you are a Nebraska resident, and that the policy “is not exempt from disclosure in any way[,] shape nor form, and [the City] rejected [your] request for it.” You further state that your “regional boss and our regional VP Of [sic] news are aware of this rejection and we all believe this is a public record they cannot just keep from the public or press.” Lastly, you assert that other law enforcement agencies consider the policy “a clear public record.” For example, you state that the “Omaha PD has it literally posted online for anyone to read,” and you just received a copy of the Saunders County Sheriff’s Office policy in response to a public records request.

DISCUSSION

In Nebraska, “public records . . . 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). However, 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 § 84-712.05.¹ The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009); *State ex rel. Nebraska Health Care Ass’n v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

The City has taken the position that § 84-712.05(5) provides an appropriate statutory basis to withhold the pursuit policy. This exception 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,

¹ Section 84-712.05 currently contains twenty-five categories of public records that may be withheld at the discretion of a public body so long as those records have not been “publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties”

intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training²

In our disposition in *File No. 20-R-123; Nebraska State Patrol; Chris Dunker, Petitioner*, dated August 19, 2020, this office considered whether the Nebraska State Patrol (“NSP”) could withhold its “policy regarding the use of non-lethal and less-lethal weapons, including but not limited to, tear gas, pepper spray, flashbang grenades, foam or rubber bullets.” *Id.* at 2. In support of withholding the policy, the NSP argued that the records at issue were “highly tactical and strategic in nature,” and that disclosing the records “could make the agency, and its employees vulnerable in situations where lives are at stake.” *Id.* The NSP further argued that disclosure would hinder the agency’s law enforcement operations and “undermine official law enforcement actions.” *Id.* The NSP also represented that the records were “used extensively in training within the agency.” *Id.*

Construing “tactical” and “strategic” in their plain and ordinary sense,³ and relying on affidavits from NSP officials, we concluded that the records fell within the exception in § 84-712.05(5). We noted that the requested policies discussed when certain types of law enforcement teams would be deployed, procedures for serving warrants, and situations where personnel or equipment would be authorized for use, which was information tactical and strategic in nature. We further noted that the policy was used in law enforcement training. *Id.* at 5.

We reached a similar conclusion in *File No. 21-R-139; Nebraska State Patrol; Chris Dunker, Lincoln Journal Star, Petitioner*, dated October 20, 2021. The petitioner had requested various records relating to the arrest of a former NSP evidence technician who was accused of stealing \$1.2 million in drugs from the Troop H Evidence Facility, including “[t]he most up-to-date policy or protocol training materials provided to evidence technicians employed at the Troop H Evidence Facility.” *Id.* at 1-2. The NSP provided the requester an almost entirely redacted policy, citing § 84-712.05(5) as its basis to withhold the redacted material. Upon review, we agreed with the withholding, stating:

While we do not believe that the redacted policy fits the definition of “tactical” *per se*, based on representations from [NSP officials], the policy appears to be highly strategic as to the disposition of evidence and seized items. For example, the

² 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.

³ “Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.” *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 123, 907 N.W.2d 301, 308 (2018).

policy addresses the types of evidence storage locations, the types of safes and boxes used, the location and duration of holding seized items, procedures for storing high value items, methods to transport seized evidence and the destruction and disposal of items. The policy is very specific and used for law enforcement training. Consequently, we believe that the redacted information appears to fall within the language of the exception and that the NSP has a sufficient statutory basis to continue to withhold it.

Id. at 6.

We come to the same conclusion with respect to the pursuit policy based on the plain language in § 29-211. Subsection (1) requires each law enforcement agency's pursuit policy to contain at least the following elements:

- (a) Standards which describe when a pursuit may be initiated, taking into consideration the nature and severity of the offense involved;
- (b) Standards which describe when a pursuit is to be discontinued, giving special attention to (i) the degree of danger presented to the general public and the pursuing officer and (ii) the probability of later apprehension of the subject based upon his or her identification;
- (c) Procedures governing the operation of pursuits including, but not limited to, the number and types of vehicles which may be used, the method of operation of such vehicles, and the exercise of supervision during pursuits;
- (d) Procedures governing pursuits which include other law enforcement agencies or which extend into the jurisdiction of other law enforcement agencies; and
- (e) A system of mandatory continued planning and review of training of personnel appropriate and consistent with the policies and jurisdiction of the law enforcement agency regarding the proper handling of pursuits, including, at a minimum, an annual review of the policy with each sworn law enforcement officer and dispatcher.

Neb. Rev. Stat. § 29-211 (2016) (emphasis added).⁴ In our view, not only does the statute contemplate a policy containing highly tactical and strategic information, but expressly requires that law enforcement personnel be trained on the policy. Thus, we find that a pursuit policy mandated under § 29-211 comprises “strategic or tactical information used in law enforcement training,” and that the City cited a sufficient statutory basis to withhold it.

⁴ Subsection (2) further mandates that all law enforcement agencies in the state “ensure that all law enforcement officers who commence employment with such law enforcement agency receive specialized training in pursuit driving” as described in the statute.

Additionally, we contacted Deputy Omaha City Attorney Bernard in den Bosch regarding your claim that the Omaha Police Department (“OPD”) posts its pursuit policy online. Mr. in den Bosch indicated that he did not know how Muckrock [third-party website where policy is located] got a copy and whether it is an old version of the policy. He clarified that OPD has withheld copies of the policy pursuant to § 84-712.05(5). Mr. in den Bosch stated that the policy provides information on how the OPD handles pursuits, e.g., when they will be continued, discontinued, etc. He stated that “[i]f a criminal were aware of the intricacies of the policy, they would know what to do in order to get the pursuit discontinued.” He advised that portions of OPD’s procedures that are considered strategic and tactical are not available on the OPD website, but the remainder of the procedures are made available.

Further, according to the Lincoln Police Department’s (“LPD”) website, “[w]hile most [department policies] are posted in their entirety, some policies contain strategic or tactical information used in law enforcement training, investigative instruction and sensitive material that could jeopardize public safety or impede officers' ability to respond to critical incidents. Those policies remain confidential.”⁵ Accordingly, LPD’s pursuit policy is not publicly available on its website.

Finally, as stated in your petition, we acknowledge that you received a pursuit policy from the Saunders County Sheriff’s Office, “which happily provided it and told [you] it is public record and not able to be ‘hidden.’” The exceptions listed in § 84-712.05 are *discretionary*. While a public body may withhold records that fall within the exceptions listed in the statute, it is not required to do so. Thus, the City of Fremont had the discretion to deny your request.

CONCLUSION

For the reasons explained above, we believe that the City of Fremont’s pursuit policy may be lawfully withheld under § 84-712.05(5). Since you have not been unlawfully denied access to public records, no further action by this office is necessary and we are closing our file.

⁵ See <https://www.lincoln.ne.gov/City/Departments/Police/About-LPD/Department-Policies>.

Jeff Forward
July 6, 2023
Page 6

If you disagree with the analysis we have set out above, you may wish to discuss with legal counsel what additional remedies may be available to you under the Nebraska Public Records Statutes.

Sincerely,

MIKE HILGERS
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Molly J. Miller (via email only)

49-3270-30