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August 26, 2022

Via email at [REDACTED]
David A. Lopez
Husch Blackwell
13330 California Street, Suite 200
Omaha, NE 68154

RE: *File No. 22-R-141; City of Omaha; Sheriff Tim Dunning, Petitioner*

Dear Mr. Lopez:

This letter is in response to your petition submitted on behalf of former Douglas County Sheriff Tim Dunning (“Dunning”) on August 11, 2022. You have requested our review of the partial denial by the City of Omaha (“City”) relating to two public records requests submitted to the City on August 1 and 2, 2022. On August 19, Deputy City Attorney Bernard in den Bosch provided this office a response to your petition, a copy of which was provided to you. You were also allowed to submit a reply to Mr. in den Bosch’s response, and we received such reply on August 23. We considered your petition and reply and the City’s response in accordance with the provisions of the Nebraska Public Records Statutes (“NPRS”), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020, Supp. 2021), amended 2022 Neb. Laws LB 876 and LB 1246. Our findings in this matter are set forth below.

BACKGROUND

This matter concerns three sets of records, two from Dunning’s August 1 request and the third from a request made August 2, as follows:

1. All records possessed by any City of Omaha department or employee, including, but not limited to, the Omaha Police Department (“OPD”) and the Law Department, containing any nondisclosure agreement, settlement, confidentiality agreement, or any related instrument entered into between former OPD Deputy Chief Greg Gonzalez and the City of Omaha from December 1, 2021, to the present.

2. All records possessed by any City of Omaha department or employee, including, but not limited to, the Omaha Police Department (“OPD”) and the Law Department, relating to any dissemination of confidential information by former OPD Deputy Chief Greg Gonzalez to his wife, Kathy Gonzalez. Such records include, but are not limited to, any dissemination by means of either Greg’s or Kathy’s personal email account(s) as a means to send or receive responsive messages. For purposes of this request, underlying confidential information is not sought and should be redacted as appropriate. Records relating to the potential dissemination of such confidential information is the target of this request.
3. If Kathy Belcastro-Gonzalez has, in the three (3) months preceding the date of this request, appealed any Omaha Police Department disciplinary action beyond the Human Resources Director, as defined in Article 18a, Section I of the 2021-2025 Labor Agreement Between the City of Omaha and the Omaha Police Officers Association, the appeal document and all attached documents or other records.¹

Mr. in den Bosch responded to both public records requests on August 5. With respect to item number 1, he indicated that if there were such a document, it would be withheld as personal information under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(8), unless otherwise required by law. As to item number 2, Mr. in den Bosch stated that

[t]he City is in possession of an Internal Affairs investigation performed by the Omaha Police Department into the conduct of Katherine Belcastro-Gonzalez. The entire investigation is withheld as all the documents included in such investigation are records developed or received by a law enforcement agency charged with duties of investigation and the record is an investigation pursuant to Neb. Rev. Stat. § 84-712.05(5).

With respect to item number 3, Mr. in den Bosch indicated that the City was in possession of two letters appealing Ms. Belcastro-Gonzalez’s discipline as contemplated under the collective bargaining agreement applicable to her employment. Both letters are dated August 1, 2022—one from Daniel Martin, vice president of the Omaha Police Officer’s Association, and the other from attorney Ray Aranza. Mr. in den Bosch denied you access to these letters under the exceptions to disclosure in §§ 84-712.05(5) and (8).

¹ Apparently, there was some confusion as to whether “other records” included the investigative file. However, you have made it clear that Dunning was only seeking the letters of appeal to the discipline imposed by OPD.

RELEVANT FACTS

Based on the materials provided by both parties, which included the affidavits of OPD Deputy Chief Anna Colón and Mr. in den Bosch, the following facts are established:

1. The requested records are public records.
2. Gregory Gonzales was an employee of OPD from January 1995 until his retirement on January 26, 2022. At the time of his retirement, Mr. Gonzalez was not the subject of an Internal Affairs investigation, and had no claim or pending or threatened lawsuit against the City. (Colón Affidavit, ¶ 2; in den Bosch Affidavit, ¶ 6.)
3. Gregory Gonzales is married to Kathy Belcastro-Gonzalez. (in den Bosch Affidavit, ¶ 4.)
4. Kathy Belcastro-Gonzalez was an employee of OPD from April 1994 until her termination on July 22, 2022. (Colón Affidavit, ¶ 3.)
5. On January 18, 2022, OPD Chief Todd Schmaderer initiated an investigation into Ms. Belcastro-Gonzalez's use of her vaulted City email account. Following the completion of the Internal Affairs investigation, and review of the investigation, Chief Schmaderer determined that Ms. Belcastro-Gonzalez's conduct warranted termination from OPD. Ms. Belcastro-Gonzalez has appealed her termination by letter dated August 1, submitted by Daniel Martin, vice president of the Omaha Police Officer's Association. A second letter from attorney Ray Aranza was also submitted on her behalf on August 1. (Colón Affidavit, ¶¶ 4, 5, and 7.)
6. When OPD receives letters appealing discipline, those letters become part of the investigative file and become part of the investigation. The OPD does not produce letters of appeal, which may contain substantive information as to the discipline imposed, nor does it produce any part of any letter of discipline or any part of an investigation. (Colón Affidavit, ¶ 9.)
7. Ms. Belcastro-Gonzalez has sued the City and Chief Schmaderer in federal court. The pending litigation is contentious. (in den Bosch Affidavit, ¶¶ 3-4.)
8. At the time Mr. Gonzalez retired from OPD, and in light of the pending lawsuit involving his wife, the City and Chief Schmaderer "desired to clarify the future communications in regard to Deputy Chief Gonzalez after his retirement." The City did not provide any consideration or benefit to Mr. Gonzales different than what would be provided to any other retiring police officer. (in den Bosch Affidavit, ¶¶ 5- 6.)

DISCUSSION

Neb. Rev. Stat. § 84-712.05 currently contains twenty-five categories of public records that may be withheld at the discretion of the records custodian 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” The City is relying on the exceptions to disclosure in Neb. Rev. Stat. § 84-712.05(5) and (8) as its basis to withhold the requested records. Those exceptions pertain to:

(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 training²

and

(8) Personal information in records regarding personnel of public bodies other than salaries and routine directory information

Upon review of the facts, and the arguments presented by the parties, it seems to us that the disposition of this file turns on the Nebraska Supreme Court case *Steckelberg v. Nebraska State Patrol*, 294 Neb. 842, 885 N.W.2d 44 (2016) [*“Steckelberg”*]. The plaintiff in *Steckelberg* was a State Patrol trooper who sought access to the score sheets and comments and recommendations made by a hiring board for a position Steckelberg interviewed for but did not get. The trial court concluded that the records could be withheld under § 84-712.05(7³), stating:

The documents sought contain the interviewing board’s impression of the candidates concerning their appearance, mannerisms, ability to answer questions, their career and personal life experiences, whether their personal life may interfere or contribute to their ability to succeed and their scores on each response to the interview questions concerning the roles and responsibilities of the Executive Protection Division. The interview board then made its recommendations concerning the applicants. *The Court finds that the information contained in the records constitutes personal information within the meaning of § 84-712.05(7).*

Todd Steckelberg v. Nebraska State Patrol, Lancaster County District Court, Case No. CI15-1710, Order on Petition for Writ of Mandamus (August 25, 2015) (emphasis added).

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 Renumbered as subsection (8) as a result of the enactment of 2022 Neb. Laws LB 1246, § 5.

On appeal, Steckelberg argued, among other things, that the requested records did not fit within the parameters of § 84-712.05(7) because, by the State Patrol's own admission, they were not part of an employee's personnel file. In rejecting this argument, the Court stated:

Steckelberg's first argument . . . misses the mark. The State Patrol did produce an affidavit stating that the records were not kept with an employee's personnel record, but were kept separately by the State Patrol's human resources division. But § 84-712.05(7) exempts “[p]ersonal information in records regarding personnel.” The district court found that the information in the records sought did contain personal information. And the information was about employees, otherwise known as personnel, of the State Patrol. There is no requirement in § 84-712.05(7) that in order to be exempt, the records must be kept within an employee's personnel record, as used as a term of art; *the records need only be personal information about personnel, defined as persons employed by an organization.*

Steckelberg, 294 Neb. at 849-850, 885 N.W.2d at 50 (internal citations omitted) (emphasis added).

Greg Gonzalez and Kathy Belcastro-Gonzalez were employees of the City of Omaha Police Department. All of the records you have requested, i.e., an agreement between Mr. Gonzalez and the City entered into at the time of his retirement, records relating to Mr. Gonzalez's potential dissemination of confidential information to his wife, and Ms. Belcastro-Gonzalez's letters to appeal her termination, pertain to retirement, employee misconduct, and disciplinary matters. Those matters are personal in nature. If the Nebraska Supreme Court concluded that score sheets and comments made during an interview for a trooper position fell within the exception, then certainly matters involving the retirement, misconduct and discipline of public employees fall under this exception as well.

We disagree that § 84-712.05(8) is inapplicable to withhold “an entire contract between a public body and third party” as asserted in your reply for a number of reasons. The agreement was executed by the City and Mr. Gonzalez in his capacity as an OPD employee. He was not a “third party.” Moreover, as stated by Mr. in den Bosch, the agreement was made without consideration or benefit to Mr. Gonzalez. We are not convinced that this agreement is analogous to the types of agreements that are entered into by public entities with third parties involving the expenditure of public funds which do require disclosure.⁴

⁴ See, e.g., *File No. 15-R-122; City of Grand Island; Tracy Overstreet, Grand Island Independent, Petitioner* (May 27, 2015), in which we directed the city attorney to make available, with limited redaction, a copy of the requested contract for ambulance billing services.

However, your petition illustrates the limitations we face when attempting to determine whether certain exceptions asserted by public bodies and officials to withhold public records do in fact apply. Often, there is insufficient evidence to compel public entities to produce public records. There is certainly nothing in § 84-712.03 that allows us to see the records in dispute. In the present case, in light of the plain language of the exception, and the Court's straightforward construction of it set out in *Steckelberg*, § 84-712.05(8) provides a plausible basis to withhold the records at issue. Consequently, it is not necessary to consider the City's arguments that § 84-712.05(5) also provides a basis to withhold.

Finally, we will take this opportunity to address the City's initial response to item number 1—that *if* there was such a record, it would be withheld under § 84-712.05(8). In his response to this office, Mr. in den Bosch acknowledges that the "response was not as direct as that which normally be provided, however the timing of the request is important." He goes on to state that Mr. "Gonzalez is seeking political office and there is some potential that any document, even if were merely identified, would be used for political purposes." Section 84-712.04 requires a public body to provide, among other things, "[a] description of the contents of the records withheld" in addition to the statutory basis to withhold. The City's initial response was insufficient under the statute. We would also reiterate that "[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." *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 801, 943 N.W.2d 231, 247 (2020) (quoting *State ex rel. Sileven v. Spire*, 243 Neb. 451, 457, 500 N.W.2d 179, 183 (1993)).

CONCLUSION

Based on the foregoing, we conclude that the City may continue to withhold the requested records under the personal information exception set out in § 84-712.05(8). Since no further action by this office is necessary, we are closing this file. If you disagree with the conclusion reached above, you may wish to consider the additional remedies available to you under the NPRS.

Sincerely,

DOUGLAS J. PETERSON
Attorney General


Leslie Donley
Assistant Attorney General