

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA:

State ex rel. Slate Magazine and)	Case No.
Emily Bazelon,)	
)	
Relators,)	
)	
v.)	
)	
James Peschong, in his official capacity)	VERIFIED PETITION FOR
as Chief of the Lincoln Police)	WRIT OF MANDAMUS
Department,)	
)	
Respondent.)	
)	

COME NOW Relators, by and through their attorneys, and allege as follows:

INTRODUCTION

1. *Slate* Magazine and Emily Bazelon (“Relators” or “*Slate*”) bring this Petition for a Writ of Mandamus to compel the Lincoln Police Department (“LPD”) to describe and disclose records requested by *Slate* senior editor Emily Bazelon pursuant to the state Public Records Act (“PRA” or “Act”), Neb. Rev. Stat. § 84.712 *et seq.* The records in question relate to an alleged rape reported to the LPD in June 2004. This alleged rape was never prosecuted or even, to the victim’s knowledge, adequately investigated. Nearly ten years later, and with the victim’s support and consent, Relators seek to obtain copies of records relating to this incident. Because the alleged perpetrator is a person of some public prominence in Nebraska athletics, the victim is concerned that he may have been subject to favorable treatment.

2. Respondent denied the request almost in its entirety, refusing to disclose anything beyond a few terse incident reports and dispatch records, and failing even to describe the records withheld. None of the information released to date provides any indication of the depth of the

investigation into the alleged rape, and none provides the victim with an understanding of how her crime was handled. Some of the records LPD is believed to possess – and may now be withholding – derive from the victim herself, including statements to the police, a rape kit and, presumably, the results thereof.

3. Respondent has failed to provide any meaningful explanation for its withholdings, instead simply asserting that all of the withheld records are exempt from disclosure under the Public Records Act. LPD has not described the nature or number of the records it possesses. This response flouts the plain statutory requirements of the Nebraska Public Records Act.

4. LPD relies on the law enforcement exemption to the Public Records Act to deny any meaningful disclosure. But LPD's sweeping application of this exemption is contrary to law. If allowed to stand, it would dramatically restrict the ability of the public to meaningfully oversee local police departments and other law enforcement agencies. Without additional description and disclosure, the public is unable to determine whether law enforcement is properly discharging its duties. The records sought here, for instance, could reveal whether LPD seriously investigated a rape allegation that the alleged victim believes was never adequately pursued.

5. Relators therefore ask this Court to find that LPD has acted contrary to law in refusing to describe and disclose the records sought, and to order LPD immediately to (a) offer a full description of the withheld records and (b) disclose in whole or in part those records that are not properly withheld.

NATURE OF THE ACTION

6. This is a petition for a Writ of Mandamus pursuant to the Public Records Act, Neb. Rev. Stat. § 84-712.03(1)(a), against the Chief of the LPD, who in his official capacity is

responsible for the LPD's failure to comply with the Act in response to Relators' request for records.

7. Relators seek expedited treatment of this case pursuant to Neb. Rev. Stat. § 84-712.03(3).

JURISDICTION AND VENUE

8. This Court has jurisdiction over this matter pursuant to Neb. Rev. Stat. § 84-712.03(2) to enjoin the Respondent from withholding records, to order the disclosure of records, and to grant such other equitable relief as may be proper.

9. Venue is proper in this district pursuant to Neb. Rev. Stat. § 84-712.03(1)(a) because Respondent is located within this district and may be served in this district.

PARTIES

10. Relator *Slate Magazine* is an online commercial newsmagazine with roughly eight million monthly readers, published by Graham Holding Co., LLC.

11. *Slate's* principal place of business is 1350 Connecticut Avenue NW, Suite 400, Washington, DC 20036.

12. Relator Emily Bazelon is a senior editor at *Slate Magazine*. She submitted the request for records to the LPD in her capacity as a writer for *Slate Magazine*.

13. Respondent James Peschong is Chief of Police of the Lincoln Police Department. Respondent Peschong denied Relators' requests for records, and is the custodian of LPD's records for purposes of the Public Records Act, Neb. Rev. Stat. §§ 84-712, 712.03(1)(a). He is sued in his official capacity.

FACTS

14. On November 12, 2013, Relators submitted a Public Records Act request to the Lincoln Police Department seeking disclosure of information relating to three cases, numbered A2-105190, A4-063048, and A5-019140. Relators requested “access to and a copy of all reports, communications (including, but not limited to, email, memoranda, and letters), documents, and all other information and records related to” these cases. Relators asked LPD to provide a written explanation for any refusal to disclose requested records, and also asked LPD to disclose segregable portions of records that contained portions considered exempt from disclosure. (A true and correct copy of Relators’ November 12, 2013 request is attached as Exhibit A.)

15. Relators, by this Petition, challenge LPD’s failure to disclose records regarding case number A4-063048. That case concerns an alleged rape that occurred on June 11, 2004, and was reported to the LPD on June 12, 2004. Among the evidence gathered by the police were a statement from the victim and a sexual assault evidence collection kit (commonly known as a rape kit), the results of which have not previously been disclosed to the victim. The alleged victim wrote and signed a letter dated November 18, 2013, in support of Relators’ request for access to records concerning this case. The alleged victim states that no charges were ever brought in relation to this incident, and since no investigation is ongoing she asked that the case be designated as officially “closed.” The victim consents to the release of all reports, communications, documents and other information to Relators. (A true and correct copy of the letter signed by the victim of the alleged rape is attached as Exhibit B.)

16. By letter dated November 15, 2013, an official from the LPD, writing on behalf of Respondent, approved in part and denied in part Relators’ request. Respondent released the public incident reports and dispatch records for the three cases sought, including the one at issue

in this action. (A true and correct copy of Respondent's November 15, 2013 letter, as well as the incident report and dispatch report for case A4-063048, are attached as Exhibit C.)

17. Respondent's November 15 letter stated that a search would be conducted for any 911 or "CAD" records relating to the three cases identified by Relators. (Relators believe that CAD refers to the computer-aided dispatch system linked to 911 services.)

18. Respondent's November 15 letter acknowledged possession of "investigatory case records" for the cases in question, but withheld them in full pursuant to Neb. Rev. Stat. § 84-712.05(5). The letter did not identify the withheld records, stating only that they "may include email, memoranda, and letters," the categories of documents requested by Relators.

19. The November 15 response letter did not specify on what basis any particular records, or portions thereof, were being withheld. The letter recited various grounds for withholding under § 84-712.05(5), but failed to specify which particular ground(s) it was in fact relying on for withholding any particular document. The letter did not indicate whether LPD had attempted to produce all segregable portions of otherwise exempt material as required by law.

20. The November 15 letter denied any additional disclosures relating to the three cases.

21. Relators subsequently received a letter dated November 20, 2013 purporting to amend the letter of November 15, 2013. The letter attached copies of the "CAD" record for each of the three cases sought, including the one at issue in this action. (A true and correct copy of the Respondent's November 20, 2013 letter, as well as the CAD record for case A4-063048, are attached as Exhibit D.)

22. The November 20 letter did not attach any records beyond the CAD records. It advised Relator Bazelon that she could purchase a complete criminal history report online. It

repeated verbatim the portion of the November 15, 2013, letter refusing to release any further records pursuant to §84-712.05(5), and again failed to identify any of the withheld records or provide any specific justification for withholding specific documents. Like the previous letter, it denied disclosure of all remaining records.

23. On November 22, 2013, Relators filed a timely appeal to the Attorney General pursuant to Neb. Rev. Stat. § 84-712.03(1)(b). Relators asserted that Respondent's withholding was unlawful because Respondent was relying on a faulty and overbroad interpretation of § 84-712.05(5) as a basis for withholding the records. (A true and correct copy of Relators' November 22, 2013 letter to the Attorney General is attached as Exhibit E.)

24. On December 6, 2013, Relators filed a supplementary letter with the Nebraska Attorney General. The letter reaffirmed Relator's desire to obtain "redacted versions of any materials that cannot be produced in full, as Nebraska's public record statute requires," as well as obtain "a full written explanation of why particular documents are being withheld." (A true and correct copy of Relator's December 6, 2013 letter to the Attorney General is attached as Exhibit F.)

25. The Attorney General denied Relators' appeal in its entirety on December 9, 2013. (A true and correct copy of Respondent's December 9, 2013 letter to Relators is attached as Exhibit G.)

26. Relators now bring this petition for a Writ of Mandamus in order to compel the Respondent to comply with the law, and produce the withheld records that relate to case number A4-063048, or any portions thereof that are not properly exempt. Respondent must also provide a detailed description of any records that are withheld, along with specific explanations for why each record (or portion thereof) falls under a particular basis for withholding. Relators have no

available remedies other than this proceeding, and Relators have not previously applied for the relief requested herein.

FIRST CLAIM FOR RELIEF

(FAILURE TO DISCLOSE RECORDS)

27. Relators repeat and re-allege paragraphs 1 through 26 as if set forth in full.

28. Under the Nebraska Public Records Act, all of the documentary materials in possession of the LPD are presumptively open and available for public examination, unless otherwise provided by law. Neb. Rev. Stat. §§ 84-712, 712.01(1). Moreover, any reasonably segregable public portion of a record must be released after deletion of portions that are lawfully withheld. Neb. Rev. Stat. § 84-712.06.

29. Respondent has refused to release an undisclosed number of records, relying on a single statutory exemption, Neb. Rev. Stat. § 84-712.05(5).

30. Respondent has not redacted any of the withheld records. Respondent has not stated whether it has reviewed those records to determine whether any reasonably segregable portions may be made public.

31. The withheld records, or some portions thereof, are not properly exempt from disclosure under the claimed exemption. All such records (or portions thereof) must be disclosed.

SECOND CLAIM FOR RELIEF

(FAILURE TO DESCRIBE RECORDS AND JUSTIFY REFUSAL TO DISCLOSE)

32. Relators repeat and re-allege paragraphs 1 through 26 as if set forth in full.

33. The Public Records Act requires that when a public body denies a request for records, it must provide a full description of the contents of the records withheld and a statement

of the specific reasons for denial, correlating specific portions of the records to specific reasons for denial. Neb. Rev. Stat. § 84-712.04.

34. Respondent has not provided a description of the contents of the records or specific reasons for denial, stating only that the requested records “may include email, memoranda, and letters,” and asserting, in an entirely conclusory fashion, that the records fall within the exemption found at Neb. Rev. Stat. § 84-712.05(5). Ex. C. Respondent has therefore failed to justify his refusal to disclose the withheld records as specifically required by law. In the absence of such a justification, the withheld records must be released.

WHEREFORE, Relators respectfully ask this Court to issue a Writ of Mandamus:

- a) Declaring that Respondent has violated the Public Records Act in failing to properly justify its refusal to disclose all of the records requested by Relators;
- b) Declaring that Respondent has violated the Public Records Act in withholding the records requested by Relators;
- c) Ordering the Respondent to disclose the requested records to the Relators;
- d) Awarding Relators’ costs and reasonable attorney’s fees pursuant to Neb. Rev. Stat. § 25-2165;
- e) Granting Relators such other and further relief as this Court deems just and proper.

Dated: December 23, 2013

Respectfully Submitted,

By: _____

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