

SUPREME COURT OF NEBRASKA

Evertson v. City of Kimball, 278 Neb. 1

767 N.W.2d 751 (2009) · No. S-08-524 · Decided July 2, 2009

SUMMARY

The Supreme Court of Nebraska considered whether investigative records held by private investigators were public records under Nebraska's public records statutes after the City of Kimball delegated an investigation of alleged racial profiling. The court held that the records were public records because the investigators performed a delegated government function and the City was entitled to possess the materials, but ruled that the records were exempt from disclosure under Neb. Rev. Stat. § 84-712.05(5). The court also reversed the award of attorney fees and affirmed in part, reversed in part, and remanded with directions.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Connolly, J.; Heavican, C.J.; Wright, J.; Gerrard, J.; Stephan, J.; McCormack, J.; Miller-Lerman, J.
JURISDICTION	Nebraska
DECIDED	July 2, 2009
DOCKET	S-08-524
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The City appealed from a district court order in a mandamus action requiring disclosure of investigative records under Nebraska's public records statutes and awarding attorney fees.
STANDARD OF REVIEW	Justiciability issues without factual disputes and statutory interpretation are questions of law reviewed independently. Factual findings in a bench trial in a law action have the effect of a jury verdict and will not be disturbed unless clearly erroneous. Granting a writ of mandamus is within the trial court's discretion, and attorney-fee decisions are reviewed for abuse of discretion.
PRECEDENTIAL VALUE	Published, precedential opinion of the Supreme Court of Nebraska.
PARTIES	The City of Kimball et al. v. Bruce Evertson, Perry Van Newkirk

TOPICS

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QUESTIONS PRESENTED

1. Whether written investigative materials prepared by private investigators retained by a city are public records under Neb. Rev. Stat. § 84-712.01 when the city delegated a governmental investigative function to the investigators and did not take physical possession of the materials.
2. Whether the investigative materials were exempt from disclosure under Neb. Rev. Stat. § 84-712.05(4), (5), or (7), particularly the investigatory-records exemption in subsection (5).
3. Whether the appeal should be reviewed under the public interest exception to mootness after the district court had disclosed the records.
4. Whether the appellees were entitled to attorney fees under Neb. Rev. Stat. § 84-712.07.

HOLDINGS

1. Materials in a private party's possession are public records under § 84-712.01 when a public body delegated a governmental function to the private party, the private party prepared the records under that delegation, the public body was entitled to possess the materials to monitor performance, and the records were used to make a decision affecting the public interest. Actual physical possession by the public body is not required.
2. The investigative materials were exempt from disclosure under Neb. Rev. Stat. § 84-712.05(5). An investigation of a public body's employee is for law-enforcement purposes when it focuses on specifically alleged illegal acts, even if the Legislature has not provided civil or criminal enforcement provisions for the alleged violation.
3. The appellees were not entitled to attorney fees under § 84-712.07 because, after the investigatory exemption applied, they had not substantially prevailed.
4. The court could review the otherwise moot appeal under the public interest exception because the issues concerned recurring public-records questions and authoritative guidance for public officials was desirable.

KEY QUOTATIONS

“Specifically, under § 84-712.01, requested materials in a private party's possession are public records if the following requirements are met: (1) The public body, through a delegation of its authority to perform a government function, contracted with a private party to carry out the government function; (2) the private party prepared the records under the public body's delegation of authority; (3) the public body was entitled to possess the materials to monitor the private party's performance; and (4) the records are used to make a decision affecting public interest.” (762)

“We agree with other courts that public records laws should not permit scrutiny of all a private party's records simply because it contracts with a government entity to provide services.” (761)

FACTUAL BACKGROUND

After business members complained that Kimball police were racially profiling Hispanic employees, the mayor placed an officer on administrative leave and hired an outside private investigator. The investigator assembled a team that conducted interviews and prepared written investigative materials, including a report, although the mayor claimed that the City had received only a verbal report and had not requested or paid for a final written report. The City paid approximately \$26,000 for the investigation and relied on the information in terminating the officer's employment. Evertson and Van Newkirk sought the materials in part to defend against a related federal lawsuit.

PROCEDURAL HISTORY

Evertson and Van Newkirk filed a mandamus petition seeking disclosure of an investigative report concerning allegations of racial profiling by Kimball police officers. The district court determined that the investigative documents were public records, rejected the City's asserted exemptions, ordered disclosure with redactions, and awarded attorney fees. The Nebraska Supreme Court reviewed the appeal under the public interest exception to mootness, affirmed the public-records determination, but reversed the rulings concerning the exemption and attorney fees and remanded with directions.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The district court was directed to enter an order consistent with the opinion, including recognizing the § 84-712.05(5) exemption and denying the attorney-fee award.

CASES CITED

- In re Interest of Anaya, 276 Neb. 825, 758 N.W.2d 10 (2008)
- In re Estate of Chrisp, 276 Neb. 966, 759 N.W.2d 87 (2009)
- Pennfield Oil Co. v. Winstrom, 276 Neb. 123, 752 N.W.2d 588 (2008)
- State ex rel. Johnson v. Gale, 273 Neb. 889, 734 N.W.2d 290 (2007)
- State ex rel. Steinke v. Lautenbaugh, 263 Neb. 652, 642 N.W.2d 132 (2002)
- State ex rel. Neb. Health Care Assn. v. Department of Health, 255 Neb. 784, 587 N.W.2d 100 (1998)
- Forsham v. Harris, 445 U.S. 169, 100 S. Ct. 977, 63 L. Ed. 2d 293 (1980)
- Kissinger v. Reporters Committee, 445 U.S. 136, 151, 100 S. Ct. 960, 63 L. Ed. 2d 267 (1980)
- Department of Justice v. Tax Analysts, 492 U.S. 136, 144-45, 109 S. Ct. 2841, 106 L. Ed. 2d 112 (1989)
- News and Sun-Sentinel v. Schwab, 596 So. 2d 1029 (Fla. 1992)
- Gannon v. Board of Regents, 692 N.W.2d 31 (Iowa 2005)

- KMEG Television v. Iowa State Board of Regents, 440 N.W.2d 382 (Iowa 1989)
- State ex rel. v. Krings, 93 Ohio St. 3d 654, 758 N.E.2d 1135 (2001)
- State ex rel. Stenberg v. Consumer's Choice Foods, 276 Neb. 481, 755 N.W.2d 583 (2008)
- Simon v. City of Omaha, 267 Neb. 718, 677 N.W.2d 129 (2004)
- Department of Interior v. Klamath Water Users Protective Assn., 532 U.S. 1, 121 S. Ct. 1060, 149 L. Ed. 2d 87 (2001)
- Stern v. FBI, 737 F.2d 84 (D.C. Cir. 1984)
- Patterson v. IRS, 56 F.3d 832 (7th Cir. 1995)

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