

TO: Fritz and Maixner

FROM: Cherie L. Clark  
Assistant Cass County State's Attorney

DATE: February 2, 2016

RE: Tom Nagel & Elizabeth Kapp, BCI Report No. 15-0727

### **INTRODUCTION**

Stutsman County State's Attorney Fritz Fremgen requested that I review BCI Report No. 15-0727 and determine whether criminal charges are appropriate. The report involves potential defamation – namely, information sent to Valley News Live (“VNL”) that falsely alluded to Stutsman County law enforcement personnel using a government jet ski for personal use. After reviewing the report, I have concluded that there is insufficient evidence to support prosecution of either Jamestown Police Detective Tom Nagel or Stutsman County Sheriff's Office Sergeant Elizabeth Kapp.

### **FACTS SUMMARY**

#### **A. The Initial News Stories**

On about October 28, 2015, VNL received a packet of information that included allegations that Stutsman County Sheriff's Office personnel used government-owned property for personal use. (Report 203.) The packet, which was sent anonymously and would not be released by VNL, included a photo of Stutsman County Deputy Matt Thom and Stutsman County Sheriff Chad Kaiser's son riding on a jet ski. See <http://www.valleynewslive.com/home/headlines/340504592.html> (last viewed on January 29, 2016); (Report 203). VNL aired a story about the matter on November 4, 2015. VNL also interviewed Nagel, who indicated that using government property for “nonofficial business” is against the law, and that he hoped it was not true. See <http://www.valleynewslive.com/home/headlines/340504592.html> (last viewed on January 29, 2016). Nagel confirmed that the alias attached to the packet (“Dominque Brimm”) was one that he used but denied that he sent the packet to VNL. See <http://www.valleynewslive.com/home/headlines/340504592.html> (last viewed on January 29, 2016).

Stutsman County Auditor Casey Bradley confirmed that the jet ski in the photo was not owned by Stutsman County. (Report 201.) Because of the sheriff's and police chief's potential conflicts, BCI Agent Dale Maixner investigated the potential defamation.

#### **B. The BCI Investigation**

During the investigation, Agent Maixner interviewed several persons. Jamestown Police Officer Jason Prochnow and Lieutenant Robert Opp had no knowledge of who sent the packet to VNL. (Report 202; Report 207.) Valley City Police Sgt. David Swenson also had no knowledge of who sent the packet to VNL. (Report 207.)

Jamestown Police Officer Nick Hardy indicated that he had never heard Nagel say anything about the jet ski incident; that he was aware that Kapp possibly planned to run for sheriff; and that both Kapp and Nagel were upset with Sheriff Kaiser. (Report 206.)

Jamestown Police Officer Leroy Gross said that on about July 7, 2015, Nagel commented that someone would be going to jail for misuse of government property. (Report 205.) Nagel indicated that he was not suggesting Gross was the person misusing government property. (Report 205.)

Stutsman County Correctional Officer Teresa Martini stated that she was a good friend of Kapp's, that Kapp contacted Martini after the VNL story aired, that Kapp thought Kapp would be blamed as the source for the story, but that Kapp stated she was not the source. (Report 206.)

Stutsman County Account Benefit Coordinator Gwen Dubord and Stutsman County Sergeant Damian Hoyt indicated that Nagel was emphatic that Stutsman County officers vote for joining the NDPERS law enforcement retirement system and was angry with Sheriff Kaiser for encouraging officers to vote against joining. (Report 207.) Hoyt also reported that Nagel was upset because he believed that Sheriff Kaiser fired Tim Gillespie. (Report 207.)

Jamestown Police Captain Gary Peterson reported that Nagel indicated Nagel did not send the packet to VNL and Nagel did not know who had sent the packet. Further, Captain Peterson stated that he believed Nagel was being truthful. (Report 209.)

Besides interviewing persons, Agent Maixner had Nagel's and Kapp's computers examined. Review of Nagel's computer showed that he had been researching how to delete the Facebook page of "Dominique Brimm" and that that Facebook account in fact appeared to be deactivated. (Report 201.) When Kapp's computer was analyzed, a thumbnail size photo appearing to match the one that VNL aired (of Deputy Thom and Sheriff Kaiser's son riding on the jet ski) was located. (Report 207.) The photo appeared to have been arrived on Kapp's computer on November 11 or November 12, 2015. (Report 207.)

## ANALYSIS

For prosecution of defamation or any crime, the unconquerable hurdle in this matter is identity: proving who actually sent the packet to VNL. Nagel and Kapp could be suspects. Indeed, some factors could be used to point at Nagel or Kapp: in July 2015, Nagel suggested to Deputy Gross that someone would be going to jail for misusing government property; Nagel spoke with a VNL reporter about misuse of government property and admitted that the alias used with the jet ski photo was the same one Nagel used; Kapp's computer appeared to have the same jet ski photo as the one sent to VNL; and both Nagel and Kapp had apparent disagreements or conflicts with Sheriff Kaiser. Yet these factors are inconclusive; innocent explanations could exist for each.

Nagel's comment to Deputy Gross was vague. Whether it related to the jet ski incident is uncertain; it included no details and was made well before (three to four months) the packet was sent to VNL. Moreover, even if the comment was shown to relate to the jet ski incident, it proves knowledge – not action. In other words, one could reasonably conclude that Nagel (1) knew (or more accurately, had been misadvised) about the jet ski incident and (2) anticipated that others would report the incident or that it would otherwise be revealed without Nagel's action.

Nagel's speaking to the VLN reporter about misuse of property and admitting that the alias used with the jet ski was one he used are not dispositive. Nagel denied sending the packet, and even told the reporter that he hoped the allegation about misuse of government property was not true. And the packet sender's use of the alias does not, after more than superficial consideration, create a reliable connection to Nagel. As a detective, Nagel obviously would know that an alias he used on Facebook could easily be tracked back to him. Moreover, many others would know what Nagel's Facebook alias was. One could thus reasonably conclude that Nagel was not the one who used the alias to send the packet to VNL.

The fact that Kapp's computer appeared to contain the same photo as the one sent to VNL seems incriminating. But the timing of the photo's arrival on her computer undermines that seemingly incriminating character. The computer analyst reported that the photo appeared to originate on Kapp's computer on November 11 or November 12, 2015. By that time, VNL had already possessed the packet, including the photo, for about two weeks. Plus the news story had already aired. One could reasonably conclude that Kapp simply obtained the photo after the packet was sent to VNL and aired on the news.

The disagreements or conflicts that Nagel and Kapp appeared to have with Sheriff Kaiser would at best create motive. But the chief law enforcement officer for the county and an elected official would undoubtedly have others who disagree with his views. Nagel's and Kapp's conflicts thus are of minimal value.

Besides the inconclusiveness of the suspicions, other factors show that proving Nagel's or Kapp's guilt beyond all reasonable doubt does not appear possible. One such factor

is the uncertainty about the information in the packet sent to VNL. The packet was sent anonymously. Further, VNL will not disclose to law enforcement any of the documents in the packet. VNL also asserts the protections provided under federal and state law for the information in the packet. Moreover, VNL disposed of the envelope in which the packet was sent. In short, the unavailability of the packet and the precise information within it, besides the jet ski photo that was aired, create a prosecutorial problem.

Another factor adding to doubt is the lack of any witnesses. No person saw Nagel or Kapp possess or send the packet. Nor did any person hear Nagel or Kapp make any admissions about possessing or sending the packet. In fact, some persons tended to have exculpatory information or views regarding Nagel and Kapp. Captain Peterson believed that Nagel was being truthful when Nagel said he did not know who had sent the packet. And Teresa Martini, a good friend of Kapp's, reported that Kapp acknowledged that Kapp might be blamed but denied sending the packet.

Still another factor contributing to doubt is the existence of at least two potential suspects. Nagel could point at Kapp, and Kapp could point at Nagel.

But Nagel and Kapp really would not have to point at each other; pointing out the weaknesses of the cases against each would be successful. In sum, insufficient evidence exists to prove that Nagel or Kapp sent the packet to VNL.

### **CONCLUSION**

After reviewing all the circumstances, I have concluded that insufficient evidence exists to support a criminal prosecution.