

STATE OF NEBRASKA
Office of the Attorney General

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NATALEE J. HART
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June 6, 2011

Gary Anderson
Strategic Systems, Inc.
6006 N. 109th Street
Omaha, NE 68164

RE: *File No. 11-R-120; Nebraska Department of Health and Human Services;
Gary Anderson*

Dear Mr. Anderson:

This letter is in response to your correspondence received by us on May 27, 2011, in which you petitioned this office under Neb. Rev. Stat. § 84-712.03 to review a request for public records belonging to the Nebraska Department of Health and Human Services ("HHS") and the response thereto. As is our normal practice with such requests, we contacted the party against whom the complaint was made. In this case, we contacted Brad Gianakos, Legal Counsel for HHS, by telephone to discuss your complaint. We have now considered your petition for access to records under Neb. Rev. Stat. § 84-712.03 (the "Petition"), as well as HHS's response, under the Nebraska Public Record Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008; Cum. Supp. 2010), and our findings in this matter are set forth below.

FACTS

Our understanding of the facts in this matter is based on your Petition, the response of HHS, and our phone conversation with Mr. Gianakos. You have requested our review of your April 4, 2011 public records request to HHS, and the response you received on April 13, 2011, which you allege has not complied with the Nebraska Public Records Statutes. We also reviewed the following additional materials in our consideration of your Petition: (a) April 15, 2011 letter from you to HHS, (b) April 27, 2011 Telephone Conversation Log, (c) May 10, 2011 letter from HHS to you, (d) May 11, 2011 letter from you to HHS, (e) May 18, 2011 letter from HHS to you, and (f) May 22, 2011 letter from you to HHS.

ANALYSIS

Generally speaking, the Nebraska Public Records Statutes allow interested persons in Nebraska the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts from those public records, and to obtain copies of public records in certain circumstances.

Your initial letter to HHS of April 4, 2011 requested the following: "State of Nebraska summary welfare data (soft copy in Microsoft Access or Excel file format) by census tract and/or block data by county for year 2010. Names of welfare recipients and other confidential information are not being sought."

HHS replied on April 13, 2011 stating that "DHHS does not track or maintain the number of welfare children and adults by census tract (sic) and/or block." HHS offered to compile the information it does maintain into the form you requested, at a cost. You have taken issue with this response.

This office has previously stated that Neb. Rev. Stat. § 84-712 (2008) does not require a public agency to review documents and create abstracts or other lists, to answer questions or to create documents which do not otherwise exist. Op. Att'y Gen. No. 94092 (November 22, 1994); Op. Att'y Gen. No. 94035 (May 11, 1994); Op. Att'y Gen. No. 87104 (October 27, 1987). This means the requestor is entitled only to make a request for specific documents or records, and the custodian is required only to provide documents or records responsive to the records request, if any exist. The requestor is not entitled to ask, and the custodian is not required to answer, any questions in the request. The custodian is also not required to create documents that do not exist, or to interpret a public records request to determine what records are being requested.

While you appear to believe that HHS should maintain the data in the form in which you requested it, this is not the case. HHS has explained to this office that it does not report welfare recipients by census tract, and thus does not maintain the data by census tract/block.

In your April 15, 2011 letter, you made an alternate request that HHS provide you with the "current electronic raw address data without names or other identification information." The response to this by HHS explained that this is not an acceptable alternative. HHS cannot provide you with the raw address data you have requested, even if the names of the recipients are redacted. Neb. Rev. Stat. § 68-313 prohibits HHS from providing "any information concerning" persons who have applied for or received aid from HHS. Address information would be included in "any information

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concerning.” The Nebraska Public Records Statutes exempt information from disclosure that is prohibited by another statute from disclosure. § 84-712(1). Therefore, HHS cannot provide you with the raw address information you have requested. If the confidential address information is redacted by HHS from the raw data before disclosure, it is no longer usable to you.

HHS is the only entity which may run reports which are based upon name, address, or any “other information concerning” aid recipients, due to the prohibition on disclosure of that identifying information. The record you requested does not exist, therefore, HHS cannot produce it. They have offered to create the record for you, for a fee. The estimate of that fee has been calculated through estimating the cost of necessary programming, as permitted in Neb. Rev. Stat. § 84-712. Should the actual cost of providing you the record be less than the estimate, any overage of your deposit would be returned to you. HHS does not maintain a “statutory fee charge rate listing,” and has provided you with the information required by the Public Records Statutes regarding its fee estimate. No further information is required by HHS.

Additionally, your final letter to HHS, dated May 22, 2011, asks several questions of HHS. That agency is not required to respond to questions made in a public records request.

You also complain that the individual to whom you directed your public records request, Mr. Kerry Winterer, did not respond directly to you. It is not a violation of the Public Records Statutes for an agency to designate someone other than the addressee to respond to a public records request. Therefore, the responses of Ashlea Whitney, Todd Reckling, and Brad Gianakos are on behalf of HHS. Mr. Winterer is not required to provide you with an additional response. We also do not agree that by her response Ms. Whitney was practicing law without a license, as you claim.

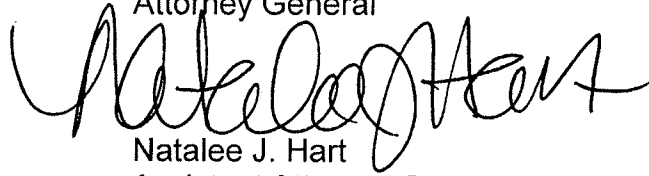
CONCLUSION

As discussed above, you have not been denied access to public records, as HHS does not maintain the records you have requested, in the form you have requested. If you disagree with our legal analysis set out herein, you may wish to consult with your private attorney to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

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Sincerely,

JON BRUNING
Attorney General

A handwritten signature in black ink, appearing to read "Natalee J. Hart". The signature is fluid and cursive, with the first name being the most prominent.

Natalee J. Hart
Assistant Attorney General

cc: Brad Gianakos

02-244-30