

STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

JON BRUNING
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

December 11, 2012

Mark Kennedy
Associate General Counsel
PCRM
5100 Wisconsin Avenue, NW, Suite 400
Washington, DC 20016

RE: *File No.12-R-109; University of Nebraska Medical Center; Petitioner
Lauren Briese, Physicians Committee for Responsible Medicine*

Dear Mr. Kennedy:

This letter is in response to your petition received by us on April 9, 2012, in which you requested our review of the denial of a public records request by the University of Nebraska Medical Center ("UNMC"), submitted by the Physicians Committee for Responsible Medicine ("PCRM"). As is our normal practice with such requests, we contacted the party against whom the complaint was made. In this case, we contacted William F. Lynch III, Director, University Records Management, and requested a response to your petition, which we received on April 20, 2012. On April 23, 2012, we wrote to you advising that we had conducted a preliminary investigation of your petition, and it appeared that the UNMC had properly withheld the requested records. However, we also indicated that our response would be delayed so that we could further analyze the issues. We have now concluded our analysis and have fully considered your petition for access to records as well as the University's response. Our review was conducted in accordance with Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010). Our findings in this matter are set forth below.

FACTS

Our understanding of the facts in this matter is based on your petition and the information contained in the University's response.

According to the petition, on March 30, 2012, Lauren Briese, PCRM Research and Education Programs Coordinator, e-mailed Sheila Wrobel, UNMC Chief Compliance Officer, and requested copies of the following documents:

- A. All documentation related to the purchase or acquisition of nonhuman primates for use in experiments at UNMC, including, but not limited to, experiments performed by Dr. Shilpa J. Buch and Dr. Howard S. Fox.
- B. UNMC Institutional Animal Care and Use Committee (IACUC) protocols, protocol reviews, and other IACUC documentation related to the use of nonhuman primates in research performed by Dr. Shilpa J. Buch and Dr. Howard S. Fox.
- C. All communications with UNMC or between UNMC and others about Items A. and B. above.
- D. All photographs and video footage related to the use of nonhuman primates at UNMC.

Ms. Briese requested documents for the time period January 1, 2009, to March 30, 2012.

By letter dated April 5, 2012, Mr. Lynch denied the public records request in its entirety. He cited as the basis for the denial one of the exceptions set out in Neb. Rev. Stat. § 84-712.05(3) ("academic and scientific research work which is in progress and unpublished"). Specifically, Mr. Lynch concluded: "[B]ased upon the research exclusion your request is denied for all information relating to nonhuman primate academic and scientific research." Mr. Lynch further stated that "[t]his interpretation of Nebraska law has been supported" by this office. He then referenced our disposition letter written in response to our *File No. 10-R-109, University of Nebraska Medical Center; Petitioner Amy Coburn*, dated May 20, 2010.

You subsequently filed your petition with our office. You assert that under the Nebraska Public Records Statutes, the UNMC had an obligation to redact and produce "all requested records that validly fell within the exemption." You state that "[i]t is inconceivable that every portion of every single requested purchase record, related communication, or photo constitutes a 'trade secret,' under Neb. Rev. Stat. § 84-712.05(3)." In addition, you point out that under the NPRS, and specifically Neb. Rev. Stat. § 84-712.01(3),¹ "citizens have a heightened right of access" to records

¹ This section provides: Sections 84-712 to 84-712.03 shall be liberally construed whenever any state, county, or political subdivision fiscal records, audit, warrant, voucher, invoice, purchase order,

Mark Kennedy
December 11, 2012
Page 3

involving the expenditure of public funds. In this regard, you state that the University of Nebraska, as a large public university, "routinely creates and maintains standardized purchase and acquisition forms for a myriad of purposes." You assert, however, that these "records are not trade secrets."

In his response to us, Mr. Lynch represents that UNMC requires IACUC approval prior to ordering research animals, and that no animal can be ordered without a current IACUC animal protocol approval number. All animals must be ordered through Comparative Medicine, a department under the authority of the Office of the Vice Chancellor for Research. An online animal ordering system under the custody and control of Comparative Medicine may be used to order the animals. Mr. Lynch asserts that "[s]uch nonhuman primates are 'research animals' from the moment the animals are ordered." Mr. Lynch maintains that "any records related to the nonhuman primates during the acquisition and purchase process, are considered by UNMC to be an integral part of the 'research in progress' exception," and are therefore appropriately denied under Neb. Rev. Stat. § 84-712.05(3).

DISCUSSION

The Nebraska Public Records Statutes generally 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 records, and to obtain copies of records in certain circumstances. Under those statutes, every record "of or belonging to" a public body is a public record which individuals may obtain a copy of unless the custodian of the record can point to a specific statute which allows the record to be kept confidential. The burden of showing that a confidentiality statute applies to particular records rests upon the custodian of those records. *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

In your petition, you reference "trade secrets" as the purported basis to withhold the requested records. However, "trade secrets" was never cited by the UNMC as a reason to deny PCR/M access to records. To the contrary, the UNMC relied solely on

requisition, payroll, check, receipt, or other record of receipt, cash, or expenditure involving public funds is involved in order that the citizens of this state shall have the full right to know of and have full access to information on the public finances of the government and the public bodies and entities created to serve them. See *Evertson v. City of Kimball*, 278 Neb. 1, 9, 767 N.W.2d 751, 759 (2009) ("[Section] 84-712.01(3) requires that courts liberally construe the public records statutes for disclosure when a public body has expended its funds.").

Mark Kennedy
December 11, 2012
Page 4

the “research in progress” exemption as the statutory basis to withhold the requested records. That specific exemption provides, in pertinent part:

The following records, unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties, may be withheld from the public by the lawful custodian of the records:

(3) Trade secrets, **academic and scientific research work which is in progress and unpublished**, and other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose

Neb. Rev. Stat. § 84-712.05(3) (emphasis added.)

As indicated above, this office has previously considered whether certain records of UNMC pertaining to nonhuman primates could be appropriately withheld under § 84-712.05(3). In our *File No. 10-R-109*, the petitioner sought, *inter alia*, complete medical records and documentation of “Environmental Enrichment Program for Nonhuman Primates” and all “Environmental Enrichment Logs” for 25 nonhuman primates identified in the petitioner’s request, and copies of various IACUC protocols and associated documentation. Petitioner subsequently amended her request to include records made prior to the inoculation of any viruses or toxins, which she believed triggered the initiation of research. The petitioner asserted that none of the requested documents fell under the exception because they did not constitute a release of scientific research in progress nor would the release of information give an advantage to business competitors.

Upon review, we disagreed. In our disposition letter dated May 20, 2010, we stated:

We are unaware of any Nebraska cases that discuss the research exclusion set out above. However, we find guidance in an Indiana case cited by the UNMC, *Robinson v. Indiana University, et al.*, 659 N.E.2d 153 (1995). In *Robinson*, the Indiana Court of Appeals was asked to determine whether completed IACUC records, which were submitted to two university committees for review, and any references to research projects appearing in the meeting minutes of those committees, were exempt from disclosure under the Indiana Public Records Act. *Id.* at 155.

In its analysis, the court discussed a factually similar case from North Carolina, *S.E.T.A. UNC-CH, Inc. v. Huffines*, 101 N.C.App. 292, 399

S.E.2d 340 (1991). In *S.E.T.A. UNC-CH*, a student organization sought access to various IACUC records, but the committee chair refused to provide the records for particular experiments. The North Carolina Court of Appeals held that the records must be disclosed, but required redaction of information that could be patented or would lead to the identification of researchers and staff. *Id.* at 156. In distinguishing the *S.E.T.A.* case from its own, the *Robinson* court stated:

There is a critical distinction between the present case and *S.E.T.A.* which dictates against following North Carolina's precedent: North Carolina's Public Records Act does not contain a concerning research exception. Indiana's inclusion of the concerning research exception, in addition to a trade secret exception, see IC 5-14-3-4(a)(4), indicates the legislature's intent to extend nondisclosure to a larger number of records. Some records may not be of a proprietary nature so as to constitute a trade secret, but may be of a scientific or experimental nature so as to concern research. The latter category of documents would fall into the concerning research exception, and, thus, would not be subject to disclosure.

Id. at 156-57. The *Robinson* court concluded its analysis by stating:

We agree with the trial court's determination that the information sought by the research applications was "information concerning research conducted by [or] under the auspices of Indiana University." . . . The application seeks information about the researcher, the nature of the proposed or ongoing research project, and procedures to be employed throughout the project. **The sole subject matter of the application is a research project and related personnel and procedures. Even in the narrowest sense, the information sought by the application concerns research. As such, it was not subject to disclosure under the Public Records Act.**

Id. at 158. [Emphasis added.]

Our previous disposition also noted the legislative history of the research exemption enacted by the Nebraska Legislature in 1979. "To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question." *Goolsby v. Anderson*, 250 Neb. 306, 309, 549 N.W.2d 153, 156 (1996). Although limited in

scope, the history indicates that the words "academic and scientific" were added before "research" "in order to identify those things that the University might be working on, those research and studies that might be going forward that truly are not in the interest of the public to have them disclosed." Floor Debate on LB 86, 86th Neb. Leg, 1st Sess. 5214 (May 11, 1979) (Statement of Sen. Murphy). In this regard, it appears to us that, like Indiana, the Nebraska Legislature intended to extend nondisclosure to a large number of records when it enacted an exemption including (1) trade secrets, (2) research and (3) other proprietary or commercial information. The Nebraska Legislature also recognized that while some records may not be of a proprietary nature to constitute a trade secret, academic and scientific research work was deemed as important. As a result, "research" was expressly exempted from disclosure at the discretion of the public body involved.

In the present case, we have carefully considered the public records requested by Ms. Briese on behalf of PCR. She has asked for all purchase and acquisition records for all of the nonhuman primates being used for research by UNMC, but in particular the nonhuman primates used in experimentation by Drs. Buch and Fox; communications relating to the purchase and acquisition of the animals; IACUC protocols and other IACUC documentation relating to the use of these animals in research by Drs. Buch and Fox, and any communication relating thereto; and any and all photographs and video footage of the nonhuman primates used in experimentation at UNMC. We have also considered your argument that citizens have a "heightened right of access" to records relating to the expenditures of public funds. However, on balance, we believe that all of the requested records, including purchasing documents, when construed in their narrowest sense, concern research in progress at the University of Nebraska Medical Center. Consequently, we believe that the denial of your public records request based on the statutory research exemption was appropriate under the circumstances here.

CONCLUSION

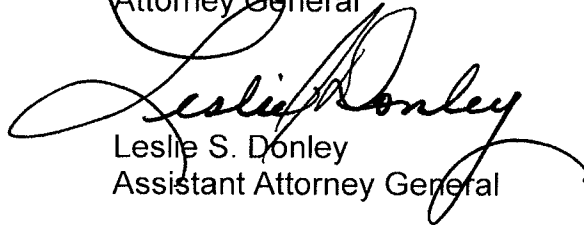
We conclude, as we did in our previous disposition, that any records relating to the nonhuman primates at the UNMC constitute research. As such, we believe that those records may lawfully be withheld under Neb. Rev. Stat. § 84-712.05(3).

Mark Kennedy
December 11, 2012
Page 7

If you disagree with our legal analysis set out herein, you may wish to pursue what additional remedies may be available to you under the Nebraska Public Records Statutes.

Sincerely,

JON BRUNING
Attorney General



Leslie S. Donley
Assistant Attorney General

cc: William F. Lynch III

49-922-30