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December 18, 2018

Stephen Reilly
Investigative Reporter
USA TODAY
7950 Jones Branch Drive
McLean, VA 22108

RE: *File No. 18-R-137; Nebraska DHHS; Stephen Reilly, Petitioner*

Dear Mr. Reilly:

We are writing in response to correspondence received by this office on December 4, 2018 in which you petitioned for our review of the response to a request for certain records made to the Nebraska Department of Health and Human Services ("DHHS") under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2014, Cum. Supp. 2016) ("NPRS"). As is our normal practice, we requested that the public body named in the correspondence provide a response to your petition, and an answer was provided to us by Jaime Hegr, an attorney for DHHS. We have now completed our analysis of this matter and our findings are set forth below.

RELEVANT FACTS

Our understanding of the facts in this matter is based on your petition and the response we received from DHHS. On November 29, 2018 you made the following request for records:

Copies of all monthly and/or bi-monthly Disciplinary Data System (DDS) reports received from The Association of State and Provincial Psychology Boards by the Nebraska Board of Psychologists from January 1, 1998 to present reflecting the name, date of discipline, reporting jurisdiction, disciplinary action and reason for discipline for each licensed provider of psychological services sanctioned during the period covered by the report.

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On December 4, 2018, DHHS responded stating:

Upon review of your request, you are asking for records including those of states other than Nebraska. Pursuant to Neb. Rev. Stat. § 84-712.01(1), public records include records of or belonging to Nebraska. This would not include records from other states. Therefore, attached please find the responsive [Nebraska] public records.

The response of DHHS attached disciplinary data from Nebraska for 2008–2018. This response was supplemented on December 6, 2018 to provide data dating for the years 1998 through 2008. Additionally, as DHHS explained further in their supplemental response,

you are seeking records that are not of or belonging to the State of Nebraska, specifically, a report generated by [The Association of State and Provincial Psychology Boards] ASPPB from their Disciplinary Data System. The database is owned, operated, and run by ASPPB. The information submitted to ASPPB and contained in the database, which is used to generate the report, is information belonging to each member state. As a dues paying member of this organization, all member states, including Nebraska, submit disciplinary information to ASPPB's DDS database. This allows for each member state to perform a query to determine if incoming applicants have disciplinary actions in other states. The report is simply a compilation of data submitted by member state. The only information contained in the database, and in any generated report sent out by ASPPB, that is of or belonging to the State of Nebraska, is Nebraska's disciplinary information, which is attached.

Your petition was submitted to us on December 4, 2018 immediately following DHHS's initial response to you stating that these records cannot be provided by DHHS, as they do not belong to that agency. You provided to us a sample copy of the report you seek and state that the information which was provided by DHHS is not responsive to your request for records. You ask us to review the response of DHHS and your position is that because the records are in the possession of DHHS, they belong to DHHS under the NPRS. You equate possession with ownership and believe DHHS's response to you was improper under the NPRS.

We inquired with DHHS for additional information as to the reports you seek. We understand that Nebraska is a voluntary member of ASPPB and has access to the disciplinary database maintained by ASPPB, which contains data from all member states. Approximately every two months, ASPPB creates a report of disciplinary data at that point in time and distributes it to the member states. This report is provided unsolicited to DHHS and it is routinely discarded upon receipt by DHHS. DHHS has full access to the disciplinary database and the reports are unnecessary in order to carry out DHHS's

statutory duties. There is no duty imposed by Nebraska law for DHHS to report information to ASPPB, nor is there a duty for Nebraska to maintain disciplinary data provided by other states to ASPPB. DHHS is only required to collect and maintain disciplinary data concerning the professional licenses it issues and any discipline related thereto. That information was provided to you for 1998 to date.

We have now reviewed all of the information provided to us and have reached the following conclusion.

DISCUSSION

The NPRS generally allow interested persons the right to examine public records in the possession of public agencies in Nebraska during normal agency business hours, to make memoranda and abstracts from those records, and to obtain copies of records in certain circumstances. Neb. Rev. Stat. § 84-712. Except when any other statute expressly provides that particular information or records shall not be made public, public records shall include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form shall remain a public record when maintained in computer files. Neb. Rev. Stat. § 84-712.01(1) (emphasis added). DHHS has stated that the records you seek are not “of or belonging” to that agency and are therefore not public records; you believe the records do belong to DHHS and must be released under the NPRS.

This office previously considered the definition of public records under the NPRS in Op. Att’y Gen. No. 97033 (June 4, 1997) which concerned access to records of a DHHS contractor and whether such records were required to be disclosed under the NPRS. In that matter, the contractor was required to provide DHHS with access to certain data, reports, and information, which were not necessarily required to come into the physical possession of DHHS. In determining whether the records at issue were required to be disclosed, we stated that “of or belonging to” should be given its plain and ordinary meaning; “belong to” generally means “to be owned” and “connotes title to or ownership” *Id.* at 3. We then opined that “records ‘of’ or ‘belonging to’ state agencies under § 84-712.01 are those records ‘owned’ by the agencies or those records for which the state agencies possess title or an ownership interest.” Consequently, we determined that records which were contractually required to be provided to DHHS under the contract were “owned” by DHHS and subject to disclosure under the NPRS.

Here, DHHS does not have a contractual relationship with ASPPB. DHHS maintains a voluntary membership in ASPPB, provides Nebraska disciplinary data to that organization, and receives access to its disciplinary database. DHHS does not request reports from ASPPB, nor is ASPPB required to provide them. The information contained in these reports is compiled from ASPPB member states and is owned by each of those

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states. The subsequent report is owned by ASPPB and provided to the member states as a courtesy. DHHS routinely discards the reports you seek and does not maintain them, as it is under no duty to do so. Any information DHHS requires as to an applicant's disciplinary history in other states is retrieved by a search of the database. DHHS lacks the ability to recreate the reports from the ASPPB database, as only ASPPB has the ability to create these reports. Additionally, DHHS does not delegate any governmental authority to ASPPB and ASPPB performs no public function on behalf of DHHS¹. Based on these factors, it is our conclusion that the ASPPB reports are not owned by DHHS and are not records "of or belonging" to that agency which are subject to the NPRS. DHHS provided you with Nebraska disciplinary data for the years you requested, which is the only data which is "of or belonging to" DHHS relevant to your request. DHHS is not required to provide you with the ASPPB reports, if any are currently in its possession.

CONCLUSION

For the reasons stated above, we do not believe you have been improperly denied access to public records. If you disagree with our analysis under the Public Records Statutes set out above, you may wish to review the NPRS to determine what additional remedies, if any, are available to you under those statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Jamie Hegr, DHHS

02-712-29

¹ Such an arrangement would trigger a review of whether the records at issue would be subject to the NPRS under *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009) and *Frederick v. City of Falls City*, 289 Neb. 869, 857 N.W.2d 569 (2015). However, neither case is relevant to the facts in this petition.