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January 18, 2022

Lisa Leick



RE: *File No. 22-R-101; Department of Health and Human Services; Lisa Leick, Petitioner*

Dear Ms. Leick:

This letter is in response to your petition in which you sought our assistance in obtaining certain public records from the Department of Health and Human Services (“DHHS”). We received your petition on January 3, 2022. Upon receipt of your petition, we forwarded it to DHHS attorney Jaime Hegr and requested a response, which we received on January 11, 2022. We considered your petition and the DHHS response in accordance with the provisions of the Nebraska Public Records Statutes (“NPRS”), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Supp. 2021). Our findings in this matter are set forth below.

RELEVANT FACTS

You are employed by DHHS CFS as an Office Technician. On December 16, 2021, you submitted a public records request to DHHS containing 15 separate items. At issue in this review are your requests for the following records:

—Entire Supervisory File Camas Holder maintains on Lisa Leick (me) as of today's date. Camas Holder has acted within the role of Supervisor over me on several occasions including when my direct Supervisor is absent. Camas has resigned and her last day is January 3, 2021 [*sic*].

—Entire Supervisory File Keaton Donovan maintains on Lisa Leick (me) as of today's date.

DHHS denied your request for the two items on December 22, 2021, stating as to each item as follows:

The requested document have [sic] been withheld because they contain personal information in records regarding personnel of public bodies other than salaries and routine directory information under Neb. Rev. Stat. § 84-712.05(7).

Following the denial, you asserted to DHHS staff that the exception did not apply since the files in question were maintained on *you*. You stated that you were

not asking for personal or non-public information regarding any other person. DHHS may use redaction of any part it deems non-public regarding any other person contained in the Supervisory File on me. Public Records Law § 84-712.05(7) specifically refers to the Employee Personnel File....not the manager's own Supervisory File on any given employee. Further, my own Employee Personnel File is always accessible to the Employee. DHHS must provide these requested Supervisory Files, and may use redaction if necessary. . . .

The agency asserted that the information in the supervisory files was “not public information” since it was “above employee directory information.” DHHS further suggested that you “work directly with HR to request that information.”

In your petition, you state that DHHS has no official policy relating to the use of supervisory files, which “contain emails, notes, communications, etc. between employees, and as such, is Public Information.” You assert that this information remains public “even when placed in a ‘file.’” You further assert that this information is neither an “‘investigation’ tool” nor a “‘disciplinary’ file,” and that the files could be redacted as necessary under § 84-712.06. You further state:

The overly broad decision to call a “Supervisory File” non-public because it contains personal information is incorrect. No items in either Supervisory File contains my personal information; rather, it is information created by a public employee while employed as a State of Nebraska DHHS public employee. “Personal” is not an equivalent to “related to” or “the subject of”. Personnel Files are maintained on employees, and within lies private information; however, even the employee may view their own file in its entirety. A person requesting information a public entity maintains on that person is viewable to that person. HR representatives may also maintain files on employees, but neither Supervisory Files I request were created or maintained by an HR representative. (Emphasis in original.)

Ms. Hegr informs us that supervisory files are unofficial files maintained by individual supervisors. The files may contain personal employee information, including performance and possible disciplinary action information. Supervisors are not required to maintain such files. In addition, “[s]upervisory files are not part of an employee’s personnel file that is maintained by Human Resources.”

In response to your argument that you should be able to obtain the supervisory files through a public records request because those files pertain to you, Ms. Hegr asserts that this would require DHHS to treat you and your request differently than any other requester. Ms. Hegr states that the fact that you are seeking your own information under § 84-712 “does not make the underlying information being sought any less confidential, nor does it make the underlying information any more releasable under public records laws.” Ms. Hegr further states that DHHS would deny any request for supervisory file information for any employee. She asserts that DHHS properly withheld the requested files under § 84-712.05(7) since those files “contain[] information about an employee beyond salary and routine directory information.”

DISCUSSION

The basic rule for access to public records is set out in Neb. Rev. Stat. § 84-712(1) (2014). This provision generally states that “[e]xcept as otherwise expressly provided by statute,” all Nebraska citizens and other interested persons have 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. Neb. Rev. Stat. § 84-712(1) (2014) (emphasis added). “Public records” are defined as follows:

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) (2014) (emphasis added). Thus, in those instances where the Legislature has provided that a particular record shall be confidential or may be withheld at the discretion of the records custodian under § 84-712.05,¹ there is no right of access.

DHHS has withheld the requested supervisory files under the exception to disclosure set out in § 84-712.05(7), which pertains to “[p]ersonal information in records regarding personnel of public bodies other than salaries and routine directory information In Nebraska, “[s]tatutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory

¹ Neb. Rev. Stat. § 84-712.05 (Supp. 2021) currently contains 23 categories of public records that may be withheld at the discretion of the records custodian so long as those records have not been “publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties”

words which are plain, direct, and unambiguous.” *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 792-793, 943 N.W.2d 231, 243 (2020). Contrary to your assertion, the exception is not limited to an employee’s personnel file. The plain and ordinary reading of § 84-712.05(7) indicates that public bodies may lawfully withhold *personal information* regarding its personnel, except for salary and routine directory information.²

This office has previously considered whether a state agency can rely on the exception in § 84-712.05(7) as a basis to withhold personal records requested by one of its employees. In *File No. 18-R-102; Nebraska Department of Revenue; Grace Willnerd, Petitioner*, January 18, 2018 [“*Willnerd*”],³ we considered the department’s denial of an employee’s request for records containing information about her absence from work due to a medical situation involving a family member. The department denied the request under § 84-712.05(7), asserting “that records relating to an employee’s [family] would constitute personal information under any standard.” *Willnerd* at 2. The department noted that the fact the employee was requesting personal information about herself did not alter its analysis as to what could be withheld under the NPRS. The department further indicated that it “would apply the same rationale” in response to an identical request made by a member of the public. *Id.* Upon review, we agreed with the department. We noted that the records at issue involved personal, private information pertaining to a department employee and did not contain salary or routine directory information.

We also discussed *Steckelberg v. Nebraska State Patrol*, 294 Neb. 842, 885 N.W.2d 44 (2016), a Nebraska Supreme Court case cited by the department to support its decision to withhold the requested records under § 84-712.05(7). *Steckleberg* involved a State Patrol trooper who sought access to records relating to an interview and selection process for a position within the State Patrol, a position he interviewed for but did not get. While the records at issue were not part of the appellate record, the records were provided to the district court judge for an *in camera* review pursuant to Neb. Rev. Stat. § 84-712.03(2). Upon review of the records, the court found that

[t]he documents sought contain the interviewing board’s impression of the candidates concerning their appearance, mannerisms, ability to answer questions, their career and personal life experiences, whether their personal life may interfere or contribute to their ability to succeed and their scores on each response to the interview questions concerning the roles and responsibilities of the Executive Protection Division. The interview board then made its recommendations concerning the applicants. *The Court finds that the information contained in the records constitutes personal information within the meaning of § 84-712.05(7).*

² This office has construed “routine directory information” to include an employee’s name, job title, work telephone number and address and dates of hire and separation.

³ See [File No. 18-R-102](#).

Todd Steckelberg v. Nebraska State Patrol, Lancaster County District Court, Case No. CI15-1710, Order on Petition for Writ of Mandamus (August 25, 2015) (emphasis added).

On appeal, Steckelberg argued that the requested records did not fit within the parameters of § 84-712.05(7) because, by the State Patrol's admission, they were not part of an employee's personnel file. In rejecting this argument, the Court stated:

Steckelberg's first argument . . . misses the mark. The State Patrol did produce an affidavit stating that the records were not kept with an employee's personnel record, but were kept separately by the State Patrol's human resources division. But § 84-712.05(7) exempts “[p]ersonal information in records regarding personnel.” The district court found that the information in the records sought did contain personal information. And the information was about employees, otherwise known as personnel, of the State Patrol. There is no requirement in § 84-712.05(7) that in order to be exempt, the records must be kept within an employee's personnel record, as used as a term of art; *the records need only be personal information about personnel, defined as persons employed by an organization.*

Steckelberg, 294 Neb. at 849-850, 885 N.W.2d at 50 (internal citations omitted) (emphasis added).

The records you seek from DHHS contain personal information about you, a DHHS employee. Ms. Hegr asserts that DHHS' legal analysis relating to its ability to withhold the supervisory files under § 84-712.05(7) does not change because the information maintained in those records pertains to you. We agree. Our conclusion is consistent with the court's broad reading of the exception set out *Steckelberg* and the conclusion reached in File No. 18-R-102.⁴ There is nothing in your request or petition that would warrant a different result.

⁴ See also File No. 19-R-102; *Omaha Public Power District; Matthew Luczynski, Petitioner*, January 18, 2019 (Determining that OPPD could deny district employee's request for a copy of his personnel file under § 84-712.05(7)).

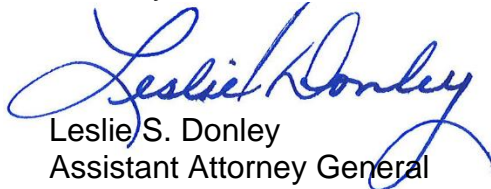
CONCLUSION

Based on the foregoing, DHHS may continue to rely on the exception in § 84-712.05(7) to deny you a copy of the supervisory files. Since we believe that the application of the exception is appropriate under the circumstances presented, no further action is warranted and we are closing our file.⁵

If you disagree with our analysis of this matter, you may wish to consider the other remedies available to you under the NPRS.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Jaime Hegr

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⁵ Our disposition only addresses your ability to obtain the supervisory files under the NPRS. We express no view as to whether you have other avenues to obtain such information as an DHHS employee.