STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
TIERONE FAX (402) 471-4725

JON BRUNING
ATTORNEY GENERAL

September 9, 2010

Mr. Dwite Pedersen
21440 Shamrock Circle
Elkhorn, NE 68022

Mr. Heinrich P. Tesch von Cultz II
29353 Ida St.
Valley, NE 68064

Re: File No. 10-R-132; Administrative Office of the Courts & Probation; Pedersen.

Gentlemen:

This correspondence is in response to the letter which you sent to us by facsimile on August 25, 2010. In that letter, you petitioned this office under the Nebraska Public Records Statutes, Neb. Rev. Stat. ' ' 84-712 through 84-712.09 (2008, Supp. 2009), to determine if the Nebraska Administrative Office of the Courts & Probation ("Probation Office") had improperly denied you access to public records or otherwise failed to comply with those statutes. Our response to your petition is set out below.

FACTS

Our understanding of the facts in this matter is based upon your letter and the materials you provided to us with it, along with discussions with staff from the Probation Office.

On August 16, 2010, you sent an email request for public records to Ellen Brokofsky, State Probation Administrator, in which you requested the following records:

> I am requesting to be provided with the amounts of vouchers paid out to and on-behalf of *all* "registered providers" whether paid to individuals or agencies for who "registered providers work. I would like this information to include payment made since the inception of the voucher program,

> which, according to one of your responses to a previous request was march 2006. (sic)
>
> . . . I request your response include the amounts that each individual registered provider has been paid or has earned for agencies for whom they work.

Julie Scott, Justice Treatment Systems Specialist with the Probation Office, responded to your records request with a letter dated August 17, 2010. In her response, she quoted from an earlier email which Probation Administrator Ellen Fabian Brokofsky sent you on February 12, 2010, regarding a previous records request:

> I have been informed by our financial office that the Office of Probation Administration pays individuals or companies based on their W-9 form. If they are listed as an individual that information would be available, but if they are listed as an employee of an agency that information would not be available. Only the amount paid to the agency would be listed. All payments that are made to venders is public information and can be found on the State Treasurer's website. I would encourage you to check this site for the detailed information you are requesting.

Ms. Scott then concluded by noting that " . . . the Office of Probation Administration does not track the amounts paid to individuals employed by agencies." Ms. Scott also responded to your records request by providing you with a listing of the dollar amounts which the Fee for Service Voucher Program has paid to individual providers and agencies since that program's inception.

ANALYSIS

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 therefrom, and to obtain copies of records in certain circumstances. However, we have consistently taken the position over time that those statutes do not require public officials to answer questions, or to create records which do not otherwise exist. For that reason, it is entirely proper for an agency to indicate, in response to a written public records request, that it has no records responsive to that request, so long as the agency actually has no responsive records.

In the present instance, you seek information from the Probation Office for registered providers who are paid as individuals, and also for registered providers who are employed by agencies and paid by agencies. As best we can tell from your request, you seek records which would set out the amount that each registered provider has been paid by the Probation Office for the services that provider has provided since the inception of the voucher program in 2006, or which set out the amount that each provider has earned for his or her agency during that same time period.

Based upon the response from Ms. Scott and our discussions with staff from the Probation Office, it is our understanding that the Probation office does not have records responsive to your records request apart from the list you were provided in response to your email request of August 16. First of all, the Probation Office does not have any record which lists the amounts paid out individually to all registered providers since March, 2006, because of the manner in which the Probation Office makes payments for the services at issue. If a service provider who works independently from any agency submits vouchers under the voucher program, the Probation Office pays that provider directly based upon his or her own tax identification number. On the other hand, when services are provided by providers who are employed by an agency, the agency is paid directly for those services based upon its tax identification number, and the agency then makes its own arrangements for payment of the service providers. As a result, the Probation Office has no record which shows the amounts paid individually to *all* service providers since 2006; it has only those records which show the amounts paid directly to service providers who are independently employed or the amounts paid to agencies which employ service providers. Those records were provided to you.

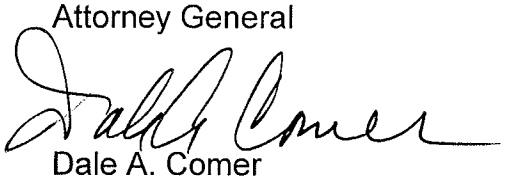
In addition, in instances where individual providers work for agencies, we also understand that the Probation Office has no record which shows the total amounts that each individual provider has earned for his or her agency. For example, the Probation Office has no record which shows the total amounts of vouchers that each provider has submitted on behalf of his or her agency since March, 2006. That sort of a total would have to be compiled or created from a review of individual vouchers.

For those reasons, it does not appear that the Probation Office denied you access to any records which were responsive to your earlier records request. It simply has no records which contain all the information which you seek. Consequently, the Probation Office was not required to give you a denial letter including the disclosures required by § 84-712.04.

Since you have not been denied access to public records, we plan no further action regarding this matter, and we are closing this file. If you disagree with our analysis under the Public Records Statutes, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under those statutes.

Sincerely yours,

JON BRUNING
Attorney General



Dale A. Comer
Assistant Attorney General
Chief, Legal Services Bureau

cc. Julie M. Scott