

STATE OF NEBRASKA  
**Office of the Attorney General**

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April 9, 2015

Joseph E. Sandler  
Sandler Reiff  
1025 Vermont Ave. NW, Suite 300  
Washington, DC 20005

RE: *File No 15-R-111; University of Nebraska; Petitioner Gary Ruskin, U.S.  
Right to Know*

Dear Mr. Sandler:

This letter is in response to your Public Records petition received by us on March 25, 2015. You seek our review of a denial of a request made by your client, Gary Ruskin, Executive Director of U.S. Right to Know, to the University of Nebraska ("University") for certain records belonging to that institution. As is our normal practice with such requests, we contacted the party against whom the complaint was made. In this case, we received a response from Erin Busch, Director of University Records and University Associate General Counsel, on April 3, 2015. We have carefully reviewed your request and the response of the University received by our office, under the Nebraska Public Records Statutes<sup>1</sup>, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2014). Our findings in this matter are set forth below.

### FACTS

Our understanding of the facts in this case is based on your public records petition and its enclosures along with the response of the University to your petition. Mr. Ruskin made a public records request dated January 28, 2015 addressed to Erin Busch at the University of Nebraska for records of Dr. Richard E. Goodman, a research

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<sup>1</sup> Mr. Ruskin's initial request references the "Nebraska Freedom of Information Act." Nebraska does not have a "Freedom of Information Act," and the Federal Freedom of Information Act does not apply, as FOIA is a federal law, codified at 5 USC § 552, which generally provides that any person has the right to request access to *federal* agency records and information. As Mr. Ruskin is seeking information from the University of Nebraska, a publicly-supported University in Nebraska, the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09, govern access to records of and belonging to the University. Consequently, our analysis will be related to the Nebraska Public Records Statutes.

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professor at the University of Nebraska, Lincoln. That request was quite detailed, but in summary, requests correspondence between Dr. Goodman and a number of organizations such as Monsanto, Bayer, BASF, and DuPont. Mr. Ruskin's request also seeks correspondence to or from Dr. Goodman that contained certain search terms. The time period for the request was limited to January 1, 2012 to the date of the request.

The University denied Mr. Ruskin's request on February 4, 2015. That denial letter stated that Mr. Ruskin's request "intrudes upon Dr. Goodman's rights of academic freedom, which are protected by the First Amendment." It also states that:

Even if the University were to review Dr. Goodman's correspondence for documents responsive to your request, it is not likely that the University would produce a large number of documents because the vast majority of records contain 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. *See Neb. Rev. Stat. § 84-712.05 (3).*

You seek a review of the University's denial by this office. The University responded to your petition in a letter to this office from Ms. Busch. The University asserts that the public records sought by Mr. Ruskin "fall squarely within the unpublished research exception to the Nebraska Public Records" Statutes, as Mr. Ruskin's request seeks "research communications."

### **ANALYSIS**

The Nebraska Public Records Statutes ("NPRS") are found at Neb. Rev. Stat. §§ 84-712 through 84-712.09. Mr. Ruskin's request for records was denied by the University. Neb. Rev. Stat. § 84-712 (4) (2014) requires:

Upon receipt of a written request for access to or copies of a public record, the custodian of such record shall provide to the requester as soon as is practicable and without delay, but not more than four business days after actual receipt of the request, an estimate of the expected cost of the copies and either (a) access to or, if copying equipment is reasonably available, copies of the public record, (b) if there is a legal basis for denial of access or copies, a written denial of the request together with the information specified in section 84-712.04, or (c) if the entire request cannot with reasonable good faith efforts be fulfilled within four business days after actual receipt of the request due to the significant difficulty or the extensiveness of the request, a written explanation, including the earliest practicable date for fulfilling the request, an estimate of the expected cost of any copies, and an opportunity for the requester to modify or prioritize the items within the request. The requester shall have

ten business days to review the estimated costs, including any special service charge, and request the custodian to fulfill the original request, negotiate with the custodian to narrow or simplify the request, or withdraw the request. If the requester does not respond to the custodian within ten business days, the custodian shall not proceed to fulfill the request. The four business days shall be computed by excluding the day the request is received, after which the designated period of time begins to run. Business day does not include a Saturday, a Sunday, or a day during which the offices of the custodian of the public records are closed.

Neb. Rev. Stat. § 84-712 (4) (emphasis added). Neb. Rev. Stat. § 84-712.04 (2014) governs denials of public records requests and provides:

(1) Any person denied any rights granted by sections 84-712 to 84-712.03 shall receive in written form from the public body which denied the request for records at least the following information:

(a) A description of the contents of the records withheld and a statement of the specific reasons for the denial, correlating specific portions of the records to specific reasons for the denial, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial;

(b) The name of the public official or employee responsible for the decision to deny the request; and

(c) Notification to the requester of any administrative or judicial right of review under section 84-712.03.

(2) Each public body shall maintain a file of all letters of denial of requests for records. This file shall be made available to any person on request.

The University's denial letter does not comply with Neb. Rev. Stat. § 84-712.04(1)(a). The public body is required in their response to include information in a denial letter as to the description of the contents of the records withheld. We do not see any such description in the University's February 4, 2015 response to Mr. Ruskin. Additionally, it is apparent to us that the University has made no effort to determine whether there are any responsive records which exist in their files. The University states that "even if" it undertook a search for records responsive to Mr. Ruskin's request, it would be "unlikely" to produce a "large number of documents." This is concerning; the University clearly made no attempt to comply with the Nebraska Public Records Statutes. Neb. Rev. Stat. § 84-712.04 necessarily implies that a public body must first undertake a search for records before it can prepare a response letter.

Additionally, Neb. Rev. Stat. § 84-712.06 (2014), requires that "[a]ny reasonably segregable public portion of a record shall be provided to the public as a public record upon request after deletion of the portions which may be withheld." Should the University locate records responsive to Mr. Ruskin's request that it withholds under Neb.

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Rev. Stat. § 84-712.05, the provisions of Neb. Rev. Stat. § 84-712.06 are triggered and the University must provide Mr. Ruskin with any “reasonably segregable” portions of the records it has withheld under Neb. Rev. Stat. § 84-712.05. We believe it is unlikely that entire letters would be segregable; there are certainly portions, at a minimum, which should be produced under the NPRS. Mr. Ruskin has placed restrictions on how he would prefer redaction of any information from documents provided. However, how the University chooses to delete portions withheld is up to that institution, and it is not bound by Mr. Ruskin’s request only to “black out” rather than “white out” or cut out any redacted information.

The University has also cited Dr. Goodman’s “rights of academic freedom, which are protected by the First Amendment” as a reason to deny Mr. Ruskin’s request for records. There is no such “academic freedom” provision found in the NPRS. We will remind the University, through a copy of this letter to Ms. Busch, that it may only deny a public records request based on provisions the Nebraska Legislature has afforded under Neb. Rev. Stat. §§ 84-712 through 84-712.09. “Academic Freedom” is not a valid reason for a denial of a public records request.

If the University finds that it has records responsive to Mr. Ruskin’s request, whether there are a large or small number of records, then the University must either provide him with those records, or withhold them under one of the provisions of Neb. Rev. Stat. § 84-712.05 (2014). The burden of showing that an exception applies to the disclosure of 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). However, the University must identify those specific records and which exception correspondingly applies in its denial under the provisions of Neb. Rev. Stat. § 84-712.04. It is impossible for us to determine if an exception of the Public Records Statutes, such as Neb. Rev. Stat. § 84-712.05(3), applies until the University provides an appropriate response to your request.

Therefore, we are informing the University, by sending a copy of this letter to Ms. Busch, that it must perform a search of its records and make a determination as to whether it has records responsive to Mr. Ruskin’s request, determine whether the records will be provided or declared confidential, and provide Mr. Ruskin with any portions of its records relating to his request which are segregable from confidential material. If, after its review and redaction of confidential material in its records, the University withholds any complete records, the University must provide Mr. Ruskin with a description of those records pursuant to Neb. Rev. Stat. § 84-712.04.

## CONCLUSION

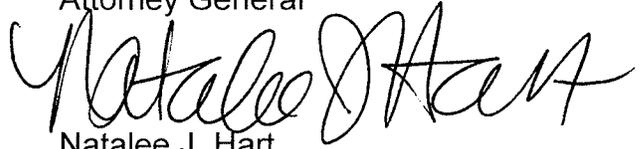
For the reasons stated above, we do not believe the University has complied with the provisions of the Nebraska Public Records Statutes. We will direct the University to take immediate action to rectify its deficiencies and provide Mr. Ruskin with a response

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which fulfills its obligations under those statutes. We trust the University will undertake this in good faith, thus, no further action will be taken by this office with respect to this complaint at this time.

Sincerely,

DOUG PETERSON  
Attorney General

A handwritten signature in black ink, appearing to read "Natalee J. Hart". The signature is written in a cursive, flowing style with some loops and flourishes.

Natalee J. Hart  
Assistant Attorney General

cc: Erin Busch

02-487-29