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February 29, 2016

Via email and Regular U.S. Mail
Leo "Rusty" Hike
15402 Hwy 75 S
Bellevue, NE 68123

RE: *File No. 16-R-106; Bellevue Public Schools; Leo "Rusty" Hike, Petitioner*

Dear Mr. Hike:

We are writing in response to your email correspondence received by this office on February 12, 2016, in which you requested our assistance in obtaining certain public records belonging to the Bellevue Public Schools ("District"). As is our normal practice with such requests, we contacted the public body named in your correspondence. In this particular case, we contacted District Superintendent Frank Harwood, and advised him of the opportunity to provide this office a response to your petition, which we received on February 25, 2016. In addition to the District's response, we also received information from Dr. Kim Hoogeveen, MindSet LLC, whose company owns the Mindset Culture Survey. Our review of this matter was conducted in accordance with the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS"), and our findings are set forth below.

RELEVANT FACTS

Our understanding of the facts in this matter is based solely on your correspondence,[1] the response we received from Dr. Harwood, and the information provided to us by Dr. Hoogeveen.

Sometime on or around October 22, 2015, you submitted a request for public records to Dr. Harwood, seeking the following records:

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1 As referenced in your petition, the underlying documentation for your petition (i.e., the request for records and the District's response) was provided to this office by Sarah Centineo, who attempted to file a petition with our office based on this documentation on February 8, 2016.

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> 1. Any individual Climate Surveys for all the buildings in [Bellevue Public Schools] for the past 3 years including the current year
>
> 2. The annual salary totals of all [Bellevue Public Schools] staff, teachers, and administrators for the past 3 years including the current year

It appears that Dr. Harwood responded to your request by email on November 6, 2015.[2] In denying your request for the survey information, Dr. Harwood stated, in pertinent part:

> The district is denying your request for copies of the individual building surveys conducted by MindSet pursuant to Neb. Rev. Stat. 84-712.05(3) and (7), as said documents contain proprietary or commercial information and personal information regarding personnel of public bodies other than salaries and routine directory information.

In his response to this office, Dr. Harwood states that the survey at issue here was "designed and conducted by MindSet, LLC to assess and improve the culture within each of the schools that comprise the Bellevue Public Schools." He indicates that the survey is based, in large measure, on psychometrics, "which requires a high level of knowledge and experience in its application." Dr. Harwood states that MindSet, LLC, unlike some of its competitors, designs climate surveys on a building level. The survey design is proprietary, and would give MindSet, LLC competitors, like Gallup or Quantum, a distinct commercial advantage if disclosed. Dr. Harwood also indicates that the individuals taking the survey do so with the expectation "that the results will be kept confidential and used only for purposes of improving organizational culture."

With respect to withholding the requested survey information under the exception in § 84-712.05(7) of the NPRS, Dr. Harwood states, in pertinent part:

> By definition, a climate survey involves questions that relate to the performance of such personnel as administrators, principals and/or supervisors. MindSet, LLC's building specific survey reports for each of the schools within Bellevue Public Schools is no different. Although the building specific survey reports refer to certain personnel by position (i.e., supervisors), it is not difficult to identify the specific individuals who hold those positions and glean information about their performance.

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[2] Based on the information we received, it appears that the District's response was untimely. Neb. Rev. Stat. § 84-712(4) (2014) requires the custodian of public records to respond to the requester no later than four business days after actual receipt of a written request for public records. Assuming the District received the request during regular business hours on October 22, 2015, any response from the District was due no later than October 28, 2015.

> Performance-related information is not routine directory information that Bellevue Public Schools shares with members of the public. For this reason, the building specific survey reports contain personal information of school personnel that can be lawfully withheld pursuant to Neb. Rev. Stat. § 84-712.05(7).

In your petition to us, you indicate that "[t]hese surveys were paid with public funds and are being held from the public and even the Bellevue Public Schools school board."

DISCUSSION

The basic rule for open public records in Nebraska is found at Neb. Rev. Stat. § 84-712 of the Nebraska Public Records Statutes. That statute provides, in pertinent part:

> **Except as otherwise expressly provided by statute**, all citizens of this state and all other persons interested in the examination of the public records as defined in section 84-712.01 are hereby fully empowered and authorized to (a) examine such records, and make memoranda, copies using their own copying or photocopying equipment in accordance with subsection (2) of this section, and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business and (b) except if federal copyright law otherwise provides, obtain copies of public records in accordance with subsection (3) of this section during the hours the respective offices may be kept open for the ordinary transaction of business.

(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 records requested under the NPRS are exempt from disclosure by statute, there is no right of access. This is true regardless of whether tax dollars were used to create the records at issue.

While the Nebraska Public Records Statutes provide citizens and other interested persons access to public documents, those statutes are not absolute. The NPRS also

provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). Neb. Rev. Stat. § 84-712.05 contains eighteen categories of documents which may be kept confidential from the public at the discretion of the public body involved. In the present case, the District relies on the exceptions in Neb. Rev. Stat. § 84-712.05(3) and (7) as its basis to withhold the requested records. Subsection (3) 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* . . . .

(Emphasis added.)

In Op. Att'y Gen. No. 16003 (February 16, 2016), the Attorney General addressed whether certain contracts entered into by the Nebraska State Fair could be lawfully withheld from disclosure under the proprietary or commercial exception set out in § 84-712.05(3). In our opinion, we reaffirmed the standards which had been discussed and developed in a previous opinion to assist a governmental body to determine whether the exception applied to certain financial records.[3] Those standards include the following:

> (a) Section 84-712.05(3) does not impose any requirement of "substantial" competitive injury or advantage to make the exception from disclosure available;
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> (b) A bare assertion by the provider of commercial information that such information is confidential is insufficient to justify nondisclosure; and
>
> (c) Nondisclosure must be based upon a showing that a specified competitor may gain a demonstrated advantage by disclosure rather than a mere assertion that some unknown business competitor may gain some unspecified advantage.

Id. at 3-4. While we were unable to definitively address whether the State Fair contracts fell within the exception, due to the lack of specific information, we concluded that any governmental entity that wished to withhold information pursuant to the exception in § 84-

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3 *See* Op. Att'y Gen. No. 92068 (May 7, 1992); Op. Att'y Gen. No. 97033 (June 9, 1997).

712.05(3) is required to engage in an analysis consistent with the standards set out above. *Id.* at 6.

In that regard, we have carefully considered the documentation provided to us by the District and Dr. Hoogeveen in conjunction with the standards referenced above. Upon review, it appears that the District has met its burden with respect to the application of this exception. According to Dr. Hoogeveen, the MindSet Survey is unique in several regards and, therefore, maintains a competitive edge in the marketplace. The survey covers fourteen specific "cultural domains," which are unique to the MindSet survey. The survey is also unique in that it delves into departmental or, in this case, building specific level data. The overall survey results provide "intergroup normative data." However, the company has "developed and use[s] a unique intragroup normative data presentation method with the department or building level reports." (Emphasis in original.) He indicates that the company uses a proprietary color coding system based on extensive trials and research to identify the correct statistical ranges so building level data can be quickly and better understood by clients. Dr. Hoogeveen states that "[e]xisting and would-be competitors would find it advantageous to receive copies of the entire MindSet report—showing our cultural domain breakdowns and building level methodology for display of data." In the present case, the District and Dr. Hoogeveen have provided us specified competitors, i.e., Gallup, Quantum, and have specified the nature of the advantage if the building specific surveys were disclosed. Consequently, we conclude that the District may rely on the exception in § 84-712.05(3) to withhold the requested building level surveys.

The second exception claimed by the District—§ 84-712.05(7)—pertains to the following:

> (7) Personal information in records regarding personnel of public bodies other than salaries and routine directory information . . . .

In Nebraska, in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Swift and Company v. Nebraska Department of Revenue*, 278 Neb. 763, 773 N.W.2d 381 (2009). 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 (i.e., name, job title, date of hire and separation, etc.). Here, while we understand that the building specific surveys refer to positions, and not specific individuals *per se*, it seems to us that it would not be difficult to match survey responses, comments and criticisms to any particular employee. Moreover, both Dr. Harwood and Dr. Hoogeveen have represented to this office that information in the building specific surveys would reveal personal information regarding specific personnel. We conclude therefore that the building specific surveys contain personal information pertaining to

individuals in District administration, and does not implicate salary and directory information. Thus, we believe that the records at issue fall within the claimed exception.

CONCLUSION

For the reasons explained above, we believe that the building specific surveys belonging to Bellevue Public Schools may be lawfully withheld under Neb. Rev. Stat. § 84-712.05(3) and (7). Consequently, we conclude that the Bellevue Public Schools did not unlawfully deny your records request, and that no further action by this office is warranted. Accordingly, we are closing this file.

If you disagree with the analysis and the conclusion we have set out above, you may wish to consider what additional remedies may be available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

Leslie S. Donley
Assistant Attorney General

c: Superintendent Frank Harwood
(via email only)

49-1533-29