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April 8, 2016

Stephen Cavanaugh
#78775
P.O. Box 22500
Lincoln, NE 68542

RE: *File No. 16-R-115; Nebraska Department of Correctional Services; Stephen Cavanaugh, #78775, Petitioner*

Dear Mr. Cavanaugh:

This letter is in response to the correspondence received by this office on March 24, 2016, in which you requested that we order the Nebraska Department of Correctional Services ("Department") to provide you certain records which you requested under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS"). As is our normal practice with such requests, we contacted the public body against whom the complaint was made. In this case, we contacted Julie D. Smith, Department General Counsel, and requested a response to your letter, which we received on March 30, 2016. We have now considered your letter, which we have construed to be a petition for access to records under Neb. Rev. Stat. § 84-712.03, as well as the Department's response. Our findings in this matter are set forth below.

FACTS

Our understanding of the facts in this matter is based solely on your petition dated March 21, 2016, and the information contained in the Department's response.

According to your petition, you requested a copy of your "own personal psychological and mental health care record." You indicate that after trying for several months to obtain these records, on March 3, 2016, you submitted a formal request to the prison warden. Your request stated, in pertinent part:

> Pursuant to the Nebraska Public Records Act (Neb. Rev. Stat. § 84-712 et seq.) I am formally demanding a complete copy of my "mental health" medical chart for submission to the Department of Veterans Affairs. These documents must be furnished directly to me, free of charge, (see Neb. Rev.

> Stat. § 84-712.02) within four business days of this request. (See Neb. Rev. Stat. § 84-712(4)) I have previously attempted to obtain copies of these documents through internal requests (kites) to the NSP Psychiatrist and the NSP mental health department. These requests were ignored. . . .

On March 9, 2016, you received a reply from Associate Warden Jason Hurt, who responded as follows:

> According to Administrative Regulation 115.23 Mental Health Services, an inmate may request access to his/her psychological and Mental Health Care Record, and the Department will allow inmates access to their psychological and mental health records upon request unless any treating physician, psychologist, or mental health practitioner determines in their professional opinion that release of the records would not be in the best interest of the patient unless the release is required by court order. (Neb. Rev. Stat. § 71-8403). You are encouraged you [*sic*] to sign a release of information with your MH provider to allow NDCS to send your MH file/information to the VA. The VA then can send us a request for the MH information stating the specific information they would like us to release to assist them in treatment planning. If you prefer having access to your mental health file, you will need to send a request to Dr. Alice Mitwaruciu and she will have a MH clinician visit with you concerning your request.

You indicate that the same day you received Mr. Hurt's response, you met with mental health staff, who indicated that "they would not allow me to even view my record without a Court Order." You believe that this violates Administrative Regulation 115.23 and well as the NPRS. You indicate that you "need access to these records to complete a claim for benefits with the VA," and the suggestion that you sign a release to have the records forwarded directly to the VA is "unacceptable."

In your petition, you offered several arguments to support your position that the requested records must be disclosed under the provisions of the NPRS. For example, you state that while § 84-712.05(2) exempts medical records from disclosure, the purpose of the exemption is to protect the privacy of the subject of the records. Here, you are requesting access to your own records, and the exemption "serves no purpose and should not apply." You also argue that § 84-712.02, which requires custodians of public records to provide certified copies of public records free of charge to claimants before the U.S. Department of Veterans Affairs, suggests that medical records are not completely exempt from disclosure. In addition, you assert that there can be little argument that providing the requested records would pose a safety or security threat within the prison when you consider that prison rules allow access to such records. You further represent that you have spoken with the psychiatrist under contract with the Department, who has indicated to you that there is nothing in your record that would preclude your access to the requested records.

According to Ms. Smith, the Department considers mental health records to be confidential and an exception to disclosure as public records. She states that Assistant Warden Hurt advised you of the two options to access the requested records, i.e., sign a release or submit a request to view the records to Dr. Mitwaruciu. Ms. Smith points out that under Neb. Rev. Stat. § 83-178(2), "[t]he department retains the authority to withhold mental health and psychological records of the inmate when appropriate."

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.) Under the NPRS, every record "of or belonging to" a public body is a public record which individuals may access or obtain a copy of unless the custodian of the record can point to a specific statute which allows the record to be kept confidential. The public body has the burden to show that a public record falls within an exemption to the general disclosure requirement. *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).

In the present case, the Department has referred us to § 83-178 to support its position that your mental health records are confidential, and are not subject to the general disclosure requirements in § 84-712 of the NPRS. Section 83-178 provides, in pertinent part:

> (1) The director shall establish and maintain, in accordance with the regulations of the department, an individual file for each person committed to the department. . . .
>
> (2) . . . The content of the file shall be confidential and shall not be subject to public inspection except by court order for good cause shown and shall

> not be accessible to any person committed to the department. *An inmate may obtain access to his or her medical records by request to the provider pursuant to sections 71-8401 to 71-8407 notwithstanding the fact that such medical records may be a part of his or her individual department file. The department retains the authority to withhold mental health and psychological records of the inmate when appropriate.*

(Emphasis added.) One of the statutes referenced in § 83-178 above—§ 71-8403—provides, in pertinent part:

> (1) A patient may request a copy of the patient's medical records or may request to examine such records. *Access to such records shall be provided upon request pursuant to sections 71-8401 to 71-8407, except that mental health medical records may be withheld if any treating physician, psychologist, or mental health practitioner determines in his or her professional opinion that release of the records would not be in the best interest of the patient unless the release is required by court order.* The request and any authorization shall be in writing. . . .

(Emphasis added.) In addition, Administrative Regulation 115.23 provides in part that

> [a]n inmate may request access to his/her psychological and Mental Health Care Record, and the Department will allow inmates access to their psychological and mental health records upon request unless any treating physician, psychologist, or mental health practitioner determines in their professional opinion that release of the records would not be in the best interest of the patient unless the release is required by court order. (Neb. Rev. Stat. §71-8403).

AR 115.23 § XI.I.3 (rev. Oct. 30, 2015). These statutes and regulation set out the process you must follow in order to receive the requested mental health records. Your arguments that disclosure of your mental health records is mandated under §§ 84-712 and 84-712.02, or that § 84-712.05(2) does not limit access to your own medical records, overlooks the fact that there is a separate statutory process which expressly governs inmates' access to their mental health records. To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute. *Cox Nebraska Telecom L.L.C. v. Qwest Corp.*, 268 Neb. 676, 681, 687 N.W.2d 188, 192 (2004); *Sack v. Castillo*, 278 Neb. 156, 768 N.W.2d 429 (2009). Under these circumstances, §§ 83-178 and 71-8401 to 71-8407 control access to your mental health records, not the Nebraska Public Records Statutes.

Since it appears that you have already rejected the suggestion made by Assistant Warden Hurt to sign a release to have your medical records sent directly to the U.S. Department of Veterans Affairs, your other option is to submit a request to access your

mental health records to Dr. Mitwaruciu. Keep in mind, however, that your right to access these particular records is not absolute, and the Department has the authority under § 83-178 to withhold mental health and psychiatric records as it deems appropriate.[1]

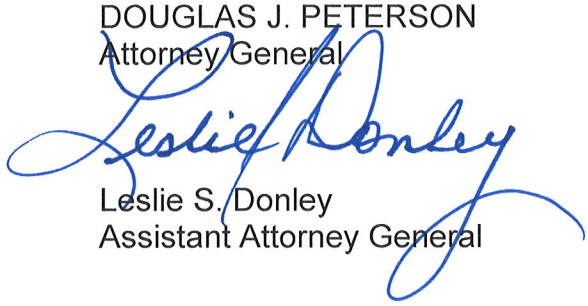
CONCLUSION

For the reasons explained above, we conclude that the general disclosure requirements in § 84-712 of the Nebraska Public Records Statutes do not apply to your request for access to your mental health and psychiatric records. Any such disclosure is expressly governed by §§ 83-178 and 71-8401 to 71-8407, and the Department may withhold your mental health records at it deems appropriate. Since we have concluded that the Department of Correctional Services did not unlawfully deny you access to records under the NPRS, no further action by this office is warranted. Accordingly, we are closing this file.

If you disagree with the analysis we have set out above, you may wish to contact your private attorney to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Julie D. Smith

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[1] *See State ex rel. Jacob v. Bohn*, 271 Neb. 424, 429-430, 711 N.W.2d 884, 890 (2006) ("[Section 83-178] did not obligate [the Department's mental health administrator] to provide the mental health records requested by Jacob without exception. Instead, § 83-178(2) allowed [the administrator] the discretion to withhold the records if it was determined such withholding was appropriate.").