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STATE OF NEBRASKA
OFFICIAL
MAY 16 1991
DEPT. OF ATT. GEN.

DATE: May 13, 1991

SUBJECT: Disclosure Under Public Records Statutes of Documents Maintained by the Nebraska Office of Risk Management

REQUESTED BY: Yvonne Norton Leung
State Risk Manager

WRITTEN BY: Don Stenberg, Attorney General
Lynne R. Fritz, Assistant Attorney General

You have requested our opinion regarding whether various types of documents maintained in the Office of Risk Management may be withheld from disclosure under the public records statutes, Neb.Rev.Stat. §§ 84-172 through 84-712.09 (Reissue 1987). As to each document you describe, you inquire whether the document is confidential, to whom it may be released, and whether at any point in the process it loses its confidential character so that it may be released. Further, you assume that members of the State Claims Board, the Attorney General's Office, and the Office of Risk Management have full access to all information and that the parties involved have access to their own submissions. We agree with your assumptions in this regard.

The basic rule for open public records in Nebraska is found at Neb.Rev.Stat. § 84-712 (Reissue 1987) which provides in pertinent part as follows:

> Except as otherwise expressly provided by statute, all citizens of this state, and all other persons interested in the examination of the public records . . . are hereby fully empowered . . . to examine the same, and to make memoranda . . . therefrom, . . . free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business.

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A "public record" is broadly defined in Neb.Rev.Stat. § 84-712.01 to include all records and documents, regardless of physical form, belonging to the state or any agency or unit thereof, except where any statute expressly provides that particular records or information not be made public.

Neb.Rev.Stat. § 84-712.05 specifically enumerates certain categories of public records which the custodian may choose in the exercise of his or her discretion to withhold from the public, unless the records are revealed in open court, open administrative proceeding, or open meeting. In responding to your specific inquiries hereinafter, it is necessary to focus on four of these categories defined in Neb.Rev.Stat. § 84-712.05 in pertinent part as follows:

> (2) Medical records, other than records of births and deaths, in any form concerning any person, . . .
>
> . . . .
>
> (4) Records which represent the work product of an attorney and the public body involved which are related to preparation for litigation . . . or claims made by or against the public body, or which are confidential communications as defined in section 27-503;
>
> (5) Records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, when the records constitute a part of the examination, investigation, . . . citizen complaints or inquiries, . . .
>
> . . . .
>
> (7) Personal information in records regarding personnel of public bodies other than salaries and routine directory information;

Based on these statutory provisions, the specific documents described in your opinion request are analyzed below.

I. WORKERS' COMPENSATION CLAIMS

1. First Report of Alleged Injury:

Pursuant to Neb.Rev.Stat. § 48-197 (Reissue 1988), workers' compensation claims against the state must be filed with the Risk Manager. Said statute provides in part that:

> The Risk Manager shall immediately advise the Attorney General of the filing of any claim, and it shall be the duty of the Attorney General to cause a complete investigation to be made of all such claims. Whenever any state agency receives notice or has knowledge of any alleged injury under the Nebraska Workers' Compensation Act, such state agency shall immediately file a first report of such alleged injury with the Nebraska Workers' Compensation Court and the Risk Manager and shall file such other forms as may be required by such court or board.

The first report simply indicates the employer has been notified its employee alleges he or she suffered an occupational injury. The first report basically contains directory information, wage information, and a statement of the alleged accident. As such, in our opinion, the first report of injury itself does not fall within any of the categories of documents enumerated in Neb.Rev.Stat. § 84-712.05. Therefore, in our opinion, it is a public record which must be disclosed.

2. Agency Incident Report:

According to your opinion request, these documents consist of information about a workers' compensation claim sent to the Office of Risk Management by the employing agency. As noted above, Neb.Rev.Stat. § 48-197 authorizes the Attorney General to cause a complete investigation to be made of all workers' compensation claims against the state. As a longstanding practice, the Attorney General has delegated this investigatory authority to the Office of Risk Management. The agency incident report is an initial phase of this investigation.

In our opinion, agency incident reports constitute records received by a public body authorized to conduct an investigation which are part of the investigation; therefore, said documents fit within the exception described in subparagraph (5) of Neb.Rev.Stat. § 84-712.05. The Risk Manager may withhold an incident report from any member of the public, including the injured employee and his or her representative, unless it is disclosed in open court, which would include a proceeding in Workers' Compensation Court. Our office which represents the State in such proceedings would be able to advise you in a specific case regarding whether a report must be disclosed for this reason.

3. Medical Bills:

You describe these documents as medical bills received from medical providers and hospitals. These statements usually note the procedure performed as well as the cost of the service.

In our opinion, medical bills fall within the medical records exception codified at subparagraph (2) of Neb.Rev.Stat. § 84-712.05, which permits nondisclosure. Further, due to the employee's privacy interest, these documents should be kept confidential except for disclosure to the employee and, with the proper release, his or her attorney. This limited disclosure is authorized by Neb.Rev.Stat. § 48-120 (Reissue 1988) which provides that all medical and hospital information relevant to the particular injury shall be made available on demand to the employer, employee, carrier, and compensation court.

Medical bills which are publicly disclosed in open court might be subject to disclosure, as discussed above in response No. 2.

4. Doctor's Office Notes:

In our opinion, these records should be treated the same as medical bills discussed above in response No. 3.

5. Doctor's Response to Specific Questions:

In our opinion, these records should be treated the same as medical bills discussed above in response No. 3.

6. Letters From Risk Management Requesting Specific Information:

You describe these documents as investigation requests from your office to medical providers, rehabilitation consultants, the employing agency, and others. As stated above, by practice the Office of Risk Management performs the investigation of workers' compensation claims authorized by the Attorney General.

These requests for information you have described, in our opinion, fall with the exception enumerated at subparagraph (5) of Neb.Rev.Stat. § 84-712.05. Said documents are developed by a public body charged with duties of investigation of persons and are a part of that investigation. Thus, the Risk Manager may withhold said documents from any member of the public unless the documents are publicly disclosed in open court.

7. Computer Printout of Claims and Payments From the Database:

Neb.Rev.Stat. § 84-712.01(1) (Reissue 1988) provides that data which is a public record in its original form shall remain a public record when maintained in computer files. Subparagraph (2) of said statute provides:

> (2) Sections 84-712 to 84-712.03 shall be liberally construed whenever any state, county or political

> subdivision fiscal records, audit, warrant, voucher, invoice, purchase order, requisition, payroll, check, receipt or other record of receipt, cash or expenditure involving public funds is involved in order that the citizens of this state shall have full rights to know of, and have full access to information on the public finances of the government and the public bodies and entities created to serve them.

In our opinion, computer printouts showing benefits paid to a claimant are public records which must be disclosed to anyone requesting the information.

8. Reports From Rehabilitation Counselors:

According to your request, these documents consist of information outlining a claimant's physical and/or emotional state and future capacity to work. In our opinion, these records fall within the exception for investigatory records codified at subparagraph (5) of Neb.Rev.Stat. § 84-712.05, for reasons similar to those discussed pursuant to our response to No. 6 above.

Alternatively, these documents, in our opinion, may constitute personal information regarding personnel of public bodies, which are exempt from mandatory public disclosure pursuant to subparagraph 7 of Neb.Rev.Stat. § 84-712.05. While we are aware of no Nebraska Supreme Court cases interpreting the scope of this exception, federal case law applying the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976), is instructive.

In Plain Dealer Publishing Co. v. United States Department of Labor, 471 F.Supp. 1023 (D.C. D.Ct. 1979), the court upheld the agency's refusal to disclose documents contained in active files of workers' compensation claims relying in part on the "personnel files" exception in the FOIA. Among the documents exempt from disclosure by virtue of being categorized as part of the "personnel file" were vocational rehabilitation reports, referrals and rehabilitation plans, assessments of wage earning capacity, and work tolerance limitations forms. The court noted that public disclosure of such reports would infringe privacy interests of individuals with normal sensibilities. The court further explained that:

> [C]laimants will experience practical disabilities as a result of disclosure of these confidential, intimate details, some of which could be highly embarrassing, because disclosure may cause an individual to lose friends who for one reason or another might be prejudiced by this information. Disclosure may also cause a claimant to lose employment opportunities, because a

> prospective employer, having access to the intimate details of the claimant's history, may decline to offer employment or offer it only at a reduced salary or in a lower position.

Id. at 1028-29.

Similar reasoning suggests the conclusion that these reports from rehabilitation counselors are personal records exempt from mandatory disclosure pursuant to subparagraph (7) of Neb.Rev.Stat. § 84-712.05. The Risk Manager may exercise his or her discretion in deciding whether to disclose such records; however, this discretion should be exercised only in a manner consistent with the individual's right to privacy. In other words, ordinarily the documents should only be disclosed to the claimant or his or her attorney, or, alternatively, the documents should only be disclosed pursuant to established discovery procedures upon the initiation of litigation.

Again, the documents would become public if they were publicly disclosed in open court. This is a determination our office could assist you in making in any particular case.

II. STATE CLAIMS BOARD CLAIMS

1. Claim Form and Attachments Filed by a Claimant:

Pursuant to Neb.Rev.Stat. § 81-8,212 (1990 Cum.Supp.), tort claims must be filed with the Risk Manager in the manner prescribed by the State Claims Board. Pursuant to Neb.Rev.Stat. § 81-8,297 (1990 Cum.Supp.), all claims under the Miscellaneous Claims Act, all claims under Neb.Rev.Stat. §§ 25-1802 to 25-1807, and all claims under the State Contract Claims Act must be filed with the Risk Manager.

In our opinion, all such claims and attachments are beyond any of the exemptions in Neb.Rev.Stat. § 84-712.05, and, therefore, said documents are public records which must be disclosed upon request.

2. Investigative Reports Filed by the Agency Involved:

Pursuant to Neb.Rev.Stat. § 81-8,298 (1990 Cum.Supp.), the State Claims Board has the authority to investigate miscellaneous claims, contract claims, and claims filed pursuant to Neb.Rev.Stat. §§ 25-1802 to 25-1807. Pursuant to Neb.Rev.Stat. § 81-8,212 (1990 Cum.Supp.), the Attorney General is authorized to cause a complete investigation to be made of all tort claims. As a matter of longstanding practice, this investigation is conducted by the Office of Risk Management.

In our opinion, investigative reports filed by the agency involved fall within the exception described at subparagraph 5 of Neb.Rev.Stat. § 84-712.05. Said reports are received by a public body charged with duties of investigation of people and institutions as part of that investigation. Thus, the Risk Manager may choose not to disclose such reports to any member of the public until the reports are publicly disclosed at an open meeting or an open administrative proceeding. For example, if the investigative report is publicly discussed or considered by the State Claims Board at an open meeting then, in our opinion, it would thereafter need to be disclosed to the public upon request.

3. Risk Manager's Recommendation on the Claim Made to the Board:

In our opinion, this recommendation is probably also part of the investigatory process. Thus, the analysis of its disclosure would be the same as the immediately preceding response.

III. REPORTS ON UNSAFE CONDITIONS

1. OSHA Reports Directed to the Office of Risk Management:

In your opinion request you explain that complaints on unsafe workplace conditions may be filed confidentially with OSHA. However, OSHA has no jurisdiction over the state so these reports are redirected to the Office of Risk Management for action. You inquire whether the complainant's name must remain confidential when you contact state agencies.

Neb.Rev.Stat. § 81-8,239.01 (1990 Cum.Supp.) establishes a Risk Management Program for the State of Nebraska administered by the Risk Manager for the purpose of "the systematic identification of exposures to risk of loss," as provided in several statutes including the Workers' Compensation Act and the State Tort Claims Act. Under this program, the Risk Manager has the authority and responsibility to:

> b. Develop and maintain loss and exposure data on all state property and liability risks;
>
> c. Develop and recommend risk reduction or elimination programs for the state and its agencies and establish, implement, and monitor a statewide safety program;

Without explicitly stating, in our opinion, the broad authority granted to the Risk Manager, as quoted above, includes the authority to investigate complaints of unsafe working conditions for state employees such as those referred from OSHA.

Records of this investigation, including the complainant's name, could be withheld from the public under the exemption set forth in Neb.Rev.Stat. § 84-712.05(5), as discussed in preceding paragraphs.

2. Reports Made Directly to the Office of Risk Management:

You have further inquired whether the names of persons directly reporting unsafe conditions on state properties to the Office of Risk Management are confidential. Our analysis of this inquiry is the same as that set forth in response to the preceding inquiry. In our opinion, the complaint and complainant's name are part of the records of the investigation which, in the discretion of the Risk Manager, could be withheld from the public, unless publicly disclosed in open court or open meeting.

IV.

1. Letters From the Attorney General's Office Indicating That a Case Has Been Accepted for Representation and Giving Basic Details of the Case and its Potential Loss Reserves:

Pursuant to Neb.Rev.Stat. § 81-8,239.05 (1990 Cum.Supp.), the Attorney General shall notify the Risk Manager when an official or employee is being represented by the Attorney General and the costs of litigation are to be paid by the Risk Manager from the State Self-Insured Indemnification and Liability Fund.

In our opinion, a letter such as you describe from our office constitutes the work product of an attorney in anticipation of litigation. Therefore, it is exempt from mandatory public disclosure pursuant to Neb.Rev.Stat. § 84-712.05(4). Disclosure of such information could conceivably compromise this office's defense of the litigation if opposing parties knew our evaluation of the case's potential for loss. However, in our opinion, this exemption would no longer apply after the case was concluded.

2. Bills and Documentation Submitted to the Office of Risk Management for Payment:

As set forth above, the provisions of Neb.Rev.Stat. § 84-712.01 emphasize the particular importance of disclosure of records involving the expenditures of public funds. However, in the course of litigation, it is conceivable that disclosure of bills and documents submitted for payment could compromise this office's preparation for litigation. For example, such records might reveal experts or consultants retained for litigation which might not otherwise be discoverable or at least might not need to be revealed to opposing parties at that time. Therefore, in our opinion, such records constitute work product in anticipation of litigation as set forth in subparagraph 4 of Neb.Rev.Stat. § 84-712.05. Such

records are therefore exempt from mandatory public disclosure until the litigation is concluded.

3. Final Closing Documents Such as Awards, Agreements, or Settlements:

Usually said documents are filed with the court in which the case is pending. As part of the court file, the documents would clearly be public records which must be disclosed.

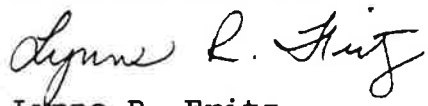
As for settlement agreements which are not made part of the court record, usually said agreements involve the expenditure of public funds. Therefore, the statutory emphasis in favor of disclosure applies. Absent a most unusual situation, in our opinion, such documents do not fall within the exemptions enumerated in Neb.Rev.Stat. § 84-712.05 and must be disclosed to the public.

SUMMARY

While we have attempted to fully respond to each of your requests, no answer can apply to all factual situations. Further, even if a document falls within the Neb.Rev.Stat. § 84-712.05 exemptions, the Risk Manager still has the discretion to disclose it. In the exercise of that discretion, the impact of disclosure on the privacy interest of any individuals mentioned in the document, as well as the State's interests, must be balanced against the importance of the interests of the party requesting disclosure. If we can be of any assistance in any particular factual situation, please do not hesitate to contact this office.

Sincerely,

DON STENBERG
Attorney General



Lynne R. Fritz
Assistant Attorney General

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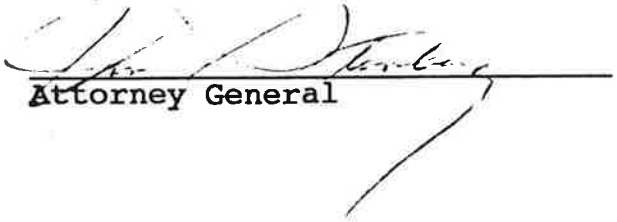

Attorney General