

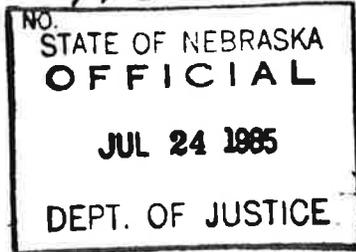
DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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July 22, 1985



SUBJECT: Release of Public Assistance Recipient/
Grant Information

REQUESTED BY: Gina C. Dunning, Director, Nebraska Department
of Social Services

OPINION BY: Robert M. Spire, Attorney General
Royce N. Harper, Assistant Attorney General

QUESTION: Is the Department of Social Services permitted
under Neb.Rev.Stat. §68-313.01 (Cum.Supp. 1984)
to inquire of persons requesting access to
information about their intended use of the
information in order to ensure that it will not
be used for commercial or political purposes?

CONCLUSION: Yes.

Neb.Rev.Stat. §68-313.01 (Cum.Supp. 1984) provides for
access to records maintained by the Department of Social
Services as follows:

Books and records; access by state and county
officials; names and payments on financial records;
open to public; limitation. . . The public shall
have free access to all information concerning lists
of names and amounts of payments which appear on any
financial records, except that no lists shall be used
for commercial or political purposes.

(Emphasis added.) In construing this statute, a question
arises as to whether the express limitation is addressed to
members of the public who have already obtained the requested
information or, rather, is addressed to the Department of

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Social Services so that it may prevent the disclosure of information which, if obtained, would be used for commercial or political purposes. It is our opinion that the statute imposes an obligation upon members of the public not to misuse acquired information as well as a duty upon the Department of Social Services to prevent the misuse of information where possible.

The Department of Social Services is entrusted with the power to establish and enforce reasonable rules and regulations governing the custody and use of state records. Neb.Rev.Stat. §68-312 (Cum.Supp. 1984). And, except as permitted by §68-313.01, it is prohibited from disclosing any information concerning persons applying for or receiving public assistance. Neb.Rev.Stat. §68-313 (Cum.Supp. 1984). One of the implied objectives of the above cited statutes is to protect against public harassment of aid recipients.

Section 68-313.01 provides for public access to lists of names and amounts of payments in an effort to protect against the possibility of fraud or administrative misuse of aid monies. However, the statute reiterates a policy expressed in previous statutes in favor of protecting the privacy of aid recipients by prohibiting the use of such information for commercial or political purposes. This express limitation must allow the Department of Social Services some discretion, following reasonable guidelines, in the disclosure of information. If the limitation were interpreted as addressing members of the public only, after having obtained the information, the practical effect would be to allow the misuse and resulting harm to occur before the statute's limitation could be enforced. Enforcement against public misuse of information is made somewhat difficult, moreover, since the statutes do not provide what sanction is to be imposed for any given violation. See, McMullan v. Wohlgemuth, 308 A.2d 888 (1973), where the Supreme Court of Pennsylvania similarly interpreted that state's statute as requiring members of the public to affirmatively assert some noncommercial or nonpolitical purpose for the information requested prior to obtaining the information.

There may be additional circumstances, moreover, which would require the Department of Social Services to refrain from releasing information otherwise obtainable under the statute. This is due to stricter federal standards governing the administration of the AFDC Program.

As a participant in the federal Aid to Families with Dependent Children Program, Nebraska must comply with restrictions on disclosure of information regarding AFDC applicants and recipients contained in federal law. 42 U.S.C. 3 U.S.C. 602(a) (9) (1982) provides that a state plan must

[P]rovide safeguards which restrict the use of information concerning applicants or recipients to purposes directly connected with (A) the administration of the plan of the State approved under this part [or under other listed federal welfare statutes], (B) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or program

45 C.F.R. §205.50 implements the above listed restrictions which provide that, at least with respect to information regarding names and addresses, the privacy interests of individual applicants and recipients require nondisclosure except in certain specifically articulated instances.

Section (a) (1) (iv) of §205.50 retains an earlier provision which states:

Publication of lists or names of applicants or recipients will be prohibited. Exception. In respect to a State plan for financial assistance under title I, IVA, X, XIV, or XVI (AABD) of the Social Security Act, an exception to this restriction may be made by reason of the enactment or enforcement of State legislation, prescribing any conditions under which public access may be had to records of disbursement of funds or payments under such titles within the State, if such legislation prohibits the use of any list or names obtained through such access to such records for commercial or political purposes. 45 C.F.R. §205.50(a) (1) (iv) (1983).

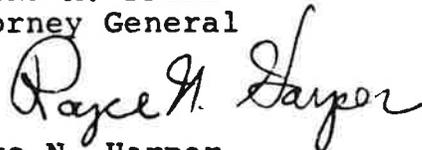
This section is more commonly referred to as the Jenner Amendment which was adopted in 1951. Nebraska's statute is obviously patterned after this amendment to the Code of Federal Regulation. In light of the recent subsequent amendments of §602(a) (9) requiring disclosure only in specified instances, a question arises as to the continued effect of the earlier Jenner Amendment. The few cases which have construed the Jenner Amendment have held that it serves no current legitimate purpose and is therefore inoperative. See, Whisler v. Whisler, 684 P.2d 1025 (1984); Michigan Welfare Rights Organization v. Dempsey, 462 F.Supp. 227, 237, n. 9 (E.D. Mich 1978); accord, Rosado v. Wyman, 397 U.S. 397, 90 S.Ct. 1207 (1970); King v. Smith, 392 U.S. 309, 88 S.Ct. 2128 (1968); State ex rel. Danbrowski v. Moser, 113 Wis.2d 296, 334 N.W.2d 878. In addition, the Attorney General of Kansas has issued an opinion noting that the Jenner Amendment does not provide justification for public access to records mandated by that state's statute. See, Attorney General Opinion 79-130 (July 2, 1979).

We are in agreement with the above cited authorities that all exceptions to the general rule of nondisclosure are enumerated exclusively in the provisions of 602(a)(9). In short, federal law adopts a general rule of nondisclosure. Conversely Nebraska's statutes adopt a broader general rule of free public access. As a participant in the federal AFDC Program, Nebraska must comply with federal restrictions on disclosure of information regarding AFDC recipients.

The general rule of free public access to information provided for in Neb.Rev.Stat. §68-313.01 is thereby qualified in two respects. First, the Department of Social Services is permitted to inquire of persons requesting information about their intended use in order to insure that the information will not be misused for commercial or political purposes. Finally, to the extent that Neb.Rev.Stat. §68-313.01 mandates public access to information where federal law would prohibit such disclosure, federal law must prevail.

Sincerely,

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Attorney General



Royce N. Harper
Assistant Attorney General

RNH:cw

APPROVED



Attorney General