

STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

JON BRUNING
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

October 17, 2011

Mark E. Welsch, President
Group to Alleviate Smoking Pollution
(GASP) of NE, Inc.
5611 Howard Street
Omaha, NE 68106-1257

RE: *File No. 11-R-135; Region 6 Behavioral Healthcare; Mark E. Welsch,
Petitioner*

Dear Mr. Welsch:

We are writing in response to your e-mail sent to Assistant Attorney General Comer on September 29, 2011, in which you requested our assistance in obtaining certain public records belonging to Region 6 Behavioral Healthcare ("Region 6"). We have considered your e-mail a petition under the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010). Our findings in this matter are set forth below.

RELEVANT FACTS

Our understanding of the facts in this case is based on the e-mail string sent to Mr. Comer on September 29, 2011.

Your initial request for public records was e-mailed to Marcy Harrington, a Region 6 tobacco prevention specialist, on July 2, 2011. Your request stated, in part:

Please send the following information to me by email attachments:

- 1. The grant that MOTAC has gotten from Tobacco Free Nebraska that ended on June 30, 2011 – I want the workplan and budget information for all organizations**
- 2. The grant that MOTAC applied for from Tobacco Free Nebraska**

that I believe should have started on July 1, 2011 – I want the workplan and budget information for all organizations.

If the second grant is not yet finished, please send the most current draft for that grant.

(Emphasis in original.) It appears from the e-mail string that Ms. Harrington attempted to respond to your public records request on July 5, 2011. However, according to her e-mail to you dated July 7, 2011, her previous e-mail “bounced back twice.” Her e-mail concludes: “Please see note and attachments regarding your request. Thanks.”

You responded minutes later, requesting that Ms. Harrington “send the grants in a file format that may be searched for specific key words.” You indicated that the PDF files you received could not be “searched for anything.” On July 11, 2011, you contacted Ms. Harrington again by e-mail requesting that she resend the two grants to you again “in a searchable format (like a Word document).” You indicated that you couldn’t find the grants previously sent. You also stated:

I make this request for the searchable formatted files under the Nebraska Open Records Law. As I mentioned in my note below, the PDF files you sent can’t be searched for anything.

You also indicated that the Region 6 e-mail system may have a problem sending e-mail to your regular e-mail address, Mark@SmokeFreeNebraska.org, and requested that Region 6 use an alternative address until the matter was resolved.

Ms. Harrington responded on July 13, indicating that you had received the documents requested, and that Region 6 will only issue documents in a PDF format. You responded on August 2, 2011, requesting that Ms. Harrington resend the documents to you in “MSWord, Excel or other searchable files for those two grants.” You indicated that you did not get them. You stated: “The only files I did get on 7-7-2011 from you are two PDF files that can not be searched on my computer. Those un-searchable files are not what I requested.” It appears that Ms. Harrington attempted to respond to you later that day, indicating that the files you had requested were provided to you in the format approved by the office. Ms. Harrington followed up that e-mail with an e-mail on August 9, 2011, indicating that she had “used the e-mail that bounces back.” She apologized “for not using the email that reaches you best.”

It appears that Jeffrey W. Helaney, Manager of Prevention System Services for Region 6, then contacted you the following day, August 10. Mr. Helaney indicated that it was the agency’s practice to provide the documents only in PDF format. He also advised that a number of options for modifying those documents into other formats were available, and suggested that you look at CNET and other sites to find out what you needed to accomplish this.

DISCUSSION

Generally speaking, the Nebraska Public Records Statutes allow interested persons in Nebraska the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts from those public records, and to obtain copies of public records in certain circumstances. A public body is not required, however, to create documents that do not otherwise exist, or to answer questions made to the public body under the guise of a public records request.

Neb. Rev. Stat. § 84-712(3)(a) (2008) is critical to our discussion. That subsection provides that “[c]opies may be obtained pursuant to subdivision (1)(b)¹ of this section only if the custodian has copying equipment reasonably available. Such copies may be obtained in any form designated by the requester in which the public record is maintained or produced, including, but not limited to, printouts, electronic data, discs, tapes, and photocopies.” “In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense” *Harris v. Omaha Housing Authority*, 269 Neb. 981, 989, 698 N.W.2d 58, 65 (2005). “Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.” *Skaggs v. Nebraska State Patrol*, 282 Neb. 154, 159, ___ N.W.2d ___ (2011).

The plain and ordinary meaning of § 84-712(3)(a) indicates that copies may be provided to the requester in any “form” maintained or produced by the custodian. The statute goes on to clarify that “form” includes photocopies, printouts, electronic data, tapes and discs. According to the facts of this case, on July 2 you contacted Ms. Harrington by e-mail, and requested that she send you two particular grants “by e-mail attachments.” Ms. Harrington complied with your request by e-mailing you the two grants on July 7. We understand that maybe the grants as received did not provide you the search capability you were seeking. However, as indicated above, the NPRS only requires that requesters be provided copies of documents in the *form* in which they are maintained or produced. In this regard, the grants were maintained electronically, and delivered to you electronically. We believe this satisfied the requirements of the law.

Your remaining allegations relate to the “privacy statement” appearing at the end of Mr. Helaney’s e-mail signature, and Region 6’s inability to send you e-mail using your Mark@SmokeFreeNebraska.org address. With respect to the privacy statement, we believe it to be nothing more than a standard disclosure, informing an unintended

¹ That subsection states: “[E]xcept if federal copyright law otherwise provides, [requesters may] 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.” Neb. Rev. Stat. § 84-712(1)(b) (2008).

Mark E. Welsch
October 17, 2011
Page 4

recipient to contact the sender and destroy the e-mail in the event an e-mail is received in error. It attempts to protect Region 6 in the event personally identifiable information is disclosed to an unauthorized third party. A "privacy statement" in an e-mail has no effect on Region 6's responsibilities to disclose public records under the Nebraska Public Records Statutes.

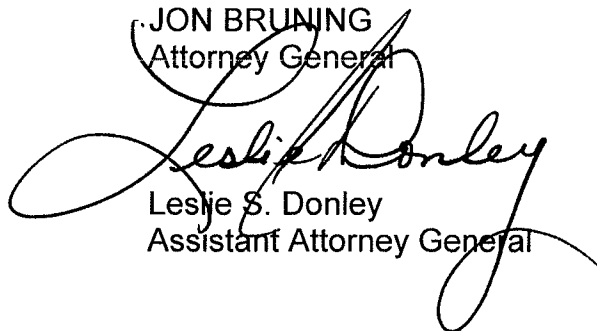
With respect to the problems with your e-mail address, you have inquired as to whether it is the responsibility of a government agency, like Region 6, to make sure that all of its servers are configured to send all e-mails. We believe that governmental agencies must make a reasonable attempt to deliver communications that are required by statute. As a result, we would suggest to Region 6, by sending a copy of this response to Mr. Helaney, that in the future Region 6 should take whatever steps are reasonably necessary to ensure that communications required by the Nebraska Public Records Statutes are completed in a timely manner.

We would also take this opportunity to point out to you that since you sent your initial request for the grants on Saturday, July 2, Ms. Harrington's response to you on July 7 was timely despite the "bounced" e-mail. Neb. Rev. Stat. § 84-712(4) provides that upon written receipt of a request for public records, the custodian has four business days after actual receipt of the request to respond to the requester. Under these circumstances, "actual receipt" was Tuesday, July 5, 2011, and Region 6 had four business days after that in which to respond to you.

Finally, when we receive petitions under § 84-712.03, our focus is to ensure that citizens have not been improperly denied public records. We investigate these petitions on a case-by-case basis. Since you have received the records [grants] at issue, we see no reason to continue our investigation, and we are closing the file.

Sincerely,

JON BRUNING
Attorney General



Leslie S. Donley
Assistant Attorney General

cc: Jeffrey W. Helaney