

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

DOUGLAS J. PETERSON
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

December 28, 2017

Via email at GSchulte@ap.org
Grant Schulte
Associated Press

RE: *File No. 17-R-149; Nebraska Department of Correctional Services; Grant Schulte, Associated Press, Petitioner*

Dear Mr. Schulte:

This letter is in response to your correspondence emailed to this office on December 13, 2017, in which you requested that we review the denial by the Nebraska Department of Correctional Services ("Department") of your recent request for public records relating "to the department's efforts to acquire lethal injection drugs." Specifically, you are seeking our determination as to whether the Department is in compliance with the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 to 84-712.09 (2014, Cum. Supp. 2016) ("NPRS"). We have construed your correspondence to be a petition for review under the provisions of Neb. Rev. Stat. § 84-712.03(1)(b).

Please be advised that litigation has been instituted against the Department which raises the same or similar issues found in your petition. *See State of Nebraska ex rel. Amy A. Miller and ACLU of Nebraska Foundation v. Scott Frakes*, Case No. CI 17-4283 (Lancaster County District Court). A copy of the ACLU's complaint is enclosed with this letter. Since this office will be defending the Department's position in that litigation, we are unable to take action on your petition. Consequently, we are closing this file.

Grant Schulte
December 28, 2017
Page 2

However, you have an alternative remedy for relief of the Department's denial of your records request under Neb. Rev. Stat. § 84-712.03(1)(a) (2014).¹

Sincerely,

DOUGLAS J. PETERSON
Attorney General

pp. 
Leslie S. Donley
Assistant Attorney General

Enclosure

49-1913-29

¹ For your information, on December 15, 2017, the Omaha World-Herald, Lincoln Journal Star, and Media of Nebraska filed a complaint seeking to intervene in Case No. CI 17-4283. We have attached a copy of this complaint for your review as well.

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA ex rel,
AMY A. MILLER and
ACLU OF NEBRASKA FOUNDATION,

Relators,

vs.

SCOTT FRAKES, in his official capacity
as DIRECTOR OF THE NEBRASKA
DEPARTMENT OF CORRECTIONAL
SERVICES,

Respondent.

Case No:

C-17-4283

CLERK OF THE
DISTRICT COURT

2017 DEC 1 AM 8 32

LANCASTER COUNTY

**COMPLAINT FOR
WRIT OF MANDAMUS**

**Expedited Proceeding
Pursuant to Neb.Rev.Stat. §84-712.03(3)**

COMES NOW the Relators, Amy A. Miller and the ACLU of Nebraska Foundation, pursuant to Neb. Rev. Stat. § 84-712.03(1)(a), and for their cause of action and claim for relief against the Respondent, Scott Frakes ("Respondent"), allege that Relators are entitled to a preemptory writ of mandamus requiring the Respondent, in his capacity as Director of the Department of Correctional Services, to provide copies of and/or allow inspection of certain records requested by Relators in accordance with the Nebraska Public Records Act. In support of this Complaint, Relators hereby state and allege as follows:

INTRODUCTION

1. Amy A. Miller and the ACLU of Nebraska Foundation ("Relators") bring this Complaint for a Writ of Mandamus to compel the Director of the Nebraska Department of Correctional Services ("Director" or "Respondent") to describe and disclose records requested by Relators pursuant to the state Public Records Act, Neb.Rev.Stat. §84.712 et seq. The records in question generally relate to



OK

Respondent's attempts to obtain pharmaceuticals or other substances for the purposes of carrying out lethal injection executions;

2. No other Nebraska state agency has been the subject of more scandals and problems in the last several years than the Nebraska Department of Correctional Services (Department) and the state prison system. One of the subjects of controversies involves the efforts of the Department and state officials to obtain lethal injection drugs. The actions of the state has resulted in the expenditure of state moneys without receipt of such drugs; clashes between the state and federal authorities regarding the importation of drugs; and disputes between the state and drug manufacturers that have provided the state with drugs;
3. One recent controversy was a 2015 attempt by the Department and officials to obtain lethal injection drugs to attempt to carry out executions. In 2015, Chris Harris and Harris Pharma entered into an "agreement" with the state in which it promised delivery of sodium thiopental. Nebraska officials have never received the sodium thiopental, despite the payment of over \$54,000 in public funds for it. This matter only came to light as a result of open records requests by advocates and members of the press, pursuant to the Nebraska Public Records Act, which were very similar to the request at issue in this matter;
4. Nebraskans expect government officials to remedy problems and to not repeat them. The only reliable means to ensure oversight of government is for the public to be able to examine the activities and efforts and state officials. This state has a proud tradition of open government as is proclaimed outside an entrance to our

Capitol: "The Salvation of the State is Watchfulness of the Citizen." The Nebraska Public Records Act is a statutory embodiment of this principle;

5. This fundamental concept of open government is at issue in this case. The taking of a person's life is the most extreme use of state power. The circumstances surrounding the death penalty are certainly matters of public concern and the means of the death penalty should not be implemented in the shadows. Citizens and the press are entitled to access to complete information, not selective or edited information;

PARTIES

6. Relator Amy A. Miller is a citizen of the State of Nebraska;
7. Relator ACLU of Nebraska Foundation is a non-profit, non-partisan organization that works to defend and strengthen the individual rights and liberties guaranteed in the United States and Nebraska Constitutions through policy advocacy, litigation, education, and community empowerment. A fundamental component of the protection of these rights is the concept of open government in which citizens have the right to access documents and proceedings of the government to allow for effective oversight of its actions. Relator ACLU of Nebraska has thousands of members and supporters Nebraska who are interested in examination of the public records at issue in this matter;

8. Respondent is the duly appointed Director for the Nebraska Department of Correctional Services for the State of Nebraska. Respondent is the custodian of the records requested by the Relator at issue in this Complaint;

JURISDICTION AND VENUE

9. Relators are authorized to bring this action pursuant to Neb.Rev.Stat. §84-712.03(1)(a);
10. Venue is proper in this Court and this Court has jurisdiction pursuant to Neb.Rev.Stat. §84-712.03;

ALLEGATIONS

11. Neb.Rev.Stat. §84-712.01(1) provides that “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” (emphasis added);
12. Neb.Rev.Stat. §84-712(1) also provides that “[e]xcept 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 (b) obtain copies of public records”;
13. Neb.Rev.Stat. § 84-712.04 (1) provides that “[a]ny person denied any rights granted by sections 84-712 to 84-712.03 shall receive from the public body which

denied the request for records at least the following information: “(a) a description of the contents of the records withheld and a statement of the specific reasons for the denial, **correlating specific portions of the records to specific reasons for the denial**, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial. . . . and (c) [n]otification to the requester of any administrative or judicial right of review under section 84-712.03.” (emphasis added);

14. In an email correspondence and letter correspondence dated October 27 2017, Relators requested copies of records regarding relating to lethal injection drugs and related records from pharmaceutical manufacturers, distributors, brokers, suppliers, and/or pharmacies; officials from other states or the federal government; United States Drug Enforcement Administration (DEA); and documentation relating to the use of public funds (hereinafter “suppliers”). A true and accurate copy of Relators’ written request is attached to this Complaint as Exhibit A;
15. Since 2015, Relators have made regular and repeated Nebraska Public Records Act requests which are nearly identical to the requests at issue in this case, marked as Exhibit A. Respondent has complied with all prior requests;
16. In an email correspondence and written correspondence dated November 2, 2017 Respondent, through a representative, notified Relators that it was unable to fulfill the request within four business days and estimated that it would complete the request by November 22, 2017. A true and accurate copy of Respondent’s November 2, 2017 written response is attached as Exhibit B;

17. In an email correspondence and written correspondence dated November 15, 2017 Respondent, through a representative, granted or responded in part to the Relators' request for documents. A true and accurate copy of Respondent's written response is attached to this Complaint as Exhibit C;

18. In an email correspondence and written correspondence dated November 22, 2017 Respondent, through a representative, denied the Relators' request for documents, claiming that while Respondent does possess records responsive to Relators' request as to the identity and information about suppliers, these records will not be released because the records "consist of attorney work product, are subject to the attorney-client privilege, are not public records and/or are confidential and exempt from disclosure under Neb. Rev. Stat. §83-967(2)". A true and accurate copy of Respondent's written response is attached to this Complaint as Exhibit D;

CLAIM FOR RELIEF Violation of Neb. Rev. Stat. § 84-712.

**The Requested Records are not Protected by Attorney-Client Privilege and are not
Attorney Work Product**

19. Relators incorporate the allegations contained in paragraphs 1 through 18 as though set forth here in full;

20. The Relators are a citizen of this state and a person interested in the examination of public records for purposes of Neb. Rev. Stat. § 84-712(1);

21. The Relators are "fully empowered and authorized" to examine the requested public records under Neb. Rev. Stat. § 84-712(1);

22. Neb.Rev.Stat. § 84-712.05(4) authorizes the withholding of certain records requested by the Relators, if certain records exist. This exception provides that “[r]ecords which represent the work product of an attorney and the public body involved which are related to preparation for litigation, labor negotiations, or claims made by or against the public body or which are confidential communications as defined in section 27-503.”;
23. Neb.Rev.Stat. § 27-503(1)(d) provides that “[a] communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the **client** or those reasonably necessary for the transmission of the communication.” (emphasis added);
24. Neb.Rev.Stat. § 27-503(1)(a) defines client as “a person, public officer, or corporation, association, or other organization or entity, either public or private, **who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.**” (emphasis added);
25. Neb.Rev.Stat. §27-503(2) and (3) provide that the client may claim the privilege.
26. The communications or correspondence with suppliers or records relating to the identity of suppliers described in Relators’ October 27, 2017 request do not constitute communication with clients under the definition of §27-503;
27. The communications or correspondence with suppliers or records relating to the identity of suppliers described in Relators’ October 27, 2017 request are not attorney work product under Nebraska law;

28. The Nebraska Public Records Act, including Neb.Rev.Stat. §84-712 and §84-712.01, was duly enacted by the Nebraska Legislature, and applies to the Nebraska Department of Correctional Services;
29. Respondent has a clear duty to provide the requested documents pursuant to the Nebraska Public Records Act.

CLAIM FOR RELIEF Violation of Neb. Rev. Stat. § 84-712.

**The Entities relating to the Requested Records are not Members of the
Execution Team**

30. Relators incorporate the allegations contained in paragraphs 1 through 18 as though set forth here in full;
31. Neb.Rev.Stat. §83-967(2) provides that “[t]he identity of all members of the execution team, and any information reasonably calculated to lead to the identity of such members, shall be confidential and exempt from disclosure pursuant to sections 84-712 to 84-712.09 and shall not be subject to discovery or introduction as evidence in any civil proceeding unless extraordinary good cause is shown and a protective order is issued by a district court limiting dissemination of such information.”;
32. Nebraska statutes do not define who makes up “the execution team”. Instead Neb.Rev.Stat. §83-965(2)(c) (d) and (e) give the Director the authority to “designate an execution team composed of one or more executioners and any other personnel deemed necessary to effectively and securely conduct an execution, (d)

- describe the respective responsibilities of each member of the execution team, (e)
describe the training required of each member of the execution team.”;
33. The Nebraska Administrative Code Title 58 Chapter 11 regarding Execution Protocols defines “execution team” and the qualifications and duties of the team;
34. The suppliers described in Relators’ October 27, 2017 request are not members of the execution team; are not state personnel; and the Director does not have the authority to describe their respective responsibilities or training;
35. The Nebraska Public Records Act, including Neb.Rev.Stat. §84-712 and §84-712.01, was duly enacted by the Nebraska Legislature, and applies to the Department;
36. To the extent that any requested record reveals the identity of a member of the “execution team” Neb.Rev.Stat. §84-712.06 requires the Department to retract or delete only the identity and produce the balance of any and all records requested;
37. The Respondent, is required to correlate “specific portions of the records to specific reasons for the denial, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial.” Respondent has failed to do so;
38. Respondent has a clear duty to provide the requested documents pursuant to the Nebraska Public Records Act.

PRAYER FOR RELIEF

WHEREFORE, the Relators pray:

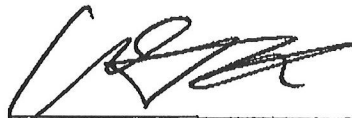
1. That the Court issue a preemptory writ of mandamus requiring Respondent to provide access to and copies of the records requested by the Relators in Exhibit A, pursuant to Neb.Rev.Stat. §84-712, or alternatively;
2. That the Court issue an Order to Show Cause why Respondent declines to provide such access by filing an Answer to this Complaint for Writ of Mandamus which responds to the allegations of Relators by a date certain;
3. That the Court expedite this matter pursuant to Neb.Rev.Stat. §84-712,03(3) and set this matter for hearing as soon as practicable;
4. That the Court issue an Order awarding attorney fees and costs to Relators pursuant to Neb.Rev.Stat. §84-712.07;
5. That the Court grant Relators any other relief the Court deems just and proper.

Respectfully submitted,

AMY A. MILLER, Relator,

ACLU of Nebraska Foundation, Relator,

By:

 Eickholt #21472

Christopher L. Eickholt, #21472

Eickholt Law LLC

721 South 14th Street

Lincoln, Nebraska 68508

Phone: 402-310-5663

spike@eickholtlaw.com



October 27, 2017
BY EMAIL AND MAIL DELIVERY

Director Scott Frakes
Nebraska Department of Correctional Services
P.O. Box 94661
Lincoln NE 68509

Dear Director Frakes:

AMERICAN CIVIL
LIBERTIES UNION of
NEBRASKA
FOUNDATION

134 S. 13TH ST. #1010
LINCOLN, NE 68508
T/ 402.476.8091
F/ 402.476.8135

LEGAL HELP LINE
1.855.567.ACLU (2258)

www.aclunabraska.org

This is a request under Nebraska public records law. I am seeking documents relating to your attempts to obtain pharmaceuticals or other substances for the purposes of carrying out lethal injection executions. In the following request, "Department" refers to the Department of Correctional Services, and hereinafter "injection drugs" refers collectively to *any and all substances intended for use in an execution, including but not limited to sodium thiopental, pentobarbital, midazolam, potassium, paralytic drugs, and/or any ingredients of same.* At any reference to "injection drugs," the intent is to obtain any document referring to any and all attempts to obtain such pharmaceuticals.

In the following request, "Documents" includes notes, memos, emails, text messages, faxes, letters or written items of any kind whether in paper format or electronic format. As a reminder, our request is intended to include notes of phone communications or emails memorializing phone conversations.

As you may know, Nebraska state law requires a response to an open records request to be made within four (4) days of receipt. If you need additional time, please advise.

The materials I am requesting are limited to the time period of June 15, 2017 to present time.

1. Any documents including email, letter, phone message or other communication with any and all potential pharmaceutical manufacturers, distributors, brokers, suppliers and/or pharmacies—whether domestic or foreign—showing efforts to obtain lethal injection drugs or discussing lethal injection drugs.
2. Any documents including email, letter, phone message or other communication with any officials from other states or the federal government regarding efforts to obtain lethal injection drugs or discussing lethal injection drugs.
3. Any documents including email, letter, phone message or other communication with Chris Harris and or Harris Pharma.

EXHIBIT A

4. Any documents including email, letter, phone message or other communication with **Benjamin England, FDA Imports, Alpha Brokers Corp. or any other third party entity** regarding efforts to obtain lethal injection drugs or discussing lethal injection drugs.
5. Any documents including email, letter, phone message or other communication between the Department and the **Governor, or Governor's office, or Governor's corrections advisory committees, or Governor's private political consultants** related to the efforts to obtain injection drugs.
6. Any documents including email, letter, phone message or other communication with any representatives of the **United States Food and Drug Administration (FDA)** in regards to obtaining a license for the importation and acquisition of injection drugs or any other matters relating to the importation and acquisition of injection drugs.
7. Any documents including email, letter, phone message or other communication with any representatives of the **United States Drug Enforcement Administration (DEA)** in regards to obtaining a license for the importation and acquisition of injection drugs or any other matters relating to the importation and acquisition of injection drugs.
8. Any documents including email, letter, phone message or other communication with any representatives of the **United States Customs and Border Protection (CBP)** in regards to obtaining a license for the importation and acquisition of injection drugs or any other matters relating to the importation and acquisition of injection drugs.
9. Any documentation showing the **expiration date** for the injection drugs currently in the Department's possession, including a copy of the packaging itself.
10. Any documentation with any party as to the **testing, potency, efficacy, or other matters** related to the injections drugs by any party including **Chris Harris, Harris Pharmaceuticals, the DEA, the FDA, or independent testing entity.**
11. Any documentation from any common carrier such as the **United States Postal Service, Fed Ex, UPS, or other commercial entity or private courier** related to the importation or acquisition of injection drugs or conveyance of public funds to purchase injections drugs.
12. Any documentation showing the **use of public funds** to purchase injection drugs including any invoice, purchase order, requisition, check, receipt or other similar record.
13. Any documentation showing the **use of public funds to pay for legal services** related to efforts to purchase injection drugs, including any invoice, contract, check, receipt or other similar record.

When the documents relevant to this request are ready, you may provide them in electronic form or, if you are providing in paper form, please advise and we will arrange pick up for fastest receipt.

I look forward to hearing from you:

A handwritten signature in black ink, appearing to read "Amy Miller". The signature is fluid and cursive, with a horizontal line extending from the end.

Amy A. Miller
Attorney at Law

cc: Mr. David Grauman, NDCS Legal Counsel

AMERICAN CIVIL
LIBERTIES UNION OF
NEBRASKA

NEBRASKA

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DEPT OF CORRECTIONAL SERVICES



Pete Ricketts, Governor

November 2, 2017

Amy Miller
ACLU of Nebraska
134 S. 13th St. #1010
Lincoln, NE 68508

RE: Public Records Request

Dear Ms. Miller,

I am writing in response to the request for public records that you sent to Director Frakes on October 27, 2017. Your request is for "documents relating to your attempts to obtain pharmaceuticals or other substances for the purposes of carrying out lethal injection executions."

We are also processing multiple, voluminous requests from your office and additional counsel in the current pending litigation. As such, we are unable to fulfill your request within four business days. We estimate that we will be able to complete this request by November 22, 2017.

Sincerely,

Dawn-Renee Smith
NDCS Communications Director

EXHIBIT B

Scott R. Frakes, Director
Dept of Correctional Services
P.O. Box 94661 Lincoln, NE 68509-4661
Phone: 402-471-2654 Fax 402-479-5623
corrections.nebraska.gov

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DEPT OF CORRECTIONAL SERVICES



Pete Ricketts, Governor

November 15, 2017

Amy Miller
ACLU of Nebraska
134 S. 13th St. #1010
Lincoln, NE 68508

RE: Public Records Request

Dear Ms. Miller,

I am writing in response to your email of November 15, 2017, wherein you request to prioritize or modify your request of October 27, 2017. Specifically, you have requested records that are clearly outside of any privilege or confidentiality be provided immediately with the remaining items provided following internal review. Below and attached are items that fit your criteria.

(1) Any documents including email, letter, phone message or other communication with any and all potential pharmaceutical manufacturers, distributors, brokers, suppliers and/or pharmacies – whether domestic or foreign – showing efforts to obtain lethal injection drugs or discussing lethal injection drugs.

- Letter from Pfizer

(2) Any documents including email, letter, phone message or other communication with any officials from other states or the federal government regarding efforts to obtain lethal injection drugs or discussing lethal injection drugs.

- Email (3) from the Association of State Correctional Administrators to Scott Frakes
- Notice of Inspection of Controlled Premises – US DOJ/DEA
- Drug Enforcement Administration – Closing Inventory
- DEA Form 225-A – Completed
- Controlled Substance Registration Certificate

(3) Any documents including email, letter, phone message or other communication with Chris Harris and or Harris Pharma.

- NDCS has no records responsive to this request.

EXHIBIT C

Scott R. Frakes, Director
Dept of Correctional Services
P.O. Box 94661 Lincoln, NE 68509-4661
Phone: 402-471-2654 Fax: 402-479-5523
corrections.nebraska.gov

(5) Any documents including email, letter, phone message or other communication between the Department and the Governor, or Governor's office, or Governor's corrections advisory committees, or Governor's private political consultants related to the efforts to obtain injection drugs.

- NDCS has no records responsive to this request

(6) Any documents including email, letter, phone message or other communication with any representatives of the United States Food and Drug Administration (FDA) in regards to obtaining a license for the importation and acquisition of injection drugs or any other matters relating to the importation and acquisition of injection drugs.

- NDCS has no records responsive to this request

(7) Any documents including email, letter, phone message or other communication with any representatives of the United States Drug Enforcement Administration (DEA) in regards to obtaining a license for the importation and acquisition of injection drugs or any other matters relating to the importation of injection drugs.

- See response to #2

(8) Any documents including email, letter, phone message or other communication with any representatives of the United States Customs and Border (CBP) in regards to obtaining a license for the importation and acquisition of injection drugs or any other matters relating to the importation of injection drugs.

- NDCS has no records responsive to this request

(9) Any documentation showing the expiration date for the injection drugs currently in the Department's possession, including a copy of the packaging itself.

- Inventory logs

(11) Any documentation from any common carrier such as the United States Postal Service, Fed Ex, UPS, or other commercial entity or private courier related to the importation or acquisition of injection drugs or conveyance of public funds to purchase injections drugs.

- NDCS has no records responsive to this request.

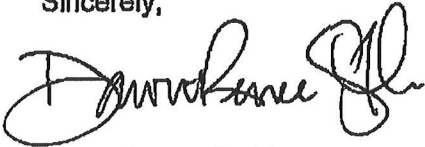
(13) Any documentation showing the use of public funds to pay for legal services related to efforts to purchase injection drugs, including any invoice, contract, check, receipt or other similar record.

- NDCS has no records responsive to this request

Amy Miller
ACLU of Nebraska
November 15, 2017
Page 3

If you believe records have been withheld contrary to Neb. Rev. Stat. § 84-712, you may pursue administrative or judicial remedies as outlined in Neb. Rev. Stat. § 84-712.03.

Sincerely,

A handwritten signature in black ink, appearing to read "Dawn-Renee Smith". The signature is fluid and cursive, with a large initial "D" and "S".

Dawn-Renee Smith
NDCS Communications Director

NEBRASKA

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DEPT OF CORRECTIONAL SERVICES



Pete Ricketts, Governor

November 22, 2017

Amy Miller
ACLU of Nebraska
134 S. 13th St. #1010
Lincoln, NE 68508

RE: Public Records Request

Dear Ms. Miller,

I am writing in response to your request for public records received on October 27, 2017. Your request is for "documents relating to your attempts to obtain pharmaceuticals or other substances for the purposes of carrying out lethal injection executions." Certain documents were provided to you on November 16, 2017.

We have completed our search for records responsive to your request, and have located additional records responsive to request number 9, which we have enclosed with this letter. There is no charge. With respect to request numbers 3, 5, 6, 8, 10, 11 and 13, we have no responsive records.

We have records responsive to request numbers 1, 2, 4, 7, 9 and 12 that will not be provided to you. These particular records consist of attorney – client communications; communication between an NDCS team member and a supplier; DEA forms; inventory logs; photos of packaging; invoices and purchase orders.

These documents constitute attorney work product, are subject to the attorney – client privilege, are not public records and/or are confidential and exempt from disclosure under Neb. Rev. Stat. § 83-967 (2). Consequently, per advice provided by legal counsel, Director Frakes is denying you access to these records on the basis of Neb. Rev. Stat. § 83-967(2); 84-712.01(1) and 84-712.05(4).

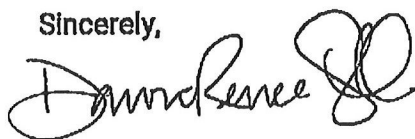
EXHIBIT D

Scott R. Frakes, Director
Dept of Correctional Services
P.O. Box 94661 Lincoln, NE 68509-4661
Phone: 402-471-2664 Fax: 402-479-5628
corrections.nebraska.gov

Amy Miller
ACLU of Nebraska
November 22, 2017
Page 2

If you believe records have been withheld contrary to Neb. Rev. Stat. § 84-712, you may pursue administrative or judicial remedies as outlined in Neb. Rev. Stat. § 84-712.03.

Sincerely,

A handwritten signature in black ink, appearing to read "Dawn-Renee Smith". The signature is stylized with a large, looped initial "D" and a flourish at the end.

Dawn-Renee Smith
Communications Director

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA ex rel, AMY A.)
MILLER and ACLU OF NEBRASKA)
FOUNDATION,)
)
Relators,)
)
v.)
)
SCOTT FRAKES, in his official capacity)
as DIRECTOR OF THE NEBRASKA OF)
CORRECTIONAL SERVICES,)
)
Respondent,)
)
v.)
)
BH MEDIA GROUP, INC. d/b/a OMAHA)
WORLD-HERALD; LEE ENTERPRISES,)
INCORPORATED d/b/a LINCOLN)
JOURNAL STAR; and MEDIA OF)
NEBRASKA, INC.,)
)
Intervenors.)

Case No. CI 17-4283

COMPLAINT IN INTERVENTION

BH Media Group, Inc. d/b/a the Omaha World-Herald, Lee Enterprises, Incorporated d/b/a the Lincoln Journal Star, and Media of Nebraska, Inc., (“Intervenors”), file this Complaint in Intervention pursuant to Neb. Rev. Stat. § 25-328 to 330. Intervenors generally join the Relators’ request for relief, and allege as follows:

1. BH Media Group, Inc. d/b/a the Omaha World-Herald is a Delaware corporation which publishes the Omaha World-Herald (“OWH”) newspaper in Omaha, Nebraska.

2. Lee Enterprises, Incorporated is a Delaware corporation which publishes the Lincoln Journal Star (“LJS”) newspaper in Lincoln, Nebraska.

3. Media of Nebraska, Inc. is a Nebraska nonprofit corporation which advocates on behalf of Nebraska’s print and broadcast journalism outlets.

4. Both OWH and the LJS made public records requests to the Nebraska Department of Corrections (“DOC”) pursuant to Neb. Rev. Stat. § 84-712 et seq. seeking records relating to pharmaceuticals obtained by DOC in order to carryout judicial executions by lethal injection. A true and correct copy of the request(s) made by the OWH are attached hereto as Exhibit “A.” A true and correct copy of the request(s) made by the LJS are attached hereto as Exhibit “B.”

5. OWH, LJS and Media of Nebraska are citizens of this State or other persons interested in examination of public records pursuant to Neb. Rev. Stat. § 84-712.01(1).

6. DOC generally denied the records requests made by OWH and LJS. The communication(s) denying the OWH requests are attached hereto Exhibit “C.” The communications denying the LJS requests are attached hereto as Exhibit “D.”

7. The communications made by DOC denying the records requests made by OWH and LJS fail to comply with the Nebraska Public Records Act. Specifically, the denials fail to comply with Neb. Rev. Stat. § 84-712.04(1)(a) in that they do not correlate specific records withheld to specific reasons for the

denial, including citations to the particular statute and subsection thereof expressly providing the exception relied on as authority for the denial.

8. The communications made by DOC denying the records requests made by OWH and LJS also fail to comply with the Nebraska Public Records Act because, to the extent identification of execution team members can be legally withheld, the appropriate action would be to redact such identification and provide the balance of the documents pursuant to Neb. Rev. Stat. § 84-712.06, not deny the totality of the request.

9. Upon information and belief, Intervenors allege that DOC treats or considers a drug supplier or compounding pharmacy to be a member of the execution team described in Neb. Rev. Stat. §§ 83-965 and 83-967. Any such practice or decision is/would be inconsistent with those statutes, Nebraska law generally, and the Execution Protocol promulgated by DOC pursuant to the Administrative Procedure Act and filed with the Secretary of State, which may be found at 69 NAC Ch. 11.

10. Intervenors allege that none of the records sought in the OWH and LJS requests are properly withheld under Neb. Rev. Stat. § 84-712.05(4) in that none of them are subject to or protected by either the attorney/client privilege or work product doctrine.

11. Intervenors allege that none of the records sought in the OWH and LJS requests are properly withheld under Neb. Rev. Stat. § 84-712.01(1), either alone or in combination with Neb. Rev. Stat. § 83-967(2).

12. Intervenors request that the Court issue a peremptory writ of mandamus to Respondent commanding him immediately to provide the records requested by OWH and LJS.

13. Alternatively, if the Court declines to issue a peremptory writ of mandamus at the present time, Intervenors request that the Court issue an alternative writ of mandamus compelling Respondent either to immediately provide the records requested by OWH and LJS, or show cause by a date certain why he declines to provide the requested records by answering the allegations in the mandamus petition and this Complaint in Intervention, and upon the filing of such Answer, to set a date for the trial of this case. Intervenors request that the Court expedite resolution of this mandamus action pursuant to Neb. Rev. Stat. § 84-712.03(3), which requires that this matter “take precedence on the docket over all cases and shall be assigned for hearing, trial, or argument at the earliest practical date and [be] expedited in every way.”

14. Intervenors request that the Court assess against Respondent reasonable attorney fees and other litigation costs reasonably incurred by Intervenors pursuant to Neb. Rev. Stat. § 84-712.07.

WHEREFORE, Intervenors request that the Court issue a peremptory writ of mandamus compelling Respondent to provide access to the requested records; alternatively, Intervenors request that the Court issue an alternative writ of mandamus as described above compelling Respondent to answer the allegations contained in the mandamus petition and this Complaint in Intervention; that this matter be promptly set for trial; and that the Court assess against

Respondent reasonable attorney fees and litigation costs reasonably incurred by
Intervenors.

Dated this 15th day of December, 2017.

BH MEDIA GROUP, INC. d/b/a OMAHA
WORLD-HERALD; LEE ENTERPRISES,
INCORPORATED d/b/a LINCOLN
JOURNAL STAR; MEDIA OF
NEBRASKA, INC., Intervenors

By: /s/ Shawn D. Renner
Shawn D. Renner - #17784
CLINE WILLIAMS WRIGHT
JOHNSON & OLDFATHER, LLP
233 South 13th Street
1900 U.S. Bank Building
Lincoln, NE 68508-2095
(402) 474-6900 Ph.
(402) 474-5393 Fax
srenner@clinewilliams.com

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2017, I electronically filed the foregoing document with the Clerk of the United States District Court using the CM/ECF system which sent notification of such filing to the following attorneys of record:

Christopher L. Eickholt
721 S. 14th St.
Lincoln, NE 68508

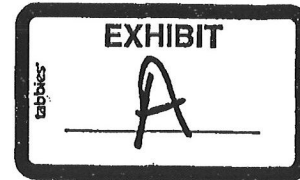
And by email or U.S. mail to:

Ryan S. Post
Assistant Attorney General
Nebraska Department of Justice
2115 State Capitol
P.O. Box 98920
Lincoln, NE 68509

/s/ Shawn D. Renner
Shawn D. Renner

Duggan, Joe

From: Duggan, Joe
Sent: Friday, November 10, 2017 8:27 AM
To: Smith, Dawn Renee
Subject: records request
Attachments: image001.gif.html



11-09-2017

Dawn-Renee Smith

Communications Director, Nebraska Department of Correctional Services

Dawn-Renee,

Pursuant to Neb. Rev. Stat. Secs. 84-712 to 84-712.09, I request any emails, text messages, letters or other correspondence between personnel of the Nebraska Department of Correctional Services and any sales agents, brokers, wholesalers, corporate representatives, pharmacy owners, etc., regarding the sale/purchase of the four drugs the department intends to use for lethal injection for the period of November 1, 2016 through November 10, 2017. I also request any bills of sale, invoices, receipts, laboratory testing results and records reflecting the purchase prices, quantities of the drugs and their expiration dates.

In the event you are not the custodian of the records being requested, please redirect this to the appropriate person's attention and apprise me of the change.

If you expect the cost of this request to exceed \$50, please contact me beforehand. If you deny this request, please provide a written explanation, including a reference to the specific statutory exemption(s) on which you rely. Note that state law requires you to provide all redacted portions of otherwise exempt material.

Please don't hesitate to contact me if you have any questions about fulfilling this request. I would appreciate your communicating with me by e-mail or telephone rather than by mail if you have questions regarding this request.

Sincerely,

Joe Duggan

Reporter, Omaha World-Herald

Joe Duggan
Reporter
402-473-9587 - Direct
402-444-1000 x6613 - From Omaha
402-476-6281 - Fax
Email: Joe.Duggan@owh.com



www.omaha.com

Duggan, Joe

From: Duggan, Joe
Sent: Tuesday, November 28, 2017 2:02 PM
To: Smith, Dawn Renee
Subject: more follow up

Dawn-Renee,

I apologize for another email before you've responded to my questions from yesterday, but I am trying to understand what is it about the records specifically you hold to be exempt from the public records law. I call your attention to subsection (a) below:

84-712.04 Public records; denial of rights; public body; provide information.

(1) Any person denied any rights granted by sections 84-712 to 84-712.03 shall receive in written form from the public body which denied the request for records at least the following information:

(a) A description of the contents of the records withheld and a statement of the specific reasons for the denial, correlating specific portions of the records to specific reasons for the denial, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial;

Can you please provide additional information that correlates to specific portions of the records to specific reasons for denial? My request pertains to the withheld records including communications between NDCS team and the supplier, DEA forms, inventory logs, chemical analysis reports, photos of packaging, invoices and purchase orders.

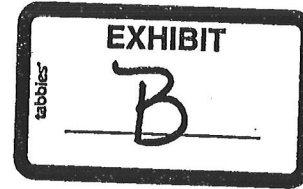
Please call if I can explain further.

Thanks,

Joe

Joe Duggan
Reporter
402-473-9587 - Direct
402-444-1000 x6613 - From Omaha
402-476-6281 - Fax
Email: Joe.Duggan@owh.com

 **Omaha World-Herald**
www.omaha.com



From: JoAnne Young
Sent: Thursday, November 09, 2017 3:25 PM
To: dawnrenee.smith@nebraska.gov
Cc: Shelly Kulhanek
Subject: Freedom of Information request

Nebraska Department of Correctional Services
801 W Prospector Place
Lincoln, NE 68522
Dawn-Renee Smith
Director Scott Frakes

Dear Ms. Smith,

Under the Nebraska Public Records Law § 84-712 et seq., I am requesting an opportunity to inspect or obtain copies of public records, documents or purchase agreements that answer these questions on the Nebraska death penalty lethal injection process.

What company or suppliers sold/provided these current lethal injection drugs: diazepam, fentanyl citrate, cisatracurium besylate and potassium chloride?

Were these drugs produced by a local company or a compounding company?

Please supply any purchase information for these drugs.

If there are any fees for searching or copying these records, please inform me if the cost will exceed \$50. However, I would also like to request a waiver of all fees in that the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of the new death penalty protocol. This request is related to news gathering purposes, and is not being sought for commercial purposes.

The Nebraska Public Records Law requires a response time of four business days. If access to the records I am requesting will take longer than this amount of time, please contact me with information about when I might expect copies or the ability to inspect the requested records.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

Thank you for considering my request.

Sincerely,

JoAnne Young
jyoung@journalstar.com
402-473-7228

Nebraska Department of Correctional Services
801 W Prospector Place
Lincoln, NE 68522
Director Scott Frakes
Dawn-Renee Smith

Dear Director Frakes, Ms. Smith,

Under the Nebraska Public Records Law § 84-712 et seq., I am requesting an opportunity to inspect or obtain copies of public records, documents or purchase agreements that answer these questions on the Nebraska death penalty lethal injection process.

How did the department develop this four-drug protocol? Why are four drugs necessary? Would the diazepam and fentanyl citrate be sufficient to cause death? If they are, why add the third and fourth drugs? Why is the third drug dosage 100 times more than a normal dosage? What evidence is there that the first drug will cause Sandoval to be unconscious? What steps will be taken to make sure that he is? What person or company tested the drugs for quality?

If there are any fees for searching or copying these records, please inform me if the cost will exceed \$50. However, I would also like to request a waiver of all fees in that the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of the new death penalty protocol. This request is related to news gathering purposes, and is not being sought for commercial purposes.

The Nebraska Public Records Law requires a response time of four business days. If access to the records I am requesting will take longer than this amount of time, please contact me with information about when I might expect copies or the ability to inspect the requested records.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

Thank you for considering my request.

Sincerely,

JoAnne Young
jyoung@journalstar.com
402-473-7228

Main Office:

926 P Street
Lincoln, NE 68508

Mailing Address

P.O. Box 81609
Lincoln, NE 68501-1609

Phone 402-475-4200
Toll-Free 800-742-7315

feedback@journalstar.com

November 29, 2017

JoAnne Young
Lincoln Journal Star
926 P Street
Lincoln, NE 68508

Director Scott Frakes
Dawn-Renee Smith
Department of Correctional Services
801 West Prospector Place
Lincoln, NE 68522

Dear Director Frakes, Ms. Smith,

Under the Nebraska Public Records Law § 84-712 et seq., I am requesting more detailed answers as to why various items in our Freedom of Information requests of Nov. 9, 2017, and Nov. 15, 2017, were denied.

According to Nebraska Statute 84-712.04 (1), your agency is required to correlate specific portions of records to specific reasons for denial, including citations to the legal authority for withholding. Your denials don't do that.

- (1) What company or providers sold/provided these current lethal injection drugs: diazepam, fentanyl citrate, cisatracurium besylate, potassium chloride?
- (2) Were these drugs produced by a local company or a compounding company? Please supply any purchase information for these drugs.
- (3) How did the department develop this specific four-drug protocol, and why are four drugs necessary?
- (4) What company tested the drugs for quality?

Please detail individually why you are denying the following records responsive to our request, explaining how each document constitutes attorney work product, are subject to attorney-client privilege, are not

public records and/or are confidential and exempt from disclosure under Neb. Rev. Stat. § 83-967(2).

- (a) Communication between a Department of Corrections team member and a supplier;
- (b) DEA forms
- (c) Photos of packaging
- (d) Invoices
- (e) Purchase orders
- (f) Chemical analysis reports

We believe these documents generally are not prepared by a lawyer, and not created for use in or in connection with litigation, or prepared because of the prospect of litigation. A document created in the regular course of business is not protected by the work product doctrine. The mere fact that litigation may happen at some unspecified time in the future, and the documents may have something to do with that litigation, is insufficient.

We believe none of these documents are properly subject to attorney-client privilege.

We don't see how Neb. Rev. Stat. § 84-712.01(1), which defines public records, could authorize withholding any records.

We anticipate your quick response to our concerns.

Sincerely,

JoAnne Young
Lincoln Journal Star
402-473-7228

NEBRASKA

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DEPT OF CORRECTIONAL SERVICES



Pete Ricketts, Governor

November 22, 2017

Joe Duggan
Reporter, Omaha World Herald
jduggan@owh.com



RE: Public Records Request

Dear Mr. Duggan,

I am writing in response to the request for public records received on November 13, 2017. Your request is for "(1) Emails, text messages, letters or other correspondence between personnel of the Nebraska Department of Correctional Services and any sales agents, brokers, wholesalers, corporate representatives, pharmacy owners, etc., regarding the sale/purchase of the four drugs the department intends to use for the lethal injection for the period of November 1, 2016 through November 10, 2017; and (2) Any bills of sale, invoices, receipts, laboratory testing results and records reflecting the purchase prices, quantities of the drugs and their expiration dates." Certain documents were provided to you on November 16, 2017.

We have completed our search for records responsive to your request, and have located additional records responsive to request number 2, which we have enclosed with this letter. There is no charge.

We have records responsive to request numbers 1 and 2 that will not be provided to you. These particular records consist of attorney – client communications; communication between an NDCS team member and a supplier; DEA forms; inventory logs; chemical analysis reports; photos of packaging; invoices and purchase orders.

These documents constitute attorney work product, are subject to the attorney – client privilege, are not public records and/or are confidential and exempt from disclosure under Neb. Rev. Stat. § 83-967 (2). Consequently, per advice provided by legal counsel, Director Frakes is denying you access to these records on the basis of Neb. Rev. Stat. §§ 83-967(2); 84-712.01(1) and 84-712.05(4).

Scott R. Frakes, Director

Dept of Correctional Services

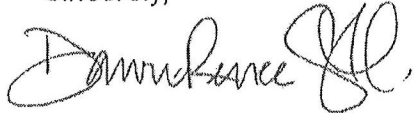
P.O. Box 94661 Lincoln, NE 68509-4661
Phone: 402-471-2654 Fax: 402-479-5623

corrections.nebraska.gov

Joe Duggan
Omaha World Herald
November 22, 2017
Page 2

If you believe records have been withheld contrary to Neb. Rev. Stat. § 84-712, you may pursue administrative or judicial remedies as outlined in Neb. Rev. Stat. § 84-712.03.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dawn-Renee Smith".

Dawn-Renee Smith
Communications Director

From: Smith, Dawn Renee [<mailto:DawnRenee.Smith@nebraska.gov>]
Sent: Tuesday, November 28, 2017 3:05 PM
To: Duggan, Joe
Subject: RE: public records follow up questions

Joe,

We are not expanding on the response to the public records request. We are not disclosing additional information at this time.

Dawn-Renee Smith

Communications Director | CENTRAL OFFICE

Nebraska Department of Correctional Services

OFFICE 402-479-5713

CELL 402-580-9495

dawnrenee.smith@nebraska.gov

corrections.nebraska.gov | [Facebook](#) | [Twitter](#)

From: Reilly, Mike
Sent: Thursday, November 30, 2017 2:27 PM

To: Duggan, Joe; Hammel, Paul
Subject: RE: ACLU is going to call Media of Nebraska -- a heads up

Thanks.

Did she respond in writing or just tell you no comment?



A Berkshire Hathaway Company

Mike Reilly
Vice President for News
402-444-1277 - Office
Email: Mike.Reilly@BHMGInc.com
1314 Douglas Street, Suite 700
Omaha, NE 68102

From: Duggan, Joe
Sent: Thursday, November 30, 2017 2:25 PM
To: Reilly, Mike; Hammel, Paul
Subject: RE: ACLU is going to call Media of Nebraska -- a heads up

Yes, in writing. Below is what I sent to Dawn-Renee on Tuesday.

Dawn-Renee,

I apologize for another email before you've responded to my questions from yesterday, but I am trying to understand what is it about the records specifically you hold to be exempt from the public records law. I call your attention to subsection (a) below:

84-712.04 Public records; denial of rights; public body; provide information.

(1) Any person denied any rights granted by sections 84-712 to 84-712.03 shall receive in written form from the public body which denied the request for records at least the following information:

(a) A description of the contents of the records withheld and a statement of the specific reasons for the denial, correlating specific portions of the records to specific reasons for the denial, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial;

Can you please provide additional information that correlates to specific portions of the records to specific reasons for denial? My request pertains to the withheld records including communications between NDCS team and the supplier, DEA forms, inventory logs, chemical analysis reports, photos of packaging, invoices and purchase orders.

Please call if I can explain further.

Thanks,

Joe

Joe Duggan

Reporter

402-473-9587 - Direct

402-444-1000 x6613 - From Omaha

402-476-6281 - Fax

Email: Joe.Duggan@owh.com



Omaha World-Herald

www.omaha.com

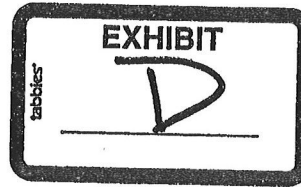
NEBRASKA

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DEPT OF CORRECTIONAL SERVICES



Pete Ricketts, Governor



November 22, 2017

JoAnne Young
Reporter, Lincoln Journal Star
jyoung@journalstar.com

RE: Public Records Request

Dear Ms. Young,

I am writing in response to the request for public records received on November 15, 2017. Your request is for "documents or purchase agreements that answer these questions on the Nebraska death penalty lethal injection process": (1) How did the department develop this four-drug protocol?; (2) Why are four drugs necessary?; (3) Would the diazepam and fentanyl citrate be sufficient to cause death?; (4) If they are, why add the third and fourth drugs?; (5) Why is the third drug dosage 100 times more than a normal dosage?; (6) What evidence is there that the first drug will cause Sandoval to be unconscious?; (7) What steps will be taken to make sure that he is?; (8) What person or company tested the drugs for quality?"

We have completed our search for records responsive to your request. With respect to request numbers 1 – 7, the execution protocol is the only responsive document we have.

We have records responsive to request number 8 that will not be provided to you. These particular records consist of chemical analysis reports.


These documents constitute attorney work product, are subject to the attorney – client privilege, are not public records and/or are confidential and exempt from disclosure under Neb. Rev. Stat. § 83-967 (2). Consequently, per advice provided by legal counsel, Director Frakes is denying you access to these records on the basis of Neb. Rev. Stat. § 83-967(2); 84-712.01(1) and 84-712.05(4).

Scott R. Frakes, Director
Dept of Correctional Services
P.O. Box 94661 Lincoln, NE 68509-4661
Phone: 402-471-2654 Fax: 402-479-5628
corrections.nebraska.gov

JoAnne Young
Lincoln Journal Star
November 22, 2017
Page 2

If you believe records have been withheld contrary to Neb. Rev. Stat. § 84-712, you may pursue administrative or judicial remedies as outlined in Neb. Rev. Stat. § 84-712.03.

Sincerely,

A handwritten signature in black ink, appearing to read "Dawn-Renee Smith". The signature is fluid and cursive, with a large, stylized initial "D".

Dawn-Renee Smith
Communications Director

NEBRASKA

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DEPT OF CORRECTIONAL SERVICES



Pete Ricketts, Governor

November 22, 2017

JoAnne Young
Reporter, Lincoln Journal Star
jyoung@journalstar.com

RE: Public Records Request

Dear Ms. Young,

I am writing in response to the request for public records received on November 9, 2017. Your request is for "documents or purchase agreements that answer these questions on the Nebraska death penalty lethal injection process: (1) What company or suppliers sold/provided these current lethal injection drugs: diazepam, fentanyl citrate, cisatracurium besylate and potassium chloride? and (2) Were these drugs produced by a local company or a compounding company? Please supply any purchase information for these drugs."

We have completed our search for records responsive to your request. We have records responsive to your request that will not be provided to you. These particular records consist of communication between an NDCS team member and a supplier; DEA forms; photos of packaging; invoices and purchase orders.

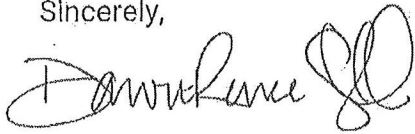
These documents constitute attorney work product, are subject to the attorney – client privilege, are not public records and/or are confidential and exempt from disclosure under Neb. Rev. Stat. § 83-967 (2). Consequently, per advice provided by legal counsel, Director Frakes is denying you access to these records on the basis of Neb. Rev. Stat. § 83-967(2); 84-712.01(1) and 84-712.05(4).

Scott R. Frakes, Director
Dept of Correctional Services
P.O. Box 94661 Lincoln, NE 68509-4661
Phone: 402-471-2654 Fax: 402-479-5623
corrections.nebraska.gov

JoAnne Young
Lincoln Journal Star
November 22, 2017
Page 2

If you believe records have been withheld contrary to Neb. Rev. Stat. § 84-712, you may pursue administrative or judicial remedies as outlined in Neb. Rev. Stat. § 84-712.03.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dawn-Renee Smith". The signature is written in black ink and is positioned above the printed name.

Dawn-Renee Smith
Communications Director