



STATE OF NEBRASKA

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April 3, 2020

Via email at gachola@burlingtoncapital.com
George Achola, Vice President and Counsel
Burlington Capital, Real Estate
1004 Farnam St, Suite 400
Omaha, NE 68102

RE: *File No. 20-R-109; University of Nebraska; George Achola, Petitioner*

Dear Mr. Achola:

This letter is in response to your email correspondence submitted to our office on March 9, 11 and 19, 2020, in which you requested our review of the denial of your public records requests by the University of Nebraska ("University"). By way of background, you emailed your initial petition to us on March 9, in response to the University's March 9 denial of your public records request submitted to the University on March 3. On March 11, you emailed a modified request for public records to the University. By letter emailed to you on March 19, the undersigned advised that this office would not review your petition until there had been a final disposition of your pending request with the University. Later on March 19, you informed us that you had received a response from the University on March 18, and that you wished to "renew my request for your office to review the denial." In response to our request, on March 31, Erin E. Busch, Director University Records, provided our office a written response further explaining the basis for the University's denial. We have considered your correspondence and the University's response in accordance with the provisions of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018, Supp. 2019) ("NPRS"). Our findings in this matter are set forth below.

RELEVANT FACTS

As indicated above, on March 11, you emailed a modified request to the University seeking the following records:

1. A complete list of Nebraska football's letter winners from 1960 to present.

2. For each such individual who is a current student, such individual's years at the University, academic college and major field of study, enrollment status, dates of attendance, university email address, and hometown.
3. For each such individual who is not a current student, such individual's address, phone number, and email.

You informed Ms. Busch that for current students, everything requested in item nos. 1-3 is directory information as defined by law and the University. As to "prior students," neither the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA") nor the exception in Neb. Rev. Stat. § 84-712.05(3) (relating to commercial and proprietary records) applied.¹ You also indicated that "addresses and contact information are considered directory information available from multiple sources" You cited to previous opinions of this office where we had determined that certain records, i.e., applications for absentee ballots and nonfinalist job application materials, were public records to support your position that "basic information about football letter winners is also public record" You also cited *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998), as authority for your position that since all of the information requested has been available in the past as routine directory information, it may not be withheld from the public now.

In response to item no. 1, Ms. Busch provided you a link to a University webpage that contained records responsive to your request. With respect to item no. 2, Ms. Busch indicated that no such compilation existed, and that under "Neb. Rev. Stat. § 84-712(3)(e), the University is not required to create a new record or produce the records in a different form or format modified from that of the original public record." She indicated that the University could provide you a listing of directory information for all current UNL students upon payment of \$55 to the University Registrar.

With respect to item no. 3, Ms. Busch again indicated that a compilation report did not exist, and that the University was not required to create one. She also stated that "[t]he University has record[s] containing the name, telephone number, and email address of former football players," but was withholding the records under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(1). Ms. Busch further stated:

¹ For the record, the University denied your March 3 request for records "listing the Names, addresses and contact information for Nebraska Football letter winners from 1960 to the current date" on the basis of FERPA, the regulations promulgated under FERPA, Neb. Rev. Stat. § 84-712.05(1) and (3), and Board of Regents Policy 5.10.

Please note that the telephone number and non-University email address for former students is not defined by the University as public directory information. See Regents Policy 5.10 at <https://nebraska.edu/-/media/unca/docs/offices-and-policies/policies/board-governing-documents/board-of-regents-policies.pdf?la=en>. Please also note that the exception set forth in Neb. Rev. Stat. § 84-712.05(1) is broader than FERPA and permits the withholding of [prospective] student and former student information.

As noted above, you renewed your request for our review on March 19. Beyond that contained in your original petition and the modified request, we received no additional comment or argument from you in response to the partial denial of records contained in Ms. Busch's March 18 response.

DISCUSSION

The basic rule for access to public records in Nebraska is set out in Neb. Rev. Stat. § 84-712(1) (2014). That provision states 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 make memoranda, copies using their own copying or photocopying equipment in accordance with subsection (2) of this section, and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business and (b) except if federal copyright law otherwise provides, obtain copies of public records in accordance with subsection (3) of this section during the hours the respective offices may be kept open for the ordinary transaction of business.

(Emphasis added.) “Public records” in Nebraska “include all records and documents, regardless of physical form, of or belonging to” governmental entities in the state, “[e]xcept when any other statute expressly provides that particular information or records shall not be made public.” Neb. Rev. Stat. § 84-712.01(1) (2014). Thus, there is no absolute right to access public records in those instances where records are exempt from disclosure by statute. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009); *State ex rel. Nebraska Health Care Ass'n v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

Section 84-712.05 of the NPRS currently lists twenty-three categories of public records that may be withheld at the discretion of the records custodian “unless publicly

disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties” The University is relying on the exception in subsection (1) to deny you access to records which contain the name, telephone number, and email address of former football players who were letter winners. That provision provides an exception to disclosure for

[p]ersonal information in records regarding a student, prospective student, or former student of any educational institution or exempt school that has effectuated an election not to meet state approval or accreditation requirements pursuant to section 79-1601 when such records are maintained by and in the possession of a public entity, other than routine directory information specified and made public consistent with 20 U.S.C. 1232g, as such section existed on February 1, 2013, and regulations adopted thereunder

Neb. Rev. Stat. § 84-712.05(1) (Supp. 2019).

Ms. Busch indicates that the University understands that information received from former students after they have graduated from the University is not protected under FERPA. However, it is the University’s position that the exception in § 84-712.05(1) is broader than FERPA since the exception pertains to both prospective and former students. Ms. Busch asserts that “[j]ust because a record is not protected by FERPA does not mean that the information is ‘specified and made public’ by FERPA.”

Ms. Busch further argues that even if FERPA applies under these circumstances, the information at issue, i.e., telephone numbers and personal email addresses, are not considered public directory information by the University. In that regard, Board of Regents Policies, RP-5.10—Student Information and the Family Educational Rights and Privacy Act of 1974 (FERPA), states, in part, as follows:

The University of Nebraska has defined the following student information as public directory information:

- student name
- year at the University
- dates of attendance
- academic college and major field of study
- enrollment status (e.g. undergraduate or graduate; full-time or part-time)
- participation in officially recognized activities and sports
- degrees, honors and awards received
- most recent educational agency or institution attended
- University email address
- hometown

The University of Nebraska has defined the following student information as non-public directory information:

- local address
- permanent address
- telephone listings

See <https://nebraska.edu/-/media/unca/docs/offices-and-policies/policies/board-governing-documents/board-of-regents-policies.pdf?la=en>, pages 187-188.

In Nebraska, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018); *Farmers Cooperative v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017). The plain and ordinary reading of § 84-712.05(1) indicates that any institution or school may withhold personal information pertaining to former students it maintains and possesses. An exception exists for “routine directory information,” which the entity must define and publish in accordance with FERPA. We note that while FERPA includes a definition of directory information (20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.3), it is up to the entity to decide which categories of information will be made public under certain conditions. 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. § 99.37.

Upon review, we conclude that Neb. Rev. Stat. § 84-712.05(1) provides a basis to withhold the record containing the names, telephone numbers, and personal email addresses of former students who were letter winners. We agree that FERPA does not apply to former students in this context.² However, the University’s directory information promulgated under FERPA does apply to determine whether the records at issue here may be withheld. Since the University has established that telephone numbers and personal email addresses are not included under the University’s definition of directory information, its reliance on § 84-712.05(1) is appropriate under the circumstances presented. Finally, to be clear, while the names of the former students may be subject to disclosure, Ms. Busch has already provided you a link to a University webpage that has all letter winners listed by sport.

² Under FERPA, the term “education records” does not include “[r]ecords created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual’s attendance as a student.” 34 C.F.R. § 99.3 Education records. However, “[a]n educational agency or institution may disclose directory information about former students without complying with the notice and opt out conditions in paragraph (a) of this section.” 34 C.F.R. § 99.37(b).

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CONCLUSION

Based on the foregoing, we believe that records containing the personal information of former students who were letter winners at the University of Nebraska may be withheld under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(1). Since we have concluded that the University did not unlawfully deny your records request, no further action by this office is warranted. Accordingly, we are closing this file.

If you disagree with the conclusion reached above, you may wish to review the other remedies available to you under Neb. Rev. Stat. § 84-712.03.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

/s/ Leslie S. Donley
Assistant Attorney General

c: Erin E. Busch (via email only)

49-2430