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April 10, 2020

Via email at david@nedental.org
David J. O'Doherty
Executive Director
Nebraska Dental Association
7160 S. 29th Street, Ste. 1
Lincoln, NE 68516

RE: *File No. 20-R-110; Department of Health and Human Services;
David J. O'Doherty, Nebraska Dental Association, Petitioner*

Dear Mr. O'Doherty:

This letter is in response to your petition received by this office on March 17, 2020, in which you sought our review of the partial denial of your public records request by the Nebraska Department of Health and Human Services ("DHHS"). In accordance with our normal practice, we forwarded a copy of your petition to DHHS upon receipt. On March 26, we received a response to your petition from DHHS attorney, Jaime Hegr. On April 1, we wrote to you indicating that we had conducted a preliminary investigation of your petition, and it appeared to us that DHHS had properly responded to your public records request. However, we indicated that our response would be delayed so that we could finalize our decision. We have now fully considered your petition and the DHHS 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

On February 10, you submitted a public records request to DHHS on behalf of the Nebraska Dental Association ("NDA"). The request contained five separate items of records, including

- Billing or coding audits conducted of Smiles 4 Kids, P.C.;
- Billing or coding audits conducted of Children's Dentistry of South Omaha, LLC;
- Aggregate claims data for all Nebraska Pediatric dentistry claims, including provider name, code billed, number of patients, and amounts paid;
- All correspondence to, from, cc'ing, or bcc'ing the Centers for Medicare and Medicaid Services ("CMS") regarding billing or coding audits of pediatric dental providers in Nebraska from 2016 through 2019, including audits conducted by Uniform Program Integrity Contractors (UPIC) audit contractors;
- All correspondence to, from, cc'ing, or bcc'ing Anne Harvey (anne.harvey@nebraska.gov) regarding billing or coding audits of pediatric dental providers in Nebraska from 2016 through 2019, including any conducted by UPIC contractors.

DHHS staff responded to your request on March 4, providing you 885 pages of aggregate claims data and 200 pages of CMS or Ms. Harvey's correspondence. Other records were not provided to you based on the following provisions: Neb. Rev. Stat. § 84-712.05(4) (attorney work product and attorney-client confidential communications); Neb. Rev. Stat. § 84-712.05(5) (records of investigation); Neb. Rev. Stat. § 68-313 and "42 CFR 431.300-02" (relating to "protected health information"); and Op. Att'y Gen. No. 91054 (June 17, 1991) (relating to draft documents).

You state in your petition that DHHS excluded the requested correspondence from Ms. Harvey, "including any conducted by UPIC audit contractors, specifically AdvanceMed." You state that "[t]he NDA believes that the citations contained within the DHHS response are not applicable." For instance, with respect to § 84-712.05(4), you state that "Anne Harvey is not an attorney representing UPIC contractor AdvanceMed." You assert that § 84-712.05(5) and § 68-313 do not apply, without further explanation as to why. You also state that the citation to the federal regulation is incorrect, and that "431.300 requires that a State plan must provide safeguards that restrict the use or disclosure of information concerning applicants and beneficiaries to purposes directly connected with the administration of the plan." With respect to the Attorney General opinion, you state that it "does not apply . . . using materials against the State in future litigation. The NDA does not have standing to sue DHHS regarding this issue."

Ms. Hegr states that Medicaid program staff, including UPIC staff and Ms. Harvey, routinely seek legal advice from program attorneys via email. The legal advice ranges from day-to-day operations, specific cases (including those involving pediatric dental providers) and "ongoing audit investigations, and pending administrative hearings or lawsuits stemming from those audits." She indicates that a portion of Ms. Harvey's correspondence "were emails where program staff sought legal advice from counsel and counsel's subsequent response(s)." Consequently, these emails were withheld under Neb. Rev. Stat. §§ 84-712.05(4) and 27-503(2). Ms. Hegr states that DHHS also withheld any notes and memoranda constituting attorney work product contained in correspondence or documents under § 84-712.05(4).

Ms. Hegr indicates that DHHS is required under federal law and the state plan with CMS to maintain “the UPIC unit to oversee providers and conduct investigations on claims of fraud, waste, or abuse.” Ms. Hegr asserts that the exception in Neb. Rev. Stat. § 84-712.05(5) provides a basis to withhold some of the records at issue because Ms. Harvey’s correspondence contained investigatory information. In addition, since federal law requires UPIC staff to conduct investigations, the UPIC is a “public body charged with the duties of investigation or examination of persons, institutions, or businesses,” which is a required element under the exception.

Ms. Hegr states that DHHS withheld records that contained protected health information of individuals or contained information that could be used to identify an individual as a recipient of Medicaid services. Emails and attachments that discussed specific medical providers, individual claim numbers, and associated claim amounts paid, which in the aggregate could reasonably lead to the identification of Medicaid recipients, applicants or services provided were withheld under Neb. Rev. Stat. § 68-313 and 42 C.F.R. §§ 431.300–431.302. In this regard, Ms. Hegr states:

Neb. Rev. Stat. § 68-313 prohibits the disclosure of any information regarding recipients of medical assistance unless it is in direct connection with the administration of the Medicaid program. In addition, 42 C.F.R. §§ 431.300–431.302 requires DHHS to provide safeguards and restrict disclosure of information related to Medicaid beneficiaries. 42 C.F.R. § 431.302 specifically defines what is directly related to the administration of the program. Public records requests are not identified as a specified reason to release the names of individuals or any other information that could be used to identify a recipient of Medicaid services. Since the withheld documents or emails could be used together to identify individuals as recipients of Medicaid services, these documents were withheld.

Finally, DHHS withheld “working draft copies” of a provider bulletin submitted to DHHS by a health care provider under contract with the state. Under the contract, a draft bulletin must be submitted to the Division of Medicaid and Long-Term Care (“MLTC”) for review and approval prior to publishing. Working draft copies contained comments, suggestions and other proposed edits shared between MLTC staff and the contractor. Ms. Hegr states that in Op. Att’y Gen. No. 91054, the Attorney General concluded that notes and drafts of documents which remain subject to approval by management and which have not been issued because they are preliminary materials are not considered “records” or “documents.” As a result, DHHS withheld “any emails or correspondence that contained draft language for responses or attachments that were preliminary and working draft documents”

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” DHHS is relying on two exceptions in § 84-712.05—subsections 4 and 5—to deny you access to some of Ms. Harvey’s correspondence. Those exceptions pertain to

(4) Records 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;

(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, intelligence information, citizen complaints

or inquiries, informant identification, or strategic or tactical information used in law enforcement training

Neb. Rev. Stat. § 84-712.05(4) and (5) (Supp. 2019).

Upon review, we believe that both exceptions were appropriately applied to the records at issue here. It is not necessary for Ms. Harvey to be an attorney in order for her email to be withheld under the attorney-client communications exception. If Ms. Harvey's email contains communications to and from program attorneys with respect to DHHS legal matters, those emails may be withheld under subsection (4). Moreover, there is little question that the UPIC unit is a "public body charged with duties of investigation or examination of persons, institution, or businesses" ¹ To the extent Ms. Harvey's correspondence contains investigatory information, that information may be withheld under subsection (5).

We have also considered the other exceptions relied on by DHHS to withhold some of Ms. Harvey's correspondence. Neb. Rev. Stat. 68-313 (2018) provides that

[i]t shall be unlawful, except as permitted by section 68-313.01² and except for purposes directly connected with the administration of general assistance, medically handicapped children's services, medical assistance, assistance to the aged, blind, or disabled, or aid to dependent children, and in accordance with the rules and regulations of the Department of Health and Human Services, for any person or persons to solicit, disclose, receive, make use of, authorize, knowingly permit, participate in, or acquiesce in the use of, any list of or names of, any information concerning, or persons applying for or receiving such aid or assistance, directly or indirectly derived from the records, papers, files, or communications of the state, or subdivisions or agencies thereof, or acquired in the course of the performance of official duties.

(Emphasis added.) In addition, 42 C.F.R. §§ 431.300–431.302 not only provide a basis to withhold the requested records, but mandate that DHHS establish "safeguards that restrict the use or disclosure of information concerning applicants and beneficiaries to

¹ See *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 792, 587 N.W.2d 100, 106 (1998) ("[A] public record is an investigatory record where (1) the activity giving rise to the document sought is related to the duty of investigation or examination with which the public body is charged and (2) the relationship between the investigation or examination and that public body's duty to investigate or examine supports a colorable claim of rationality.").

² Section 68-313.01 provides that any records pertaining to the aid and assistance referred to in § 68-313 may be made available for free to members of the Legislature and all state and county officials. In addition, "[t]he 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." Neb. Rev. Stat. § 68-313.01 (2018).

purposes directly connected with the administration of the plan.” 42 C.F.R. § 431.300(a). Under 42 C.F.R. § 431.302, those purposes include: “(a) Establishing eligibility; (b) Determining the amount of medical assistance; (c) Providing services for beneficiaries; and (d) Conducting or assisting an investigation, prosecution, or civil or criminal proceeding related to the administration of the plan.” Consequently, to the extent the records at issue contain information that identify recipients of Medicaid services or would reasonably lead to their identities, DHHS has a statutory duty to safeguard those records. Ms. Hegr has represented to this office that certain records withheld by DHHS did in fact contain such information.

Finally, we conclude that DHHS’ reliance on Op. Att’y Gen. No. 91054 was appropriate to withhold drafts of a bulletin created prior to its final approval and publication. We note that the opinion requires that any determination as to whether a draft is a “record” or “document” under the NPRS must be made on an individual, case-by-case basis. In the present case, the bulletin was initially drafted by the provider. It underwent MLTC review and edits, and its content was subject to final approval by designated MLTC staff. As such, we do not think that the various drafts, and the comments, edits, and suggestions, which have not been prepared in final form, constitute public records that must be disclosed.

CONCLUSION


Based on the foregoing, we conclude that DHHS has met its burden to show that Neb. Rev. Stat. § 84-712.05(4) and (5) apply to the records withheld. Moreover, state and federal provisions require that DHHS restrict the use and disclosure of information pertaining to Medicaid applicants and beneficiaries for the purpose of plan administration only. We further conclude that under the facts presented here, any drafts of the provider bulletin, prior to final approval and issuance, do not constitute a “public record” subject to disclosure. Since we do not believe that DHHS violated the NPRS by withholding a portion of Ms. Harvey’s correspondence, no further review by this office is necessary and we are closing this file.

David J. O'Doherty
April 10, 2020
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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

A handwritten signature in blue ink that reads "Leslie S. Donley". The signature is written in a cursive style with a large initial "L".

Leslie S. Donley
Assistant Attorney General

c: Jaime Hegr

49-2437