



STATE OF NEBRASKA  
**Office of the Attorney General**

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October 14, 2020

Via email at [adamlambert@chasecountyschools.org](mailto:adamlambert@chasecountyschools.org)  
Adam Lambert, Superintendent  
Chase County Schools  
520 E. 9<sup>th</sup> Street  
Imperial, NE 69003

RE: *File No. 20-R-131; ESU 15; Adam Lambert, Petitioner*

Dear Mr. Lambert:

This letter is in response to your petition received by this office on September 17, 2020, in which you requested that this office review the denial by ESU 15 of your public records requests emailed to ESU 15 staff on September 11 and 14, 2020. We forwarded your petition upon receipt to ESU 15 administrator, Paul Calvert, and advised him of the opportunity to respond to your petition. On September 30, 2020, ESU 15 legal counsel, Justin Knight of the Perry Law Firm, requested an extension in which to respond, which we granted. We subsequently wrote to you on October 2 and 7, indicating that our disposition in this matter would be delayed until today. We have considered your petition and ESU 15's response in accordance with the provisions of the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018, Supp. 2019). Our findings in this matter are set out below.

### FACTS

On September 11, 2020, you emailed Mr. Calvert and ESU 15 Special Education Director John Hanson requesting the following records:

1. Please provide each service provider's current weekly schedule including what student they work with, when they work with them and for how long.
2. Please provide all 8 school's 20-21 contracts.
3. Please provide all 8 school's 19-20 8 billing cycles.

You also asked that they confirm that "McCook does not use any ESU 15 service providers" and describe how "North Platte St. Patt's utilize [*sic*] ESU 15."

You followed up this request with an email to Cindy McCorkle, ESU 15 Business Manager, on September 14, in which you requested:

1. I am wanting the 10 contracts for the 20-21 school year for each school district. You can exclude Chase County if that would make things easier.
2. I would like the 10 contracts for the 19-20 school year. Again you can exclude Chase County.
3. Lastly, I would like all 8 billing cycles for all 10 schools from the 19-20 school year.

Mr. Calvert responded to your requests on September 17, stating that “[t]he billings of individual schools as well as contracts are confidential and will not be able to get to you and we do not have a contract policy, just historical practices.” Mr. Calvert did attach a copy of the special education staff assignments for all of the ESU 15 schools.

In response, Mr. Knight indicates that “[a]lthough items in the contracts and billing statements may include confidential information under Neb. Rev. Stat. § 84-712.05(1), ESU 15 does not wish to engage in a records request dispute or divert public funds towards a records request disagreement.” He represented that those records would be made available to you by October 6. With respect to the questions posed in your September 11 email regarding McCook and North Platte St. Pat’s, Mr. Knight asserts that “ESU 15 is not obligated to respond to [your] request for information or create any records . . . .” Mr. Knight further asserts that ESU 15 is not obligated to produce the requested schedules. In this regard, Mr. Knight states that

[t]hese records necessarily identify students by name. And most, if not all, of these students are students with disabilities. Under Neb. Rev. Stat. § 84-712.05(1), the Family Educational Rights and Privacy Act, the Individuals with Disabilities Education Act and other student privacy laws, ESU 15 cannot permissibly disclose documents that would identify students as those having a disability. In addition, under Neb. Rev. Stat. § 84-712.05(7), personnel documents, other than salaries and routine directory information, may be withheld. In this case, Mr. Lambert’s request seeks documents contained in ESU 15 employees’ personnel files that do not relate to such employees’ salaries or routine directory information.

## DISCUSSION

We will begin our discussion with some comments regarding the general parameters of the NPRS. These statutes allow Nebraska citizens and other interested persons the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts from those records, and to obtain copies of records in certain circumstances. Under the NPRS, every record “of or belonging to” a public body is a public record which individuals may obtain a copy of unless the custodian of the record can point to a specific statute which allows the record

to be kept confidential. However, there is no absolute right to access public records in those instances where records are exempt from disclosure by statute. This office has also consistently taken the position that the NPRS do not require public officials to answer questions or to create documents which do not otherwise exist. See Op. Att'y Gen. No. 87104 (October 27, 1987); Op. Att'y Gen. No. 94035 (May 13, 1994). Instead, those statutes focus on access to and obtaining copies of specific records.

ESU 15 represented to this office that it would provide you the requested contracts and billing statements. We also agree with ESU 15 officials that the NPRS does not require it to answer questions or create documents when responding to a public records request. Consequently, we are left to determine whether ESU 15 may deny you access to the service provider schedules. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 788, 943 N.W.2d 231, 240 (2020); *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 123, 907 N.W.2d 301, 308 (2018).

ESU 15 has asserted that the schedules are exempt from disclosure under several provisions of law, i.e., Neb. Rev. Stat. § 84-712.05(1) and (7) (Supp. 2019); the Family Educational Rights and Privacy Act ("FERPA") (20 U.S.C. § 1232g; 34 C.F.R. Part 99); and the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C. § 1401 *et seq.*; 34 C.F.R. Parts 300, 303). Section 84-712.05(1) and (7) are two of the twenty-three categories of public records set out in § 84-712.05 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 . . . ." Subsection (7) in particular allows public bodies to withhold "[p]ersonal information in records regarding personnel of public bodies other than salaries and routine directory information." (Emphasis added.) Mr. Knight argues that the schedules are "documents contained in ESU 15 employees' personnel files that do not relate to such employees' salaries or routine directory information."

"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 words which are plain, direct, and unambiguous." *Thomas v. Peterson*, 307 Neb. 89, 96, \_\_\_ N.W.2d \_\_\_ (2020). "[I]n construing 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." *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 353, 899 N.W.2d 893, 898 (2017). The plain and ordinary reading of § 84-712.05(7) indicates that public bodies may lawfully withhold *personal* information regarding its personnel, except for salary and routine directory information.<sup>1</sup> In this context, "personal"

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<sup>1</sup> This office has construed "routine directory information" to include an employee's name, job title, work telephone number and address and dates of hire and separation. See the Classified System Personnel Rules—Chapter 12 – Personnel Records, Title 273, Nebraska Administrative Code, Chapter 12, § 001.01 (October 30, 2006).

may be defined as “of, relating to, or coming as from a particular person; individual; private: *a personal opinion.*”<sup>2</sup> The records at issue here are certain ESU 15 employees’ weekly work schedules, including the students receiving services, and the date, time and length of the services provided. We are unable to conclude that the *work* schedules of these employees in this context constitute “personal information” that warrants protection from disclosure. To be clear, the exception does not apply solely to records in a “personnel file.” Consequently, we believe that Neb. Rev. Stat. § 84-712.05(7) does not provide a basis to withhold the requested schedules.

However, we believe that Neb. Rev. Stat. § 84-712.05(1) does provide a basis to withhold the names of any students contained in the schedules. Section 84-712.05(1) allows a public body to withhold at its discretion

[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).<sup>3</sup> Under FERPA, “[d]irectory information includes, but is not limited to, the student’s name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended.” 34 C.F.R. § 99.3. We note further that 92 *Nebraska Administrative Code*, Ch. 6—*Regulations and Standards for Uniform Sharing of Student Data, Records and Information* (“Rule 6”)—requires educational agencies or institutions to designate current and former students’ names as directory information “[i]n order to promote a more uniform exchange of information . . . .” See § 003.01.

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<sup>2</sup> See <https://www.dictionary.com/browse/personal> accessed on October 7, 2020.

<sup>3</sup> During the committee hearing on 1979 Neb. Laws LB 86, principal bill drafter Alan Peterson stated: “Exception 1 is patterned after federal law somewhat, the federal Buckley Amendment, which is the Educational Rights and Privacy Act, I believe it is called, gave us some guidance in this area. . . . The idea is that personal information in records regarding a student or a prospective student, should remain private, as is required by federal law, with the exception of routine directory information. I think we should have in the legislative history that that term of directory information is defined in the federal law.” Hearing on the Government, Military and Veterans’ Affairs Committee on LB 86, 86<sup>th</sup> Nebraska Legislature, 2<sup>nd</sup> Sess. (Feb. 9, 1979) at 4.

In the present case, Mr. Knight indicates that most if not all of the students listed in the schedules are students with disabilities. It seems to us then that disclosing the students' names, which under Rule 6 is directory information, would also disclose that these students have disabilities. Under these circumstances, this information is no longer directory and constitutes personally identifiable information that may be withheld under § 84-712.05(1). In addition, you have not provided this office a basis under FERPA that would entitle you to receive personally identifiable information of students attending any other educational entity outside of your school district. Since we have concluded that Neb. Rev. Stat. § 84-712.05(1) provides a basis to redact all student information from the requested schedules, except for those students attending Chase County Schools, it is not necessary for us to determine to what extent FERPA and the IDEA apply.

Finally, we will take this opportunity to point out the deficiencies in Mr. Calvert's September 17 response. Neb. Rev. Stat. § 84-712.04 (2014) requires a public body to provide the following information, in writing, any time it denies a requester any rights granted to him or her under §§ 84-712 to 84-712.03:

- (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;
- (b) The name of the public official or employee responsible for the decision to deny the request; and
- (c) Notification to the requester of any administrative or judicial right of review under section 84-712.03.

Neb. Rev. Stat. § 84-712.04 (2014). Mr. Calvert's response contained none of these items. Consequently, we will advise Mr. Calvert, by sending a copy of this disposition letter to Mr. Knight that, in the future, strict adherence to § 84-712.04 is required in the event access to public records is denied by the district.

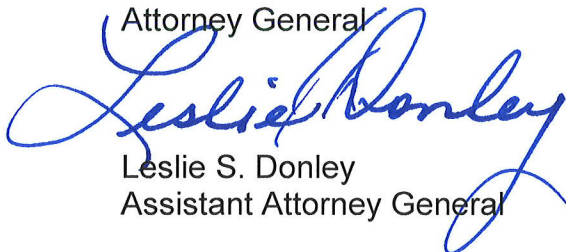
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### CONCLUSION

Based on the foregoing, we conclude that Neb. Rev. Stat. § 84-712.05(7) does not provide a basis to withhold the requested service provider work schedules. However, student names, other than those students attending Chase County Schools, may be redacted under Neb. Rev. Stat. § 84-712.05(1). Consequently, we will direct ESU 15 to provide those schedules to you at its earliest possible convenience, but in no event later than close of business on October 21.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General



Leslie S. Donley  
Assistant Attorney General

c: Justin Knight (via email only)

49-2574-29