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Office of the Attorney General

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October 16, 2020

Via email at dlibit@theintercollegiate.com

Daniel Libit
The Intercollegiate
P.O. Box 250
Highland Park, IL 60035

RE: *File No. 20-R-133; University of Nebraska; Daniel Libit, Petitioner*

Dear Mr. Libit:

This letter is in response to your petition dated September 27, 2020, and received by this office on October 1, 2020, in which you requested that we review the denial by the University of Nebraska ("University") of your public records request submitted on September 21, 2020. On October 9, the undersigned spoke to Erin E. Busch, Director University Records, about your petition. At our request, Ms. Busch subsequently provided us a copy of your public records request and the University's email denying your request. We considered your petition 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 forth below.

FACTS

On September 21, 2020, you emailed Ms. Busch, requesting the following records:

[T]he outside income reporting forms, written detailed accounts, or similar declarations, which, pursuant to NCAA regulations, are submitted annually by any of the following athletic department employees, since the beginning of the 2018-19 academic year: athletic director; director of athletic training or head trainer; head strength and conditioning coach; head football coach; head men's basketball; and head women's basketball coaches.

Any such document for each of the aforementioned employees, which identifies the source(s) of outside, athletically related income and the amount(s) received or value(s) of the benefit(s) is sufficient to satisfying this request.

Ms. Busch denied your request on September 27.¹ She indicated that

[o]utside source income constitutes personal information in records regarding an individual employee of the University that is not routine directory information. Accordingly, such records are withheld under authority of the provisions [of] Neb. Rev. Stat. § 84-712.05(7). This interpretation of Nebraska law has been repeatedly supported by the Nebraska Attorney General's Office.

You have asked us to determine, in light of the University's reliance on this office, the propriety of the University's denial. You state that the University is a member institution of the NCAA, and "is required by NCAA regulations to obtain from each of its athletic department employees, on an annual basis, information about the sources and amounts of all 'athletically related outside income and benefits' over \$600." You also point to Neb. Rev. Stat. § 84-712.01(3) (2014), which requires a liberal construction of provisions of the NPRS when records of receipt or expenditure of public funds are involved. You further state that

the records I seek inform and correlate to the salary compensation these public employees receive. Furthermore, the information potentially informs the public about potential conflicts of interest involving public employees. Please understand that these financial disclosures only reveal the income generated by the employees that substantially relates to their prime roles as athletic department employees of a public university. These do not reveal any other types of personal information about such individuals.²

DISCUSSION

The basic rule for access to public records 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

¹ Since it appears that the University's actual receipt of your request was September 22, Ms. Busch had until September 28 in which to timely respond.

² Please note that "[t]he public records statutes apply 'equally to all persons without regard to the purpose for which the information is sought.' As a general rule, citizens are not required to explain why they seek public information." *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 801, 943 N.W.2d 231, 247 (2020). Accordingly, this office does not consider the reason or purpose for a records request when making our determination under § 84-712.03(1)(b).

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.

“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. *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).

The exception relied on by the University—Neb. Rev. Stat. § 84-712.05(7)—allows the custodian to withhold at its discretion “[p]ersonal information in records regarding personnel of public bodies other than salaries and routine directory information” The NCAA bylaw at issue here requires that

[a] full-time or part-time athletics department staff member who receives athletically related income or benefits from a source outside the institution (e.g., income from endorsement or consultation contracts with apparel companies, equipment manufacturers, television and radio programs; income from ownership, control or management of a foundation, organization or other entities; etc.) must report such earnings to the president or chancellor on an annual basis; however, the athletics staff member is not required to report any cash or cash equivalent (as opposed to tangible items) if the total amount received is \$600 or less. (See Bylaw 11.2.2.) (Adopted: 8/8/18).

Bylaw 11.3.2.1.1, Noninstitutional Income and Benefits Disclosure, 2020-2021 NCAA Division I Manual, effective August 1, 2020, at 50. You assert in your petition that the records required under Bylaw 11.3.2.1.1 “inform and correlate to the salary compensation these public employees receive.” You further assert that these records disclose the income generated by these individuals in their capacity as athletic department employees of a public university, but “do not reveal any other types of personal 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 in records of its employees, except for *salary* and routine directory information.³ In this context, “personal” may be defined as “2. private; individual; affecting individuals; peculiar or proper to a certain person or to private actions or character” Webster’s New Universal Abridged Dictionary 1338 (2nd ed. 1983). “Salary” is defined as “[a]n agreed compensation for services—esp. professional or semiprofessional services—usu. paid at regular intervals on a yearly basis, as distinguished from an hourly basis.” Black’s Law Dictionary (11th ed. 2019), salary.

Upon review, we believe there is little question that the financial information University employees must report under NCAA Bylaw 11.3.2.1.1 is personal information relating to personnel of a public body. And while the outside income and benefits might correlate to an employee’s overall income, it does not correlate to “salary compensation.” In fact, the NCAA bylaws indicate that this income is in addition to institutional salary. See 11.3.2. As noted, a salary is a fixed payment for services from the employer to the employee received at regular intervals. Income or benefits from an outside source and the salary an employee receives from his or her employer are not the same thing. Under § 84-712.05(7), only an employee’s salary (and routine directory information) must be disclosed.⁴

We also do not find that § 84-712.01(3) applies to the financial information required to be reported under Bylaw 11.3.2.1.1. Section 84-712.01(3) states that

[s]ections 84-712 to 84-712.03 shall be liberally construed whenever any state, county, or political subdivision fiscal records, audit, warrant, voucher, invoice, purchase order, requisition, payroll, check, receipt, or other record of receipt, cash, or expenditure involving public funds is involved in order that the citizens of this state shall have the full right to know of and have full access to information on the public finances of the government and the public bodies and entities created to serve them.

³ 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).

⁴ During the committee hearing on 1979 Neb. Laws LB 86, the legislative bill that created the exception, principal bill drafter Alan Peterson stated: “[W]e wanted to make sure it’s understood that salaries always have been considered to be the business of the people since they pay them. So we specifically said other than salaries, and again, other than routine directory information, name, address, possibly where the person works in the company and that sort of thing. But private references that he might have to used to get the job, that sort of thing, that’s confidential personnel information, and there’s no attempt to make that a public record.” Hearing on the Government, Military and Veterans’ Affairs Committee on LB 86, 86th Nebraska Legislature, 2nd Sess. (Feb. 9, 1979) at 6.

Daniel Libit
October 16, 2020
Page 5

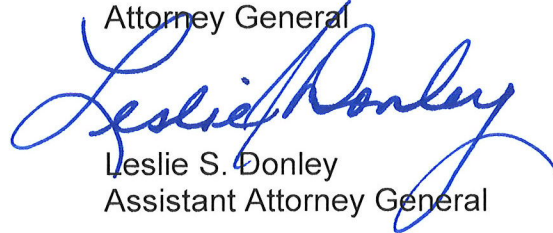
“The Legislature intended that courts liberally construe §§ 84-712 to 84-712.03 for disclosure ‘whenever any state . . . record of receipt [or] voucher, invoice, purchase order . . . or expenditure involving public funds is involved.’ And it did so ‘in order that the citizens of this state shall have the full right to know of and have full access to information on the public finances of . . . the public bodies and entities created to serve them.’ Because the Legislature has expressed a strong public policy for disclosure, an appellate court must narrowly construe statutory exemptions shielding public records from disclosure.” *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 787-788, 943 N.W.2d 231, 240 (2020). However, the records at issue do not relate to the receipt or expenditures of *public funds* as indicated in the statute. To the contrary, the records relate to income or benefits received by athletic department employees from a variety of sources outside of the University. Consequently, the statute does not apply to the records requested.

CONCLUSION

Based on the foregoing, we conclude that the records at issue are personal information, pertain to University personnel, and do not constitute salary information. Consequently, the University’s withholding of the requested records under § 84-712.05(7) was proper. If you disagree with the conclusion reached in this disposition letter, you may wish to discuss these matters with your private attorney to determine what, if any, additional remedies might be available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Erin E. Busch (via email only)

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