



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

August 30, 2021

Via email at [REDACTED]
Sean Mohatt

RE: File No. 21-R-123; Department of Health and Human Services; Sean Mohatt, Petitioner

Dear Mr. Mohatt:

This letter is in response to your email correspondence received by this office on August 13, 2021, in which you sought our review of the decision by the Department of Health and Human Services (“DHHS”) to deny you access to certain COVID-19 data. On August 30, the undersigned discussed this matter with DHHS legal counsel Erik Fern. We considered your petition under Neb. Rev. Stat. § 84-712.03(1)(b) of the Nebraska Public Records Statutes (“NPRS”), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020). Our findings and conclusion in this matter are set forth below.

RELEVANT FACTS

On August 11, 2021, you emailed a public records request to DHHS asking for the following information “broken down by month”:

Statewide Vaccine Breakthroughs (01/01/2021 - 07/31/2021)

- * 44,246 Cases - Not Fully Vaccinated
- * 1,616 Cases - Fully Vaccinated
- * 2,235 Hospitalizations - Not Fully Vaccinated
- * 79 Hospitalizations - Fully Vaccinated
- * 729 Deaths - Not Fully Vaccinated
- * 17 Deaths - Fully Vaccinated

Mr. Fern responded on August 12, 2021, indicating that DHHS “is releasing COVID-19 breakthrough data cumulatively in statewide aggregate” and “is updating these numbers each week on <https://dhhs.ne.gov/Pages/COVID-19-Weekly-Update.aspx>.” Mr. Fern denied your request for monthly COVID data on the basis of Neb. Rev. Stat. §§ 71-503.01 and 71-542 (2018), stating as follows:

Neb. Rev. Stat. § 71-503.01(1) provides that whenever any statute or any rule or regulation of an administrative agency requires medical practitioners or other persons to report cases of communicable diseases, illnesses, or poisonings or to give notification of positive laboratory findings to the Department of Health and Human Services [and Neb. Rev. Stat. §§ 71-502.04 and 71-503 and Title 173 Neb. Admin. Code ch. 1 require reporting of coronavirus] such reports or notifications and the resulting investigations shall be confidential [with certain exceptions in that statute not applicable here][,] shall not be subject to subpoena, and shall be privileged and inadmissible in evidence in any legal proceeding of any kind or character and shall not be disclosed to any other department or agency of the State of Nebraska.

In addition to the state's communicable disease statute, immunization information is confidential and may only be release[d] pursuant to the agency's rules and regulations. The agency has determined that cumulative and statewide data is releasable at this time.

You assert in your petition that the state’s data “is not up to date and does not reflect the current covid situation in our state.” You argue that the requested data “should be public knowledge so individuals, businesses and health care facilities can make the best decisions for themselves and employees.”¹ You further assert that you are being denied access to COVID data “that the state clearly has.”

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

¹ For your information, “[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); *State ex rel. Sileven v. Spire*, 243 Neb. 451, 457, 500 N.W.2d 179, 183 (1993).

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.

In the present case, DHHS is relying on §§ 71-503.01 and 71-542 as its basis to deny you access to the requested information. Section 71-503.01 states, in pertinent part:

(1) Whenever any statute of the state, any ordinance or resolution of a municipal corporation or political subdivision enacted pursuant to statute, or any rule or regulation of an administrative agency adopted and promulgated pursuant to statute . . . requires medical practitioners or other persons to report cases of communicable diseases, including sexually transmitted diseases and other reportable diseases, illnesses, or poisonings or to give notification of positive laboratory findings to the Department of Health and Human Services or any county or city board of health, local public health department established pursuant to sections 71-1626 to 71-1636, city health department, local health agency, or state or local public official exercising the duties and responsibilities of any board of health or health department, such reports or notifications and the resulting investigations . . . shall be confidential except as provided in this section, shall not be subject to subpoena, and shall be privileged and inadmissible in evidence in any legal proceeding of any kind or character and shall not be disclosed to any other department or agency of the State of Nebraska.

(Emphasis added.) Under § 71-503.01(3), DHHS may “[p]ublish analyses of reports, information, and the notifications described in subsection (1) of this section for scientific and public health purposes in such a manner as to ensure that the identity of any individual concerned cannot be ascertained”

With respect to immunizations, § 71-542 states:

Immunization information in the immunization information system established pursuant to section 71-541.01 is confidential, and unrestricted immunization information may only be accessed pursuant to rules and regulations of the

Sean Mohatt
August 30, 2021
Page 4

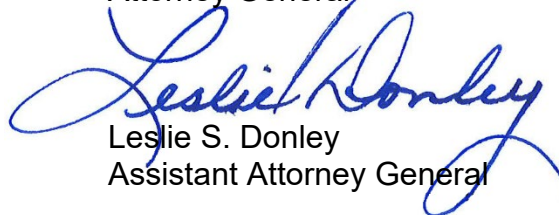
Department of Health and Human Services. Unauthorized public disclosure of such confidential information is a Class III misdemeanor.²

Upon review, we conclude that the information you seek is not a public record. Sections 71-503.01 and 71-542 are statutes that “expressly provide[] that particular information or records shall not be made public.” Section 71-503.01(3) allows, but does not require, DHHS to release certain COVID-19 information so long as “the identity of any individual concerned cannot be ascertained.” While DHHS could release monthly data, it is under no legal obligation to do so. In any event, the aggregated data available on DHHS’ *COVID-19 Weekly Data Update* web page is not a “public record” as defined in § 84-712.01(1). Consequently, you have no right under § 84-712 of the NPRS to access the “state level covid data” you seek.

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

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Erik Fern (via email only)

49-2757-29

² DHHS officials have confirmed that all immunization information at the agency (including information pertaining to COVID-19) is in the Immunization Information System. See Title 173, *Nebraska Administrative Code*, Ch. 8, Communicable Diseases—Concerning the Establishment and Operation of the Nebraska State Immunization Information System (eff. June 10, 2020).