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NO.
STATE OF NEBRASKA
OFFICIAL
JUN 9 1997
DEPT. OF JUSTICE

DATE: June 4, 1997

SUBJECT: Definition of Public Records Under the Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (1994, Cum. Supp. 1996), and the Exception to Disclosure for Proprietary or Commercial Information Contained in § 84-712.05(3)

REQUESTED BY: Jeff Elliott, Director
Department of Health and Human Services
Finance and Support

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

In 1995, the Nebraska Department of Social Services contracted with Exclusive Healthcare, Inc., a health maintenance organization or HMO, to provide certain health care services in return for periodic fixed payments by the State.[1] That contract requires Exclusive Healthcare, Inc. (the "HMO") to provide the Department with access to certain data, reports and information regarding various aspects of its operation and the contract with the Department. You now have posed two questions to us regarding

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[1] Under 1996 Neb. Laws LB 1044, the former Nebraska Department of Social Services became a part of the Nebraska Department of Health and Human Services, and that successor agency became the succeeding state party under the Exclusive Healthcare contract. References in this opinion to the "Department" are references to the Nebraska Department of Health and Human Services.

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application of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (1994, Cum. Supp. 1996), to the data, reports and information covered under the terms of the Exclusive Healthcare, Inc. contract.

Four portions of the Exclusive Healthcare, Inc. contract with the Department are at issue in your opinion request:

1. Section 4.4.1(b) of the contract requires the HMO to maintain and operate a Quality Assurance Plan. Under § 4.4.1(b)(7)(c), the HMO must "maintain adequate records of services delivered [to certain dental patients] (including preventive education provided) for each encounter with [a client] . . . ." § 4.4.1(b)(7)(d) requires the HMO and its affiliated dental providers to establish and document a recall system for routine dental check-ups and other appointments, and § 4.4.1(b)(7)(f) requires the HMO to be able to document follow-up and evaluation of all client complaints.

2. Section 4.5 of the contract requires the HMO to manage and document a credentialling and re-credentialling process for its physicians and providers, and to provide a report indicating the number and percentage of providers denied credentialling and/or re-credentialling in the first year of the contract term. That report must be provided within 60 days after the contract year.

3. Under § 4.7.1 of the contract, the HMO is required to develop and adopt two clinical practice guidelines for conditions which have traditionally exhibited high cost and/or variation among provider treatment methodologies. Within thirty days after the end of the first contract year, the HMO must document both the process for the dissemination of the clinical practice guidelines to participating providers and the ongoing evaluation process for updating and revising those guidelines as indicated by current medical practice standards.

4. Finally, § 4.8.6 of the contract requires the HMO to have a program of health education and prevention available and within reasonable geographic proximity to its clients. On a quarterly basis, the HMO must provide documentation of health and wellness program activity for the preceding quarter.

1. Definition of Public Records and Access to Proprietary Information

Your first question with respect to the information discussed above involves both the definition of public records and access to

proprietary or commercial information under the Public Records Statutes. You ask:

> Does the information required to be supplied by Exclusive Healthcare, Inc. to the Department of Health and Human Services pursuant to the terms of the contract become a public record pursuant to section 84-712.01 and subject to public examination pursuant to section 84-712, or is the information received an exception to the public record laws as provided for in section 84-712.05(3) as "proprietary" information?

You amplify this question by stating:

> It is arguable that any or all of the information required by these terms of the contract [the four discussed above] could be classified as "proprietary" according to section 84-712.05(3) and "which if released would give advantage to business competitors and serve no public purpose." I would appreciate your legal response to this argument and to consider whether, alternatively, such records are those which are "of, or belonging to this State" . . . and therefore, subject to public access and examination.

Under the pertinent portions of § 84-712.01, public records in Nebraska include "all records and documents, regardless of physical form, ***of or belonging to*** this state . . . or any agency . . . of the foregoing." (Emphasis added). We are aware of no Nebraska cases which give any specific guidance as to what constitutes a record "of or belonging to" the state in the context of § 84-712.01. However, in Nebraska, in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning. ***Application of City of Grand Island*** 247 Neb. 446, 527 N.W.2d 864 (1995). In that regard, "belong," when used with the word "to," generally means "to be owned." WEBSTER'S NEW WORLD DICTIONARY 130 (2nd college ed. 1982). Consistent with that definition, courts in other jurisdictions have indicated that "belonging to" connotes title to or ownership. ***People v. Crouch***, 77 Ill.App.2d 290, 222 N.E.2d 46 (Ill. App. Ct. 1966). On the basis of that authority, we believe that records "of" or "belonging to" state agencies under § 84-712.01 are those records "owned" by the agencies or those records for which the state agencies possess title or an ownership interest.

With that definition in mind, it seems to us that any records or documents which the HMO must provide to the Department under the terms of the contract at issue which have been delivered to it in

accordance with the requirements of the contract are records "owned" by the Department and "public records" which are generally subject to disclosure. For example, the report on the HMO's credentialling and re-credentialling process required by § 4.5 of the contract is clearly a public record after it is provided to the Department, irrespective of the fact that it might contain data generated by the HMO. On the other hand, when the HMO is simply required to provide the Department with access to its records to "document" the fact that certain activities required by the contract have taken place, we do not believe that the Department has any ownership interest in the HMO records involved based solely upon the right to access. Such records are, therefore, not records "of" or "belonging to" the Department which are subject to the Public Records Statutes. In addition, to the extent that the Department has "information" about the HMO's operations based upon the knowledge of the Department's employees and not upon a specific record or document belonging to the Department, that "information" is not generally subject to the disclosure requirements of the Public Records Statutes. We have said on numerous occasions that, in our view, the Public Records Statutes only require public access to records or documents, and do not require public officials to respond to questions.

It is also clear that, while the Nebraska Public Records Statutes allow for citizen access to public records and documents, those statutes are not absolute, and they provide for exemptions from disclosure by express and special provisions. ***Orr v. Knowles***, 215 Neb. 49, 337 N.W.2d 699 (1983). For example, § 84-712.05 sets out a number of categories of public records which may be kept confidential from the public at the discretion of the governmental custodian of those records. Of particular interest in the present instance is the category of documents described at § 84-712.05(3):

> trade secrets, academic and scientific research work which is in progress and unpublished, and other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose.

As we understand it, your initial question also involves the issue of whether any data generated by the HMO and contained in records belonging to the Department falls within the proprietary or commercial information exemption from disclosure set out in § 84-712.05(3).

Again, there are no Nebraska cases which offer guidance for the meaning of the language at issue in § 84-712.05(3). However, in Op. Att'y. Gen. No. 92068 (May 7, 1992), we indicated that the

material which may be withheld under this portion of § 84-712.05(3) must be commercial or proprietary information, the disclosure of which would give advantage to business competitors, and serve no public purpose. In that context, we also stated in Opinion No. 92068 that: (a) § 84-712.05(3) does not impose any requirement of "substantial" competitive injury or advantage to make the exemption from disclosure available, (b) a bare assertion by the provider of commercial information that such information is confidential is insufficient to justify nondisclosure, and (c) nondisclosure must be based upon a showing that a specified competitor may gain a demonstrated advantage by disclosure rather than upon an assertion that some unknown business competitor may gain some unspecified advantage.

As a result, when governmental entities have asserted the proprietary or commercial information exemption from disclosure in connection with Public Records complaints in the past, we have asked them to name specific competitors of the business entity providing the information which might gain advantage from disclosure of the material at issue, and we have asked them to specify the nature of the advantage which could be gained from that disclosure. In addition, when considering the propriety of a denial of access to public records based upon the proprietary or commercial information exemption, we have also noted the provisions of § 84-712.06 which deal with the segregation of confidential portions of a public document, and we have asked the agencies involved to provide access to segregable portions of the documents at issue with the proprietary or commercial information deleted or excised.

In the present instance, it is apparent that we have insufficient information from you at this juncture to determine if any records belonging to the Department as a result of the Exclusive Healthcare contract are subject to the proprietary or commercial information exemption from disclosure set out in § 84-712.05(3). To make that determination with respect to particular records, we would need the names of specific competitors of Exclusive Healthcare, Inc. which could gain competitive advantage from access to the records at issue, and we would need some description of the nature of the commercial advantage which would could be gained from that access. Should you wish to provide us with such information regarding particular records from the Exclusive Healthcare contract, we will provide you with our views as to whether and to what extent § 84-712.05(3) allows those records to be kept confidential.

2. Location of the Department's Review of the Records and Information

Your second Public Records question is as follows:

> For purposes of section 84-712, is there any difference [with respect to disclosure] if authorized members of the Department go to the place where such records are kept by Exclusive Healthcare, Inc., to review the records and information required by the contract and if the records are at no time transferred into the actual physical custody of the Department?

In general, the mere fact that a record is in the possession of a public officer or a public agency does not make it a public record. 76 C.J.S. ***Records*** § 99; 66 Am. Jur. 2d ***Records and Recording Laws*** § 3. Conversely, public records need not be in the physical possession of an agency to be subject to disclosure under state records acts. 76 C.J.S. ***Records*** § 99. As a result, it appears to us that the key question with respect to the Department's responsibilities under the Public Records Statutes regarding the HMO records at issue in this instance is not where those records are located or where Department employees view them. Rather, the key question goes to whether particular records at issue are records "of" or "belonging to" the Department. If they are records of the Department, then they are public records subject to disclosure regardless of their location. If they are not records of the Department, then they are not subject to the Public Records Act.

Where Department employees view particular records may have some bearing, however, on the issue of whether the Department has an ownership interest in those records which would make them records "of" or "belonging to" the Department. For example, as discussed above, it appears to us that the Department has little ownership interest in HMO records which the Department's employees simply access to "document" the HMO's compliance with various contract provisions. This is particularly true if the Department's employees access those "documentary" records at the place where the HMO keeps the records and do not make copies or take the records with them. On the other hand, if the HMO sends its "documentary" records to the Department for review there, it becomes easier to argue that the records at issue are records "of" the Department. That argument becomes even stronger if the "documentary" records are sent to the Department without any understanding that they must

be returned to the HMO. At that point, it seems to us that the "documentary" records from the HMO are records "of" the Department which are subject to disclosure.

Sincerely yours,

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Approved by:

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