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NO.
STATE OF NEBRASKA
OFFICIAL
DEC 5 1994
DEPT. OF JUSTICE

DATE: November 28, 1994

SUBJECT: Application of the Nebraska Public Records Statutes to Information Obtained by the Coordinating Commission for Postsecondary Education in its Capacity as the State Postsecondary Review Entity

REQUESTED BY: Dr. David Powers, Executive Director
Coordinating Commission for Postsecondary Education

WRITTEN BY: Don Stenberg, Attorney General
Lauren L. Hill, Assistant Attorney General

Pursuant to enactment of the federal "Higher Education Amendments of 1992," Public Law 102-325, each state is required to designate a State Postsecondary Review Entity [hereinafter "SPRE"] to be responsible for conducting or coordinating the review and approval of all institutions of higher education in a state for the purpose of determining each institution's eligibility for participation in federal student financial assistance programs. *See* 20 U.S.C. § 1099a through § 1099a-3 (Supp. 1994). The Coordinating Commission for Postsecondary Education [hereinafter "Commission"] has been designated as Nebraska's SPRE. In its capacity as the SPRE, the Commission has requested an opinion from this office regarding the applicability of the Nebraska public records statutes, Neb. Rev. Stat. § 84-712 through § 84-712.09 (1987, Cum. Supp. 1992, Supp. 1993, and Laws 1994, LB 1061, LB 1224, LB 1275), to various documents obtained by the SPRE in carrying out its duties under Pub. L. No. 102-325.

Specifically, the SPRE has posed a two-part inquiry: 1) whether institutional profiles received from the U.S. Department of Education, the preliminary list of institutions referred to the

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SPRE by the U.S. Department of Education, and the prioritized list of institutions subject to SPRE review are public records as defined by Neb. Rev. Stat. § 84-712, and 2) whether these documents, if determined to be public records, may be exempt from public disclosure under the public records statutes. The scope of the SPRE's duties under the federal law is set forth briefly below as background for our analysis of these issues.

State Postsecondary Review Entities

Enactment of the "Higher Education Amendments of 1992" created a new oversight responsibility for states: the State Postsecondary Review Program. "The purpose of the program is to reduce fraud and abuse in [federal student financial aid] programs through development of [s]tate standards for, and [s]tate oversight and review under those standards, of [specified postsecondary institutions]." State Postsecondary Review Program Final Rule, 59 Fed. Reg. 22,289 (1994) (*to be codified at* 34 C.F.R. § 667). Under the amended law, the U.S. Department of Education shall review all eligible institutions of higher education within Nebraska and determine if an institution exhibits any of the following:

- a cohort default rate (as defined in 20 U.S.C. § 1085m) on federally-guaranteed student loans of 25% or greater;
- a cohort default rate (as defined in 20 U.S.C. § 1085m) on such loans of 20% or greater under certain other conditions;
- two-thirds or more of the total budget is derived from Title IV financial aid program funds;
- a limitation or suspension action has been taken by the U.S. Department of Education within the last five years;
- a consistent audit finding which has resulted in the repayment of more than 5% of Title IV funds received;
- a citation by the U.S. Department of Education for failure to submit required audits;
- annual fluctuation of more than 25% in the amounts received through Title IV sources;
- failure to meet financial responsibility standards established in statute;

- specified substantial changes in ownership of the institution;

- except with regard to any public institution that is affiliated with a State system of higher education, participation in any of the Title IV programs for less than 5 years; or

- a pattern of complaints to the U.S. Department of Education regarding misrepresentation or misconduct.

20 U.S.C. § 1099a-3(b) (Supp. 1994).

Institutions which meet one or more of these criteria and which do not exercise the right of appeal granted within the program statutes shall be referred by the U.S. Department of Education to the SPRE for further review. 20 U.S.C. § 1099a-3(d) (Supp. 1994); ***see also*** 59 Fed. Reg. at 22,291 (*to be codified at* 34 C.F.R. § 667.5(c)).

The SPRE must develop, in accordance with state law, the standards under which it will review institutions which are referred to it by the U.S. Department of Education. 20 U.S.C. § 1099a and 20 U.S.C. § 1099a-3(d) (Supp. 1994). The SPRE's review standards must evaluate

> (1) the extent to which the institution makes available to its students and prospective students its catalogs, admission requirements, course outlines, tuition-and-fee schedules, refund policy, course cancellation policy, rules and regulations, and enrollment agreement, if appropriate;
>
> (2) whether the institution's descriptions of its courses and educational programs are accurate;
>
> (3) whether the institution has a method to assess a student's ability to successfully complete the educational program for which he or she applies;
>
> (4) whether the institution maintains and enforces standards relating to satisfactory academic progress;
>
> (5) whether the institution maintains adequate student and other records;
>
> (6) whether the institution complies with relevant safety and health standards, such as fire, building, and sanitation codes;

(7) the extent to which the institution's financial and administrative capacity is appropriate to its scale of operations;

(8) for an institution that the SPRE determines is at financial risk, the adequacy of the institution's plans, if it chooses, to provide for (i) instruction to enrolled students; and (ii) retention of and access to academic and financial aid records;

(9) if a vocational program is provided (i) whether the tuition and fees charged for that vocational program are excessive given the amount of money that a student who successfully completes the program may reasonably be expected to earn; and (ii) whether the vocational program provides students with quality training that leads to useful employment in an occupation recognized in that State;

(10) the extent to which the institution provides to its students relevant information regarding (i) market and job availability for students in its occupational, professional, and vocational programs; and (ii) the relationship between the institution's educational programs and State licensing standards for specific occupations;

(11) the appropriateness of the number of semester, trimester, or quarter credit or clock hours required for the completion of an educational program;

(12) the appropriateness of the length of 600-clock-hour educational programs;

(13) whether, and the extent to which, the actions of any owner or shareholder of the institution, or any person exercising control over the institution, may adversely affect its participation in federal student financial aid programs;

(14) the adequacy of the institution's procedures for investigating and resolving student complaints;

(15) the appropriateness of the institution's advertising promotion and student recruiting practices;

(16) whether the institution has a fair and equitable refund policy; and

> (17) the extent to which the institution's educational programs are successful as measured by specified factors.

59 Fed. Reg. at 22,295 (*to be codified at* 34 C.F.R. § 667.21(a)).

"After a SPRE completes its review of a referred institution, the SPRE must issue an initial report of the SPRE's findings and provide it to the institution no later than 45 days after the SPRE completes its review." *Id.* at 22,296 (*to be codified at* 34 C.F.R. § 667.23(c)). If an institution is in violation of one of the SPRE's standards, then the SPRE must cite the standard violated and the nature of the violation and either a) prescribe a course of action the institution must follow to correct the violation or b) initiate proceedings to terminate the institution's participation in federal higher education financial aid programs. *Id.*

The review functions required of the SPRE are federally-funded. 20 U.S.C. § 1099a-1 (Supp. 1994). If the SPRE anticipates that the cost of reviewing all of the institutions referred by the U.S. Department of Education will exceed its federal appropriation, then the SPRE shall prioritize the listed institutions for review. 59 Fed. Reg. at 22,294 (*to be codified at* 34 C.F.R. § 667.12(c)(2)).

Whether Various Preliminary Review Lists Provided to or Developed by the SPRE are Public Records

Under the State Postsecondary Review Program outlined herein, the SPRE anticipates that, on a routine basis, it will handle three types of documents: 1) institutional profiles received from the U.S. Department of Education, 2) the preliminary list of institutions referred by the U.S. Department of Education for review by the SPRE, and 3) the prioritized list of institutions subject to review by the SPRE.

Neb. Rev. Stat. § 84-712 (1987) provides that all persons interested in viewing public records are "fully empowered and authorized to examine the same, and to make memoranda and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business." "Public records" are defined by statute to include "all records and documents, regardless of physical form, of or belonging to this state, . . . or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing." Neb. Rev. Stat. § 84-912.01 (1987) (as amended by Laws 1994, LB 1275, § 12). We noted in a prior opinion that the definition of what constitutes a "public record" was added to the Public Records Act in 1979. *See* Op. Att'y Gen. No. 91-054 (June

14, 1991). In the prior opinion, we examined the question of at what point in time materials prepared by public officials become "records and documents" subject to public review. We found that "[n]either the statutory definition nor the legislative history of [the implementing legislation] gives any guidance as to whether materials in incomplete form are 'records and documents' for purposes of § 84-712.01." Op. Att'y Gen. No. 91-054 at p. 3. We determined:

> There is an obvious tension between a governmental agency's legitimate need to operate internally without interruption and intrusion on the one hand, and a legitimate concern that public documents might be hidden from view behind a "draft" label on the other. We believe that this tension should be resolved by determining what constitutes a record or a document under the Public Records Act on an individual, case-by-case basis. There may well be instances where certain materials are so embryonic that they do not constitute "records" or "documents" under the Act. For example, notes or drafts of documents prepared by lower level personnel within an agency which still remain subject to approval by upper management and which have not been issued by the agency. It seems to us that such preliminary materials do not constitute "records" or "documents" under the Public Records Act, and thus may be withheld from the public. In contrast, materials which have been through the formation process within the agency and which have left the agency are more obviously "records" or "documents" even though procedures may require further approval before formal issuance. This latter category of documents, while arguably involving materials in a "draft" form, still constitutes "records" or "documents" subject to disclosure.

Id. We now address in turn whether each of the documents which the SPRE has described are public records as defined by Nebraska law.

1. **Institutional Profiles**.

The SPRE has received from the U.S. Department of Education a document entitled "Preliminary Information Regarding Institutions Satisfying Review Criteria of HEA 494(b)." The U.S. Department of Education represents that this document is not a list of institutions that will be referred to the SPRE, but rather, it is to be deemed a planning document -- one which gives the SPRE an indication of how many Nebraska institutions may be referred for review under the SPRE's eventual standards. The initial "institutional profile" received from the federal government has been provided to this office. On this computer print-out, we note

that the institutions are not identified by name. They are identified only by type and control (i.e., proprietary, private, or public) and by length of program (i.e., one-year, two-year, five-year). Based upon information received from the federal government, the SPRE has indicated to us that the institutional profiles are subject to change and that an institution now cited on the profile may not be actually referred to the SPRE if the institution successfully appeals to the U.S. Department of Education. *See* 59 Fed. Reg. at 22,291 (*to be codified at* 34 C.F.R. § 667.5(c)).

The SPRE has expressed its concern that the premature release of the institutional profiles could unnecessarily damage public confidence in Nebraska's institutions of higher education since release of this information would likely prompt speculation regarding the identity of entities appearing on the list. We recognize this as a valid concern. In part, similar concerns provided the basis for our determination that "there may well be instances where certain materials are so embryonic that they do not constitute 'records' or 'documents' under the [Public Records] Act." Op. Att'y Gen. No. 91-054 at 3.

Arguably, three factors favor a conclusion that the institutional profiles could be deemed as governmental works in progress. First, due to the nebulous nature of the information provided in the profiles, not even the SPRE will be able to ascertain which institutions will be referred to it for review. Next, none of the SPRE staff will have participated in development of the profiles. Finally, the SPRE will take no formal action upon receipt of the profiles. Despite these factors, however, we cannot ignore that the institutional profiles are in their final form when sent from the U.S. Department of Education to the SPRE. We have previously determined that "materials which have been through the formulation process within the agency and which have left the agency are more obviously 'records' or 'documents' even though procedures may require further approval before formal issuance." *Id.* Although this holding was premised upon review of a draft report which had been forwarded from one state agency to another, we find the principle equally applicable when a state agency has received materials from a federal or other public agency. Therefore, we conclude that the institutional profiles constitute "records" as defined in Neb. Rev. Stat. § 84-712.01 and, as such, are subject to disclosure unless otherwise exempted from disclosure by Neb. Rev. Stat. § 84-712.05.

2. **Preliminary List of Institutions Referred to the SPRE.**

The second document on which the SPRE seeks our opinion is the preliminary list of institutions which will be referred by the U.S. Department of Education to the SPRE. As noted earlier in

this opinion, the document will be a list of institutions, identified by name, which the federal Education Department has determined meet one or more of the criteria set forth in 20 U.S.C. § 1099a-3(b). These institutions are to be evaluated by the SPRE under state standards which reflect the review criteria outlined in 20 U.S.C. § 1099a-3(d). If the anticipated cost of the SPRE's review of each of the listed institutions exceeds the SPRE's federal appropriation, then the SPRE may prioritize the list and conduct reviews of only the number of institutions for which the SPRE has received funding.

The SPRE has the same concern regarding premature release of this type of document as it has with release of the institutional profiles. The SPRE notes that release of the preliminary list of referred institutions may be premature since the SPRE's review of the preliminary list is contingent upon the adoption of a priority system. The preliminary list of institutions referred to the SPRE by the U.S. Department of Education is comprised of an identification of those institutions which have triggered one or more of the criteria contained within 20 U.S.C. § 1099a-3(b). An institution appearing on the preliminary list has either elected not to appeal the U.S. Department's finding or has been unsuccessful in appealing to have its name removed from the review list. *See* 59 Fed. Reg. at 22,291 (*to be codified at* 34 C.F.R. § 667.5). Although the SPRE has no role in developing this list, the SPRE is obligated -- absent a lack of funding -- to prioritize reviews of each institution appearing on this list. Therefore, we conclude that the preliminary list is a document or record belonging to a Nebraska agency as defined in Neb. Rev. Stat. § 84-712.01 and, as such, is subject to disclosure unless otherwise exempted from disclosure by Neb. Rev. Stat. § 84-712.05.

3. <u>List of Prioritized Institutions</u>.

The third document on which our opinion is sought is the final list of prioritized institutions. This list, which will be developed by the SPRE, will consist of a ranking or prioritization of the list of institutions referred to the SPRE by the U.S. Department of Education. It is our understanding that the SPRE has not yet adopted a plan for prioritization of reviews but deems a priority system necessary given the likelihood that sufficient funds will not be appropriated to complete a review of each referred institution. Given our conclusion that the preliminary list of institutions falls within the definition of a "public record," and that the SPRE will have taken formal action in developing the final prioritized list of institutions, we find that the prioritized list also falls within the definition of a public record. As such, it is subject to disclosure unless otherwise exempted from disclosure by Neb. Rev. Stat. § 84-712.05.

Whether the Public Records May Be Withheld by the SPRE

The public records statutes are not absolute for they provide exceptions to disclosure. ***Orr v. Knowles***, 215 Neb. 49, 337 N.W.2d 699 (1983). Pursuant to Neb. Rev. Stat. § 84-712.05 (Supp. 1993 and Laws 1994, LB 1061, § 7 and LB 1224, § 88), specified records may be withheld from the public by the lawful custodian of the records unless publicly disclosed in open court, an open administrative proceeding, an open meeting, or otherwise disclosed in the course of the agency's duties. "The exceptions in § 84-712.05 simply permit nondisclosure; they do not require confidentiality for those categories of records." Op. Att'y Gen. No. 94-004 (January 11, 1994) (citing ***Burlington Northern R.R. Co. v. Omaha Public Power Dist.***, 703 F.Supp. 826 (D. Neb. 1988), ***aff'd*** 888 F.2d 1228 (8th Cir. 1989)).

The only exception provision which we deem applicable to the SPRE's inquiry is that which allows exemption from disclosure for

> [r]ecords developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of . . . institutions . . . , when the records constitute a part of the examination, investigation, intelligence information, citizen complains or inquiries, informant identification, or strategic or tactical information used in law enforcement training, except that this subdivision shall not apply to records so developed or received relating to the presence of and amount or concentration of alcohol or drugs in any body fluid of any person.

Neb. Rev. Stat. § 84-712.05(5) (Supp. 1993) (as amended by Laws 1994, LB 1061, § 7).

Due to the preliminary and investigative nature of both the "institutional profiles" and the initial list of institutions referred for review by the U.S. Department of Education to the SPRE, we deem each of these documents to fall within the § 84-712.05(5) exception. Each form of document is submitted to the SPRE based on data available to the federal government. As to the "institutional profiles," we find it significant that not even the SPRE is certain of the identities of the listed institutions. As to the preliminary list of identified institutions referred by the U.S. Department of Education, we note that under the federal statutory scheme, there is a possibility that not all of these

institutions will, in actuality, be reviewed by the SPRE. If sufficient funds are not appropriated to the SPRE, then the SPRE is not compelled to review each of the listed institutions. *See* 59 Fed. Reg. at 22,294 (*to be codified at* 34 C.F.R. § 667.12).

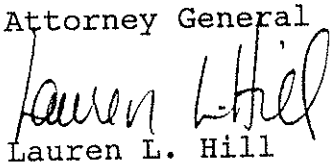
For these reasons, we conclude that even though the institutional profiles and the list of referred institutions are deemed to be public records under Neb. Rev. Stat. § 84-712, these documents fall within the category of records contained within § 84-712.05(5) and may be withheld from public scrutiny. Of course, as we have previously indicated, each agency "must determine whether, as a matter of policy, it will elect to refuse disclosure of records which may fall within any of the exceptions under § 84-712.05." Op. Att'y Gen. No. 94-004 at 2. Therefore, the SPRE, and not this office, must determine whether the institutional profiles and the preliminary list of referred institutions will be disclosed upon public request.

We reach a different conclusion regarding the exemption from disclosure of the SPRE's prioritized review list of referred institutions. We understand the SPRE's concern that even the "prioritized" list is subject to the availability of time and/or adequate funding to effect full reviews under the standards outlined in 20 U.S.C. § 1099a-3(d). As we noted earlier, we do not find that this list can legitimately be considered enough of a "draft" document to be deemed a governmental work in progress. *See* Op. Att'y Gen. No. 91-054. Therefore, the prioritized list of institutions subject to the SPRE's review, is a public record and must be disclosed to the public unless the exemption of § 84-712.05 is applicable. Although we view this as a close question, we do not find that the statutory exemption applies to the prioritized list. Our conclusion is based upon the process of the State Postsecondary Review Program. In one sense, the prioritized list is an investigatory tool of the SPRE because it is only a list of those institutions which will be reviewed if sufficient funding has been appropriated. In theory, therefore, many institutions, while appearing on this list, may not be immediately reviewed by the SPRE. We also recognize that public interest in ascertaining the identity of institutions appearing on the prioritized list is likely to be more keen than is interest in learning the outcome of the SPRE's final report. Important to our decision, however, is the fact that the SPRE will have taken formal action in reaching its prioritization decision -- in essence announcing that the prioritized list comprises those institutions which the SPRE intends to review under federal and state law standards. Therefore, the list does not fall within the discretionary

exemption authority granted by Neb. Rev. Stat. § 84-712.05(5), and must be made available for public inspection at the SPRE's main office during regular business hours.

Sincerely yours,

DON STENBERG
Attorney General



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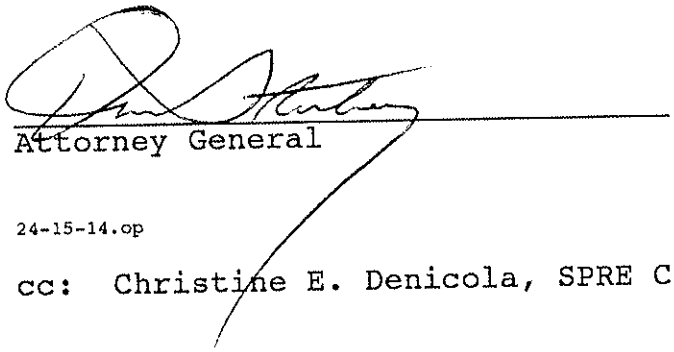

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cc: Christine E. Denicola, SPRE Coordinator