STATE OF NEBRASKA
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**JON BRUNING**
ATTORNEY GENERAL

November 25, 2013

Ms. Stacy Ryan
640 N. 159th St.
Omaha, NE 68118

Re: *File No. 13-R-137; DHHS, Licensing; Ryan*

Dear Ms. Ryan:

This letter is in response to your email correspondence dated November 8, 2013, regarding access to records of the Department of Health and Human Services (the "Department" or "DHHS") under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2012, Supp. 2013). We received your correspondence on November 8, 2013, and we considered that correspondence to be a petition for access to records under § 84-712.03. Our response to your petition is set out below.

## FACTS

Our understanding of the facts in this case is based upon your emails of November 8 and 13 along with the materials which you provided to us with them. We also received additional information from counsel at the Department.

Your daughter, Megan Coffey, applied for a license to practice nursing in the State of Nebraska. She has a criminal history involving two DUI's, so the Department initiated an investigation of her situation, and ultimately denied her a nursing license. Megan appealed that denial.

A hearing on Megan's appeal was held on July 9, 2013, and a number of exhibits were introduced at that hearing. On October 16, 2013, you made a public records request to the Department for copies of those exhibits. In response, the Department provided you with 288 pages of documents, but denied you access to hearing Exhibits 1, 5, 6, 11, 12, 13, 14, 22 and 23. It is our understanding that those exhibits contain investigative reports from licensing investigators, letters and updates from alcohol assessment clinicians, and other materials containing references to alcohol assessments. The Department's denial letter of October 22, 2013, indicates that it denied you access to those exhibits pursuant to Neb. Rev. Stat. §§ 84-712.01 and 84-712.05 (2). In an order dated October 22, 2013, the Hearing Officer for the July 9

hearing also entered a "Qualified Protective Order" which provided that the hearing exhibits listed previously contained protected information under the federal Health Insurance Portability and Accountability Act (HIPAA) and were received under SEAL. That Qualified Protective Order further provided that DHHS personnel should not disclose the exhibits pursuant to Neb. Ct. Rule 6-1513.

Subsequently, you adjusted your records request to seek only Exhibits 5 and 6 from the July 9 hearing, and after discussions with Department counsel, you were provided with copies of those exhibits. You now wish to obtain the remaining exhibits from the hearing in July, and you have asked us to review the Department's denial of access to those materials. You also stated in your letter that the Department previously provided you with all the exhibits at issue in July, 2013.

In addition to the matters involving exhibits discussed above, you made a public records request to the Department on October 29, 2013, for the Chief Medical Officer's decision in the appeal involving your daughter, Case No. 13-669. In response, Diane Pearson with the Department emailed you a copy of the Hearing Officer's dismissal of Case 130669 on November 13, 2013. You contend that the Hearing Officer's order which you received is not the record you requested on October 29, and that the Department has denied you access to the CMO's decision as a result.

## ANALYSIS

1. Denial No. 1, Hearing Exhibits

The Nebraska Public Records Statutes generally allow interested persons in Nebraska the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts therefrom, and to obtain copies of records in certain circumstances. Section 84-712.01 (1) also provides that "[e]xcept when any other statute expressly provides that particular information or records shall not be made public, public records shall include all records and documents, regardless of physical form, of or belonging to this state . . ." In that context, we have consistently taken the position that all records "of or belonging to" the State are public records which interested persons have a right to obtain a copy of unless the custodian of the record can point to a specific statute which allows the record to be kept confidential.

In this case, the Department apparently relies, in part, on the Hearing Officer's order of October 22, 2013, and the Nebraska Supreme Court's Uniform District Court Rules of Practice and Procedure, Rule 6-1521 as a basis for keeping the records at issue confidential. However, the Hearing Officer's order was presumably issued under 184 NAC 1, § 011.06 which specifically provides that evidence subject to a protective order may be received in camera at a hearing and thereafter placed under seal to preserve its confidentiality. As we understand it, the exhibits at issue were not received in camera at the July 9 hearing, and portions of those exhibits were even read into the record without objection from your daughter's counsel. In addition, Rule 6-1521 by its own terms applies only to birth dates, Social Security numbers and financial account

numbers. Accordingly, we believe that 184 NAC 1, § 011.06 and Rule 6-1521 provide little basis to keep the exhibits at issue confidential in this instance except to the extent that they contain the information listed in the Supreme Court Rule.

More importantly, the Department and the Hearing Officer also rely on the privacy provisions of the federal Health Insurance Portability and Accountability Act (HIPAA) and 45 CFR 164.512 as a basis to keep the records at issue confidential. The privacy provisions of HIPAA and the Nebraska Public Records Statutes were analyzed together in *State ex rel. Adams County Historical Society v. Kinyoun*, 277 Neb. 749, 765 N.W.2d 212 (2009). In that case, the court determined that the Department is subject to the privacy requirements of HIPAA. However, the court also noted that the privacy requirements of HIPAA contain an exception for information required to be released by law such as the Nebraska Public Records Statutes. As a result, the court looked to the requirements of the Public Records Statutes to determine if certain information could be kept confidential by the Department rather than to HIPAA. That same analysis applies in the present situation.

The exhibits at issue in the present case apparently contain material which constitutes medical records or investigatory records which could be kept confidential under §§ 84-712.05 (2) and 84-712.05 (5). However, § 84-712.05 also indicates that its listed exceptions to disclosure under the Public Records Statutes apply unless the records at issue were "publicly disclosed in an open court, [or an] open administrative proceeding." In the present instance, the records which you seek were offered into evidence without objection in an open administrative hearing. They were not received into evidence in camera, and were not placed under seal until the Hearing Officer's order of October 22. We also understand that portions of those exhibits were read into the record, again without objection.

Simply offering the exhibits which you seek at the hearing may not constitute "public disclosure" under § 84-712.05. However, it seems clear to us that reading portions of those exhibits into the record during an open hearing does. Therefore, we conclude that the Department should provide you with those portions of Exhibits 1, 11, 12, 13, 14, 22 and 23 which were read into the record at the hearing on July 9. Any other portions of the exhibits which are medical records or investigatory records may be kept confidential under §§ 84-712.05 (2) and 84-712.05 (5). In that regard, the Department should also fully comply with § 84-712.04 and provide you with a more specific description of the records which it has withheld. Medical and investigatory records contained in the exhibits which were not read into the hearing record should also be redacted from other portions of the exhibits, if possible.

2. <u>Denial No. 2, CMO decision in case 13-669</u>

We have discussed your second records request for the Chief Medical Officer's decision in Case No. 130669 with counsel for the Department. Based upon that discussion, it is our understanding that the Department's Chief Medical Officer did not make any written decision in Case No. 130669 which is responsive to your records

request. Therefore, the only "decision" in the case is the Order of Dismissal from the Hearing Officer which you were provided on November 13, 2013. On that basis, we conclude that you have not been improperly denied access to any public records in connection with your second records request.

If you disagree with our analysis, then you may wish to review the Public Records Statutes to determine what additional remedies, if any, remain available to you under those statutes.

Sincerely,

JON BRUNING
Attorney General

Dale A. Comer
Assistant Attorney General
Chief, Legal Services Bureau

cc. Brad Gianakos, Department counsel