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NATALEE J. HART
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October 22, 2014

Renie Hagensen
via e-mail only to:
rhagensen2@unl.edu

RE: *File No. 14-R-133; University of Nebraska-Omaha; Petitioner Renie Hagensen*

Dear Mr. Hagensen:

This letter is in response to your correspondence received by us on October 3, 2014, in which you requested our review of a public record request made by you to the University of Nebraska-Omaha ("University"), through Vivian Ayuso-Sanchez, for copies of application materials "in the case of the hiring process for UNO Grants Manager." As is our normal practice with such complaints, we contacted the party against whom the complaint was made in regards to your complaint. We subsequently received a response from Erin Busch, Director of University Records/Associate General Counsel. Following that response, we required further information from the University. On October 20, 2014 we wrote to you indicating our final disposition of this matter would be delayed while we conducted further inquiry. That inquiry is complete. We have now considered your complaint and the University's response under the Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2008, Cum. Supp. 2012, Supp. 2013), and our findings in this matter are set forth below.

FACTS

Our understanding of the facts in this case is based on your public records request of October 1, the October 2 response from Ms. Busch denying your records request, your e-mail to this office dated October 3 in which you requested our review of the matter and the October 10 response to your Public Records complaint from Ms. Busch, and a phone call with Ms. Busch on October 22 in which we sought further information.

You made a request on or about October 1, 2014 to the University through Ms. Ayuso-Sanchez, for "materials subject to the Nebraska Public Records Act in the case of the hiring process for UNO Grants Manager." On October 2, 2014, Ms. Busch

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responded to your request. In her response, she noted that your request was clarified on the phone with Ms. Ayuso-Sanchez and that you were requesting "the applications and resumes of the individuals who were interviewed for the UNO Manager, Grants Accounting position." Ms. Busch then denied your request under Neb. Rev. Stat. § 84-712.05 (7), which states that a custodian of records may withhold "personal information in records regarding personnel of public bodies other than salaries and routine directory information." The University's position is that the materials you seek are personnel records under the Bylaws of the Board of Regents of the University of Nebraska, which define "personal information" to be "all records and documents pertaining to any applicant or nominee for appointment to any University personnel position. . . and all records and documents pertaining to any person employed by the University."

You sought the review of this office of the University's denial of your public records request. Your complaint letter asserts that the records you have sought should be made available to you under Neb. Rev. Stat. § 84-712.05 (15), which provides that the custodian of records may withhold:

> (15) Job application materials submitted by applicants, other than finalists who have applied for employment by any public body as defined in section 84-1409. For purposes of this subdivision, (a) job application materials means employment applications, resumes, reference letters, and school transcripts and (b) finalist means any applicant (i) who reaches the final pool of applicants, numbering four or more, from which the successful applicant is to be selected, (ii) who is an original applicant when the final pool of applicants numbers less than four, or (iii) who is an original applicant and there are four or fewer original applicants.

In its response to this office, the University again cites to Neb. Rev. Stat. § 84-712.05 (7) as a basis for withholding the records. The University also refers to the Bylaws of the Board of Regents in defining personnel records as being "inclusive of the entire employment process beginning with application or nomination for appointment" which are to be withheld "regardless of whether any such person is ever actually employed by the University." This classification is far more broad than that contemplated by the Nebraska Public Records Statutes in Neb. Rev. Stat. § 84-712.05 (7). The University further appears to argue that Neb. Rev. Stat. § 84-712.05 (15) does not apply to the records you seek because they are not the records of a public body. The University believes that because the University Manager, Grants Accounting position is not hired directly by the Board of Regents, but is instead selected by a delegate of the Board of Regents through its bylaws, that a "public body" did not select the candidates for this position and consequently their application materials are not public record.

ANALYSIS

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 from those records, and to obtain copies of records in certain circumstances. Under those statutes, every record "of or belonging to" a public body is a public record of which individuals may obtain a copy unless the custodian of the record can point to a specific statute which allows the record to be kept confidential. The burden of showing that a confidentiality statute applies to particular records rests upon the custodian of those records. *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

Specifically, Neb. Rev. Stat. § 84-712.01 defines "public records" as:

> all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form shall remain a public record when maintained in computer files.

The position of the University, initially, was that the records you seek may be withheld as personnel records under Neb. Rev. Stat. § 84-712.05 (7) and the Bylaws of the Board of Regents. Additionally, in responding to this office, the University has asserted an additional position that the records are also not those of a "public body" and are not subject to disclosure even as job application materials of finalists under Neb. Rev. Stat. § 84-712.05 (15). Again, the University cites to the Bylaws of the Board of Regents in support of this position. However, internal policies, including the Bylaws of the Board of Regents are not controlling over the provisions of the Nebraska Public Records Statutes. Consequently, our analysis concerns only the statutory provisions of the Public Records Statutes and not the internal policies of the University.

The Nebraska Public Records Statutes provide that documents of a public body are public records, unless a specific statute expressly allows those records to be kept confidential. Public Records are those belonging to the state or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. University records are public records. The delegation of the hiring of the University Manager, Grants Accounting, by the Board of Regents does not alter the classification of the records relating to the hiring of this position. The statute makes no distinction as to who does the hiring; only that application has been made to be employed by a public body. Any applicant to the University is, ultimately, applying to be employed by a public body. A public body cannot circumvent the Nebraska Public Records Statutes by delegating its authority to an individual employee. As such, in order to withhold the records you seek, the University must point to a specific statutory provision which allows them to keep them confidential. Internal policies or Bylaws of the

Board of Regents are insufficient to withhold records under the Nebraska Public Records Statutes.

The University has claimed that Neb. Rev. Stat. § 84-712.05 (7) allows them to withhold the application materials you seek as "personal information in records regarding personnel of public bodies" other than salaries and routine directory information. This section of the Nebraska Public Records Statutes is not appropriate for withholding documents in this circumstance, particularly when another section of the same statute specifically mandates disclosure of "job application materials" of finalists, as defined in Neb. Rev. Stat. § 84-712.05 (15). This section, as you reference in your complaint letter, is the applicable section to the records you seek. This section is fully reproduced above, and clearly defines what application materials must be produced upon request, and as to which applicants.

Consequently, we believe the records you have requested are "public records" under the Nebraska Public Records Statutes and the application materials of the job finalists are subject to disclosure under Neb. Rev. Stat. § 84-712.05 (15). As a result, we will ask the University to review the application materials it maintains and provide those records which are responsive to your request as set forth in Neb. Rev. Stat. § 84-712.05 (15).

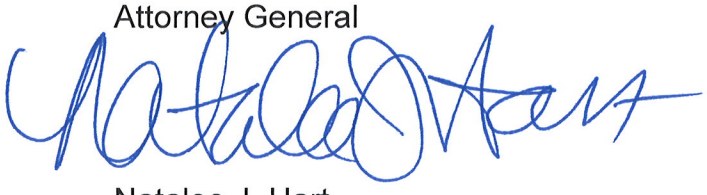
CONCLUSION

For the reasons stated above, we believe the University is required to disclose certain records in response to your public records request. We have provided guidelines herein for production of the requested documents. We trust that the University will undertake this in good faith, thus, no further action will be taken by this office with respect to this complaint.

If you disagree with our analysis under the Public Records Statutes set out above, you may wish to determine what additional remedies, if any, are available to you under those statutes.

Sincerely,

JON BRUNING
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Erin Busch

02-453-30