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June 17, 2013

Trevor Howell
3851 Mesa Drive, Apt. 203
Oceanside, CA 92056

RE: *File No. 13-R-110; University of Nebraska-Kearney; Trevor Howell, Petitioner*

Dear Mr. Howell:

We are writing in response to your correspondence received by this office on May 31, 2013, in which you requested our assistance in obtaining certain public records belonging to the University of Nebraska-Kearney ("UNK" or "University"). As is our normal practice with such requests, we contacted the party against whom the complaint was made and requested a response. In this case, we directed your correspondence to Carmen K. Maurer, Associate General Counsel, University of Nebraska. On June 4, 2013, we received Ms. Maurer's response, wherein she asked that we consider her previous responses to you, dated March 12, 2013, and April 5, 2013, respectively, as the University's legal bases for denying you access to the requested records. We considered your correspondence to be a petition for access to records under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2012). Our findings in this matter are set forth below.

RELEVANT FACTS

Our understanding of the facts in this case is based on your petition and Ms. Maurer's responses.

In your letter dated March 7, 2013, addressed to the "University of Nebraska Registrar, Student Records and Registration," you wrote:

> Under the Freedom of Information Act (FOIA), 5 USC 552 and the Nebraska Public Records Law § 84-712 et seq., I am requesting your office provide an accurate count of the number of students since 1993 who applied for academic amnesty? How many did so prior to graduation? How many did so subsequent to graduation? Of those who applied prior to graduation, how many were approved? How many disapproved? Of those who applied subsequent to graduation, how many were approved? How many disapproved? Please provide all other categories for approval verses [sic] disapproval and the reasons why.

You requested that the records be produced either in hard copy or electronically.

Ms. Maurer responded by letter dated March 12, 2013. She cited previous opinions of this office in which the Attorney General has indicated that Section 84-712 of the Nebraska Public Records Statutes does not require a public body to answer questions or create documents which do not otherwise exist. She advised that "UNK does not maintain any document which lists the requests for, nor the outcome of, those requests for Academic Amnesty." Consequently, she wrote, "we are not able to comply with your request."

In your second letter dated April 1, 2013, you acknowledge the UNK's legal position on this matter. However, you wrote:

> Notwithstanding that claim, the information itself is viable for release under Ref (a) and (b) above.[1] Having said that, please provide the "action document" which memorialized the decision for every application for academic amnesty since 1993. If the information is not retained in such a format, then please provide options for obtaining this information under Ref (a) and (b) above. In other words, how does the University intend to comply with the law? Also please provide any documents containing decision criteria or position papers with regard to how the decisions were made.

Ms. Maurer responded to your second request by letter dated April 5, 2013. She indicated that her first response fully complied with the law with respect to your public records request. She reiterated that the public records "law does not require a public agency to review documents and create abstracts or other lists, to answer questions or to create documents which do not otherwise exist." Ms. Maurer further advised that "any documents related to individual requests for academic amnesty are confidential records of the relevant student under both state law [*Neb. Rev. Stat.* § 84-712.05(1)] and the federal law known as the Family Educational Rights and Privacy Act (FERPA)."

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[1] For the record, "Ref (a)" refers to the "Freedom of Information Act (FOIA), 5 USC 552." "Ref (b)" refers to the "Nebraska Public Records Law § 84-712 et seq."

You subsequently filed your petition with this office. You state that you "believe the University is wrong and has failed to honor their legal obligations to uphold both state and federal law with regard to Freedom of Information and Public Records requests."

DISCUSSION

As an initial matter, we note that your requests to the UNK and your petition to us contain repeated references to the Freedom of Information Act ("FOIA"). For your information, FOIA is a federal law, codified at 5 U.S.C. § 552, which generally provides that any person has the right to request access to *federal* agency records or information. Your use of FOIA in this context, i.e., requesting records from the University of Nebraska, an agency of the State of Nebraska, is improper.

With that clarification in mind, we will focus solely on whether the University has complied with the Nebraska Public Records Statutes. Generally speaking, these statutes 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 public records, and to obtain copies of public records in certain circumstances. As indicated above, a public body is not required to create documents that do not otherwise exist, or to answer questions made to the public body under the guise of a public records request. *See* Op. Att'y Gen. No. 94092 (Nov. 23, 1994); Op. Att'y Gen. No. 94035 (May 13, 1994); and Op. Att'y Gen. No. 87104 (Oct. 27, 1987). Copies of our opinions are attached to this letter.

Upon review, it appears to us that your first request is more of a request for information rather than a request for public records. In that regard, you asked for the number of students since 1993 who applied for academic amnesty; the number of students who applied before or after graduation; the number of students who were approved, disapproved, etc. According to Ms. Maurer, the University has no specific documents responsive to your inquiries. And because the University is under no obligation to create these records for you, or answer your specific questions under the guise of a request for public records, the University's initial response to you was appropriate.

In your second request, you specifically sought the "'action document' which memorialized the decision for every application for academic amnesty since 1993." However, while the Nebraska Public Records Statutes provide general access to public records, the law is not absolute. They also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). 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).

In the present case, the University has claimed the exception set out in subsection (1) of Neb. Rev. Stat. § 84-712.05 as its basis for denying you access to these particular records. That subsection provides, in pertinent part:

> The following records, unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties, may be withheld from the public by the lawful custodian of the records:
>
> (1) Personal information in records regarding a student, prospective student, or former student of any educational institution or exempt school that has effectuated an election not to meet state approval or accreditation requirements pursuant to section 79-1601 when such records are maintained by and in the possession of a public entity, other than routine directory information specified and made public consistent with 20 U.S.C. 1232g, as such section existed on January 1, 2003 . . . .

We note that "directory information" is defined under 34 C.F.R. § 99.3 as

> information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (e.g., undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended.

Consequently, a public body may lawfully withhold from public disclosure any personal information in records regarding a student, former student or prospective student, except for the items listed in the federal definition above (although not an exclusive list). The federal definition contemplates that this information, if disclosed, would not be considered harmful or an invasion of the student's privacy. Here, you are seeking the disposition documents relating to every application for academic amnesty submitted to the University since 1993. It does not appear to us that these "action documents" would fall within the definition of routine directory information. To the contrary, the University has represented to us that the requested documents are confidential student records which would fall under the exception in § 84-712.05(1) and the underlying federal law, the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g; 34 C.F.R. Part 99). We agree. Consequently, the University did not violate

the Nebraska Public Records Statutes when it denied you access to these records under Neb. Rev. Stat. § 84-712.05(1).

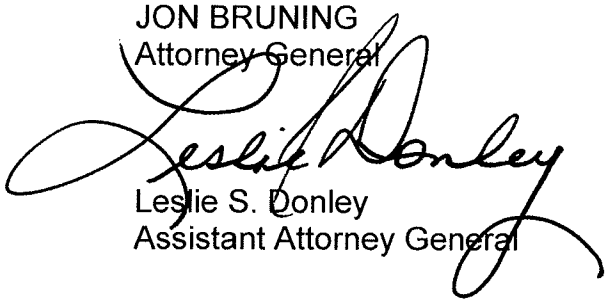
CONCLUSION

We believe that with respect to your first request for information, the University is under no obligation to create lists or answer your questions under the guise of a public records request. With respect to your second request, the requested documents belonging to the University may be kept confidential under the student records exception set out in Neb. Rev. Stat. § 84-712.05(1). Since we conclude that the University of Nebraska–Kearney did not unlawfully deny your requests under the Nebraska Public Records Statutes, no further action by this office is warranted, and we are closing this records file.

If you disagree with our legal analysis set out herein, you may wish to consult with your private attorney to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

JON BRUNING
Attorney General



Leslie S. Donley
Assistant Attorney General

Enclosures

cc: w/o enclosures Carmen K. Maurer

49-997-30