STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
TIERONE FAX (402) 471-4725

JON BRUNING
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

May 20, 2010

Amy M. Coburn, DVM
9230 Burt Street, Apt. 204
Omaha, NE 68114

RE: *File No. 10-R-109; University of Nebraska Medical Center; Petitioner Amy Coburn, DVM*

Dear Ms. Coburn:

This letter is in response to your petition received by us on February 5, 2010, in which you requested our assistance in obtaining certain public records belonging to the University of Nebraska Medical Center (the "UNMC"). As is our normal practice with such requests, we contacted the party against whom the complaint was made. In this case we contacted Richard A. Spellman, Associate General Counsel Health Sciences. On February 26, 2010, we received Mr. Spellman's response on behalf of the UNMC. We have now fully considered your petition for access to records under Neb. Rev. Stat. § 84-712.03 (the "Petition"), as well as the UNMC's response, under the Nebraska Public Record Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Supp. 2009), and our findings in this matter are set forth below.

FACTS

Our understanding of the facts in this matter is based on your Petition and the UNMC's response. We note that along with your petition, you provided us a binder of "supporting documentation and evidence" ("Supplemental Documentation"), which you requested that we keep confidential. We have complied with your request. For the record, we contacted the information practices coordinator at the institution referenced in your Supplemental Documentation to discuss that particular state's public records law.

Printed wth soy ink on recycled paper

On January 18, 2010, you e-mailed your initial public records request to Dr. Ernest Prentice. You indicated that your request was being made in accordance with the [federal] Freedom of Information Act[1] and State Open Records Laws. In your request, you requested complete medical records and documentation of "Environmental Enrichment Program for Nonhuman Primates" and all "Environmental Enrichment Logs" for the 25 nonhuman primates identified in your request. You also requested documentation for all swipe card access to all rooms that the nonhuman primates have been located; documentation for all controlled substances administered to the nonhuman primates; documentation for all controlled substances administered to all rats on either protocol 08-091 and 09-092; documentation of all experimental manipulations and observations of all rats on protocols 08-091 and 08-092; copies of various IACUC protocols and associated documentation; phone records for (402) 559-5322 on September 19, 2009; and tapes of conversations involving UNMC personnel occurring on September 19, 2009, December 23, 2009, and December 29, 2009.

Mr. Spellman responded to your request by e-mailing your attorney, Daniel T. Hoarty, on January 25, 2010. Mr. Spellman indicated that records relating to "medical and research records, IACUC protocols, IBC protocols and specific training documentation," among others, were being withheld pursuant to the exception found in Neb. Rev. Stat. § 84-712.05(3) ("academic and scientific research work that is in progress and unpublished"). Mr. Spellman also indicated that documentation pertaining to swipe card access to all rooms in which the nonhuman primates were located was being withheld under Neb. Rev. Stat. § 84-712.05(8) ("protection of the security of the public property and persons on or within public property"). He further indicated that the UNMC did not have custody of any tapes of conversations nor was he able to identify two of the individuals (Brianna and Sheila) referenced in your request. Finally, Mr. Spellman attached copies of records which were in the custody of the UNMC and responsive to your request, namely, the general description of the UNMC's "environmental enrichment program for nonhuman primates"; the safety policy for handling and caring for nonhuman primates; and phone records for (402) 559-5322 on September 19, 2009.

Later on January 25, you e-mailed Dr. Prentice an amended request for records. Your amended request sought:

1. Documentation for all outgoing and incoming phone calls from all phone numbers in Durham Research Center 3020 on 19-SEP-2009

---

[1] For your information, the Freedom of Information Act is a federal law, codified at 5 USC § 552, which generally provides that any person has the right to request access to federal agency records or information. Its application in this context, i.e., requesting records from a state agency, is improper.

2. Documentation of all pages received by page number (402) 888-2742 on 19-SEP-2009

3. UNMODIFIED Safety Policies and Procedures for Handling and Caring for Nonhuman Primates Housed at UNMC utilized to train personnel between 15-JUN-2009 and 13-OCT-2009

You reiterated your requests for medical records and environmental enrichment logs. However, you indicated that the records should be "prior to inoculation with SIV or MPTP (which would serve as the initiation of 'research in progress,' which may or may not be considered exempt per the current version of 84-712.05)." You also requested "Operational Safety Protocols" in lieu of IACUC protocols. You also reiterated your request for documentation relating to swipe card access to the nonhuman primate rooms, asserting that this information does not fall within the parameters of § 84-712.05(8). You also asserted that the date and time an unnamed individual enters a room endangers neither the safety of the public nor the nonhuman primates.

You concluded by stating:

> None of the requested documents would release information regarding scientific research in progress, nor would the release of said documents give advantage to business competitors. Therefore, requested documents do not meet the criteria for exemption per the current version of 84-712.05.

In his February 1, 2010, response to your amended request, Mr. Spellman indicated that no records were identified in response to your request no. 1 above, and that the UNMC had no records in its possession relating to pager number (402) 888-2742. Mr. Spellman did attach a copy of the UNMC's "Safety Policy and Procedures for Handling and Caring for Nonhuman Primates Housed at UNMC," dated February 4, 2008. With respect to the "medical and research records, the environmental enrichment records and logs, operational safety protocols, and occupational health and safety procedures related to the care and use of nonhuman primates," and documentation pertaining to the swipe card access, Mr. Spellman indicated that those records would continue to be withheld under the appropriate exceptions set out in Neb. Rev. Stat. § 84-712.05.

ANALYSIS

We will begin by discussing the basic parameters of 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. Even though the Nebraska Public Records Statutes do provide for access to public documents, they are not absolute, and they also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). Section 84-712.05 is comprised of eighteen categories of documents which may be kept confidential from the public at the discretion of the agency involved. In the present case, the UNMC has claimed the exceptions set out in subsections (3) and (8) as its basis for denying you access to certain records. We will discuss each of the claimed exceptions in detail below.

A. Academic and Scientific Research in Progress and Unpublished Exception

Neb. Rev. Stat. 84-712.05 provides, in relevant 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:
>
> (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 . . . .

In your amended request, you take the position that inoculating the nonhuman primates with SIV or MPTP is the "initiation of 'research in progress'" and, therefore, any records pertaining to the nonhuman primates prior to that point does not fall within the exception and should be disclosed. In response, the UNMC informs us that

> [t]he nonhuman primates are purchased by UNMC using grant funds awarded for research projects. Such nonhuman primates are "research animals" from the moment the animals arrive on campus and are placed in quarantine under specific IACUC approved research protocols. The nonhuman primates are housed and cared for by UNMC employees in the animal research facility area of Comparative Medicine at UNMC. Therefore, any records related to the nonhuman primates which are generated during quarantine and thereafter, are considered by UNMC to be an integral part of the "research in progress."

We are unaware of any Nebraska cases that discuss the research exclusion set out above. However, we find guidance in an Indiana case cited by the UNMC, *Robinson v. Indiana University, et al.*, 659 N.E.2d 153 (1995). In *Robinson*, the Indiana Court of Appeals was asked to determine whether completed IACUC records, which were submitted to two university committees for review, and any references to research projects appearing in the meeting minutes of those committees, were exempt from disclosure under the Indiana Public Records Act. *Id.* at 155.

In its analysis, the court discussed a factually similar case from North Carolina, *S.E.T.A. UNC-CH, Inc. v. Huffines*, 101 N.C.App. 292, 399 S.E.2d 340 (1991). In *S.E.T.A. UNC-CH*, a student organization sought access to various IACUC records, but the committee chair refused to provide the records for particular experiments. The North Carolina Court of Appeals held that the records must be disclosed, but required redaction of information that could be patented or would lead to the identification of researchers and staff. *Id.* at 156. In distinguishing the *S.E.T.A.* case from its own, the *Robinson* court stated:

> There is a critical distinction between the present case and *S.E.T.A.* which dictates against following North Carolina's precedent: North Carolina's Public Records Act does not contain a concerning research exception. Indiana's inclusion of the concerning research exception, in addition to a trade secret exception, see IC 5-14-3-4(a)(4), indicates the legislature's intent to extend nondisclosure to a larger number of records. Some records may not be of a proprietary nature so as to constitute a trade secret, but may be of a scientific or experimental nature so as to concern research. The latter category of documents would fall into the concerning research exception, and, thus, would not be subject to disclosure.

Id. at 156-57. The *Robinson* court concluded its analysis by stating:

> We agree with the trial court's determination that the information sought by the research applications was "information concerning research conducted by [or] under the auspices of Indiana University." . . . The application seeks information about the researcher, the nature of the proposed or ongoing research project, and procedures to be employed throughout the project. **The sole subject matter of the application is a research project and related personnel and procedures. Even in the narrowest sense, the information sought by the application concerns research. As such, it was not subject to disclosure under the Public Records Act.**

Id. at 158.

The Nebraska Public Records Statutes, like the Indiana law, contains both a trade secret and a research exclusion. The scant legislative history pertaining to the research exception indicates that the words "academic and scientific" were added before "research" "in order to identify those things that the *University* might be working on, those research and studies that might be going forward that truly are not in the interest of the public to have them disclosed." Floor Debate on LB 86, 86th Neb. Leg, 1st Sess. 5214 (May 11, 1979) (Statement of Sen. Murphy) (emphasis added). In the present case, the UNMC has represented to us that the nonhuman primates are purchased with research grant funds and are considered research animals the moment they arrive on campus and are placed in quarantine. The animals are housed in the animal research facility area at the UNMC. Clearly, the nonhuman primates are an integral part of research being performed by the UNMC. It seems to us then that *any* information pertaining to these animals, regardless of when they are inoculated with SIV or MPTP, would be considered research. As such, we believe that those records may lawfully be withheld by the UNMC under § 84-712.05(3).

Moreover, the *Robinson* case illustrates why the Supplemental Documentation is of little value in resolving this issue. In *Robinson*, the court found that the *S.E.T.A. UNC-CH* case had no precedential value because the North Carolina Public Records Act *did not have a research exception.* The same is true here. Without disclosing the state involved, we have reviewed its public records law and found no research exception. The information practices coordinator [initials LT] at the particular institution referenced in the Supplemental Documentation confirmed our findings. Clearly, the institution released these documents because it had a legal obligation to do so, not because they did not constitute research. The fact that this particular institution disclosed the documents you seek does not compel us to require the UNMC to do the same.

B. Security Records Exception

The University relies on the "security records" exception set out in Neb. Rev. Stat. § 84-712.05(8) to withhold the requested records relating to the swipe card access. This subsection provides, in relevant part:

> Information solely pertaining to protection of the security of public property and persons on or within public property, such as specific, unique vulnerability assessments or specific, unique response plans, either of which is intended to prevent or mitigate criminal acts the public disclosure of which would create a substantial likelihood of endangering public safety or property; computer or communications network schema, passwords, and user identification names; guard schedules; or lock combinations;

To support its reliance on subsection (8), the UNMC advises us that

> regardless of whether codes are generated for individual names of personnel and rooms, as the Petitioner requests, the nondisclosure of such records is necessary for the protection of both public property and persons on or within public property. The UNMC research animal facilities include animal housing, surgical suites, prep areas and laboratories that are located on the UNMC campus and maintained with UNMC funding. The portion of the records request seeking "documentation for all swipe care access to all rooms that the nonhuman primates have been located" would create a substantial likelihood of endangering the safety of public property including risk of contamination, associated health hazards and compromise of the University of Nebraska Center for Biosecurity.

This office has previously addressed whether card access records may be withheld at the discretion of the public body under the exception set out above. In this instance, purported adversaries of a Douglas County judge requested this information ostensibly to establish how many hours the judge actually spent at the courthouse. The custodian of the records withheld the records pursuant to subsection (8) and, upon review, we agreed with that decision. We concluded that disclosure of these particular records could potentially expose the judge to unwanted contact and harassment to the extent individuals could use the information to establish his schedule and whereabouts at any given time of day.

The UNMC has made a similar argument with respect to its facilities and personnel. It seems to us that disclosing swipe card access information could potentially compromise the security of the UNMC facilities and the protection of the UNMC staff. Moreover, we are aware that research on animals is a controversial issue, and that certain groups have targeted research institutions using a variety of legal and illegal tactics. As a result, we find that the exception to disclosure under Neb. Rev. Stat. § 84-712.05(8) does apply to the present case, and the UNMC may lawfully withhold documents relating to swipe card access documentation.

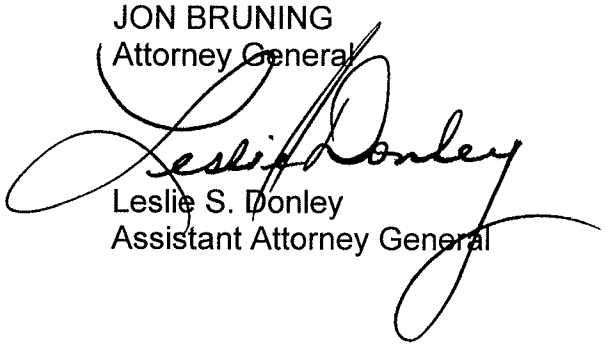
CONCLUSION

For the reasons explained above, we believe that the requested documents belonging to the University of Nebraska Medical Center may be kept confidential under § 84-712.05 (3) and (8). We further believe that the University of Nebraska Medical Center did not unlawfully deny your records requests, and that no further action by this office is warranted. Accordingly, 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

cc: Richard A. Spellman
Associate General Counsel

49-488-20