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JON BRUNING
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March 26, 2014

Bruce R. Friedman
1232 South 118th Street
Omaha, NE 68144

RE: *File No. 14-R-108; Nebraska Supreme Court; Bruce R. Friedman, Petitioner*

Dear Mr. Friedman:

We are writing in response to your correspondence received by this office on March 11, 2014, in which you allege that the Nebraska Supreme Court ("NSC") and Janice Walker, Supreme Court Administrator, have failed to comply with the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2012, Supp. 2013) ("NPRS"). Specifically, you indicate that you are "hereby formally petitioning [our] office to review, publish an opinion on, and issue an order requiring strict compliance with Neb. Rev. Stat. § 84-712."[1] We considered your correspondence to be a petition under § 84-712.03 of the NPRS. Our findings in this matter are set forth below.

Before we begin, we note that you state in your petition "[t]he records sought under Neb. Rev. Stat. § 84-712 are hereto attached as: Exhibit 'A' – Open Records Request – 1-29-2014.pdf [and] Exhibit 'B' - 021314 Friedman.pdf . . . ." As you know, this correspondence constituted the underlying documents to your first petition to this office, designated File No. 14-R-105, which we fully disposed of by letter to you dated February 21, 2014. We do not reconsider our dispositions on these matters once issued and the statute does not contemplate that we do so. Moreover, your inclusion of these documents to your petition seems to completely ignore the fact that you received the bulk of your records request from the NSC on February 13. In any event, this

[1] We have previously advised you that opinions of the Attorney General are prepared in response to a specific legal question from a state agency or state official in instances where that agency or official has need of a legal opinion in the performance of their duties. We have no statutory authority to provide opinions to private individuals, and we do not do so.

disposition letter will only address whether the NSC and Ms. Walker complied with the Nebraska Public Records Statutes with respect to your public records request dated February 7, 2014, designated in your petition as "Exhibit 'C.'"

FACTS

On February 7, 2014, you e-mailed and faxed your request for records to Ms. Walker. In your request letter, you sought "access to and a copy of certain public information and data" pertaining to thirty-two separate items. For example, the records sought under item no. 1 involved:

> Any documents, correspondence, contracts, emails or other communications in your custody ***requesting bulk distribution of court records*** in your custody.

(Emphasis in original.) Item no. 14 involved:

> Any documents, correspondence, contracts, emails or other communications in your custody ***which identifies the metadata fields applied to and or contained within*** the Case Management System (CMS) commonly known and referred to as Justice for the years 2012 through the date of this request.

(Emphasis in original.) The other thirty items were similarly structured. In your request letter, you indicated that you

> agree[d] to pay any reasonable cost of making the copies available if not more than $100.00. If the cost would be greater than this amount, please notify me immediately and please provide an estimate indicating the charges for each document requested.

Ms. Walker timely responded by e-mail and U.S. mail on February 13, 2014. Ms. Walker indicated that "due to the extensive nature of your request," her office could not fulfill your request within the statutory deadline. Ms. Walker estimated "that the earliest practicable date for fulfilling your request, or otherwise responding to such request, would be no later than 30 days from the date of your response to this correspondence, along with receipt of the deposit as outlined further below." She requested a deposit of $500, which reflected one-half of the estimated copy costs and the calculated staff time necessary to produce the records. Ms. Walker further advised:

> Because we cannot fulfill your request within four business days after receipt of the request due to significant difficulty or the extensiveness of the request, under Neb. Rev. Stat. § 84-712(4), you have the opportunity

> to modify or prioritize the items within your request. You shall have ten business days to review the estimated costs, and inform us of how you wish to proceed. If you do not respond within ten days, including making the total deposit of $500, payable to the Nebraska Supreme Court, we shall not proceed to fulfill the request.

You responded to Ms. Walker the same day. You generally disputed Ms. Walker's calculations relating to the record production, but nonetheless indicated that you would hand deliver *$550*, i.e., the full estimated copy costs and one-half of the staff time, to her office the following day "to expedite the process." In this regard, you indicated: "This in no way means that I agree with or acquiesce to your methods proposed, estimates of time and expense, to the contrary, I object at the strongest levels to your overriding my rights." In addition, you also asserted that the "law entitles me to access to the records FIRST, and copy with my own equipment if I am able, and I am. You have decided to unilaterally remove those portions of the law from your response." You stated that you would be filing a petition with this office over the way Ms. Walker's office handled your request.

On March 7, 2014, via e-mail and U.S. Mail, Ms. Walker responded to your request. We have summarized the contents of her letter as follows:

1. Due to the volume of records being produced, even in electronic format, records were placed on a CD-R, which will be mailed to you.

2. Records will not be e-mailed to you, and no paper copies were produced; therefore, copying charges will not apply.

3. Staff time to fulfill your public records request totaled fourteen hours. Deducting the first four hours as required under Neb. Rev. Stat. § 84-712(3)(c), the final amount is $250. As a result, you will be refunded $300. Directions with respect to securing your refund were explained.

4. With respect to items numbered 5, 8, 9, 10, 14, 19, 20, 21, 24, 26, 27, 28, 29, 31, and 32, there were no responsive records.

5. Records responsive to items numbered 15, 16, 17, and 22, were withheld under the exception set out in Neb. Rev. Stat. § 84-712.05(8).

6. Records relating to items numbered 11, 12, and 13, are available on the Supreme Court's website. Specific links and instructions were provided.

7. Advised you regarding reasonable access to the Internet and copies as set out in Neb. Rev. Stat. § 84-712(3)(c).

8. With respect to items numbered 1, 2, 3, 4, 6, 7, 25, and 30, records were placed on the aforementioned CD-R, with instructions.

9. With respect to any e-mails and correspondence which are internal among court staff, those records were being withheld based on language in Op. Att'y Gen. No. 04030, which suggests that a court has supervisory power over its own records.

10. Finally, you were advised of your right to review under Neb. Rev. Stat. § 84-712.03.

DISCUSSION

Your petition asks us "to review, publish an opinion on, and issue an order requiring strict compliance with the Neb. Rev. Stat. § 84-712." You then indicate that Ms. Walker, as custodian of the records at issue, "has failed to abide by § 84-712." However, your petition does not specify in what manner Ms. Walker failed to comply with § 84-712, or any other provision of the NPRS. Since § 84-712.03 requires us "to determine whether a record may be withheld from public inspection or whether the public body that is custodian of such record has otherwise failed to comply with such sections," we will briefly examine whether withholding records relating to items numbered 15, 16, 17, and 22, and certain e-mail communications was appropriate.

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 NSC and Ms. Walker have claimed the exception set out in subsection (8) of Neb. Rev. Stat. § 84-712.05 as its basis for denying you access to records pertaining to item numbers 15, 16, 17, and 22. These items involve documents, correspondence, contracts, etc., which identify the *field names* [No. 15], the *data structure* [No. 16], the *file structure* [No. 17], and the *data design* [No. 22] of the JUSTICE system, for the years 2007 through the date of your request. The exception in subsection (8) 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:

> (8) 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; lock combinations; or public utility infrastructure specifications or design drawings the public disclosure of which would create a substantial likelihood of endangering public safety or property, unless otherwise provided by state or federal law;

(Emphasis added.) In relying on subsection (8), it appears to us that the NSC and Ms. Walker have determined that disclosing records relating to the field names, data structure, file structure, and the data design of JUSTICE could potentially compromise the integrity and security of the system. We agree. As a result, we find that the exception to disclosure under Neb. Rev. Stat. § 84-712.05(8) applies to the present case, and the NSC may lawfully withhold any responsive documents.

We also agree that certain e-mails of and belonging to the NSC may be withheld from public disclosure. In Attorney General Opinion No. 04030 (December 27, 2004), we addressed whether certain judicial records, i.e., briefs and legal memoranda, were public records. We concluded that there was both a common-law right for members of the public to access briefs and legal memoranda in Nebraska, and a statutory basis to access judicial records.[2] However, we also indicated that courts may take the position that any obligation which they have to produce records under the Nebraska Public Records Statutes, including briefs and legal memoranda, is subject to the courts' supervisory power over their own records and files. *Id.* at 4. In the present instance, it appears that the NSC has asserted its supervisory control over the records at issue, and has determined that e-mails will not be released. We believe this action is consistent with Op. Att'y Gen. No. 04030, and the legal authorities cited therein.

CONCLUSION

Based on our review, there is nothing to support your assertions that the NSC and Ms. Walker failed to comply with the NPRS. To the extent possible, Ms. Walker and the NSC provided you with records responsive to your thirty-two requests. We also believe that certain documents belonging to the Nebraska Supreme Court may be kept confidential under the exception set out in § 84-712.05(8), and in accordance with Op.

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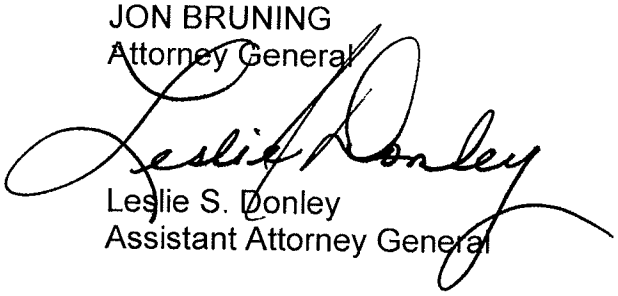
[2] *See State v. Cribbs*, 237 Neb. 947 (1991); Neb. Rev. Stat. §§ 84-712 and 84-712.01 (2008, Supp. 2013).

Att'y Gen. No. 04030, as it relates to the supervisory powers of the courts over their own records. We further believe that the NSC's request for a deposit, and the amount of the deposit, was not unreasonable given the scope and size of your request. Consequently, since we conclude that NSC and Ms. Walker did not unlawfully deny you access to public records, 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 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

c: Janice Walker
Terri Brown

49-1096-30