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January 29, 2016

Stan Jones
33792 Hwy 34
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RE: *File No. 16-R-101; Dundy County-Stratton Public Schools; Stan Jones, Petitioner*

Dear Mr. Jones:

We are writing in response to your correspondence submitted to us on January 7, 2016, via the Attorney General Constituent Complaint Form, in which you requested our assistance in obtaining certain public records belonging to the Dundy County-Stratton Public Schools ("Dundy County").[1] As is our normal practice with such requests, we contacted the party against whom the complaint was made. In this case, we contacted attorney Kelley Baker, of the Perry Guthery law firm, and advised him of the opportunity to respond to any allegations raised in your petition. On January 26, 2016, we received Mr. Baker's response on behalf of Dundy County. We have now concluded our analysis and have fully considered your petition for access to records as well as Dundy County's response. Our review was conducted in accordance with Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS"). Our findings in this matter are set forth below.

RELEVANT FACTS

Our understanding of the facts in this matter is based on your petition and the response we received from Mr. Baker.

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1 For the record, this office initially declined to prosecute your petition since you had not requested the public records at issue and, therefore, had not been denied access to them—a necessary element for relief under Neb. Rev. Stat. § 84-712.03. However, by email sent to the undersigned on January 12, 2016, you clarified that your attorney, Ashley Spahn, made the request on your behalf. Ms. Spahn confirmed this information by email sent to the undersigned on January 14, 2016.

Sometime on or around December 18, 2015, Ms. Spahn submitted a public records request to Dundy County, c/o Superintendent Jim Kent. The request stated:

> I am writing to you on behalf of a concerned client and Dundy County tax payer who would like to formally request a copy of the following: a copy of the investigation report of the hostile work environment complaint in 2014 and any and all committee recommendations, internal or otherwise, following said investigation.
>
> We are of the opinion that any and all investigations or further actions paid for by public funds should be accessible to the tax payer. . . .

Mr. Baker denied Ms. Spahn's request by letter dated December 29, 2015.[2] In his denial letter, Mr. Baker indicated that the requested records were confidential under express language in Neb. Rev. Stat. § 79-8,109 (2014). Mr. Baker further indicated that the requested records were exempt from disclosure pursuant to subsection (7) of Neb. Rev. Stat. § 84-712.05 of the NPRS. With respect to Ms. Spahn's contention that the taxpayer should have access to the requested records because they were paid for with public funds, Mr. Baker stated that such "logic would render meaningless the statutes cited above regarding the confidentiality of certain documents." Mr. Baker advised Ms. Spahn of the remedies available to her under Neb. Rev. Stat. § 84-712.03.

In your petition to this office, you repeated your claim that because, to the best of your knowledge, the investigation was paid for with tax dollars, it should be public information. You further contend that Mr. Baker also serves as Mr. Kent's private attorney and, as such, a conflict of interest exists "as the report is for his appropriate behavior in the work place."[3]

In his response to this office, Mr. Baker indicates that during a special school board meeting in July 2014, the board received a written complaint regarding the conduct of Superintendent Kent. Mr. Baker states that "[t]he board has treated the complaint as a confidential personnel matter . . . and has not conducted any open or public discussions of the complaint, the investigation of the complaint, or recommendations about it." His response included minutes for the July 7, 2014, July 14, 2014, and the September 8, 2014, board meetings, demonstrating the board's handling of the complaint in closed session. In his conclusion, Mr. Baker states that "[t]he Dundy County Board of Education

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2 We note that there is some discrepancy with respect to the actual date of the request. We received an unsigned copy of the request with the date "December 18," but Mr. Baker refers to Ms. Spahn's letter "dated December 21."

3 Whether a conflict of interest exists under these circumstances is outside the scope of our review under Neb. Rev. Stat. § 84-712.03, and we did not consider it in our analysis.

has treated the complaint, its investigation, and the report of the investigation as a confidential personnel matter which it is statutorily prohibit[ed] from disclosing."

DISCUSSION

The basic rule for access to public records in Nebraska is found at Neb. Rev. Stat. § 84-712 of the Nebraska Public Records Statutes. That statute provides, in pertinent part:

> *Except as otherwise expressly provided by statute*, all citizens of this state and all other persons interested in the examination of the public records as defined in section 84-712.01 are hereby fully empowered and authorized to (a) examine such records, and make memoranda, copies using their own copying or photocopying equipment in accordance with subsection (2) of this section, and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business and (b) except if federal copyright law otherwise provides, obtain copies of public records in accordance with subsection (3) of this section during the hours the respective offices may be kept open for the ordinary transaction of business. (Emphasis added).

"Public records" are defined as follows:

> *Except 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, 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.

Neb. Rev. Stat. § 84-712.01(1) (2014) (emphasis added).

Section 84-712 expressly provides that the right to examine or obtain copies of public records exists "[e]xcept as otherwise provided by statute." The definition of "public records" in § 84-712.01(1) provides an exception from that definition "when any other statute expressly provides that particular information or records shall not be made public . . . ." Thus, where records requested under the NPRS are excepted from disclosure by statute, <u>there is no right of access</u>.

In the present case, Dundy County relies on Neb. Rev. Stat. § 79-8,109 (2014) as one basis to deny you access to the requested records. That statute provides:

> Any teacher, administrator, or full-time employee of any public school district shall, upon his or her request, have access to his or her personnel file maintained by the district and shall have the right to attach a written response to any item in such file. Such teacher, administrator, or employee may in writing authorize any other person to have access to such file, which authorization shall be honored by the district. Such access and right to attach a written response shall not be granted with respect to any letters of recommendation solicited by the employer which appear in the personnel file. *No other person except school officials while engaged in their professional duties shall be granted access to such file, and the contents thereof shall not be divulged in any manner to any unauthorized person.*

(Emphasis added.) Dundy County, through its counsel, has represented to this office that the school board treated the complaint against Superintendent Kent as a confidential personnel matter, and that any records pertaining to the investigation are part of his personnel file. As a result, it appears to us that, under § 79-8,109, Dundy County is precluded from divulging the contents of Dr. Kent's file to any person not authorized to receive it.

While the Nebraska Public Records Statutes provide citizens and other interested persons access to public documents, those statutes are not absolute. The NPRS also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). Neb. Rev. Stat. § 84-712.05 contains eighteen categories of documents which may be kept confidential from the public at the discretion of the public body involved. In the present case, Dundy County relies on the exception in Neb. Rev. Stat. § 84-712.05(7) as another basis to withhold the requested 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:
>
> (7) Personal information in records regarding personnel of public bodies other than salaries and routine directory information; . . . .

In Nebraska, in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

Swift and Company v. Nebraska Department of Revenue, 278 Neb. 763, 773 N.W.2d 381 (2009). The plain and ordinary reading of § 84-712.05(7) indicates that public bodies may lawfully withhold personal information regarding its personnel, except for salary and routine directory information (i.e., name, job title, date of hire and separation, etc.). In the present case, Dr. Kent is an employee of Dundy County and the records at issue constitute personal information and do not implicate salary and directory information. Thus, we believe that the records at issue fall squarely within the claimed exception.

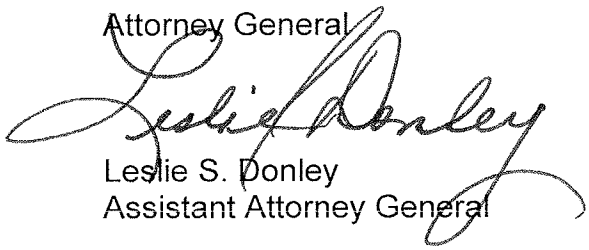
CONCLUSION

For the reasons explained above, we believe that any records relating to the 2014 investigation of Superintendent Kent belonging to Dundy County-Stratton Public Schools are confidential under Neb. Rev. Stat. § 79-8,109, and may be lawfully withheld under Neb. Rev. Stat. § 84-712.05(7). Consequently, we conclude that Dundy County did not unlawfully deny your records request, and that no further action by this office is warranted. Accordingly, we are closing this file.

If you disagree with the analysis we have set out above, you may wish to consider what additional remedies may be available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Kelley Baker
Ashley Spahn

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