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February 8, 2016

Jon Bruning
Bruning Law Group, LLC
1201 Lincoln Mall, Suite 100
Lincoln, NE 68508

RE: *File No. 15-R-152; Nebraska Department of Health and Human Services; Home Depot, Petitioner*

Dear Mr. Bruning:

We are writing in response to your petition dated December 10, 2015, and received by this office on December 14, 2015, in which you requested our assistance in obtaining certain public records belonging to the Nebraska Department of Health and Human Services ("DHHS"). As is our normal practice with such requests, we contacted the party against whom the complaint was made. In this case, we contacted DHHS Agency Counsel Brad Gianakos, and advised him of the opportunity to respond to any allegations raised in your petition. On December 17, 2015, Mr. Gianakos advised the undersigned that DHHS was unaware of any additional information that would be helpful to our analysis, but would provide us any information upon request. On December 29, 2015, we wrote to you indicating that we had conducted a preliminary investigation of your petition, and it appeared that DHHS had properly withheld the requested records. However, we indicated that our response would be delayed so that we could further analyze the issues. In this regard, we requested and received additional information from DHHS with respect to the petition and the records at issue. We have now completed our analysis and have fully considered your petition for access to records as well as the agency's denial to withhold the requested records. 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

On October 16, 2015, Home Depot filed a complaint with DHHS. The complaint involved a series of events involving a flu shot clinic held for Home Depot employees on October 8, 2015 at a store in Papillion, Nebraska. The clinic was conducted by Provant

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Health Solutions, LLC ("Provant"). Provant assigned "J.U." to administer the flu vaccine, which Provant had shipped to J.U.'s home prior to the event. With the understanding that the syringes provided for the event were preloaded with flu vaccine, J.U. administered shots to thirty Home Depot employees. Later that evening, J.U. discovered that the flu vaccine vials provided by Provant were in his freezer, with the contents frozen. J.U. then notified Provant that the individuals who received shots during the October 8, 2015 clinic did not receive flu vaccine since he believed the syringes were preloaded.

Home Depot notified its employees upon learning the facts surrounding the flu clinic. DHHS and Dr. Safranek investigated the flu clinic in response to Home Depot's complaint. On November 2, 2015, Thomas E. Best, Home Depot's Associate General Counsel, sent an email to DHHS Legal Counsel Brad Gianakos. Mr. Best's email set out a series of questions relating to the event, and also made the following request:

> Jon [Bruning] has indicated that Dr. Safranek may be preparing a report. I would like to formally request a copy of that report, but if possible to avoid delay while the report is being typed and reviewed, I would request that the contents of the report be discussed in a conference call as soon as possible.

Mr. Gianakos responded to Mr. Best's request by email on November 18, 2015, stating: "Thank you for your inquiry. Please be advised that DHHS is prohibited by Nebraska Revised Statutes § 38-1,106 from providing the information you have requested."[1] The next day, Mr. Gianakos sent an email to Mr. Best, with a copy to you, as follows:

> *Tom/Jon:*
>
> *I am authorized to share the following additional information with you:*
>
> *If, during any epidemiological investigation, DHHS identifies a risk to individuals, it would notify the individuals or their care providers. If an individual or their care provider has not received such notice that would indicate that DHHS has not identified any such risk.*
>
> *I hope this information is helpful.*

Later that day (November 19, 2015), Mr. Bruning sent another public records request to Mr. Gianakos, as follows:

> Please consider this email a formal public records request under Nebraska law for any and all records in your possession referring to [J.U.] and the

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[1] It appears that DHHS did not treat Mr. Best's email as a public records request, which requires a response from the public body four business days after actual receipt of the request.

> Home Depot flu clinic he conducted in October on behalf of Provant. This includes the report put together by Dr. Safranek. We will pay associated costs.

Carmen Bachle, a DHHS paralegal, responded to the second public records request on November 20. Ms. Bachle indicated that records responsive to the November 19, 2015, records request were enclosed. However, certain records ("investigative records and associated correspondence") were being withheld pursuant to Neb. Rev. Stat. § 38-1,106.

In your petition, you argue that the statutory basis for withholding the requested records—§ 38-1,106—is part of the Nebraska Uniform Credentialing Act ("UCA"), and that "[t]he scope of the UCA is limited to the licensing and credentialing of health service providers." You allege that the UCA does not contemplate withholding information relating to the general health and well-being of Nebraska citizens. You further assert that the public records requests made by Home Depot do not relate to any disciplinary matter involving [J.U.], but rather relate to "provid[ing] clarity and . . . peace of mind to its associates."

In the course of our review, we were able to determine that the report at issue had not been made a part of the credentialing/disciplinary file. Based on this information, on December 30, 2015, the undersigned requested the following information from DHHS:

> 1. Any responsive records provided to Jon Bruning per the email from Carmen Bachle to Jon Bruning, dated November 20, 2015;
>
> 2. A confirmation that the Safranek report did in fact exist since no such report was contained in the completed credentialing/disciplinary file; and
>
> 3. Information as to who had possession of the report, if in fact it existed, and the statutory basis to withhold it.

We received DHHS's response on January 15. With respect to question no. 1, it appears that DHHS produced only the email string involving you, Mr. Best and Mr. Gianakos referenced on page 2 above. In response to question no. 2, DHHS confirmed that Dr. Safranek conducted an investigation and prepared a written report. As to question no. 3, DHHS stated that the report at issue belongs to the DHHS Division of Public Health, Office of Epidemiology, and is confidential under Neb. Rev. Stat. § 71-503.01. In addition, DHHS asserted that after having reviewed both the epidemiological investigatory report and the credentialing/disciplinary investigatory report, the "former contains a significant amount of factual information that also appears in the latter, thus

we contend that the epidemiological investigatory report is protected under § 38-1,106 as well as § 71-503.01."

DISCUSSION

The basic rule for open 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, in those instances where records requested under the NPRS are excepted from disclosure by statute, there is no right of access. The burden of showing that a statutory exception applies to disclosure of 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, DHHS initially claimed it was withholding the investigative report under Neb. Rev. Stat. § 38-1,106 (2008). That statute provides, in pertinent part:

> (1) Reports under sections 38-1,129 to 38-1,136, complaints, and investigational records of the department shall not be public records, shall not be subject to subpoena or discovery, and shall be inadmissible in evidence in any legal proceeding of any kind or character except a contested case before the department. Such reports, complaints, or records shall be a public record if made part of the record of a contested case before the department. No person, including, but not limited to, department employees and members of a board, having access to such reports, complaints, or investigational records shall disclose such information in violation of this section, except that the department may exchange such information with law enforcement and other state licensing agencies as necessary and appropriate in the discharge of the department's duties and only under circumstances to ensure against unauthorized access to such information. Violation of this subsection is a Class I misdemeanor.

The documentation referenced in § 38-1,106 refers to the investigational report compiled for the purposes of disciplining a credential holder. In that regard, Neb. Rev. Stat. § 38-1,105 (2008), provides, in pertinent part:

> (1) The department shall advise the appropriate board on the progress of investigations. . . .
>
> (2) When the department determines that an investigation is complete, the department shall consult with the board to obtain its recommendation for submission to the Attorney General. In making a recommendation, the board may review all investigative reports and have full access to the investigational file of the department and any previous investigational information in the files of the department on the credential holder that may be relevant to the investigation, except that (a) reports or other documents of any law enforcement agency provided to the department shall not be available for board review except to the extent such law enforcement agency gives permission for release to the board and (b) reports provided by any other agency or public or private entity, which reports are confidential in that agency's or entity's possession and are provided with the express expectation that the report will not be disclosed, may be withheld from board review.

> (3) The recommendation of the board shall be made part of the completed investigational report of the department and submitted to the Attorney General.

DHHS argues that § 38-1,106 is applicable because the requested report "contains a significant amount of factual information that also appears in the [completed investigational report]." There is little question that significant overlap exists between the completed investigational file and the investigatory report since each relates to the same incident. However, that fact does not mean that the investigatory report may be withheld under § 38-1,106, when it was not made part of the completed investigational file, a fact DHHS concedes in its response to this office dated January 15, 2016. As a result, § 38-1,106 does not provide DHHS a basis to withhold the investigatory report at issue here.

The second statute relied on by DHHS to withhold the requested report—Neb. Rev. Stat. § 71-503.01 (Cum. Supp. 2014)—states, in pertinent part:

> (1) Whenever any statute of the state, any ordinance or resolution of a municipal corporation or political subdivision enacted pursuant to statute, or any rule or regulation of an administrative agency adopted and promulgated pursuant to statute allows medical practitioners or other persons to prescribe, provide, or dispense prescription drugs pursuant to sections 71-503.02 and 71-503.03 or requires medical practitioners or other persons to report cases of communicable diseases, including sexually transmitted diseases and other reportable diseases, illnesses, or poisonings or to give notification of positive laboratory findings to the Department of Health and Human Services or any county or city board of health, local public health department established pursuant to sections 71-1626 to 71-1636, city health department, local health agency, or state or local public official exercising the duties and responsibilities of any board of health or health department, such reports or notifications and the resulting investigations and such prescription, provision, or dispensing of prescription drugs and records pertaining thereto shall be confidential except as provided in this section, shall not be subject to subpoena, and shall be privileged and inadmissible in evidence in any legal proceeding of any kind or character and shall not be disclosed to any other department or agency of the State of Nebraska.

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 § 71-503.01 indicates that whenever a provision

of law requires a medical practitioner or other individual to report or notify DHHS or other public health entity with respect to (1) providing prescription drugs to treat cases of chlamydia or gonorrhea or (2) cases or positive lab findings of communicable diseases, including sexually transmitted diseases ("STD"), illnesses or poisonings, those reports or notifications shall be confidential, not subject to subpoena, and privileged. The statute goes on to provide that DHHS, et al. may disclose such reports and notifications to the Centers for Disease Control and Prevention and other state and local health departments for the protection of public health. We further note that DHHS has specifically defined "communicable disease, illness, or poisoning" to "mean[] an illness due to an infectious or malignant agent, which is capable of being transmitted directly or indirectly to a person from an infected person or animal through the agency of an intermediate animal, host, or vector, or through the inanimate environment." Title 173 *Nebraska Administrative Code*, Ch. 1, § 1-002 (effective date May 11, 2010).

By all accounts, Dr. Safranek's investigation centered on the flu shot clinic on October 8, 2015, and what substance, if any, may have been contained in the flu syringes. We have been provided no information establishing that the investigatory report at issue involves a communicable disease, STD, illness or poisoning. No individual became ill or was poisoned. Absent such information, we believe disclosure is warranted. Moreover, we are not persuaded by arguments made by DHHS that since the investigation *could* have identified an illness or poisoning, the report may be withheld under § 71-503.01. Based on the plain language of the statute, we do not believe the investigatory report at issue here constitutes a report or notification that may be kept confidential under § 71-503.01.

CONCLUSION

For the reasons stated above, we conclude that DHHS has not met its burden to show that Neb. Rev. Stat. § 38-1,106 and/or Neb. Rev. Stat. § 71-503.01 applies to the report at issue. Since we believe that neither statute provides a basis to withhold the requested report, we will direct the Department of Health and Human Services, by

sending a copy of this disposition letter to Mr. Gianakos, to provide you a copy of Dr. Safranek's investigatory report at its earliest opportunity.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

Leslie S. Donley
Assistant Attorney General

c: Brad Gianakos
DHHS Agency Counsel

49-1518-29