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May 24, 2017

Steven M. Jacob
P.O. Box 2500-41659
Lincoln, NE 68542-2500

RE: *File No. 17-R-126; Department of Health and Human Services; Steven M. Jacob, Petitioner*

Dear Mr. Jacob:

This letter is in response to your correspondence received by this office on May 9, 2017, in which you sought our assistance in obtaining certain records from the Nebraska Department of Health and Human Services ("DHHS"). When we receive petitions of this nature, our normal practice is to contact the entity involved and advise it of the opportunity to provide a response to this office. In the present case, we contacted the individual named in your petition, Dr. Ming Qu, Administrator, DHHS Epidemiology & Informatics, and advised him of your petition and the opportunity to respond. On May 17, 2017, we received correspondence from Deputy Director Jenifer Roberts-Johnson, DHHS Division of Public Health, who responded on behalf of the agency. We have construed your correspondence to be a petition for review under Neb. Rev. Stat. § 84-712.03 of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2016) ("NPRS"). Our findings in this matter are set forth below.

FACTS

According to your petition, sometime on or around April 11, 2017, you requested the following information from Dr. Qu:

[A] listing of all the Nebraska deaths in 2016 due to Creutzfeldt-Jakob disease (CJD) or suspected CJD.

You specifically "asked for a list to include (1) the name of the deceased, (2) the date of their death, (3) the County in which the death occurred [*sic*], and (4) whether the death was confirmed CJD or suspected CJD." You received no response to your request, and subsequently contacted our office.

Ms. Roberts-Johnson informs us that DHHS received your request on April 14, 2017. However, Dr. Qu was out of the office and unaware of your request.¹ She states that DHHS does not have a list of individuals that died of CJD in Nebraska in 2016, and that under provisions of Neb. Rev. Stat. § 84-712, DHHS is not required to “create lists or document[s] which do not otherwise exist or to answer questions for the public.”

Ms. Roberts-Johnson further informs us that Neb. Rev. Stat. § 71-503.01 (Cum. Supp. 2016) would likely provide a basis to withhold any responsive information. In this regard, the statute provides that when a statute or regulation requires medical practitioners or other persons to report certain diseases, then the reports and resulting investigations “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.” Ms. Roberts-Johnson confirms that Title 173 *Nebraska Administrative Code* 1 requires the reporting of CJD.² However, to the extent DHHS has any of the requested information, it is not available as a public record. Moreover, while the statute permits DHHS to publish analyses of reports and information, it must be done “in such a manner as to ensure that the identity of any individual concerned cannot be ascertained[.]” Neb. Rev. Stat. § 71-503.01(3)(a).

DISCUSSION

The Nebraska Public Records Statutes generally allow citizens and other interested persons the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts from those records, and to obtain copies of records in certain circumstances. There is no provision in the NPRS that requires a custodian of public records to review documents and create abstracts or other lists, to answer questions or to create documents which do not otherwise already exist.³

Neb. Rev. Stat. § 84-712 sets out the basic rule for access to public records in Nebraska. That statute provides, in pertinent part:

¹ We would suggest to Dr. Qu and other DHHS officials that a process for screening time sensitive mail, like public records requests, should be implemented to avoid any future noncompliance of § 84-712.

² 173 NAC 1-004.02.

³ Op. Att’y Gen. No. 94092 (November 22, 1994); Op. Att’y Gen. No. 94035 (May 11, 1994); Op. Att’y Gen. No. 87104 (October 27, 1987).

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.) While Section 84-712 states that records are matters of public interest, it is not absolute; exceptions may be created by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). 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).

Upon review, we believe that DHHS has met its burden with respect to the records at issue. It has represented that it does not have a list of individuals who died in 2016 from CJD or suspected CJD. To the extent DHHS has information about individuals affected by this disease, that particular information is not subject to disclosure under express language in § 71-503.01(1). In addition, we note that you are seeking the *names* of individuals who may have died from CJD, which is precisely the information that DHHS is prohibited from releasing under § 71-503.01(3).

CONCLUSION

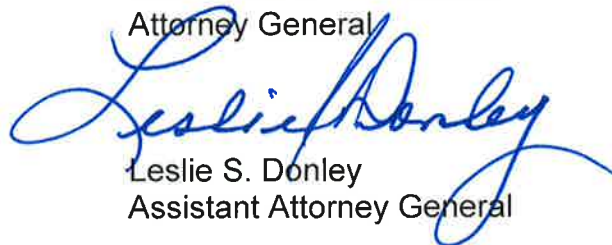
For the reasons explained above, we believe that DHHS did not unlawfully deny you access to public records. As a result, no further action by this office is necessary. Accordingly, we are closing this file.

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If you disagree with the analysis we have set out above, you may wish to contact your private attorney to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Dep. Dir. J. Roberts-Johnson

49-1792-29