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May 26, 2022

Via email at [REDACTED]
Nathan Arentsen
Lincoln, NE

RE: *File No. 22-R-122; Department of Health and Human Services and the University of Nebraska; Nathan Arentsen, Petitioner*

Dear Mr. Arentsen:

This letter is in response to your petition received by this office on May 11, 2022, in which you requested the assistance of the Attorney General relating to your public records requests submitted to the University of Nebraska ("University") and the Department of Health and Human Services ("DHHS") on April 15 and 21, 2022, respectively. On May 13, we forwarded a copy of your petition to legal counsel for both entities, and discussed the petition with each of them on that date. We considered your petition in accordance with the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020, Supp. 2021). Please note that since you received the University's cost estimate on May 25, we have decided to delay our review of the University's handling of your records request until after the ten business days' response time set out in § 84-712(4). Accordingly, our review today is limited to DHHS' handling of your records request. Our findings with respect to that matter are set out below.

RELEVANT FACTS

You emailed and hand delivered your public records request¹ to DHHS on April 21, 2022. DHHS attorney Blake Simpson timely responded to your request with two separate emails sent April 27. In one email, he denied your request for the following records under the exception to disclosure in § 84-712.05(4) (pertaining to attorney-client confidential communications and attorney work product):

¹ A copy of your request is attached hereto as Exhibit A.

All documents, electronically stored information, and tangible things, including but not limited to any emails, letters, notes, memoranda, exhibits, drafts, research materials, tapes, transcripts, contracts, agreements, or amendments, used by Grant Dugdale for the purpose of any investigation, review, or decision pertaining to the “Final Decision” . . . emailed by Mr. Dugdale to Nathan Arentsen on April 19, 2022

In a second email, Mr. Simpson provided you a time and cost estimate (“Estimate”) to produce the requested records. DHHS estimated that the earliest practicable date in which to fulfill your request would be June 1, 2024, at a cost of \$249,654.20. Mr. Simpson provided you the link to the Nebraska State Contracts Database to access the contracts requested in paragraphs 2 and 3 of your request. He also provided you links to documents requested in paragraph 4, and indicated that the agency would produce another report by May 6, 2022.² Estimates were broken down by the individual performing the tasks, the number of hours of labor and hourly rate per individual, the description of work to be performed, subtotals and the total cost.

On May 13, DHHS closed your public records file since you did not respond to DHHS regarding the Estimate within the ten business days set out in § 84-712(4).

According to your petition, the withheld records relate to DHHS’ “investigation into, and decision-making about, its staff and administrators’ conduct toward victims of sexual violence and sexual harassment. That investigation and decision-making specifically reviewed DHHS’s violations of Title IX. . . .”³ You argue that DHHS wrongly asserted its denial based on § 84-712.05(4) “even though the federal government’s Title IX regulations prohibit a Title IX investigator and decision-maker from holding a bias or conflict of interest toward an investigated party including an offending agency’s staff.” You allege that DHHS violated Title IX by having the Title IX coordinator decide the complaint, and that this purported violation jeopardizes DHHS’ access to millions of dollars of federal funding. You assert that the Attorney General has an interest in ensuring “that DHHS does not assert legal interpretations which violate Title IX and thereby endanger its access to federal program funds.” In order to maintain DHHS’ compliance with Title IX to the greatest extent possible, you ask that we advise DHHS that it cannot assert § 84-712.05(4) to withhold records of its Title IX investigation and decision.

You have requested that we instruct DHHS to provide you the requested records and to revise its Estimate. You have also requested that we issue a disposition to that effect.

² We understand that DHHS Public Records provided you the *2013-2019 Nebraska Initial Design and Implementation Report: Title IV-E Waiver Demonstration Project* on May 6 at no cost.

³ Generally, Title IX is a federal law that protects individuals from discrimination based on sex in education programs or activities that receive federal financial assistance. 30 U.S.C. §§ 1681 et seq.

DISCUSSION

The NPRS generally allow Nebraska 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 public records in certain circumstances. Under § 84-712(1), access to public records in Nebraska is guaranteed “[e]xcept as otherwise expressly provided by statute” “Public records” in Nebraska “include all records and documents, regardless of physical form, of or belonging to” governmental entities in the state, “[e]xcept when any other statute expressly provides that particular information or records shall not be made public” Neb. Rev. Stat. § 84-712.01(1) (2014). Thus, there is no absolute right to access public records in those instances where records are exempt from disclosure by statute. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 788, 943 N.W.2d 231, 240 (2020); *Aksamit Resource Management LLC v. Nebraska Public Power Dist.*, 299 Neb. 114, 123, 907 N.W.2d 301, 308 (2018).

In the present case, DHHS is relying on the exception in § 84-712.05(4) as its basis to withhold the documentation used by Mr. Dugdale to investigate, review or decide his “Final Decision” emailed to you on April 19. This exception allows record custodians to withhold, at their discretion, “[r]ecords which represent the work product of an attorney and the public body involved which are related to preparation for litigation, labor negotiations, or claims made by or against the public body or which are confidential communications as defined in section 27-503.” The exception becomes unavailable if the records are “publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties” We understand that Mr. Dugdale is employed as an attorney by DHHS.

The crux of your argument appears to be that because DHHS officials violated Title IX, they cannot assert the exception to withhold Mr. Dugdale’s work product and privileged communications relating to an investigation he conducted. You also appear to argue that asserting the attorney-client privilege and the work product doctrine is itself a Title IX violation. We find no merit to these arguments. To be clear, our review under § 84-712.03(1)(b) is limited to whether a record may be withheld from public inspection. We have no authority to consider your claims regarding DHHS’ compliance with Title IX and, accordingly, we express no view on such claims. DHHS has represented to this office that the records you seek are Mr. Dugdale’s work product and contain confidential, privileged communications. Consequently, we conclude that DHHS’ reliance on the exception in § 84-712.05(4) was appropriate under the circumstance presented.⁴

⁴ While not relied on by DHHS, we note the exception from disclosure for investigatory records in Neb. Rev. Stat. § 84-712.05(5) may also provide a basis to withhold the requested records.

With respect to the Estimate, § 84-712(3) authorizes records custodians to assess a fee to produce copies of public records:

(b) Except as otherwise provided by statute, the public body, public entity, or public official which is the custodian of a public record may charge a fee for providing copies of such public record pursuant to subdivision (1)(b) of this section, which fee shall not exceed the actual added cost of making the copies available. For purposes of this subdivision, (i) for photocopies, the actual added cost of making the copies available shall not exceed the amount of the reasonably calculated actual added cost of the photocopies, which may include a reasonably apportioned cost of the supplies, such as paper, toner, and equipment, used in preparing the copies, as well as any additional payment obligation of the custodian for time of contractors necessarily incurred to comply with the request for copies, (ii) for printouts of computerized data on paper, the actual added cost of making the copies available shall include the reasonably calculated actual added cost of computer run time and the cost of materials for making the copy, and (iii) for electronic data, the actual added cost of making the copies available shall include the reasonably calculated actual added cost of the computer run time, any necessary analysis and programming by the public body, public entity, public official, or third-party information technology services company contracted to provide computer services to the public body, public entity, or public official, and the production of the report in the form furnished to the requester.

(c) The actual added cost used as the basis for the calculation of a fee for records shall not include any charge for the existing salary or pay obligation to the public officers or employees with respect to the first four cumulative hours of searching, identifying, physically redacting, or copying. A special service charge reflecting the calculated labor cost may be included in the fee for time required in excess of four cumulative hours, since that large a request may cause some delay or disruption of the other responsibilities of the custodian's office

In addition, § 84-712(3)(f) allows public bodies to request a deposit prior to fulfilling a request if copies are estimated to be more than \$50.

Under § 84-712.03(1)(b), this office may consider “whether the fees estimated or charged by the custodian are actual added costs or special service charges as provided under section 84-712.” As noted above, you have requested that this office instruct DHHS to revise its Estimate. We find no basis to do so. DHHS’ Estimate, attached as Exhibit B, contains sufficiently detailed information to support the cost and production date provided to you. Email searches were conducted to identify potentially responsive records. The results of those searches, i.e., the employees, the search terms, the number of emails, are all set out in the document. Detailed estimates relating to the production of HHS documents (other than emails) are also included. Accordingly, we believe DHHS

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may charge you the amount set out in its Estimate and may delay production of responsive records until June 1, 2024.⁵

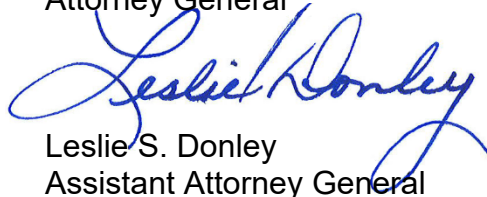
CONCLUSION

Based on the foregoing, DHHS appropriately applied the exception in § 84-712.05(4) to withhold Mr. Dugdale's records underlying his investigation into your complaint. In addition, you have not been denied access to public records on the basis of excessive costs and we do not find that DHHS violated the NPRS or acted in bad faith in handling your public records request. As a result, no further review by this office is necessary and we are closing this file.

If you disagree with the conclusion reached above, you may wish to review the other remedies available to you under Neb. Rev. Stat. § 84-712.03.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Jaime Hegr (via email only)
Jaclyn Klintoe (via email only)

49-2949-30

⁵ In a recent disposition letter issued this week, we reiterated that in the case of a voluminous records request, the custodian of the records may take whatever time is needed under the circumstances to prepare copies of the records at issue, taking in account the agency's facilities, equipment and personnel. Public officials are not required to abandon other public duties in order to fulfill a records request. See *File No. 22-R-121; Secretary of State; Susan Bliss, Petitioner*, May 23, 2022.