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June 14, 2023

Via email at [REDACTED]
Perry A. Pirsch

RE: *Public Records Petition Filed by Dr. Robert Colwell*
File No. 20231061

Dear Mr. Pirsch:

We understand that you represent Dr. Robert Colwell in litigation involving this office. This letter is in response to correspondence emailed to this office by Dr. Colwell on May 30, 2023, in which he challenged the date estimated by the Department of Health and Human Services ("DHHS") to fulfill a public records request. We construed Dr. Colwell's correspondence to be a petition under § 84-712.03(1)(b) of the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2022). We have completed our review of Dr. Colwell's petition and our findings are set out below. Since you represent Dr. Colwell, we are providing our disposition in this matter to you. We ask that you, in turn, share this letter with your client.

RELEVANT FACTS

On April 17, 2023, Dr. Colwell requested the following records from DHHS:

1. The Medical Loss Ratio (MLR) provided by MCNA aka MCNA Dental, the sole PAHP for the Nebraska Medicaid Dental.
2. Please provide each MLR for every year MCNA has received funds from the Nebraska Medicaid program.
3. Please include any substantiating documents that MCNA provided as part of the MLR.

4. Please provide any audits performed by Nebraska Department of Health and Human services [sic] or any other Nebraska agency of MCNA's MLR.

DHHS attorney Thomas Skutt, Jr. responded to Dr. Colwell's request on April 21. He informed Dr. Colwell that "[g]iven the volume of your request and the current workloads of our staff, the agency expects to be able to provide a response to your request by June 9, 2023." In response, Dr. Colwell stated, in part, "[t]he timeframe you are suggesting is unacceptable under the Statute when these documents should be readily accessible as oversight of MCNA." Dr. Colwell subsequently filed his petition with this office on May 30. According to documentation provided to the undersigned by Mr. Skutt, DHHS provided Dr. Colwell responsive records on June 8.

DISCUSSION

Neb. Rev. Stat. § 84-712(4) sets out the process to obtain public records. This provision states, in pertinent part, that

[u]pon receipt of a written request for access to or copies of a public record, the custodian of such record shall provide to the requester as soon as is practicable and without delay, but not more than four business days after actual receipt of the request, an estimate of the expected cost of the copies and either (a) access to or, if copying equipment is reasonably available, copies of the public record, (b) if there is a legal basis for denial of access or copies, a written denial of the request together with the information specified in section 84-712.04, or (c) if the entire request cannot with reasonable good faith efforts be fulfilled within four business days after actual receipt of the request due to the significant difficulty or the extensiveness of the request, a written explanation, including the earliest practicable date for fulfilling the request, an estimate of the expected cost of any copies, and an opportunity for the requester to modify or prioritize the items within the request.

When a delay is necessary "due to the significant difficulty or the extensiveness of the request," the explanation of delay must include the earliest practicable date for fulfilling the records request. In the case of a voluminous records request, the legislative history of 2000 Neb. Laws LB 628 makes it clear that the custodian of the records may take whatever time is needed under the circumstances to produce copies of the records at issue. As stated by Senator Bruning, one of the co-sponsors of LB 628:

Also in [§ 84-712(4)], there is the phrase 'if the entire request cannot with reasonable good faith efforts be fulfilled within three business days' then the written explanation needs to be provided along with the earliest practicable date. My intention, as one of the cosponsors, as well, and for the legislative record is to mean that that amount of time again may be a very long time, meaning months or more. And the reason I say this, the reason I think it's important to establish a

legislative record is just recently one of our state agencies received a request from a law firm that asks for any and all records in the custody of that state agency relating to issues of a lawsuit. Any and all records can be a huge request, and my intent in creating this legislative record is to make sure our state agencies are protected; that they can take as much time as necessary and without having to hire additional staff, without having to buy additional copy machines, without having to pay people for overtime to provide those records. It's my understanding and my intent that it could take an extremely long time if the requester is to ask for any and all records relating to such-and-such.


Floor Debate on LB 628, 96th Neb. Leg., 2nd Sess. 11212-11213 (March 22, 2000)
(Statement of Sen. Bruning).

The legislative history indicates that public bodies must be given adequate time to respond to a request for public records, taking into account available facilities, equipment, and personnel. Staff is not required to abandon their other public duties to respond to a request. In the present case, Mr. Skutt responded to Dr. Colwell's public records request within four business days in compliance with § 84-712(4). He indicated that the agency required seven weeks to respond to the request. The delay in fulfilling the request was due to the volume of the request and the current workloads of staff. Responsive records were provided to Dr. Colwell one day before the estimated date. Thus, in our view, Mr. Skutt fully complied with the requirements of the NPRS in handling Dr. Colwell's request.

Since we have identified no violations of the NPRS with respect to this matter, no further action by this office is necessary and we are closing this file. If Dr. Colwell disagrees with our analysis, he is free to consider the additional remedies available to him under the Nebraska Public Records Statutes.

Sincerely,

MIKE HILGERS
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Thomas Skutt, Jr. (via email only)
Justin Hall (via email only)