



STATE OF NEBRASKA  
**Office of the Attorney General**

2115 STATE CAPITOL BUILDING  
LINCOLN, NE 68509-8920  
(402) 471-2682  
TDD (402) 471-2682  
FAX (402) 471-3297 or (402) 471-4725

**MIKE HILGERS**  
ATTORNEY GENERAL

**LESLIE S. DONLEY**  
ASSISTANT ATTORNEY GENERAL

July 24, 2023

Via email at [REDACTED]  
Lisa Leick

RE: *Public Records Matter Involving the Department of Health and Human Services*  
File No. 20231072

Dear Ms. Leick:

This letter is our final response to your petition received by this office on June 2, 2023. You are challenging the response you received from the Department of Health and Human Services (“DHHS”) relating to the public records request initially submitted to the agency on March 20. On June 20, 2023, we wrote to you indicating that we were unable to determine, without further analysis from DHHS, whether the withheld records were in fact drafts and, therefore, not public records subject to disclosure under § 84-712 of the Nebraska Public Records Statutes (“NPRS”).<sup>1</sup> We asked Mr. Skutt to provide us an analysis on this issue, which we received on June 28, 2023. We have now concluded our review of Mr. Skutt’s response. Our findings in this matter are set forth below.

### **RELEVANT FACTS**

On March 20, 2023, you emailed the following request to DHHS attorney Grant Dugdale:<sup>2</sup>

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<sup>1</sup> Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2022).

<sup>2</sup> According to an email you sent to Mr. Skutt on May 25, 2023, you have a pending matter before the State Personnel Board, and that Mr. “Dugdale was already ordered to provide several of these documents to me by the board.” While we are generally unaware of any statutory provision that would prohibit you from submitting a public records request pertaining to a pending proceeding, it is unclear why you would do so since DHHS has already been ordered to provide you responsive records at no charge.

Good morning, Mr. Dugdale, PUBLIC RECORDS REQUEST: To assist me in acquiring the public information record of Specific Job Duties that any/all Eastern Service Area CFS Support Staff Administrators or Supervisors drafted between the dates December 4, 2019 through March 20, 2023 for any and all current or former member(s) of the Eastern Service Area Support Staff Team, I now make a Public Records Request of you, Mr. Grant Dugdale. I realize you will need to forward this request to the Public Records official office for CFS per your DHHS Policy. I appreciate your assistance in trying to track down these public information documents that are required to be produced when residents of Nebraska request such public information from a state governmental agency. As I am positive these exist, I would appreciate you finding them.

Following the exchange of correspondence between you and DHHS staff regarding estimates and payments,<sup>3</sup> Mr. Skutt informed you on June 1 that the agency had no responsive records. Mr. Skutt stated that “[c]ertain documents were withheld as they were draft documents,” citing Op. Att’y Gen. No. 91054 (June 17, 1991).

### DISCUSSION

As discussed in our June 20 letter, in Op. Att’y Gen. No. 91054 [“*Opinion*”], the Attorney General considered “whether governmental work in progress must be released under the Public Records Act.” *Opinion* at 2. The Attorney General acknowledged the tension between an agency’s legitimate need to internally operate without interruption and intrusion with the legitimate concern that public records might be hidden from view under a “draft” label. *Opinion* at 3. The Attorney General fashioned criteria, to be applied on an individual, case-by-case basis, to “determin[e] what constitutes a record or a document under the [NPRS].” He concluded that notes and drafts of documents within an agency, which (i) are prepared by lower-level personnel, (ii) remain subject to approval by upper management, and (iii) have not been issued, are preliminary materials and not “records” or “documents” under the NPRS. Conversely, materials which have been through the formation process and have left the agency are more obviously “records” or “documents,” even though they may require further approval and are arguably in “draft” form. *Id.*

Mr. Skutt informs us that as part of the analysis, he and DHHS attorney David McManaman each conducted an independent review of all documents and

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<sup>3</sup> We note that you attempted to condition your payment to the agency based on the actual receipt of records by informing the agency that “[p]ayment is for providing the documents that took two hours (plus 4) to gather for me. If no records found, you may not cash this check.” (Your emphasis.) You also wrote “Balance for documents provided” in the memo line of your check provided to the agency to pay the balance of the estimate. Section 84-712(3)(b) and (c) describe the actual added costs that may be charged by public bodies to produce copies of public records. There is nothing in those provisions that requires a public body to actually produce public records in order to receive payment for the time spent by staff to search for, identify, copy, etc., requested records.

communications provided by the program. Two emails with attachments were found to be responsive to your request, denoted as “Exhibit C” and “Exhibit D” in his response. After applying the *Opinion* criteria set forth above, Mr. Skutt represents that Exhibit C is a public record. We will therefore request that Mr. Skutt provide you this record immediately if he has not done so already.

However, Mr. Skutt maintains that Exhibit D is a draft and not a public record subject to disclosure under § 84-712. The email mentions an updated assignment list. Mr. Skutt indicates that while the email mentions “duties,” the assignment list is not complete. Specific language in the email indicates that the author “still ha[s] a few things to do . . . .” The attachment also mentions “duties,” and has yellow highlighting throughout the document. While Mr. Skutt concedes there is nothing in Exhibit D to indicate it is subject to approval by a superior in the department or requires publication to become “official,” “[t]here is a statement in the email which denotes a preliminary status to the attachment though. The highlighted portions indicate ongoing consideration of the assignments as well.” Mr. Skutt further states that “[i]t is unclear if this list of assignments was ever shared with the Eastern Service Area Support Staff Team either.”

This office has considered and upheld the application of the draft criteria to withhold records in several dispositions through the years. For example, in *File No. 22-R-157; Nebraska Department of Education; Joe Dejka, Omaha World-Herald, Petitioner*, dated November 9, 2022, we considered the State Department of Education’s reliance on the draft criteria as a basis to withhold state assessment data. The agency represented that the data was not in final form, and had been provided to school districts for purposes of verification and validation prior to masking and eventual release under the Nebraska Quality Education Accountability Act. The petitioner argued that the *Opinion* supported his position since the test scores had been disseminated to school districts and had, therefore, “left the agency.”

We noted that while the data may have been disseminated outside of the department, it was not in final form on the date of the records request or during our review. Only individually identifiable student data was sent to school districts for the purpose of review for revisions or corrections. Following completion of the school districts’ reviews, department staff began masking student data to ensure that individual students were not identified. We concluded that the state assessment data requested by petitioner was not in final form and, as a result, was not subject to disclosure under § 84-712. We further stated:

Finally, for more than thirty years, this office, as well as numerous governmental agencies and officials, have relied on Op. Att’y Gen. No. 91054 as a basis to withhold records considered to be “drafts.” “Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction.” *Capitol City Telephone, Inc. v. Nebraska Dep’t of Revenue*, 264 Neb. 515, 527, 650 N.W.2d 467, 477 (2002). “This is particularly

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so when the Legislature has failed to take any action to change such an interpretation.” *Id.* Since there has been no legislative action altering the conclusion reached in Op. Att’y Gen. No. 91054, this office will continue to rely on our opinion as a basis to exclude drafts of documents from disclosure under § 84-712.

Disposition in *File No. 22-R-157* at 6.

We have reviewed Exhibit D under the criteria in the *Opinion* and agree with Mr. Skutt’s assessment. The email indicates that the attachment is work in progress. Language in the email and highlighted text in the attachment supports this finding. It is therefore our opinion that Exhibit D is not a public record subject to disclosure under § 84-712.

If you disagree with our conclusion, you are free to pursue the other legal remedies available to you under § 84-712.03 of the Nebraska Public Records Statutes.

Sincerely,

MIKE HILGERS  
Attorney General



Leslie S. Donley  
Assistant Attorney General

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

49-3282-30