



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

September 10, 2024

Via email at: [REDACTED]
Gary Wilson

RE: *Public Records Matter Involving the Nebraska Department of Health and Human Services and Vital Records*
Our File No. 20241167

Dear Mr. Wilson:

This letter is in response to your correspondence received by this office on August 26 and September 2, 2024. You have asked us to review the denial of your July 19, 2024, public records request by the Nebraska Department of Health and Human Services (NDHHS), and the denial of your July 29, 2024, death certificate application by NDHHS Vital Records (Vital Records). We have consolidated your correspondence for purposes of our review 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), amended 2024 Neb. Laws LB 43 and LB 1204. We have completed our review of these matters, and our findings are set forth below.

RELEVANT FACTS

On July 19, 2024, you submitted a public records request to NDHHS seeking documents related to your brother, Kenny Lashay Kemp, including his care plan, medical treatment, incident reports, and communications with other family members during his time in disability facilities between 1968-2024. NDHHS attorney Thomas Skutt timely responded to your request on July 26, 2024.¹ He explained that the records you seek

¹ Neb. Rev. Stat. § 84-712(4) requires the custodian to respond to the requester no more than four business days after actual receipt of a written request. NDHHS received your request on July 24, 2024.

cannot be provided due to the restrictions in Neb. Rev. Stat. § 83-109(2), which provides that the records of state facility residents are only accessible in limited circumstances, including when a resident has legally authorized the specific release of records, or upon request once a resident has been deceased for fifty years or more.

Subsequently, on July 29, 2024, you sent an application to Vital Records for a certified copy of your brother's death certificate. You indicated the proper purpose of your request was to officially establish his death, establish your legal relationship to him, and prepare for probate proceedings. You attached to your application a copy of your driver's license, birth certificate, the proper fee, and evidence that you are Mr. Kemp's brother. Our correspondence with Vital Records indicates your application was deferred pending evidence that you have been named the administrator of Mr. Kemp's estate.

In your first petition, you argue that NDHHS's denial was improper because the records you requested "should be considered public records under Neb. Rev. Stat. § 84-712 and § 84-712.01, which defines public records broadly to include all records and documents belonging to any branch of government." Further, you indicate that NDHHS's response did not provide a sufficient explanation of the denial as required by Neb. Rev. Stat. § 84-712.04 and § 84-712.05. Finally, you assert that NDHHS should have disclosed death records regardless of other statutory restrictions because of the exception for death records provided in Neb. Rev. Stat. § 84-712.05.

Your second petition asserts that Vital Records improperly denied your application since immediate family members are typically allowed to request certified death certificates. You requested our review of this denial.

DISCUSSION

A. NDHHS's Withholding of Records Under Neb. Rev. Stat. § 83-109(2).

Neb. Rev. Stat. § 84-712 (2014) sets out the basic rule for access to public records in Nebraska. That statute provides, in pertinent part:

Except as otherwise expressly provided by statute, all residents 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” 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) (emphasis added). Thus, while access to public records is broad, it is not absolute. There is no right to access public records in those instances where the Legislature has made the records confidential or subject to withholding under Neb. Rev. Stat. § 84-712.05² or § 84-712.08. “A statute qualifies as an ‘other statute’ under § 84-712(1) when the plain language of a statute makes it clear that a record, or portions thereof, is exempt from disclosure in response to a public records request.” *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 794, 943 N.W.2d 231, 243-44 (2020).

NDHHS is relying on § 83-109(2) as its basis to withhold the requested records. This statute provides that

[a] record of every patient or resident of every institution shall be kept complete from the date of his or her entrance to the date of his or her discharge or death. *Such records shall be accessible only* (a) to the department, a legislative committee, the Governor, any federal agency requiring medical records to adjudicate claims for federal benefits, and any public or private agency under contract to provide facilities, programs, and patient services, (b) upon order of a judge, court, or mental health board, (c) in accordance with sections 20-161 to 20-166, (d) to the Nebraska State Patrol pursuant to section 69-2409.01, (e) to those portions of the record required to be released to a victim as defined in section 29-119 in order to comply with the victim notification requirements pursuant to subsections (5) and (6) of section 81-1850, (f) to law enforcement and county attorneys when a crime occurs on the premises of an institution, (g) *upon request when a patient or resident has been deceased for fifty years or more*, (h) to current treatment providers, or (i) to treatment providers for coordination of care related to transfer or discharge. *In addition, a patient or resident or his or her legally authorized representative may authorize the specific release of his or her records, or portions thereof, by filing with the department a signed written consent.*

(Emphasis added.)

“Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. It is not within the province of the courts to read a meaning into a statute that is not there or to read anything

² Section 84-712.05 currently contains twenty-six categories of records that may be withheld at the discretion of the records custodian “unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties”

direct and plain out of a statute.” *Aksamit Resource Management LLC v. Neb. Pub. Power. Dist.*, 299 Neb. 114, 123, 907 N.W.2d 301, 308 (2018).

The plain and ordinary meaning of § 83-109(2) generally prohibits the disclosure of records for every patient or resident of NDHHS institutions. However, access is available to a number of officials and entities listed in the statute, e.g., government officials, members of the judiciary, law enforcement, and treatment providers. Otherwise, all institution records are exempt from disclosure unless the patient or resident has specifically authorized release, or at least fifty years have passed since the patient’s or resident’s death. There is nothing in your petition to suggest that your brother authorized that certain records be released to you and fifty years have not passed since your brother’s passing. Consequently, the requested records fall squarely within the parameters of § 83-109(2), and Mr. Skutt’s denial to your public records request on these grounds was appropriate.

B. NDHHS’s Failure to Provide a Description of Withheld Records.

Pursuant to Neb. Rev. Stat. § 84-712.04(1), if any person is denied any rights granted under §§ 84-712 to 84-712.03, he or she should receive the following information from the public body in writing:

- (a) *A description of the contents of the records withheld* and a statement of the specific reasons for the denial, correlating specific portions of the records to specific reasons for the denial, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial;
- (b) The name of the public official or employee responsible for the decision to deny the request; and
- (c) Notification to the requester of any administrative or judicial right of review under section 84-712.03.

(Emphasis added.) We note that Mr. Skutt’s response to your request cited § 83-109(2) as the statutory basis for withholding records, declared himself as the person responsible for the decision to withhold the records, and informed you of your right to seek review of his decision. However, the response contained no “description of the contents of the records withheld.” We have reminded NDHSS staff of their statutory duty to provide a general description of the records withheld and instructed them to supplement their response to you containing the required description.

C. NDHHS and Vital Record's Denials of Access to Death Records.

Finally, you assert that you were wrongfully denied access to certain death records. As an initial matter, you state that NDHHS failed to provide you with death records in your first public records request. NDHHS officials represent, and we agree, that your July 19, 2024, public records request did not request a death certificate but sought records pertaining to Mr. Kemp's care services, medical assessments, incident reports, and family communications regarding his care. No death records were produced because none was requested.

Concerning your Vital Records application, death certificates are public records.³ However, as discussed above, access to public records in Nebraska is not absolute. Both §§ 84-712 and 84-712.01 indicate that exceptions to disclosure may be created by express and special statutory provisions. In this instance, public access to certified copies of death certificates is controlled by Neb. Rev. Stat. § 71-612. That statute provides, in pertinent part, as follows:

(1) The department, as the State Registrar, shall preserve permanently all certificates received. The department shall supply to any applicant for any proper purpose, as defined by rules and regulations of the department, a certified copy of the record of any birth, death, marriage, annulment, or dissolution of marriage or an abstract of marriage or abstract of death. The department shall supply a copy of a public vital record for viewing purposes at its office upon an application signed by the applicant and upon proof of the identity of the applicant. The application may include the name, address, and telephone number of the applicant, purpose for viewing each record, and other information as may be prescribed by the department by rules and regulations to protect the integrity of vital records and prevent their fraudulent use. Except as provided in subsections (2), (3), (5), (6), (7), and (9) of this section, the department shall be entitled to charge and collect in advance a fee of sixteen dollars to be paid by the applicant for each certified copy, abstract of marriage, or abstract of death supplied to the applicant or for any search made at the applicant's request for access to or a certified copy of any record, abstract of marriage, or abstract of death whether or not the record or abstract is found on file with the department.

Your access to death certificates is further prescribed by provisions in Title 174, *Nebraska Administrative Code*, Chapter 3 (Viewing and Release of Vital Records). As such, the above referenced statute and regulations control your access to death certificates, not the NPRS.

³ See *State ex rel. Adams County Historical Society v. Kinyoun*, 277 Neb. 749, 755, 765 N.W.2d 212, 217 (2009) ("Under Neb. Rev. Stat. § 84-712.05(2) ... '[m]edical records, other than records of births and deaths,' may generally be withheld from the public. (Emphasis supplied.)").

Gary Wilson
September 10, 2024
Page 6

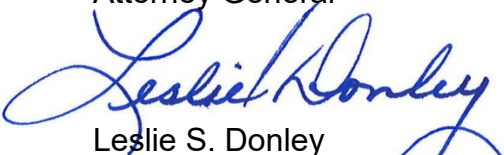
However, our discussions with Vital Records staff indicate that your application for a certified copy of a death certificate could be approved pending additional documentation. Pursuant to 174 NAC 3, § 005, certified copies of death certificates may be obtained by applicants who prove they have a proper purpose for receiving a copy. There is agreement that your purpose of establishing a legal relationship with another person is proper. Vital Records simply requires evidence of your involvement in the administration of your brother's estate to approve your application. Please direct the evidence of your need to establish a legal relationship with Mr. Kemp to Vital Records.⁴

CONCLUSION

For the reasons stated above, we conclude that NDHHS' and Vital Record's responses to your requests for institutional records and a death certificate pertaining to your brother were correct. Since no further action by this office is necessary, we are closing our file. If you disagree with our analysis set out above, you may wish to contact your private attorney to determine what additional remedies, if any, are available to you under the NPRS.

Sincerely,

MIKE HILGERS
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Thomas Skutt

49-3622-31

⁴ Please note that we will be returning your check to Vital Records by separate letter. This office cannot process your death certificate application. Please direct evidence of your involvement with Mr. Kemp's estate and any required fees to Nebraska Vital Records, P.O. Box 95065, Lincoln, NE 68509-5065.