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Office of the Attorney General

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September 30, 2024

Via email at [REDACTED]
Mike Brownlee

RE: *Public Record Matter Involving the Nebraska Department of Correctional Services*
Our File No. 20241178

Dear Mr. Brownlee:

This letter is in response to your petition received by this office on September 13, 2024. You have requested our review of the decision by the Nebraska Department of Correctional Services (NDCS) to deny you access to inmate medical consult and procedure records. We forwarded your petition to NDCS Public Records Manager Kathleen Kokensparger upon receipt, and discussed it with her on September 24. At our request, Ms. Kokensparger provided us a copy of the records she provided to you on August 14, and the records withheld. We considered your petition under the provisions 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. Our findings in this matter are set forth below.

RELEVANTS FACTS

On July 9, 2024, you emailed Ms. Kokensparger requesting the following records:

All requests for medical consults or procedures by inmates between April 9 and July 9, including but not limited to ones that were denied or approved by NDCS. In addition to "date received" and a description of the consultation, the response should also include the facility of the inmates and all other information available in the log, for instance the cost, the reason for the denial and the date of the denial, if applicable. Personal, identifying information should be redacted.

Ms. Kokensparger timely responded to your request on July 16. She indicated that during the time period listed in your request the NDCS changed the manner in which it recorded inmate medical consult/procedure requests. Ms. Kokensparger explained that the previous spreadsheet format had been replaced with “reports pulled from a database” and that reports could be generated on a facility level or an individual basis. On July 18, you agreed to receive individual-level consult reports at the cost estimate provided in her response.

On August 14, Ms. Kokensparger provided you a spreadsheet with the requested information for the time period April 9–June 2. She informed you that individual-level reports had been pulled from the database but, upon review, “it was determined that the entirety of these records are medical records that are confidential and exempt from public disclosure under Neb. Rev. Stat. §§ 83-178(2); 84-712.05(2).” Ms. Kokensparger “den[ie]d you access to [the] records on the basis of Neb. Rev. Stat. §§ 83-178(2); 84-712(1); 84-712.01(1); 84-712.05(2).”¹

You have requested our determination as to whether “these records are entirely medical records” that may be withheld from public inspection. You state that “allegedly through format alone, the department has made it impossible to access this data.” You assert that the inability to access this data is “concerning because data from the first seven months of the current medical director’s tenure suggests he is denying or deferring medical consultations and procedures at a higher rate than previous directors.”²

As noted above, the undersigned received a copy of the spreadsheet provided to you and individual inmate consult reports from the database. The spreadsheet contains fifteen fields as follows: (1) Date Received; (2) Last Name; (3) Inmate #; (4) Facility; (5) Referring Physician; (6) Urgent; (7) Request / Indications; (8) Consult Specialty Requested; (9) Date Addressed; (10) Approved / Denied/ **; (11) Medical Director Approval / Comments; (12) Category #; (13) Consult Specialty Approved; (14) On-Site; (15) Off-Site. The inmate name, inmate number and referring physician columns were redacted. Certain information in column numbers (7) and (11) was also redacted.

An individual report is entitled “Consultation Request.” The request pertains to a specific inmate and lists certain information (e.g., date of birth, sex) and the consultation/procedure requested. The report contains other medical information

¹ Sections 84-712(1) and 84-712.01(1) set out the basic access to and the definition of public records, respectively. Those provisions do not provide a statutory basis to withhold public records *per se*.

² Please note that “[t]he public records statutes apply ‘equally to all persons without regard to the purpose for which the information is sought.’ As a general rule, citizens are not required to explain why they seek public information.” *BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 801, 943 N.W.2d 231, 247 (2020) [*Frakes*]. Accordingly, we do not consider the underlying reason for the records request when making our determination under § 84-712.03(1)(b).

including, but not limited to, the inmate's current health problems, medications, and allergies and a provisional diagnosis. Ms. Kokensparger confirmed to the undersigned that a Consultation Request would be part of an inmate's individual file required to be established and maintained "for each person committed to the department" under § 83-178(1).

DISCUSSION

Public records in Nebraska "include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing." Neb. Rev. Stat. § 84-712.01(1) (2014). While access to public records is broad, it is not absolute. The NPRS allow access "[e]xcept as otherwise expressly provided by statute" (§ 84-712(1)) or "[e]xcept when any other statute expressly provides that particular information or records shall not be made public" (§ 84-712.01(1)). "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." *Frakes*, 305 Neb. at 794, 943 N.W.2d at 243-44. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *Id.* at 788, 943 N.W.2d at 240; *Aksamit Resource Mgmt. LLC v. Neb. Pub. Power Dist.*, 299 Neb. 114, 123, 907 N.W.2d 301, 308 (2018) ["*Aksamit*"].

The NDCS cited to Neb. Rev. Stat. §§ 83-178(2) and 84-712.05(2) as its basis to deny you access to the individual inmate consult reports. Section 83-178(2) provides that

[a]ny decision concerning the classification, reclassification, transfer to another facility, preparole preparation, or parole release of a person committed to the department shall be made only after his or her file has been reviewed. The content of the file shall be confidential and shall not be subject to public inspection except by court order for good cause shown and shall not be accessible to any person committed to the department. An inmate may obtain access to his or her medical records by request to the provider pursuant to sections 71-8401 to 71-8407 notwithstanding the fact that such medical records may be a part of his or her individual department file. The department retains the authority to withhold mental health and psychological records of the inmate when appropriate.

(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." *Aksamit*, 299 Neb. at

123, 907 N.W.2d at 308. The plain and ordinary meaning of § 83-178(2) makes the contents of an individual inmate file *confidential*. Public inspection is only allowed with a court order for good cause shown. An inmate may obtain access to his own medical records subject to certain restrictions imposed by the NDCS. Based on our review of the individual inmate consult reports, and the representation from Ms. Kokensparger that the reports are part of an inmate's individual file, we find that § 83-178(2) is an "other statute" that the NDCS may rely on to withhold the requested records.

The NDCS also relies on the medical records exception in § 84-712.05(2) as a basis to withhold the individual inmate consult reports.³ Subsection (2) is one of twenty-six categories of public records that may be withheld at the discretion of a public body so long as those records have not been "publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties" However, § 84-712.05 applies only to records that would otherwise be considered public records. *State ex rel. Unger v. State of Nebraska*, 293 Neb. 549, 878 N.W.2d 540 (2016). Since an inmate file established and maintained under § 83-178 is confidential and not a public record, the NDCS possesses no discretion regarding the release of its contents. Thus, the NDCS's reliance on § 84-712.05(2) is misplaced.

Finally, we realize the NDCS previously compiled inmate consult and procedure requests in a spreadsheet and made that spreadsheet available to you (with redactions). However, we are unaware of any statute that requires the NDCS to continue to create the spreadsheet. Moreover, § 84-712 does not require public bodies to review documents and create abstracts or other lists, to answer questions or to create documents which do not otherwise exist. 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). Consequently, the only responsive records now are the individual inmate consult reports and those records are confidential under § 83-178(2).

CONCLUSION

An individual inmate consult report is a medical record made part of an inmate's file. Section 83-178(2) is an "other statute" that makes the content of an inmate's file confidential and not subject to public inspection unless ordered by a court for good cause shown. Consequently, in the absence of such an order, there is no right to access the requested reports. Since we conclude the NDCS did not unlawfully deny your records request, no further action by this office is warranted and we are closing this file.

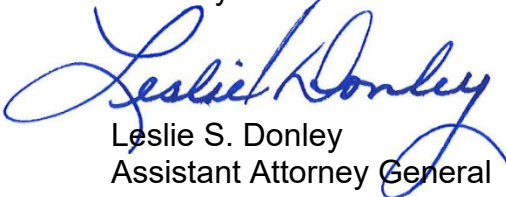
³ This exception pertains to "[m]edical records, other than records of births and deaths and except as provided in subdivisions (5) and (27) of this section, in any form concerning any person; records of elections filed under section 44-2821; and patient safety work product under the Patient Safety Improvement Act"

Mike Brownlee
September 30, 2024
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If you disagree with our analysis, you may wish to discuss this matter with your private attorney to determine what additional remedies may be available to you under the NPRS.

Sincerely,

MIKE HILGERS
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Kathleen Kokensparger (via email only)

49-3635-31