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December 31, 2024

Via email: [REDACTED]

Will Lowrey
[REDACTED]

RE: *Public Records Matter Involving the University of Nebraska Lincoln*
Our File No. 20241230

Dear Mr. Lowrey:

This letter is in response to your correspondence received by this office on December 16, 2024, in which you sought our assistance regarding your public records request submitted to the University of Nebraska-Lincoln (“University”) on August 20, 2024. Following our office’s receipt of your petition, the undersigned communicated with the University’s counsel, Jaclyn Klintoe, concerning the University’s response to your records request. We considered your petition in accordance with the Nebraska Public Records Statutes (“NPRS”) as set forth in Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2024). Our conclusions are set forth below.

RELEVANT FACTS

Our understanding of the facts in this matter is based on your petition to this office and the undersigned’s communication with Ms. Klintoe regarding the records sought. You requested “electronic copies of any video recordings, photographs, still images, or similar visual depictions, created or transmitted between January 1, 2018, and the date of fulfillment of this request” related to two research projects. During an email exchange occurring on August 20, 2024, Ms. Klintoe indicated that further review of records relevant to your request was necessary. Ms. Klintoe thereafter denied your records request via email on August 26, 2024, citing § 84-712.05(3) and claiming that the “requested records are all related to unpublished research,” and, “[b]ecause they are research records that have yet to [be] published, they are exempt from disclosure.”

You indicate in your petition that, of the two projects identified in your initial request, you now challenge only the University's denial of the records related to the project entitled "'Prevention of Lameness in Sows: Early Detection and Mitigation' (Project #: 3040-31000-106-105-T)" (the "Project"). You state that the Project "was completed on March 1, 2023," according to the United States Department of Agriculture's ("USDA") Agricultural Research Service website. You further claim that "two of the three authors from the requested Project reported that it had been completed" in a progress report for a related research project, also posted to the USDA's Agricultural Research Service website. In addition to the foregoing, you allege that the "Project's methodology and findings have been published by its authors throughout several reports that they co-authored," and you cite to several reports posted to the USDA's Agricultural Research Services website, a Ph.D. dissertation by a University of Nebraska-Lincoln graduate student, and an article published in the Precision Livestock Farming journal in February 2022.

In accord with our office's procedures, the undersigned contacted Ms. Klintoe regarding your petition. According to Ms. Klintoe, the March 1, 2023, project end date referenced in your petition referred to the end of the Project's funding period, and the researchers have only completed the data collection phase without completing their data analysis. Ms. Klintoe further states that "[t]he requested video and image-based materials underpin currently active University research initiatives . . . in the [University's] Biological Systems Engineering program." With respect to the materials requested, Ms. Klintoe explains that, while "some results of the study have been previously published, the video and images in question have not." She represents that "those video and image materials underpin research currently being undertaken by the University and its students that is both ongoing and unpublished at present."

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." § 84-712.01. While the NPRS broadly authorize public access to public records, they are not absolute. Section 84-712.05 lists several categories of public records that may be withheld at the discretion of the custodian of such records. At issue is the applicability of the exception found at § 84-712.05(3), which provides:

The following records, unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties, may be withheld from the public by the lawful custodian of the records:

. . .

(3) Trade secrets, academic and scientific research work which is in progress and unpublished, and other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose.

This matter concerns the portion of § 84-712.05(3) pertaining to “academic and scientific research work which is in progress and unpublished.” In prior dispositions, this office has determined whether certain records belonging to the University and the University of Nebraska Medical Center (“UNMC”) could be withheld under this section. In all cases, this office has relied on the same analysis. We will quote from one of these dispositions at length below, since the analysis remains applicable to the present matter.

We are unaware of any Nebraska cases that discuss the research exclusion set out above. However, we find guidance in an Indiana case cited by the UNMC, *Robinson v. Indiana University, et al.*, 659 N.E.2d 153 (1995). In *Robinson*, the Indiana Court of Appeals was asked to determine whether completed IACUC records, which were submitted to two university committees for review, and any references to research projects appearing in the meeting minutes of those committees, were exempt from disclosure under the Indiana Public Records Act. *Id.* at 155.

In its analysis, the court discussed a factually similar case from North Carolina, *S.E.T.A. UNC-CH, Inc. v. Huffines*, 101 N.C.App. 292, 399 S.E.2d 340 (1991). In *S.E.T.A. UNC-CH*, a student organization sought access to various IACUC records, but the committee chair refused to provide the records for particular experiments. The North Carolina Court of Appeals held that the records must be disclosed, but required redaction of information that could be patented or would lead to the identification of researchers and staff. *Id.* at 156. In distinguishing the *S.E.T.A.* case from its own, the *Robinson* court stated:

There is a critical distinction between the present case and *S.E.T.A.* which dictates against following North Carolina's precedent: North Carolina's Public Records Act does not contain a concerning research exception. Indiana's inclusion of the concerning research exception, in addition to a trade secret exception, see IC 5-14-3-4(a)(4), indicates the legislature's intent to extend nondisclosure to a larger number of records. Some records may not be of a proprietary nature so as to constitute a trade secret, but may be of a scientific or experimental nature so as to concern research. The latter category of documents would fall into the concerning research exception, and, thus, would not be subject to disclosure.

Id. at 156-57. The *Robinson* court concluded its analysis by stating:

We agree with the trial court's determination that the information sought by the research applications was "information concerning research conducted by [or] under the auspices of Indiana University." . . . The application seeks information about the researcher, the nature of the proposed or ongoing research project, and procedures to be employed throughout the project. **The sole subject matter of the application is a research project and related personnel and procedures. Even in the narrowest sense, the information sought by the application concerns research. As such, it was not subject to disclosure under the Public Records Act.**

Id. at 158.

File No. 10-R-109; University of Nebraska Medical Center; Petitioner Amy Cobum, DVM (May 20, 2010) at 5 (emphasis added). See also *File No. 15-R-141; University of Nebraska; Petitioner Dave Conklin* (Oct. 6, 2015), *File No. 14-R-117; University of Nebraska; Petitioner D. Victoria Baranetsky, New York Times* (Aug. 27, 2014), *File No. 12-R-109; University of Nebraska Medical Center; Petitioner Lauren Briese, Physicians Committee for Responsible Medicine* (December 11, 2012).

Our prior dispositions also discussed the legislative history of the academic and scientific research exception. During floor debate on 1979 Neb. Laws LB 86, the Legislature amended the bill to include "academic and scientific" as qualifiers to "research" "in order to identify those things that the University might be going forward on, those research and studies that might be going forward." See Floor Debate on LB 86, 86th Neb. Leg. 1st Sess. 5214 (May 11, 1979) (Statement of Sen. Murphy).

Having reviewed your petition, the materials cited and referenced therein, and Ms. Klintoe's representations to the undersigned, we believe the University's reliance on the academic and scientific research exception as its basis to withhold the requested records was permissible under the NPRS. Please note that our review of this matter is limited solely to those materials initially requested to be produced by the University. Thus, the records at issue consist of "any video recordings, photographs, still images, or similar visual depictions, created or transmitted between January 1, 2018, and the date of fulfillment of [your] request . . ." Per our review of the materials cited in the petition, there is no indication that any visual media relating to the Project was published.

Further, the University has represented that research work on the Project remains ongoing. While our review of the cited publications indicates that some data and results generated from the Project's research have been utilized and published in other research work, these publications do not reflect that the Project has been definitively completed. In responding to petitions under the NPRS, our office presumes that the public entities and officials that respond to public records requests discharge their statutory duties in good faith. See *Wolf v. Grubbs*, 17 Neb. App. 292, 310, 759 N.W.2d 499, 517 (2009) (observing

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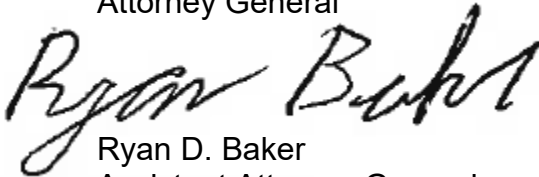
that, in a case involving the Open Meetings Act, “[i]n the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties”). We observe no indicia that the University has acted in bad faith in this matter, and we will accordingly rely on the University’s representations that the Project remains ongoing notwithstanding the stated completion of the data collection phase and termination of funding.

CONCLUSION

Based on the foregoing, we conclude that the University was justified in withholding the requested records. As a result, no further action by this office is warranted, and we will close this file. If you disagree with our findings set out in this letter, you may pursue the other remedies available under the Nebraska Public Record Statutes.

Sincerely,

MIKE HILGERS
Attorney General



Ryan D. Baker
Assistant Attorney General

c: Jaclyn Klintoe (via email only)

55-064