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Office of the Attorney General

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MIKE HILGERS
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ASSISTANT ATTORNEY GENERAL

May 28, 2026

Via email to [REDACTED]
Andrew Shiers

RE: *Public Records Matter Involving the Nebraska Department of Education*
Our File No. 20261044

Dear Mr. Shiers:

This letter is in response to your public records petition dated May 11, 2026, and received by this office on May 13. You have requested our review of the handling of three public records requests you submitted to the Nebraska Department of Education (NDE) on or about July 8, 2025. The undersigned contacted the NDE Legal Department upon receipt of your petition and requested a response. NDE Legal Counsel Troy L. Hawk responded on behalf of the NDE on May 14, and supplemented his response on May 18. We considered your petition and Mr. Hawk's responses on behalf of the NDE in accordance with the Nebraska Public Records Statutes (NPRS), Neb. Rev. Stat. §§ 84-712 to 84-712.09 (2024). Our findings in this matter are set forth below.

RELEVANT FACTS

In March 2025, you filed complaints against three individuals employed by Kearney Public Schools with the NDE. On June 9, 2025, you sent letters concerning two of these complaints to then-Deputy Commissioner Brian Halstead, stating:

I am in receipt of your letter dated May 27, 2025 regarding the above-referenced case.

In regards to this case, I request this *[sic]* following:

1. Proof of compliance with 92 NAC 28-03.03¹ and;
2. A true and accurate copy of the investigator's report made in compliance with 92 NAC 28-003.05A.

I respectfully request a response by June 27, 2025.

Your letter did not indicate you were requesting public records or refer to the NPRS.

Mr. Hawk responded to your requests by letter dated June 27, 2025, stating that the NDE was withholding "certain documents associated with NDE Investigation Case Nos. 23122 and 25008" under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(5).

On July 8, 2025, you sent three public records requests to Mr. Hawk, requesting again the records in your June 9, 2025, correspondence. You also requested records pertaining to your third complaint. You asserted in each request that the withholding under § 84-712.05(5) pertaining to the first item was "unjustified" since "the Department's compliance with 92 NAC 28-03.03 is simply a routine administrative or oversight activity, ancillary to any investigation," citing *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998). You also asserted that reliance on § 84-712.05(5) for the second item would be similarly unjustified for the following reasons:

1. The records produced pursuant to the NDE's compliance with 92 NAC 28-03.05A were not for law enforcement purposes because the only possible sanctions against the individual named in each complaint would be dismissal or a petition filed with the State Board of Education. In addition, the NDE is not authorized under law or policy to investigate criminal matters nor can it impose any criminal sanctions. "Thus, the record(s) produced by the [NDE's] investigation under [Rule 28] is not rationally related to any 'law enforcement purpose' subject to the exception of § 84-712.05(5)," citing *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).
2. Any investigatory records produced by the NDE under Rule 28 are not subject to § 84-712.05(5) because those records relate to the NDE's "routine duty to monitor and supervise the activities of the public employees whom it licenses, and not for any 'law enforcement purpose.'"
3. Since the NDE determined the allegations in the complaints did not warrant further action, the NDE admits that any law enforcement purpose that may

¹ See Title 92, *Nebraska Administrative Code*, Chapter 28, Professional Practices Investigations, Hearings, and Determinations by the State Board (effective date: September 28, 2024) (Rule 28).

have existed no longer exists. Accordingly, § 84-712.05(5) no longer applies, if it ever did in the first place.

We note you made essentially the same arguments in your petition to this office.

Mr. Hawk acknowledges the NDE relied on § 84-712.05(5) as its basis to withhold the requested investigatory records. This exception applies to

[r]ecords developed or received by law enforcement agencies **and other public bodies charged with duties of investigation or examination of persons**, institutions, or businesses, when the records constitute a part of the examination, investigation, intelligence information, complaints or inquiries from residents of this state or other interested persons, informant identification, or strategic or tactical information used in law enforcement training (Emphasis added.)

Mr. Hawk asserts the exception does not require the public body to be a law enforcement agency, nor does it require the investigation or examination to be criminal in nature. He also points out that § 84-712.05(5) contains two exceptions,² but neither applies to the records at issue here.

With respect to your reliance on *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009) [*Evertson*], Mr. Hawk states you are correct that NDE proceedings are not criminal in nature. However, *Evertson* did not state that § 84-712.05(5) *only* applies to law enforcement agencies and criminal investigations. Rather, the court stated:

Although § 84-712.05(5) does not refer to law enforcement purposes, it does refer to law enforcement agencies and public bodies charged with investigating or examining persons, institutions, or businesses. We interpret this language to mean investigations or examinations for performing adjudicatory or law enforcement functions.

Id. at 16, 767 N.W.2d at 764. Because NDE's investigations under Rule 28 are for adjudicatory purposes (i.e., determining violations of professional standards in 92 NAC 27³), which could ultimately lead to civil sanctions against the certificates of those individuals under investigation, § 84-712.05(5) applies to the records in question. Thus, Mr. Hawk asserts that because the records you requested were developed and are part of NDE's investigation of the individuals listed in your complaints, the records were appropriately withheld pursuant to § 84-712.05(5).

² These exceptions include (1) records relating to the presence of drugs or alcohol in any body fluid of an individual; and (2) records relating to the cause of death arising from or related to employment once an investigation is concluded when requested by a family member of the deceased.

³ See Title 92, *Nebraska Administrative Code*, Chapter 27, Regulations and Standards for Professional Practices Criteria (effective date: November 12, 2003).

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)). Consequently, you have no right to access public records in those instances where the Legislature has made the records expressly confidential or subject to withholding under § 84-712.05.

The test to determine whether a public record is an investigatory record for purposes of § 84-712.05(5) was set out in *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998). There, in determining whether the Department of Health and Human Services could withhold records pertaining to the desk and field audits of certain nursing homes, the court clarified that “[a] public record is an investigatory record where: (1) the activity giving rise to the document sought is related to the duty of investigation or examination with which the public body is charged, and (2) the relationship between the investigation or examination and that public body’s duty to investigate or examine supports a colorable claim of rationality.” *Id.* at 792, 587 N.W.2d at 106. The court further stated that “[i]f a document is compiled ancillary to an agency’s administrative function, then it is not protected from disclosure; when, however, an inquiry by an administrative agency departs from the routine and focuses with special intensity on a particular party, an investigation is underway for purposes of the investigatory records exception.” *Id.* at 792, 587 N.W.2d at 106-07.

There is no question the NDE is the public body charged with duties of investigation and examination of certificated individuals in Nebraska. In this respect, Neb. Rev. Stat. § 79-868 (2024) expressly provides that

[t]he [State Board of Education] may employ hearing officers to hold hearings and make recommendations to the board concerning alleged violations of standards of professional ethics and practices by persons holding a teacher's or administrator's certificate.

The commissioner may employ persons to investigate and prosecute cases of alleged violations of standards of professional ethics and practices before the board and its hearing officers. The commissioner shall cause to be investigated expeditiously any complaint which is filed with him or her or which is otherwise called to his or her attention and which if legally sufficient constitutes grounds for the revocation or suspension of a certificate or any other appropriate penalty set

forth in section 79-866 or in the rules and regulations adopted and promulgated pursuant to such section. If following an investigation the commissioner determines that legally sufficient grounds exist for revocation or suspension of a certificate or for any other appropriate penalty set forth in such section or rules and regulations, the commissioner may, in his or her discretion, file a petition with the board for adjudication of the matter or may reach an agreement for the appropriate sanction as allowed by the rules and regulations.

Rule 28 contains the regulations governing this process. As you note in your correspondence, § 03.05 expressly provides:

03.05 Evaluation and Investigation. Upon receipt of a complaint, the Commissioner or his or her designee must evaluate the complaint to determine if the facts alleged are sufficient to constitute a violation of 92 NAC 27. At his or her discretion, the Commissioner may assign an investigator to evaluate the complaint and may cause an investigation to be made into the circumstances surrounding the complaint.

003.05A It is the obligation and responsibility of the investigator to prepare a report for the consideration of the Commissioner, which report must contain the position or defense of the respondent, if any; identify the basis for jurisdiction; and set forth any legal arguments and authorities that appear applicable to the case. The report must include a recommendation as to whether there exists legally sufficient grounds for further proceedings and a recommendation of one of the following: Dismissal, further inquiry, admonishment, reprimand, or the filing of a petition.

003.05B The respondent must be mailed, or sent by electronic mail, a copy of the investigator's report and must be given twelve (12) days from the date of the mailing of the report to file exceptions with the investigator. After the expiration of this time limit, the investigator must file with the Commissioner a report in accordance with the provisions of section 003.05A of this chapter along with the respondent's exceptions, if any.

We have carefully considered the arguments you raised in your July 8, 2025, letters and subsequent petition. However, it appears you have construed the exception too narrowly. As Mr. Hawk correctly points out, the exception is not limited to law enforcement agencies but also applies to other public bodies with duties of investigation and examination. The NDE falls within this category. The records you seek were developed and received by the NDE while investigating the three individuals in your complaints. Those records were not compiled for a routine function, but focused with special intensity on specific parties in accordance with state law and regulations. Consequently, we find the Nebraska Supreme Court's test is satisfied in this matter, and the NDE may lawfully withhold the requested records under § 84-712.05(5).

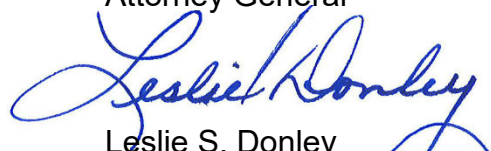
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CONCLUSION

For the reasons set forth above, we conclude the NDE's withholding of the investigatory reports under the exception in Neb. Rev. Stat. § 84-712.05(5) was appropriate. Since you have not been denied access to public records, no further action by this office is warranted, and we are closing this file. If you disagree with our findings set out in this letter, you may wish to consult with an attorney to determine what, if any, additional remedies may be available to you under the NPRS.

Sincerely,

MIKE HILGERS
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Troy L. Hawk (via email only)

49-4163-31