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Office of the Attorney General

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CHIEF, LEGAL SERVICES BUREAU

August 31, 2010

Mr. Matt Wynn
Omaha World-Herald
1314 Douglas Street Suite 700
Omaha, NE 68102

Re: *File No. 10-R-124; UNL; Wynn; World-Herald*

Dear Mr. Wynn:

On July 16, 2010, you faxed us various materials regarding access to public records of or belonging to the University of Nebraska, Lincoln ("UNL" or the "University"). We considered your submission of those materials to be a petition under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Supp. 2009), and in particular, under § 84-712.03. On August 2, 2010, we concluded our initial review of your submission, and we sent you correspondence in which we stated that the University's denial of your records request may have been permissible. However, in that letter, we also stated that your petition required further investigation and analysis, and we indicated that we would provide you with a final decision at a later date. We have now completed our review of the University's denial of your records request, and our conclusions in that regard are set out below.

FACTS

Our understanding of the facts in this instance is based upon the materials you provided to us along with our discussions of this matter with counsel for the University.

On or about June 29, 2010, you made a public records request to the University seeking a variety of records involving grade distributions for UNL classes. You requested grade distributions, or the number of A's, B's, C's, etc., by Department, Course Title, Course Number, Section Number, Semester, Academic Unit, if applicable, and Instructor.

A letter to you dated July 15, 2010, from Carmen Maurer, Associate General Counsel for the University, indicates that UNL did provide part of the grade distribution information which you sought to you, except for classes with small enrollment which

Mr. Matt Wynn
August 31, 2010
Page 2

might implicate FERPA. However, the University also withheld the instructor information which you requested because it would allow you to tie certain grade distributions to particular instructors. The University based its denial of the latter information upon the provisions of § 84-712.05 (7), which pertains to personal information regarding personnel of public bodies, because the grade distribution information at issue is apparently used in some faculty performance evaluations. You then contacted this office for our review of the propriety of that denial by UNL.

ANALYSIS

The Nebraska Public Records Statutes generally allow interested persons in Nebraska the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts therefrom, and to obtain copies of records in certain circumstances. However, while those statutes do provide for access to public documents, they are not absolute, and they also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). For example, § 84-712.05 sets out a number of categories of documents which may be kept confidential from the public at the discretion of the agency involved, and one such category is set out at § 84-712.05 (7):

Personal information in records regarding personnel of public bodies other than salaries and routine directory information.

The University based its denial of your records request upon § 84-712.05 (7).

It is our understanding that grade distributions may be used as a part of faculty evaluations in some instances by UNL, either as a part of specific department procedures in each case, or as a part of a specific inquiry involving a particular faculty member. The University argues that in those instances, the grade distributions become a part of the individual faculty member's performance evaluation, and "personal information" regarding that faculty member in the University's records because they were used in that fashion. In other words, the grade distributions become a part of the faculty member's personnel file through the performance evaluation process. The University also contends that if it were to give you grade distributions for those faculty members who have not had their distributions reviewed while keeping the grade distributions for other faculty members confidential as personal information, that disclosure itself would reveal personal information regarding all faculty members, i.e., whose grade distributions had been reviewed as a part of a performance evaluation and whose had not.

On balance, while the University's arguments are a bit convoluted, we are persuaded that under the circumstances described, information which would tie grade

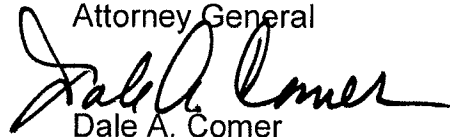
Mr. Matt Wynn
August 31, 2010
Page 3

distributions to particular members of the faculty can be characterized as personal information in the University's records regarding its personnel. On that basis, we conclude that the records at issue may be kept confidential under § 84-712.05 (7).

If you disagree with our analysis under the Public Records Statutes set out above, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under those statutes.

Sincerely,

JON BRUNING
Attorney General

A handwritten signature in black ink, appearing to read "Dale A. Comer". The signature is written in a cursive style with a large initial "D".

Dale A. Comer
Assistant Attorney General
Chief, Legal Services Bureau

cc: Joel D. Pedersen

05-212-30