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February 13, 2019

Via email at [CORDES@owh.com](mailto:CORDES@owh.com)  
Henry Cordes  
Metro News Reporter  
Omaha World-Herald  
1314 Douglas Street, Suite 700  
Omaha, NE 68102

RE: *File No. 19-R-107; Omaha School Employees' Retirement System; Henry Cordes--Omaha World-Herald, Petitioner*

Dear Mr. Cordes:

This letter is in response to your petition received by this office on January 29, 2019, in which you sought our assistance in obtaining certain public records from the Omaha School Employees' Retirement System ("OSERS"). In accordance with our normal practice, we contacted the entity involved, in this case OSERS legal counsel James G. Powers, and advised him of the opportunity to provide this office a response to your petition. We received Mr. Powers' response on February 12, 2019. We have fully considered your petition and OSERS' response in accordance with the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018) ("NPRS"). Our findings in this matter are set forth below.

### **RELEVANT FACTS**

Our understanding of the facts in this matter is based on your petition and the accompanying emails and the response we received from Mr. Powers.

You are currently writing a series of stories relating to the Omaha Public Schools' ("OPS") "pension fund and mistakes that have cost the fund hundreds of millions of dollars." You indicate that you are working on a story about former OPS superintendent John Mackiel's involvement in this matter, and believe information pertaining to Mr. Mackiel's pension would be relevant to your investigation and reporting. Consequently, on January 15, 2019, you emailed the following questions to Cecelia Carter, OSERS executive director:

- What is John Mackiel's pension?
- What is income [sic] is it based on? Does the base include the \$1 million bonus he received upon retirement?
- Is it the biggest pension OSERS pays? If not, what are the larger pensions?

On January 25, Ms. Carter emailed you some information in response to your inquiries. However, she indicated that "any further information regarding Dr. Mackeil's [sic] personal pension information from OSERS will require a release from Dr. Mackeil. Please provide me with at least a duplicate original release from Dr. Mackeil authorizing OSERS to discuss his personal pension benefit."

Dissatisfied with the responses provided, you emailed Ms. Carter indicating that you were "formally resubmitting the three questions below under Nebraska 84-712 et al. to preserve our ability to appeal this matter to the Attorney General." On January 28, 2019, Mr. Powers, writing on behalf of OSERS, denied your request, citing Neb. Rev. Stat. § 84-712.05(7) as the statutory basis to withhold the records. He noted that under subsection (7), "personal information of public employees (other than salaries and routine directory information) are exempt from disclosure" and that you had requested "personal information of a former public employee who is now a private citizen." Mr. Powers also stated that the public interest in protecting the privacy interests of former OPS employees outweighs any public interest in the disclosure of their pension information.

In your petition, you state that in response to your initial request, Ms. Carter "cites some statutes in regards to my questions, does not give answers and then refuses to give the figure for Mackiel's monthly pension, saying I would need his written permission to do so. . . . [S]he also did not answer my question of whether his pension is the largest OSERS pays." You argue that your "request speaks for itself" and "is in the public interest." You also point out that the request involves the expenditure of "public dollars." You also argue that there is no provision in state law that requires you to get written permission to obtain this information from OSERS.

You also call our attention to pending legislative bill 33,<sup>1</sup> which you say would give OSERS records the same protection from disclosure as the records for the state teachers retirement system. You argue that the bill would not be necessary "if state law already barred these records from disclosure." Finally, you argue since the bill has not been enacted, it cannot now deny you access to the information you have requested.

According to Mr. Powers, OSERS considered your questions to be a request for records reflecting the pension benefits of Dr. Mackiel. Specifically, your request sought

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<sup>1</sup> [https://nebraskalegislature.gov/bills/view\\_bill.php?DocumentID=37552](https://nebraskalegislature.gov/bills/view_bill.php?DocumentID=37552).

personal information other than salaries and routine directory information of a former employee. It is the position of OSERS that pension benefit information does not fall under "salary and routine directory information," which is information that must be disclosed. In that regard, Mr. Powers states:

An employee's pension is an employee benefit just like other employer-provided insurance and is not subject to payroll deductions like salary payments. Pension benefits are reported to the Internal Revenue Service on a 1099R form and not a W2 form like salary disbursements. OSERS may validly withhold this information for Dr. Mackiel and all other retirees.

With respect to the pending legislation, Mr. Powers states that the amendments to Neb. Rev. Stat. §§ 79-989 and 84-712.05 provide OSERS the authority to withhold from the public the records sought in your request.<sup>2</sup> The amendments in LB 33 align the Class V School Employees Retirement Plan with the other plans administered by the Public Employees Retirement Board and "amounts to a confirmation of the State's public policy that pension information is clearly sensitive personal information that may be withheld from the public."

## DISCUSSION

Generally, the NPRS 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 from those records, and to obtain copies of records in certain circumstances. Under § 84-712(4), interested persons seeking access to or copies of a particular public record initiate that process by providing a "written request" to the custodian of that record for such access or copies. In connection with our enforcement authority under the NPRS, we have consistently taken the position for a number of years that those statutes do not require public agencies to answer questions or to create records which do not otherwise exist.<sup>3</sup> Instead, those statutes focus on access to and copies of specific records.

Here, you did not ask for access to or copies of specific records. Your request plainly indicates that it is a resubmission of your three questions under § 84-712: (1) the amount of Dr. Mackiel's pension; (2) the basis for the pension calculation; and (3) whether

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<sup>2</sup> For the record, the current Final Reading version of LB 33 amends Neb. Rev. Stat. § 79-989 (Cum. Supp. 2018), to make retirement information maintained by the school board and obtained by OSERS not a public record. See § 5. In contrast, § 6 of the bill would add "records maintained by the board of education of a Class V school district and obtained by [OSERS] for the administration of a retirement system" to the categories of public records that may be withheld at the discretion of the custodian of the records.

<sup>3</sup> Section 84-712 does not require a public agency 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).

Dr. Mackiel's pension was the largest pension paid out and, if not, which pensions were larger. Consequently, in our view, OSERS was not required to respond to your questions under the NPRS, and could have denied your request on this basis. However, since OSERS did respond and denied your request, Neb. Rev. Stat. § 84-712.03(1)(b) requires us to determine whether the basis for denial was appropriate.

Neb. Rev. Stat. § 84-712.05 sets out a number of categories of public records which may be kept confidential from the public at the discretion of the custodian of those records. The exception to disclosure is available 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 . . . ." The specific exception cited by OSERS—§ 84-712.05(7)—applies to

[p]ersonal information in records regarding personnel of public bodies other than salaries and routine directory information . . . .

In Nebraska, in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018); *Farmers Cooperative v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017). The plain and ordinary reading of § 84-712.05(7) indicates that public bodies may lawfully withhold personal information regarding its personnel, except for salary and routine directory information. In this context, Webster's New Universal Abridged Dictionary 1338 (2<sup>nd</sup> ed. 1983) defines "personal" as "2. private; individual; affecting individuals; peculiar or proper to a certain person or to private actions or character . . . ." "Salary" may be defined as "[a]n agreed compensation for services —esp. professional or semiprofessional services —usu. paid at regular intervals on a yearly basis, as distinguished from an hourly basis." Black's Law Dictionary (10<sup>th</sup> ed. 2014). As an adjective, "routine" is defined as "1. In accordance with established procedure. 2. Habitual, regular." The American Heritage Dictionary of the English Language 1131 (1981). A "directory" is described as "[a] book containing an alphabetical list of names, addresses, and telephone numbers, esp. those of a city's or area's residents and businesses. 2. Any organization's publication containing information on its members or business, such as a legal directory." Black's Law Dictionary (10<sup>th</sup> ed. 2014).

Reading the exception in its plain and ordinary sense, and construing it as narrowly as possible,<sup>4</sup> we conclude that the requested pension information is a public record that falls squarely within the exception. You have requested the amount of Dr. Mackiel's pension payments, the basis for the payments, and whether the payments are the highest paid by the district. All of the requested information is personal to Dr. Mackiel, a former

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<sup>4</sup> *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 122, 907 N.W.2d 301, 308 (2018) ("Because the Legislature has expressed a strong public policy for disclosure, an appellate court must narrowly construe statutory exemptions shielding public records from disclosure.").

employee of a public body. You have not requested Dr. Mackiel's salary while employed by OPS, nor any information relating to his job title, work address, telephone, etc. Section 84-712.05(7) gives public bodies the discretion to withhold the public records listed in the statute so long as they have not been generally disclosed. We have received no information to suggest that is the case here. Consequently, OSERS' reliance on the exception in § 84-712.05(7) was appropriate under these circumstances.<sup>5</sup>

Finally, we would like to briefly address some of the issues raised by the parties relating to this matter. First, unlike some other states' public records law, Nebraska has no requirement to weigh any privacy interests at stake against the general public interest in the disclosure of records. The only time the "public interest" is implicated in the NPRS is found in the exception in Neb. Rev. Stat. § 84-712.05(3), which allows a public body or official to withhold records relating to "[t]rade 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 . . . ."<sup>6</sup> (Emphasis added.) Second, while § 84-712.01(3) requires a liberal construction of the NPRS when the expenditure of public funds are at issue, we disagree that Dr. Mackiel's pension benefits would constitute "public funds." Thus, a more liberal construction of your request is not warranted. Third, while the enactment of LB 33 will limit access to the records relating to OPS's pension fund, that bill has no impact today on OSERS' ability to apply the exception in § 84-712.05(7) to withhold the requested records.

## CONCLUSION

Based on the foregoing, there is nothing in the NPRS that requires a public body like OSERS to respond to *questions* posed in a request made pursuant to § 84-712. In addition, OSERS may continue to rely on the exception in § 84-712.05(7) to deny you access to records relating to Dr. Mackiel's pension information. Since we have determined that you have not been denied access to public records, no further action is warranted and we are closing our file.

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<sup>5</sup> See also *Steckelberg v. Nebraska State Patrol*, 294 Neb. 842, 850, 885 N.W.2d 44, 50 (2016) ("There is no requirement in § 84-712.05(7) that in order to be exempt, the records must be kept within an employee's personnel record, as used as a term of art; *the records need only be personal information about personnel, defined as persons employed by an organization.*" (Emphasis added.)).

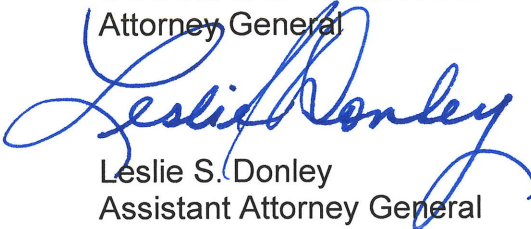
<sup>6</sup> See *Aksamit*, 299 Neb. at 125, 907 N.W.2d at 309-310 ("[W]e conclude that the language of § 84-712.05(3) does not allow us to balance the competing interests. Information which would give a business competitor an advantage may be withheld only if it would 'serve no public purpose.' There is no requirement that the public purpose to be served outweigh the competitive harm caused.").

Henry Cordes  
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If you disagree with our analysis of this matter, you may wish to consult with your legal counsel to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General



Leslie S. Donley  
Assistant Attorney General

c: James G. Powers (via email)

49-2159-29