

STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

DOUGLAS J. PETERSON
ATTORNEY GENERAL

NATALEE J. HART
ASSISTANT ATTORNEY GENERAL

December 20, 2019

April Messerschmidt-Rutz
[REDACTED]

RE: *File No. 19-R-133; Nebraska Department of Agriculture; April Messerschmidt-Rutz, Petitioner*

Dear Ms. Messerschmidt-Rutz:

We are writing in response to correspondence received by this office in which you petitioned for our review of the response to your request for certain public records belonging to the Nebraska Department of Agriculture ("Department") under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2014, Cum. Supp. 2018, Supp. 2019) ("NPRS"). We have completed our analysis of this matter and our findings are set forth below.

RELEVANT FACTS

Our understanding of the facts in this matter is based on your petition and its supporting documentation. On or about August 2, 2019, you made a request to the Department for "[a]ll reports related to the inspections of Heads Up Hounds LLC beginning late May 2019." On August 8, 2019, the Department responded, denying your request for these records as "records developed or received by public bodies charged with duties of investigation or examination" pursuant to Neb. Rev. Stat. § 84-712.05(5). Your petition has followed this denial.

DISCUSSION

The NPRS generally allow interested persons the right to examine public records in the possession of public agencies in Nebraska during normal agency business hours, to make memoranda and abstracts from those records, and to obtain copies of records in certain circumstances. Except when any other statute expressly provides that particular information or records shall not be made public, public records shall 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. Data which is a public record in its original form shall remain a public record when maintained in computer files. Neb. Rev. Stat. § 84-712.01(1). Under those statutes, every record "of or belonging to" a public body is a public record which individuals may obtain a copy of unless the custodian of the record can point to a specific statute which allows the record to be kept confidential. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *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).

Although the NPRS provide for access to public documents, they are not absolute and also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). Neb. Rev. Stat. § 84-712.05 enumerates categories of documents which may be kept confidential from the public at the discretion of the agency involved. In the present case, the Department has claimed that subsection (5) of Neb. Rev. Stat. § 84-712.05 allows it to deny you access to the records requested. This provision of the NPRS provides as follows:

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:

(5) Records 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, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training, except that this subdivision shall not apply to records so developed or received relating to the presence of and amount or concentration of alcohol or drugs in any body fluid of any person.

In its response to you, the Department explained that it is the agency which is responsible for the administration and enforcement of the Commercial Dog and Cat Operator Inspection Act (Act), Neb. Rev. Stat. §§ 54-625 to 54-643. [The Department] is currently investigating Heads Up Hounds to ascertain if it is operating in compliance with the Act. If, and when, the inspection reports become public, [the Department] will notify you.

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. *Swift and Company v. Nebraska Department of Revenue*, 278 Neb. 763, 773 N.W.2d 381 (2009). The plain and ordinary reading of § 84-712.05(5) indicates that a public body

which is charged with a duty of investigation or examination may withhold records it develops or receives in the course of its investigation or examination. The Department is charged with the duty of inspection of the facility for which you seek records pursuant to Neb. Rev. Stat § 54-628 (Cum. Supp. 2018). Part of that duty is ensuring that the facility is in compliance with the Department's relevant statutes and regulations. *Id.* The Department's letter to you advises that an investigation into Heads Up Hounds is currently ongoing.

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), the Nebraska Supreme Court considered whether certain records generated by the Department of Health and Human Services [DHHS] in the course of its audits of nursing homes were "investigatory records" which could be withheld by the agency under § 84-712.05(5). To aid in its analysis, the court adopted the following standard:

[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 found that DHHS was a public body charged with the duty to investigate nursing homes' Medicaid reimbursement claims, and that its auditing activities were "clearly and rationally related to the Department's investigatory duty." *Id.* However, it questioned whether DHHS' auditing activities were "investigations or examinations within the meaning of § 84-712.05(5)." *Id.* In addressing this question, the court formulated another standard, stating:

It has generally been held that a distinction must be drawn between (1) routine administration or oversight activities and (2) focused inquiries into specific violations of law. . . . If 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 106-107 (internal citations omitted). The court ultimately concluded that the DHHS' auditors had departed from the routine when they decided to make specific requests for further information to address particular deficiencies in the cost reports submitted by nursing homes. As a result, the court found that DHHS could lawfully withhold the requested documents under the exception in § 84-712.05(5).

Applying the standards set out in *Nebraska Health Care Association* to the circumstances here, we conclude the Department has established that it is charged with

April Messerschmidt-Rutz
December 20, 2019
Page 4


the inspection of the facility for which you seek records and that there is a rational relationship between the Department's duty to inspect and its ongoing investigation into Heads Up Hounds. Based on the foregoing, the requested documents constitute "investigatory records" as contemplated in Neb. Rev. Stat. § 84-712.05(5) and may be withheld by the Department. Consequently, you have not been improperly denied access to public records.

CONCLUSION

For the reasons explained above, we conclude that the Department has not violated the NPRS with respect to your request for records, and that no further action by this office is warranted. Accordingly, we are closing this file. If you disagree with the analysis we have set out above, you may wish to determine what additional remedies may be available to you under the NPRS.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Robert Storant, Department of Agriculture

02-761-29