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January 18, 2017

Grace R. Willnerd
[REDACTED]

RE: *File No. 18-R-102; Nebraska Department of Revenue; Grace Willnerd, Petitioner*

Dear Ms. Willnerd:

This letter is in response to your petition received by this office on January 3, 2018, in which you sought our assistance in obtaining certain public records from the Nebraska Department of Revenue ("Department"). In accordance with our normal practice, we contacted the entity involved, in this case Timothy A. Young, Department Human Resources Manager, and advised him of the opportunity to provide this office a response to the petition. On January 8, 2018, we received a response from Department legal counsel Aaron J. Hendry, who responded on behalf of the Department. We have now had the opportunity to fully consider your petition and the Department's response in accordance with the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2016) ("NPRS"). Our findings in this matter are set forth below.

RELEVANT FACTS

Our understanding of the facts in this matter is based upon your petition and the accompanying documentation and the response we received from Mr. Hendry.

On December 5, 2017, you hand delivered your public records request to Mr. Young, seeking access to Department "email correspondence which in any way responds to or forwards" an email you sent to division staff on August 8, 2017.¹ Your email explained your absence from the workplace due to a medical situation involving a member of your family. You also requested "any other email correspondence or instant messages from the date of Tuesday August 8, 2017 through August 31, 2017," which references the family member or three other specific search terms. In your request, you

¹ We understand that at the time of your public records request, you were employed with the Department's Property Assessment Division.

identified six Department employees whose email should be searched. You also requested that the Department's IT manager conduct the search in order to minimize disruption in the division, among other concerns.

By letter dated December 13, 2017, Mr. Young denied your request. He stated that a search identified responsive email² based on the parameters of your request. However, those records would be withheld under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(7) (Cum. Supp. 2016). In support of his decision to deny you access to the records, Mr. Young cited the Nebraska Supreme Court case *Steckelberg v. Nebraska State Patrol*, 294 Neb. 842, 885 N.W.2d 44 (2016), stating as follows:

The court found that for a record to be denied under the statute, "records need only be personal information about personnel, [personnel being] defined as persons employed by an organization." *Id.* at 850. While the court did not define the term "personal information," it is our firm belief that records relating to an employee's [family] would constitute personal information under any standard.

Mr. Young also informed you that the fact you were requesting personal information about yourself does not alter the Department's analysis as to what may be withheld under the NPRS, and indicated that it "would apply the same rationale" in response to an identical request made by a member of the public.

DISCUSSION

In your petition, you argue that the Department erroneously relied on the exception in § 84-712.05(7) and the *Steckelberg* case as its bases to withhold the responsive email. You also argue that in the event your August 8, 2017 email is deemed properly withheld as "personal information," any other correspondence which discusses your family would "not [be] 'personal' within the meaning of the statute and should be produced."³

The basic rule for access to public records in Nebraska is found at Neb. Rev. Stat. § 84-712 of the Nebraska Public Records Statutes. That statute provides, in pertinent part:

Except as otherwise expressly provided by statute, all citizens of this state and all other persons interested in the examination of the public records as

² In his letter to this office, Mr. Hendry clarified that there were "111 'hits' of words or phrases within the parameters of the public records request at issue," not 111 *documents* as asserted in your petition.

³ You also raised issues as to the means by which the search was performed, including the disclosure of your written records request to Department staff. However, the manner in which a public body conducts a search for public records is immaterial to our analysis so long as the public body makes a good faith effort to search for and identify responsive records.

defined in section 84-712.01 are hereby fully empowered and authorized to (a) examine such records, and make memoranda, copies using their own copying or photocopying equipment in accordance with subsection (2) of this section, and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business and (b) except if federal copyright law otherwise provides, obtain copies of public records in accordance with subsection (3) of this section during the hours the respective offices may be kept open for the ordinary transaction of business.

Neb. Rev. Stat. § 84-712(1) (2014) (emphasis added). "Public records" are defined as follows:

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) (2014) (emphasis added). Thus, in those instances where the Legislature has provided that a particular record shall be confidential or may be withheld at the discretion of the records custodian under the categories of records set out in § 84-712.05, there is no right of access.

Here the Department is relying on the exception in § 84-712.05(7) to withhold the responsive email. That exception states, in pertinent part:

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:

(7) Personal 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. *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.⁴ In this context, Webster's New Universal Abridged Dictionary 1338 (2nd ed. 1983) defines "personal" as "2. private; individual; affecting individuals; peculiar or proper to a certain person or to private actions or character" The records at issue here contain information about your absence from work due to a medical situation involving your family member—which is, without question, private information pertaining to you. You were and continue to be an employee of the Department. The records do not contain salary or routine directory information. It appears to us then that the records at issue contain exactly the type of information a records custodian would want to keep private and the exception is designed to protect. There is also no reason to conclude that if the August 8, 2017, email may be withheld under the exception, any other correspondence directly or indirectly related to this email should be disclosed.

You also question the Department's reliance on *Steckelberg*, the only Nebraska appellate case to construe the "personal information" exception. In this regard, you state that nowhere in *Steckelberg* does the court define "personal information." You also argue that since the records sought were not part of the appellate record, the Supreme Court did not actually determine that the records at issue were *personal* in nature.

The appellant in *Steckelberg* was a State Patrol trooper who sought access to records relating to the interview and selection process for an "Executive Protection Trooper" position within the Patrol, a position he interviewed for but did not get. While you correctly point out that the records at issue were not part of the appellate record, the records were provided to the district court judge for an *in camera* review pursuant to Neb. Rev. Stat. § 84-712.03(2). Upon review of the records, Judge Strong found that

[t]he documents sought contain the interviewing board's impression of the candidates concerning their appearance, mannerisms, ability to answer questions, their career and personal life experiences, whether their personal life may interfere or contribute to their ability to succeed and their scores on each response to the interview questions concerning the roles and responsibilities of the Executive Protection Division. The interview board then made its recommendations concerning the applicants. *The Court finds that the information contained in the records constitutes personal information within the meaning of § 84-712.05(7).*

Todd Steckelberg v. Nebraska State Patrol, Lancaster County District Court, Case No. CI 15-1710, Order on Petition for Writ of Mandamus (August 25, 2015) (emphasis added).

On appeal, Steckelberg argued, among other things, that the requested records did not fit within the parameters of § 84-712.05(7) because, by the State Patrol's own

⁴ This office has construed "routine directory information" to include an employee's name, job title, work telephone number and address and dates of hire and separation. See the Classified System Personnel Rules—Chapter 12—Personnel Records, Title 273, *Nebraska Administrative Code*, Chapter 12, § 001.01 (October 30, 2006).

admission, they were not part of an employee's personnel file. In rejecting this argument, the Court stated:

Steckelberg's first argument . . . misses the mark. The State Patrol did produce an affidavit stating that the records were not kept with an employee's personnel record, but were kept separately by the State Patrol's human resources division. But § 84–712.05(7) exempts “[p]ersonal information in records regarding personnel.” The district court found that the information in the records sought did contain personal information. And the information was about employees, otherwise known as personnel, of the State Patrol. 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.*

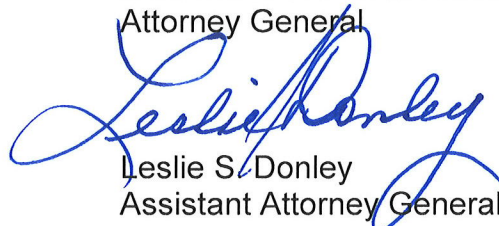
Steckelberg, 294 Neb. at 849-850, 885 N.W.2d at 50 (internal citations omitted) (emphasis added). The Department has indicated to you and this office its firm belief that records involving an employee's family member constitute “personal information.” We agree. Therefore, in light of the plain language of the exception, and the Court's straightforward construction of it set out in *Steckelberg*, we conclude that the records at issue contain information personal to you—a Department employee—and that the Department of Revenue may continue to rely on the exception to withhold the records you seek.

CONCLUSION

For the reasons discussed above, we do not believe that you were improperly denied access to public records and we plan no further action regarding this file. If you disagree with our analysis, you may wish to discuss this matter with your private attorney to determine what, if any, additional remedies might be available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Aaron J. Hendry