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May 22, 2018

Eric Aspengren
Executive Director
Nebraska Democratic Party
201 N 8th St, Suite 210
Lincoln, NE 68508

RE: *File No. 18-R-117; Nebraska DHHS; Eric Aspengren and Nebraska Democratic Party, Petitioners*

Dear Mr. Aspengren:

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 Health and Human Services ("DHHS") under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2014, Cum. Supp. 2016) ("NPRS"). Your initial petition was received by us on April 24, 2018. You subsequently supplemented that petition at our request on May 7, 2018. As is our normal practice with such requests, we contacted the public body named in the correspondence and asked for a response to that petition. In this case, we provided the petition and supplement to DHHS and a response was provided to us on May 14, 2018 by Jamie Hegr, an attorney with DHHS; this response also contained a response to a portion of your petition from UnitedHealth Care ("UHC"). We received further clarification from DHHS and UHC, at our request, on May 17, 2018 and had phone conversations with Ms. Hegr on that date as to DHHS's response to your petition. We have now 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 supplement, and the responses we received from DHHS. On or about February 22, 2018, you made the following request for records to DHHS:

All communications, printed or electronic, sent to or received between Senator Merv Riepe or his staff and the Governor's office or any agency of State government. Said communications shall also include any

State government. Said communications shall also include any communications wherein Senator Riepe or his staff were copied and another person/senator was the primary addressee/recipient. Electronic communication shall include emails, text messages, or any other communication transmitted by any electronic medium whatsoever.

In response to your request, DHHS responded on April 2, 2018¹ providing certain records responsive to your request. Additionally, DHHS denied access to records it classified as “[c]ommunications relating to specifically identified constituents who applied for or were receiving public assistance through [DHHS], United Health Care materials marked proprietary, and statistical data that could lead to the identification of individual recipients of public services,” citing the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), Medicaid confidentiality laws, and Neb. Rev. Stat. § 68-313 as the basis for withholding these records.

Your petition followed this partial denial of records. You appear to accept the denial of the records classified by DHHS as “communications relating to specifically identified constituents who applied for or were receiving public assistance through [DHHS]” and it does not appear that the denial of these records is included in your petition. However, you object to the withholding by DHHS of statistical data it believes could lead to the identification of individuals receiving aid if released, and do not believe these documents can be properly withheld under Neb. Rev. Stat. § 68-313 or HIPAA. You also request our review of the denial of “United Health Care materials marked proprietary,” as these materials do not appear to fall under Neb. Rev. Stat. § 68-313 or HIPAA and you do not believe they may properly be withheld under Neb. Rev. Stat. § 84-712.05(3)².

As to the statistical records which initially were withheld in its response to you, DHHS indicated to us that it withheld more data than was required and has since provided additional documents to you containing statistical information for the 17 largest counties in Nebraska, all having populations over 20,000. As a result, DHHS’s denial is now only as to those documents which provide statistical data for non-English speaking Medicaid recipients residing in counties of less than 20,000 residents. As to these records, DHHS responded that it

provided redacted statistical information for non-English speaking Medicaid recipients to ensure that the statistical data could not be used to determine the identity of Medicaid recipients in particular counties. Under 45 CFR [§] 164.514, protected health information cannot be given out for

¹ Your petition appears to indicate that there were disclosures of documents made between your February 22, 2018 request and DHHS’s April 2, 2018 response. These interim communications are not part of your petition.

² While DHHS’s denial of documents does not cite to this statutory provision, you recognize that proprietary materials, under certain conditions, may be withheld under this provision of the NPRS.

geographical locations containing fewer than 20,000 people. As such, any statistical information regarding recipients of public assistance in counties with fewer than 20,000 people could lead to the identification of those individuals receiving assistance in that county, contrary to law.

Further, DHHS stated in its supplemental response to your petition that it would be in violation of Neb. Rev. Stat. § 68-313 and Section 1902(a)(7) of the federal Social Security Act if it released the remaining information to you, as it could be used to identify individual Medicaid recipients in these small counties.

Concerning the denial of “United Health Care materials marked proprietary,” DHHS stated that it “is in possession of two documents from UHC that are marked as confidential and proprietary by UHC.” DHHS deferred to argument provided in response to your petition by UHC as to the applicability of Neb. Rev. Stat. § 84-712.05(3) to those documents. UHC stated that there are two documents which have been withheld, titled “Promoting and Facilitating the Capacity of Nebraska Providers to Deliver Whole Person Care” and “Network Development Plan – Report for October 28, 2016.”

First, as to the “Network Development Plan,” UHC states that it “contains a detailed description of UnitedHealthcare’s network development activities including network contracting status, geo access reports, network gaps and remediation plans to fill those gaps.” Detailed information found in this document includes “contracting strategies and status, including specific names of providers by specialty, the status of our contracting efforts with each provider and the criteria used to determine how UnitedHealthcare builds its network and targets certain providers.” Additionally, “the types of contracting strategies and contracting targets that are identified in this document are not public.” UHC identifies two specific competitors in Nebraska, Nebraska Total Care and WellCare of Nebraska, which it believes would gain a competitive advantage in bidding for business with the State of Nebraska if this document was made public. Additionally, UHC identifies at least three other competitors against which it competes in other states which it states would gain an advantage against UHC in its bids for state contracts if this information is disclosed. In support of non-disclosure of this document, UHC states that its “ability to develop a strong network and contract with key providers is a core competency of UnitedHealthcare and a value that it provides to the state.”

UHC also responded as to the claim of proprietary material found in the other document withheld, “Promoting and Facilitating the Capacity of Nebraska Providers to deliver Whole Person Care.” This document was provided to DHHS in March 2017 and “outlines the development and implementation plans for an integrated program for patient-centered care (PCMH Model) that we believe is unique in the marketplace today.” This document also contains “payment methodologies, implementation processes and our plan for the program launch and how members will be educated. . . . All this information was prepared to describe all the components of a new innovative and integrated program, developed and owned by UnitedHealthcare.” UHC again identified Nebraska Total Care

and WellCare of Nebraska as two competitors within the state which it believes would gain a competitive advantage upon release of this document; UHC also cited to other competitors with which it competes on a wider basis for state contracts. It also stated that this information has “economic value to UnitedHealthcare, derived from the fact that it is not known by its competitors, is subject to UnitedHealthcare’s reasonable efforts to maintain its confidentiality, the efforts expended by UnitedHealthcare in developing it and what its competitors would expend in independently developing it.” UHC states that providing access to this document would allow its competitors to compete with it for states’ Medicaid contracts “where winning bids are dependent on the ability to implement innovative programs that improve health outcomes and member experience while reducing costs.”

We have reviewed all of the information provided to us, along with the relevant statutory provisions, and have reached the following conclusions.

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). In the present case, DHHS has claimed Neb. Rev. Stat. § 68-313, HIPAA, and Neb. Rev. Stat. § 84-712.02(3)³ as its basis for

³ DHHS does not specifically cite to this statutory provision in its denial letter. However, it makes reference to “materials marked proprietary,” which would invoke this section of the NPRS. We will take this opportunity to remind DHHS that its denial letters must contain reference to the provision(s) of the NPRS upon which it relies to deny access to records. Failing to do so violates Neb. Rev. Stat. § 84-712.04(1)(a) which requires specific reasons for denial and citations to the particular statute and subsection providing support for the denial.

denying you access to the requested records.

Denial of access to proprietary documents

First, as to UHC documents in the possession of DHHS marked proprietary, Neb. Rev. Stat. § 84-712.05 (2016) sets out twenty categories of records which may be kept confidential from the public at the discretion of the agency involved 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” In the present case, DHHS is relying on the exception to disclosure in § 84-712.05(3), which allows it to withhold, at its discretion, the following records:

Trade 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*

(Emphasis added.)

In its response to this office, DHHS deferred to UHC to provide explanation for its determination that the two documents at issue are proprietary and may be withheld by DHHS. UHC provided descriptions of the two documents withheld, its “Network Development Plan” and “Promoting and Facilitating the Capacity of Nebraska Providers to deliver Whole Person Care.” As to the “Network Development Plan” UHC states that this document contains information relating to its contracts with medical providers within its insurance network and the relationship between UHC and its providers and potential providers. The other document withheld contains detailed information about a unique patient-centered care model developed by UHC for use in the Nebraska Medicaid system. UHC claims each of these documents fits squarely within Neb. Rev. Stat. § 84-712.05(3) as containing commercial or proprietary information.

The Nebraska Supreme Court has recently ruled on the scope of Neb. Rev. Stat. § 84-712.05(3) in *Aksamit Res. Mgmt. LLC v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018).⁴ In this case, the Court was presented for the first time with the interpretation of the provision of the NPRS which allows a public body to withhold proprietary and commercial information. Aksamit sought records from the Nebraska Public Power District (“NPPD”) showing cost and revenue information broken down by generation unit. Aksamit is an undisputed business competitor of NPPD, seeking to provide electricity in Nebraska; NPPD denied access to these records pursuant to Neb. Rev. Stat. § 84-712.05(3). Aksamit argued that disclosure of these records served a

⁴ While the Nebraska Legislature subsequently passed 2018 Neb. Laws. LB 1008, §3, allowing public power districts to withhold competitive or proprietary information which would give advantage to business competitors, that provision does not apply to the records at issue here which are records of DHHS and not a public power district.

public purpose, that of providing Nebraska residents detailed information about the financial viability of public power in the state. The Nebraska Supreme Court held that NPPD had the burden of showing that not only would a business competitor gain an advantage from disclosure of the information, but also that the information served no public purpose. In construing this provision of the NPRS narrowly, the Court was clear that Neb. Rev. Stat. § 84-712.05(3) does not impose a balancing test assessing whether the public purpose outweighs the competitive advantage; but rather that it consists of two parts, each of which must be demonstrated by the public body. "Information which would give a business competitor an advantage may be withheld only if it would 'serve no public purpose.'" *Id.* at 125. "A public purpose has for its objectives the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants." When we consider the meaning of the words 'public purpose' in § 84-712.05(3), liberal public disclosure of the records of public entities is an important factor." *Id.* at 124. While NPPD demonstrated that providing the requested records to Aksamit would give a business advantage to a competitor, it was unable to show that there was no public purpose in the disclosure of the documents. "The law as framed required it to prove both elements." *Id.* at 127.

In addition to the guidance provided by the Nebraska Supreme Court, we also continue to look to previous opinions of this office where we determined whether the exception in § 84-712.05(3) applied in the circumstances presented. These opinions address only the first part of the two-part test, whether the public body has demonstrated that requested documents contain proprietary or commercial information which would give advantage to competitors, and do not opine as to whether disclosure of the records would serve no public purpose. In Op. Att'y Gen. No. 92068 (May 7, 1992), we fashioned the following standards:

- (a) Section 84-712.05(3) does not impose any requirement of "substantial" competitive injury or advantage to make the exception from disclosure available;
- (b) A bare assertion by the provider of commercial information that such information is confidential is insufficient to justify nondisclosure; and
- (c) Nondisclosure must be based upon a showing that a specified competitor may gain a demonstrated advantage by disclosure rather than a mere assertion that some unknown business competitor may gain some unspecified advantage.

In Op. Att'y Gen. No. 97033 (June 9, 1997), we addressed, *inter alia*, whether certain data generated by an HMO under contract with DHHS, and contained in records belonging to that agency, fell within the proprietary or commercial information exception. We reaffirmed the standards set out in Op. Att'y Gen. No. 92068, and indicated that in our enforcement capacity under Neb. Rev. Stat. § 84-712.03, we have required

governmental bodies relying on § 84-712.05(3) to withhold records to name specific competitors who might gain advantage and the nature of the advantage which would result from disclosure of the withheld records. We have also required governmental bodies under these circumstances to provide to the public “[a]ny reasonably segregable public portion of a record . . . upon request after deletion of the portions which may be withheld.” Neb. Rev. Stat. § 84-712.06 (2014).

With those standards in mind, and with regard to *Aksamit*, it is the duty of DHHS, and by extension UHC, to demonstrate to us that the documents withheld pursuant to your public records request would both give a specific advantage to a specified competitor if they are disclosed and that disclosure serves no public purpose.

As to the first portion of the test, whether these two documents contain commercial or proprietary information which would give a specific advantage to a specific competitor, we believe DHHS, through the explanation provided by UHC, has met its burden. UHC has identified two direct competitors in the Nebraska Medicaid market, and at least three against whom it may bid in other states, which would gain an advantage in bidding against UHC should these two documents be released. Concerning the “Network Development Plan” document, UHC has indicated that it competes in Nebraska with Nebraska Total Care and WellCare of Nebraska to “obtain members based on network composition” and this particular document details its network composition strategies. Relating to the “Whole Person Care” document, UHC has made a strong argument that it contains detailed information about a program developed by UHC, which it describes as “innovative” and which no other contractor is providing. Disclosing the information in this document, according to UHC, would provide at least five other named insurance companies (two in Nebraska and three or more in a wider market) access to information which those competitors could then use to develop their own similar program. We believe that UHC has met its burden of showing that it has direct competitors who would gain specific advantages upon release of this information.

Our analysis cannot stop there, however. Even if a public body can show that a business competitor would gain a specific advantage through release of a document responsive to a public records request, that document must still be disclosed unless such disclosure would “serve no public purpose.” Neb. Rev. Stat. § 84-712.05(3). We do not believe there is a public purpose to disclosure of this information, as these documents do not promote any of the purposes the *Aksamit* court set forth in determining whether there is a public purpose, consisting of promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare. We have considered not only release of these two specific documents, but also the impact that requiring disclosure of these documents would have in relation to the Nebraska Medicaid and health insurance contracts with UHC, and other multimillion dollar contracts to which the State of Nebraska is a party. Bidders seeking to enter into a contract with the state who are required to release proprietary information, either through its bid documents or in documents later provided to the state in its execution of the contract, may choose not to bid, or

alternatively, may choose to withhold certain information in their proposals or in their dealings with state agencies. In either case, competition would likely suffer. It seems to us that there is not a public purpose in tying the hands of state agencies who wish to contract on behalf of the State of Nebraska. The public interest is served in receiving the best possible contract, and service under that contract, which should include transparency to protect citizens as well as the ability for private companies to protect their proprietary information. Consequently, we believe that DHHS may rely on the exception in § 84-712.05(3) to withhold the requested information provided to it by UHC.

Denial of access to statistical data

Your petition also objects to the reliance of DHHS on Neb. Rev. Stat. § 68-313 and HIPAA to withhold documents responsive to your request on the basis that they contain “statistical data that could lead to the identification of individual recipients of public services.” Your petition states “[s]imply because statistical information concerns individual recipients does not make those statistics protected. . . . On the other hand, the fact that statistics reflect the collective experience of public assistance recipients does not provide a basis for not disclosing those statistics.”

The NPRS provide that all records of a public body are public records “[e]xcept when any other statute expressly provides that particular information or records shall not be made public.” Neb. Rev. Stat. § 84-712. In its response to you, DHHS pointed to Neb. Rev. Stat. § 68-313 as prohibiting the release of certain statistical records. This statute provides:

It shall be unlawful, except as permitted by section 68-313.01 and except for purposes directly connected with the administration of general assistance, medically handicapped children's services, medical assistance, assistance to the aged, blind, or disabled, or aid to dependent children, and in accordance with the rules and regulations of the Department of Health and Human Services, for any person or persons to solicit, disclose, receive, make use of, authorize, knowingly permit, participate in, or acquiesce in the use of, any list of or names of, any information concerning, or persons applying for or receiving such aid or assistance, directly or indirectly derived from the records, papers, files, or communications of the state, or subdivisions or agencies thereof, or acquired in the course of the performance of official duties.

Neb. Rev. Stat. § 68-313.01 allows members of the Legislature and state and county officials to obtain these records. It also allows the public to have “free access to all information concerning lists of names and amounts of payments which appear on any financial records, except that no lists shall be used for commercial or political purposes.” Neb. Rev. Stat. § 68-313.01.

Your public records request was for communications between Senator Riepe and state agencies. DHHS provided Senator Riepe, who is also the chairman of the Legislature's Health and Human Services Committee, statistical information for all counties concerning non-English speaking Medicaid recipients, as permitted by Neb. Rev. Stat. § 68-313.01. DHHS has provided you with the statistical information for counties containing more than 20,000 residents which was provided to the Senator. It withheld statistical data for counties smaller than this. We believe that DHHS appropriately relied upon Neb. Rev. Stat. § 68-313 in withholding statistical information in counties with populations of less than 20,000 inhabitants. This statute prohibits the release of "any list of names of, any information concerning, or persons applying for or receiving such aid or assistance, directly or indirectly derived from the records . . . of the state" relating to certain DHHS aid programs including Medicaid. Neb. Rev. Stat. § 68-313. Federal law requires that Nebraska, in its administration of Medicaid, "provide safeguards that restrict the use or disclosure of information concerning applicants and beneficiaries to purposes directly connected to the administration of [Medicaid]." 42 USC § 1396a(a)(7). "A [s]tate plan must provide, under a [s]tate statute that imposes legal sanctions, safeguards meeting the requirements of this subpart that restrict the use or disclosure of information concerning applicants and beneficiaries to purposes directly connected with the administration of the plan." 42 C.F.R. § 431.301. Such purposes are limited to: "(a) [e]stablishing eligibility; (b) [d]etermining the amount of medical assistance; (c) [p]roviding services for beneficiaries; and (d) [c]onducting or assisting an investigation, prosecution, or civil or criminal proceeding related to the administration of the plan." 42 C.F.R. § 431.302. These regulations further require DHHS to have criteria that govern the types of information about beneficiaries that are withheld from the public. See 42 CFR § 431.305(a). Through our conversations with Ms. Hegr, DHHS has informed our office that it has established that one of these criteria is to withhold Medicaid information for counties with populations of less than 20,000.

This guideline has its origins in a similar benchmark found in HIPAA.⁵ We believe this threshold to be reasonable and correlates to guidelines used in other states relating

⁵ HIPAA and its related regulations protect most "protected health information ("PHI")" which includes demographic information relating to the past, present, or future payment for the provision of health care to individuals and either (1) identifies the individual or (2) there is a reasonable basis to believe can be used to identify the individual. See 45 CFR § 160.103. A covered entity is prohibited from releasing PHI. DHHS is a covered entity offering a health plan. See 45 CFR § 160.103. 45 CFR § 164.514 allows a covered entity to "de-identify" the PHI, removing all identifiers, for various uses including statistical and research. In order to properly de-identify PHI, a covered entity must remove most of the identifying data from the record, including names, dates, addresses, phone numbers, and "all geographic subdivisions smaller than a state." 45 CFR § 164.514(b)(2). Additionally, de-identification requires the removal of the first three numbers of a person's zip code if the aggregate of all zip codes that begin with the same three numbers contains less than 20,000 people. If there are more than 20,000 people in this aggregate area, the first three numbers of the zip code may remain. DHHS uses a similar benchmark of 20,000 people per county for which it does not release information.

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to the release of data.⁶ DHHS argues that in small counties “any statistical information regarding recipients of public assistance . . . could lead to the identification of those individuals” which would be in violation of Neb. Rev. Stat. § 68-313 and federal law. This is particularly true in this instance, where the group being reported upon is a smaller subset than the population as a whole: non-English speaking Medicaid recipients enrolled in managed care. In any county in Nebraska, the total population of non-English speakers will be smaller than the population as a whole; this provides a smaller set of individuals from which to identify those who are Medicaid recipients enrolled in managed care. In a county with 20,000 residents it is reasonable to conclude that the non-English speaking recipient(s) of that aid could be identified by fellow residents just through the statistical data, in violation of Neb. Rev. Stat. § 68-313.

DHHS released statistical information to you for counties with populations greater than 20,000. We believe that DHHS may appropriately withhold the statistical information for the less populated counties, as it could be used to indirectly identify those receiving aid in violation of Neb. Rev. Stat. § 68-313, and is not in violation of the NPRS in doing so.

In its response to this office, DHHS also cited to 45 CFR § 164.514, which is one of the federal regulations which implements HIPAA, as additional support for its denial, stating that this federal regulation prohibits the release of protected health information in counties with a population of less than 20,000. DHHS also stated that it withheld the requested information in order to “ensure that the statistical information could not be used to determine the identity of Medicaid recipients” in these smaller counties. As we have already found sufficient support for the denial by DHHS for access to certain statistical records requested by you through Neb. Rev. Stat § 68-313, we do not need to analyze whether HIPAA also prevents release of these records.

⁶ We located guidelines from both the Washington State Department of Health and the California Department of Health Care Services that indicates those entities may use a threshold of 20,000 residents when making a determination as to whether to release certain data related to public health. See *Guidelines for Working with Small Numbers*, <https://www.doh.wa.gov/Portals/1/Documents/1500/SmallNumbers.pdf>; *Data De-identification Guidelines (DDG)*, <http://www.dhcs.ca.gov/dataandstats/Documents/DHCS-DDG-V2.0-120116.pdf>. See also *Guidance Document on Creating and Releasing Hospital and Facility Discharge Data Public Use Files* from the National Association of Health Data Organizations, https://www.nahdo.org/sites/nahdo.org/files/publications/PUF%20Guidance%20Doc%20Final_0.pdf.

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CONCLUSION

For the reasons explained above, we conclude that DHHS 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 Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Jamie Hegr, DHHS

02-693-29