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September 25, 2018

Emily L. Kirksey
Associate General Counsel
Berkeley Research Group
70 W. Madison, Suite 5000
Chicago, IL 60602

RE: *File No. 18-R-128; Nebraska DHHS; Emily Kirksey, Berkeley Research Group, Petitioners*

Dear Ms. Kirksey:

We are writing in response to correspondence received by this office on August 28, 2018 in which you petitioned for our review of the denial of a 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"). As is our normal practice, we contacted the public body named in the correspondence and asked for a response to your petition. We sent you a letter on August 30, 2018 following our receipt of your petition to advise you that this disposition letter would be delayed to allow DHHS additional time to reply and allow our office sufficient time to review your petition and the response of DHHS. We provided your petition to DHHS and an answer was provided to us on September 12, 2018 by Nathan R. Watson, an attorney with DHHS, who forwarded arguments supporting the denial of the records at issue from Carlos A. Lacasa, Senior Vice President and General Counsel of MCNA Dental Plans ("MCNA"). DHHS and MCNA provided further responses on September 17 and September 18 following an inquiry from this office. We also had conversations with Mr. Watson on September 20 and 21. 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 the responses we received from DHHS and MCNA. On or about June 27, 2018, a representative of Berkeley Research Group ("BRG") made a request for records to DHHS. Following some communication with that agency, BRG submitted a revised request on

June 29, 2018, which is the relevant request for the purposes of your petition. That revised request sought the following from DHHS:

1. A summary by month of doctors who filed claims beginning [on January] 1, 2018, with total amounts paid included, and total claims if possible. Specific fields of interest include: provider name, rendering dentist name, claim receive date, TIN¹, NPI², total paid, and total claims.
2. A comprehensive list of providers currently enrolled with Medicaid. Please include a full list of Medicaid enrolled dentists, not just a subset of those who are actively serving/billing. If possible, please also include associated TIN and NPI. (What we are describing here is essentially a list format dentist directory for those dentists enrolled in Medicaid.)

On July 16, 2018, DHHS responded, providing BRG with a redacted list of currently enrolled dental providers in response to BRG's second request.³ You have not petitioned for our review as to the response of DHHS to this request. In that same response, DHHS denied access to documents responsive to request number one, monthly aggregate claim amounts for providers who had filed claims, under Neb. Rev. Stat. § 84-712.05(3) as proprietary or commercial information which may be withheld by the custodian of records.

Your petition followed this partial denial of records. We have now reviewed all of the information provided to us, along with the relevant statutory provisions, and have reached the following conclusion.

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. Neb. Rev. Stat. § 84-712. 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

¹ Tax Identification Number

² National Provider Identifier

³ DHHS's responses state that it has redacted the social security numbers of the providers, pursuant to federal law.

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).

Based on our review, we have identified a significant threshold issue not addressed by DHHS: Whether the records you requested presently exist, in the form in which you have requested them, i.e., monthly aggregate claims data by provider. Our office has consistently stated that Neb. Rev. Stat. § 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); File No. 18-R-122; Nebraska State Patrol; Annita Lucchesi, Petitioner, at 5⁴ (“[T]his office has through the years consistently taken the position that public bodies do not have to create records which do not already exist in response to a request for public records.”) Thus, a requestor is entitled only to make a request for specific documents or records, and the custodian is required only to provide documents or records responsive to the records request, if they exist. The requestor is not entitled to ask, and the custodian is not required to answer, any questions in the request. The custodian is also not required to create documents that do not exist, or to interpret a public records request to determine what records are being requested.

We inquired with DHHS as to whether the aggregate claims records you seek exist, or whether MCNA would be required to create a new document in order to fulfill your request. DHHS has represented that the records you have requested are not in the possession of DHHS and are not maintained in the form you have requested by MCNA. Aggregate claims data is not provided to DHHS in the course of MCNA fulfilling its contract with DHHS, would not ordinarily be requested by DHHS, and is not a record MCNA keeps in its normal course of business. This is a record that DHHS would request, and MCNA would create, solely to fulfill your public records request. DHHS and MCNA are not required to take such steps by the NPRS. Consequently, DHHS is not required to provide you the monthly claims data you have requested.

⁴ This disposition letter may be found on our website at: <https://ago.nebraska.gov/disposition-letters>.

Emily Kirksey, BRG
September 25, 2018
Page 4

CONCLUSION

For the reasons stated above, we do not believe you have been improperly denied access to public records. If you disagree with our analysis under the Public Records Statutes set out above, you may wish to review the NPRS to determine what additional remedies, if any, are available to you under those statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Nathan Watson, DHHS

02-702-29