



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

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

January 6, 2021

Via email at sdknigh@ilstu.edu
Sandra Nielsen PhD(c) MSN RN-BC
Associate Instructional Professor
Mennonite College of Nursing
Illinois State University

RE: *File No. 20-R-141; Department of Health and Human Services; Sandra Nielsen, Petitioner*

Dear Ms. Nielsen:

This letter is in response to your petition received by this office on December 22, 2020, in which you sought our assistance in obtaining certain records from the Nebraska Department of Health and Human Services ("DHHS"). In accordance with our normal practice, we contacted DHHS legal counsel Erik Fern and advised him of the opportunity to provide this office a response to your petition. We received Mr. Fern's response on behalf of DHHS on January 5. We have considered your petition and the agency's response in accordance with the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020). Our findings in this matter are set out below.

RELEVANT FACTS

According to the documentation you provided to this office, you initially requested certain information from DHHS by email directed to dhhs.epi@nebraska.gov on November 13, 2020, but received no response. On December 16, 2020, you made a second request, stating in pertinent part as follows:

I am looking for the cumulative number of influenza outbreaks in nursing homes and assisted living facilities measured at week 20 for Nebraska from 2014-15 annually through 2019-2020. I did find that the state is monitoring outbreak numbers but it is unclear where these outbreaks occurred. I cannot find data from the previous seasons see <https://web.archive.org/web/20201016231846/http://dhhs.ne.gov/Flu%20Documents/Report.pdf>

Your current Nebraska Influenza Surveillance Report 2020-21 Influenza Season, Week 48 is currently available and includes outbreak information.

Mr. Fern denied your request on December 21, indicating that

Neb. Rev. Stat. § 71-503.01(1) provides that whenever any statute or any rule or regulation of an administrative agency requires medical practitioners or other persons to report cases of communicable diseases, illnesses, or poisonings or to give notification of positive laboratory findings to the Department of Health and Human Services (and Neb. Rev. Stat. §§ 71-502.04 and 71-503 and Title 173 Neb. Admin. Code Ch. 1 require reporting of influenza), such reports or notifications and the resulting investigations shall be confidential[,] shall not be subject to subpoena, and shall be privileged and inadmissible in evidence in any legal proceeding of any kind or character and shall not be disclosed to any other department or agency of the State of Nebraska.

Mr. Fern further indicated that pursuant to § 71-503.01(3), DHHS reports influenza-associated outbreaks cumulatively, but does not release this information on a facility or outbreak site basis. He further advised that Ming Qu was the state official responsible for denying you access to the requested information.

You subsequently submitted your petition with our office, which included a letter addressed to Dr. Qu requesting reconsideration of the agency's denial. You indicated in this letter that you were "not asking for individual facility information. I am asking for a generalization of the available data, how many outbreaks occurred in nursing homes and assisted living facilities[.]" You requested that the cumulative number of outbreaks be emailed to you, and provided a table for Dr. Qu to fill out for his convenience.

You state in your petition that "[t]he grounds of the appeal are as indicated in my institutional IRB," which you enclosed with your petition, and that you were not seeking "personal identifiable or facility identifiable information." You indicate that this information is generally available in other states that collect this information. You further indicate that "[t]he intent of this data request is to perform research on the relationship between state policies regarding Influenza Outbreaks and the number of influenza outbreaks in nursing homes and assisted living facilities within the state cumulatively per year from the 2014-15 influenza season to the 2019-20 influenza season."

In his response to this office, Mr. Fern reiterated that release of the requested information is "expressly governed by Neb. Rev. Stat. § 71-503.01 as it is received by the agency from persons and entities required to report the information to the agency by statute and regulation." Under § 71-503.01(1), the requested information is confidential, privileged, not subject to subpoena, inadmissible as evidence in any legal proceeding, and not subject to disclosure except as provided in subsections (2) and (3). Mr. Fern indicates that Neb. Rev. Stat. §§ 71-502.04 and 71-503 require laboratories and medical

practitioners to report communicable diseases to DHHS, and that DHHS regulations include influenza as a communicable disease and also specifically “require[] the immediate reporting of clusters, outbreaks, and epidemics of influenza.”¹ Mr. Fern asserts that the requested data fall squarely within these regulations.

Finally, Mr. Fern states that

[c]ommunicable disease information is heavily protected in the State of Nebraska. Notably, the agency is prohibited from providing the information to other agencies and departments of the State of Nebraska, let alone unaffiliated researchers. Neb. Rev. Stat. § 71-503.01(1). Statute permits the agency to publish analysis, reports, and/or information that is protected for scientific and public health purposes in a manner to ensure the identity of any individual cannot be ascertained from the disclosure. Neb. Rev. Stat. § 71-503.01(3). The authority to publish the information is discretionary. There is no authority in statute that permits the agency to release the information to Petitioner to the extent the agency was willing to provide the information nor any statutory right entitling Petitioner to compel the agency to provide the requested information.

DISCUSSION

Neb. Rev. Stat. § 84-712(1) (2014) generally allows Nebraska citizens and other interested persons the right to examine public records in the possession of public agencies during normal agency business hours and to obtain copies of records in certain circumstances. Neb. Rev. Stat. § 84-712.01(1) defines “public records” to 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. . . .” However, access to public records is not absolute. In those instances where the Nebraska Legislature has provided that a particular record is confidential or may be withheld at the discretion of the records custodian under Neb. Rev. Stat. § 84-712.05 (Cum. Supp. 2020) or Neb. Rev. Stat. § 84-712.08 (2014), there is no right of access.

In withholding the requested influenza data, DHHS relies on § 71-503.01, which provides, in pertinent part:

(1) Whenever any statute of the state, any ordinance or resolution of a municipal corporation or political subdivision enacted pursuant to statute, or any rule or regulation of an administrative agency adopted and promulgated pursuant to statute allows medical practitioners or other persons to prescribe, provide, or

¹ See Title 173 *Nebraska Administrative Code*, Chapter 1—*Reporting and Control of Communicable Diseases* (effective May 11, 2010), at §§ 1-004.01A and 1-004.01B.

dispense prescription drugs pursuant to sections 71-503.02 and 71-503.03 or requires medical practitioners or other persons to report cases of communicable diseases, including sexually transmitted diseases and other reportable diseases, illnesses, or poisonings or to give notification of positive laboratory findings to the Department of Health and Human Services or any county or city board of health, local public health department established pursuant to sections 71-1626 to 71-1636, city health department, local health agency, or state or local public official exercising the duties and responsibilities of any board of health or health department, *such reports or notifications and the resulting investigations and such prescription, provision, or dispensing of prescription drugs and records pertaining thereto shall be confidential except as provided in this section, shall not be subject to subpoena, and shall be privileged and inadmissible in evidence in any legal proceeding of any kind or character and shall not be disclosed to any other department or agency of the State of Nebraska.*

Neb. Rev. Stat. § 71-503.01(1) (2018) (emphasis added). Subsection (2) of § 71-503.01 authorizes state and local public health entities and reporting individuals to disclose such reports or notifications to the Centers for Disease Control and Prevention (CDC) and official state and local health departments in other states, territories and the District of Columbia “[i]n order to further the protection of public health.” Subsection (3) authorizes a Nebraska public health entity or official to “[p]ublish analyses of reports, information, and the notifications . . . for scientific and public health purposes” so long as no individual’s identity is disclosed; “discuss the report or notification with the attending physician”; and investigate such information as necessary.

You have specifically requested “the cumulative number of influenza outbreaks in nursing homes and assisted living facilities measured at week 20 for Nebraska from 2014-15 annually through 2019-2020.” Upon review of the statutes and regulations cited by DHHS, there is no question that the requested influenza data is the type of information that must be reported to DHHS, and is protected under § 71-503.01. We further note that your request for aggregated data does not alter the fact that under the plain language² in § 71-503.01(1), the information you seek is not a public record. To the contrary, such information is confidential, not subject to subpoena, privileged, and inadmissible as evidence. DHHS is prohibited from disclosing the information to any other department or agency of the state. The statute further limits disclosure to the entities and in the manner

² In Nebraska, “[s]tatutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.” *Farmers Co-Op v. State*, 296 Neb. 347, 354, 893 N.W.2d 728, 734-735 (2017). “In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.” *Aksamit Resource Management LLC v. Neb. Pub. Power Dist.*, 299 Neb. 114, 123, 907 N.W.2d 301, 308 (2018). “It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.” *Id.*

Sandra Nielsen
January 6, 2021
Page 5

described in § 71-503.01(2) and (3). Thus, DHHS is prohibited by statute from disclosing the requested information, and its response to you in this regard was appropriate.

Finally, we understand that you are seeking this information for research purposes. However, the underlying reason for your records request is irrelevant for purposes of determining whether you are entitled to receive the requested records or whether the agency is in compliance with the NPRS. *See State ex rel. Sileven v. Spire*, 243 Neb. 451, 457, 500 N.W.2d 179, 183 (1993) (“The relator sought information pursuant to § 84-712, which applies equally to all persons without regard to the purpose for which the information is sought.”). Consequently, we do not consider such information in our analysis.

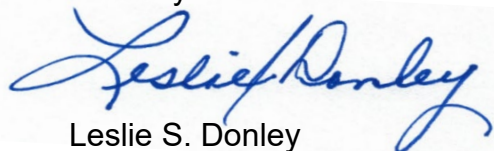
CONCLUSION

Under the express language in Neb. Rev. Stat. § 71-503.01, the requested influenza data is not a public record. The statute limits disclosure to only certain federal and state public health entities, in published analyses, or with attending physicians. DHHS is authorized to disclose this information only to the extent provided in § 71-503.01(2) and (3).

Since we have concluded that you are not entitled to receive this information, no further action by this office is necessary and we are closing this file. If you disagree with the conclusion reached in this disposition letter, you may wish to discuss these matters 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: Erik Fern (via email only)

49-2610-29