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August 27, 2014

D. Victoria Baranetsky
New York Times
620 Eighth Avenue
New York, NY 10018

RE: *File No.14-R-117; University of Nebraska; Petitioner D. Victoria Baranetsky, New York Times*

Dear Ms. Baranetsky:

This letter is in response to your petition received by us on July 18, 2014, in which you requested our review of the denial of certain public records by the University of Nebraska-Lincoln's Institute of Agriculture and Natural Resources ("University") submitted by Michael Moss of the *New York Times*. As is our normal practice with such requests, we contacted the party against whom the complaint was made. In this case, we contacted Erin E. Busch, Director University Records/Associate General Counsel, and requested a response to your petition, which we received on July 28, 2014. On August 4, 2014, we wrote to you indicating that we had conducted a preliminary investigation of your petition, and it appeared that the University had properly withheld the requested records. However, we indicated that our response would be delayed so that we could further analyze the issues. We have now completed our analysis and have fully considered your petition for access to records as well as the University's response. We have conducted our review in the context of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Supp. 2013) ("NPRS"). Our findings in this matter are set forth below.

FACTS

Our understanding of the facts in this matter is based on your petition and the information contained in the University's response.

According to the petition, on June 30, 2014, Mr. Moss submitted a request to the University of Nebraska-Lincoln's Institute of Agriculture and National [sic] Resources seeking copies of the following documents:

a. Any and all necropsy/mortality reports prepared by University personnel in monitoring the University-owned animals housed at the U.S. Meat Animal Research Center in Clay Center, Neb.

b. The audit prepared by, or for, the University, in recent months that explores the University's ownership of the animals housed at the U.S. Meat Animal Research Center, and the issues of University oversight raised by that ownership.

c. All Memorandums of Understanding between the University and the U.S. Meat Animal Research Center regarding the center's operations, including any revisions or changes made to the original MOU.

d. Any documents relating to the University's investigation and assessment of a recently publicized incident in which some 80 cows under the care of the University at a facility separate from the U.S. Meat Animal Research Center died of an overdose of feed supplement reported to be monensin, including any description of steps taken to avoid further such incidents.

By email sent to Mr. Moss on July 7, 2014, Ms. Busch partially denied the request. Ms. Busch specifically denied access to the records pertaining to item a. based on one of the exceptions set out in Neb. Rev. Stat. § 84-712.05(3) ("academic and scientific research work which is in progress and unpublished"), and the veterinarian privilege in Neb. Rev. Stat. § 38-3330 (Supp. 2013). With respect to the records referenced in item b., Ms. Busch based the denial on the research exception referenced above and the investigatory records exception in Neb. Rev. Stat. § 84-712.05(5). Any records pertaining to item d. were denied pursuant to Neb. Rev. Stat. § 84-712.05(3). A limited number of records responsive to item c. were attached to Ms. Busch's response, with an indication that more records would be forthcoming upon receipt of a deposit, and a subsequent search for older, nondigitized records.

You subsequently filed your petition with our office. You specifically appeal the University's basis to deny you access to the records listed in items a. (necropsy/mortality reports) and b. (the University audit) in that you believe "that those exceptions do not apply and thus withholding is improper and impermissible." In support of your contention, you assert that the "reports are not collected or used for an academic or scientific project in progress with a commercial purpose." You further assert that even if the reports qualify as academic or scientific research, the exception does not apply "because they serve a clear public purpose: to inform citizens about animal treatment and the use of the state's financial resources."

D. Victoria Baranetsky
August 27, 2014
Page 3

In support of your argument that the investigatory records exception does not apply, you cite to *State ex rel. Nebraska Health Care Ass'n v. HHS Finance and Support*, 255 Neb. 784 (1998). You state that “[c]ourts have explained that a distinction must be drawn between (1) routine administration or oversight activities and (2) focused inquiries into specific violations of law.” *Id.* at 792. You claim that while the University may be a public body charged with duties of investigation, the audit reports do not constitute investigatory records. You indicate that you have been told that the reports are “pro forma” and were not compiled with any specific intensity on a given question. You assert that the audit generated relates to an administrative function, not an investigatory one.

According to Ms. Busch, the University has a cooperative agreement with the U.S. Department of Agriculture’s U.S. Meat Animal Research Center (“MARC”) in Clay Center, Nebraska. Scientists from the USDA and the University conduct research on animals housed at the center “for the purpose of developing scientific information and new technology to solve high priority problems for the U.S. beef, sheep, and swine industries.” The cooperative agreement specifies that the University owns the animals which are the subjects of the research. Ms. Busch indicates that “[t]he sole purpose and use of the animals located at MARC is for research.”

With respect to the necropsy/mortality reports, Ms. Busch refutes your assertion that such records are not related to research. She states that the University uses the reports to determine cause of death to its research animals and the reports assist in determining the impact of the research on the animal. Ms. Busch states that “[s]uch information is vital to the research projects.” Ms. Busch further points out that our office has previously determined that documents relating to animal research may be lawfully withheld pursuant to the exception in § 84-712.05(3). Ms. Busch believes that the necropsy reports are unpublished research at the University, and may also be withheld pursuant to this exception.

Ms. Busch also asserts that these reports fall squarely under the veterinarian privilege set out in Neb. Rev. Stat. § 38-3330. She states that the reports are prepared by University veterinarians “concerning the care of the animals located at MARC and contain a diagnosis and description of the condition of the animal.” Therefore, the privilege applies.

In her correspondence to Mr. Moss, Ms. Busch cites to the investigatory records exception in the NPRS, as well as the academic and scientific research exception as the basis to withhold the requested audit. In her response to us, Ms. Busch states that “[t]he University’s Office of Internal Audit independently . . . investigated MARC’s control structure, policies and activities to ensure compliance with UNL policies and regulatory requirements and reported related findings and recommendations.” She asserts that

there will be a chilling effect on internal audit activities if the audit reports are subject to disclosure and suggests that an application of the self-critical analysis privilege requires withholding the requested records.

DISCUSSION

The Nebraska Public Records Statutes generally allow interested persons in Nebraska the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts from those records, and to obtain copies of records in certain circumstances. 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 confidentiality statute applies to 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).

I. The Necropsy/Mortality Reports

A. Academic and Scientific Research Exception

Although the Nebraska Public Records Statutes provide for access to public documents, they are not absolute. The NPRS 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, the University relies on the “academic and scientific research” exception as one basis to withhold the requested records. That specific exception provides, 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:

(3) 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

Neb. Rev. Stat. § 84-712.05(3) (emphasis added).

As noted above, this office has previously determined whether certain records belonging to the University of Nebraska Medical Center [UNMC] could be lawfully withheld under § 84-712.05(3).¹ In two such dispositions, we determined that certain records, directly and indirectly related to the nonhuman primate research being conducted at the UNMC, could be lawfully withheld. We will quote from one of our prior dispositions at length below, since the analysis remains relevant to the present case:

We are unaware of any Nebraska cases that discuss the research exclusion set out above. However, we find guidance in an Indiana case cited by the UNMC, *Robinson v. Indiana University, et al.*, 659 N.E.2d 153 (1995). In *Robinson*, the Indiana Court of Appeals was asked to determine whether completed IACUC records, which were submitted to two university committees for review, and any references to research projects appearing in the meeting minutes of those committees, were exempt from disclosure under the Indiana Public Records Act. *Id.* at 155.

In its analysis, the court discussed a factually similar case from North Carolina, *S.E.T.A. UNC-CH, Inc. v. Huffines*, 101 N.C.App. 292, 399 S.E.2d 340 (1991). In *S.E.T.A. UNC-CH*, a student organization sought access to various IACUC records, but the committee chair refused to provide the records for particular experiments. The North Carolina Court of Appeals held that the records must be disclosed, but required redaction of information that could be patented or would lead to the identification of researchers and staff. *Id.* at 156. In distinguishing the *S.E.T.A.* case from its own, the *Robinson* court stated:

There is a critical distinction between the present case and *S.E.T.A.* which dictates against following North Carolina's precedent: North Carolina's Public Records Act does not contain a concerning research exception. Indiana's inclusion of the concerning research exception, in addition to a trade secret exception, see IC 5-14-3-4(a)(4), indicates the legislature's intent to extend nondisclosure to a larger number of records. Some records may not be of a proprietary nature so as to constitute a trade secret, but may be of a scientific or experimental nature so as to concern research. The latter category of documents would fall into the concerning research exception, and, thus, would not be subject to disclosure.

¹ See File No. 10-R-109, University of Nebraska Medical Center; Petitioner Amy Coburn, dated May 20, 2010; and File No. 12-R-109, University of Nebraska Medical Center; Petitioner Lauren Brieser, Physicians Committee for Responsible Medicine, dated December 11, 2012.

Id. at 156-57. The *Robinson* court concluded its analysis by stating:

We agree with the trial court's determination that the information sought by the research applications was "information concerning research conducted by [or] under the auspices of Indiana University." . . . The application seeks information about the researcher, the nature of the proposed or ongoing research project, and procedures to be employed throughout the project. **The sole subject matter of the application is a research project and related personnel and procedures. Even in the narrowest sense, the information sought by the application concerns research. As such, it was not subject to disclosure under the Public Records Act.**

Id. at 158. [Emphasis added.]

In our prior dispositions, we also discussed the legislative history of the exception and concluded that, like Indiana, the Nebraska Legislature intended to extend nondisclosure to a larger number of records when it enacted an exemption which included three distinct components: (1) trade secrets, (2) research and (3) other proprietary or commercial information. During debate, the Legislature added the words "academic and scientific" to qualify "research" "in order to identify those things that the *University* might be working on, those research and studies that might be going forward that truly are not in the interest of the public to have them disclosed." Floor Debate on LB 86, 86th Neb. Leg. 1st Sess. 5214 (May 11, 1979) (Statement of Sen. Murphy) (emphasis added). It also seemed to us that the Nebraska Legislature recognized that while some records may not be of a proprietary nature to constitute a trade secret, certain research conducted at the University was deemed as important to warrant an exception from disclosure.

In addition, the University cites to the veterinarian privilege set out in Neb. Rev. Stat. § 38-3330 (Supp. 2013) as a basis to withhold the necropsy/mortality reports. This statute provides, in relevant part:

(1) Unless required by any state or local law for contagious or infectious disease reporting or other public health and safety purpose, no veterinarian licensed under the Veterinary Medicine and Surgery Practice Act shall be required to disclose any information concerning the veterinarian's care of an animal except under a written authorization or other waiver by the veterinarian's client or pursuant to a court order or a subpoena. . . .

The University represents to us that the reports at issue are prepared by a veterinarian and relate to the care of the animals located at MARC. In the present case, we believe that the necropsy/mortality reports relate to ongoing research of animals owned by the University and housed at the center. We do not believe that the research has to evince a commercial purpose. Consequently, we believe that the University's denial of your request for the necropsy/mortality reports on the basis of the statutory research exemption and the veterinarian privilege was appropriate under the circumstances here.

II. University Audit Report

As noted above, the University's initial denial to produce the audit report was based on the investigatory records exception in § 84-712.05(5) and the research exception in § 84-712.05(3). In its response to us, the University asserts that the self-critical analysis privilege provides a basis to withhold the audit report at issue. While it is unclear as to whether the University has abandoned its argument that the two exceptions in § 84-712.05 provide a basis to withhold the requested documents, we will nevertheless address each claim briefly below.

A. The Self-Critical Analysis Privilege

According to Neb. Rev. Stat. § 27-501 (2008) of the Nebraska Evidence Rules, Neb. Rev. Stat. § 27-101 through 27-1103 (2008, Cum. Supp. 2012), no person has the privilege to refuse to be a witness, refuse to disclose any matter, refuse to produce any object or writing, or prevent another from being a witness or disclosing any matter or producing any object or writing, unless the rules, federal or state statutes or constitutional provisions provide a claim of privilege.² The Nebraska Legislature has enacted a number of evidentiary privileges that are part of the Nebraska Evidence Rules, e.g., lawyer-client, physician-patient, husband-wife, trade secrets. The legislature has also enacted other privileges which appear throughout the *Revised Statutes of Nebraska*, e.g., Neb. Rev. Stat. § 20-146 (2012) (the journalist-source privilege); Neb. Rev. Stat. § 77-376 (2009) (the privilege against release of tax information); and Neb. Rev. Stat. § 38-3330 (Supp. 2013) (the veterinarian privilege discussed *supra*).

With respect to asserting the self-critical analysis privilege in response to a request for records under the Nebraska Public Records Statutes, we note that both Neb. Rev. Stat. §§ 84-712 and 84-712.01 state that public records may be reviewed by members of the public and copies may be obtained except where *statutes* expressly

² See generally *Mangrum on Nebraska Evidence*, Vol. 3, 2014 ed., at 330.

provide to the contrary. In this regard, the lawyer-client and the trade secret privileges not only exist in the Nebraska Evidence Rules, they also provide specific exceptions to disclosure in Neb. Rev. Stat. § 84-712.05 of the NPRS. However, the legislature has not enacted any legislation with respect to the self-critical analysis privilege. Consequently, we decline to consider whether this privilege provides a basis to withhold the requested report in this context.³

B. The Investigatory Records Exception

The University has also claimed the exception set out in subsection (5) as its basis for denying you access to the requested records. That subsection provides, in pertinent part:

(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;

The Nebraska Supreme Court case *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), guides our analysis. In *Nebraska Health Care Association [NHCA]*, the 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).

³ We find the University’s assertion that “[t]he public indeed has an interest in the confidentiality of the University’s internal audit reports because the Office of Internal Audit supports responsible and prudent use of University funds” somewhat problematic. The public policy of this state with respect to the disclosure of governmental financial records is set out in Neb. Rev. Stat. § 84-712.01(1) (2008). In that regard, the Nebraska Supreme Court has stated that

the Legislature intended that courts *liberally construe* §§ 84-712 to 84-712.03 whenever a public body expends public funds. Because the Legislature has expressed a strong public policy for disclosure, we must narrowly construe statutory exemptions shielding public records from disclosure.

Evertson v. The City of Kimball, 278 Neb. 1, 13, 767 N.W.2d 751, 762 (2009) (emphasis added).

To aid in its analysis, the court created the following standard where 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 conceived 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).

The University has represented to us that the Office of Special Audit independently audited the structure, policies and activities of MARC to ensure compliance with the University's policy and regulatory requirements, and made specific findings and recommendations. Applying the standards set out in *NHCA* to the circumstances here, the University would have to first show (1) that it is a public body charged with duties of investigation or examination of persons, institutions, or businesses. Assuming it could meet this hurdle, the University would then have to show (2) that the audit conducted by the Office of Special Audit was related to the University's duties of investigation and examination, and (3) that the audit was rationally related to the investigatory duties imposed on the University by law. Finally, the University would then have to show (4) that the audit report was not compiled ancillary to its administrative functions, but rather focused with special intensity on a particular party. Based on the foregoing, it appears to us that the requested audit report does not

constitute an "investigatory record" as contemplated in Neb. Rev. Stat. § 84-712.05(5) and in *NHCA*.

C. Academic and Scientific Research Exception

Finally, we have considered whether the audit report can be withheld under the academic and scientific research exception in § 84-712.05(3). Again, the University represents that the Office of Special Audit independently audited various components of MARC to ensure compliance with University policy and regulatory requirements. An audit of a research facility for legal compliance does not appear to us to be "academic and scientific research" as that term is contemplated in § 84-712.05(3). Consequently, based on the plain language of the statute, we do not believe that reliance on this exception was appropriate under these circumstances.

CONCLUSION

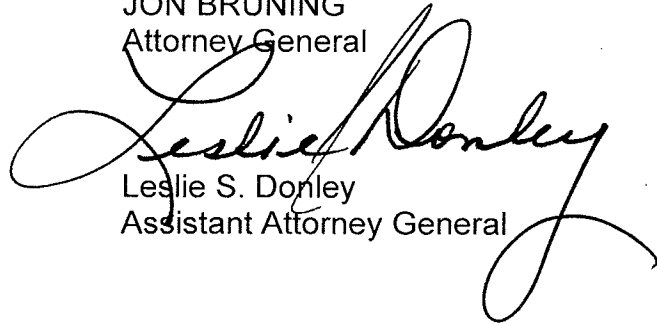
For the reasons set out above, we believe that the requested necropsy/mortality reports belonging to the University of Nebraska may be properly withheld under the research exception in § 84-712.05(3). However, we conclude that the requested audit report cannot be withheld under a qualified evidentiary privilege which does not exist in statute. Nor does it appear to us that the audit report constitutes an "investigatory record" or "academic and scientific research" as those terms are contemplated in Neb. Rev. Stat. § 84-712.05. Since none of these provisions provides a basis to withhold the requested audit report, we will direct the University to provide you a copy of the audit report at its earliest opportunity.

D. Victoria Baranetsky
August 27, 2014
Page 11

If you disagree with our legal analysis set out herein, you may wish to pursue what additional remedies may be available to you under the Nebraska Public Records Statutes.

Sincerely,

JON BRUNING
Attorney General

A handwritten signature in black ink, appearing to read "Leslie S. Donley". The signature is written in a cursive style with large, flowing loops and a long tail that extends downwards and to the right.

Leslie S. Donley
Assistant Attorney General

c: Erin E. Busch

49-1202-30