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May 3, 2018

Paula Lavigne
ESPN
Via email only to:
paula.lavigne@espn.com

RE: *File No. 18-R-115; University of Nebraska; Paula Lavigne, Petitioner*

Dear Ms. Lavigne:

We are writing in response to correspondence received by this office in which you petitioned for our review of the response to a request for certain public records belonging to the University of Nebraska ("University") 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 submitted on April 17, 2018 and per our request for further information was supplemented on April 18, 2018. As is our normal practice for petitions under the NPRS, 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 Erin Busch, Associate General Counsel and Director of Records for the University, and she provided a response to us on April 25, 2018. 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, your supplement, and the response we received from the University. On March 7, 2018, a request was made under the NPRS on behalf of ESPN by a University of Georgia student journalist to the University for the following records:

1. Any reports on Title IX sexual violence complaints that would include a total number of complaints filed from Jan. 1, 2012. If it helps for clarification, we are looking for any reports the Title IX office puts out at the end of the calendar or academic year that tally the volume of complaints, dispositions, etc., from which we can derive a total number of complaints filed within that time.

2. A copy of any reports on Title IX sexual violence complaints that would include a total number of complaints filed from Jan. 1, 2012, that involved student athletes as respondents, where student athlete is defined as someone on the roster within that academic year of team of an NCAA sport. Again, if the Title IX office compiles such a report – and breaks out the number of reports involving student athletes as respondent – we would like a copy of that report.
3. If you do not have records responsive to the above, we would request the following: A copy of each Title IX sexual violence complaint filed since Jan. 1, 2012 in which at least one of the respondents is a student athlete. We understand and accept that you might need to redact a significant portion, if not almost all, of the record. But that should not preclude handing over a copy of the document itself, even if it's just a bunch of blacked out lines. State laws usually preclude withholding an entire record if portions of that record can be redacted. We are most interested in the number of complaints and the date on which they were filed, so even if you give us six pages of mostly blacked out text, that still has value for our research. We just ask that it's clear which pages belong to which complaint.

On March 13, 2018, Ms. Busch emailed the student requestor with the University's response. As to the first request, the University provided a link to the reports requested and indicated that the University had no responsive records prior to the time period preceding the 2016-2017 school year. Additionally, Ms. Busch provided statistics for the years 2016-2017 responsive to the request. As to the remaining two requests, the University's response stated:

The University is denying your request for reports or complaints requested in numbers 2 and 3 of your request.

1. Nebraska Revised Statutes § 84-712.04 requires that a person whose request is denied be provided specified information in writing: The records responsive to this request are protected from disclosure by 20 U.S.C. § 1232g and the regulations adopted thereunder and Neb. Rev. Stat § 84-712.05(1); see *also* Board of Regents Policy 5.10. Redaction of the record will not prevent the remainder of the record from revealing personally identifiable Information and it will still be possible to identify the student due to the small number of complaints involving student athletes. Personally identifiable information includes, but is not limited to:
 - a. Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable

person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

- b. Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 CFR § 99.3.

It appears that following this denial you had a phone conversation with Ms. Busch, as she sent you an additional email on April 4, 2018 which stated:

Based on our discussion late last week, I understand that you are clarifying the attached request to request the total number of Title IX Complaints and the total number of Title IX complaints involving student athletes as respondents per year. The University does not have reporting that tracks the number of student athletes as respondents for time periods prior to 2015. Pursuant to Neb. Rev. Stat. § 84-712(3)(e), the University is not required to create a new record. The University has reporting that contains the number of respondents who are student athletes for the time period of 2015 going forward. The University is denying your request for the reports that contain this information. Nebraska Revised Statutes § 84-712.04 requires that a person whose request is denied be provided specified information in writing . . .

The remainder of Ms. Busch's email from April 4, 2018 restates the reasons for the denial as found in her March 13, 2018 email, as quoted above. On April 11, 2018, Ms. Busch provided additional information as to the total number of Title IX complaints in the years spanning 2012 to 2016. She further stated that the University's response to your public records request was now deemed complete by the University.

Your petition subsequently followed on April 17, 2018. You state that research is being conducted into sexual violence complaints involving student athletes. Your petition focuses on the denial of the entirety of records; you argue that the University can and should provide you with documents that are nearly entirely redacted, providing you only the date of the complaint.

The University responded, denying it has improperly denied you access to public records and standing on its basis for denial of records under Neb. Rev. Stat. § 84-712.05(1) and the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, and the rules promulgated at 34 C.F.R. Part 99 ("FERPA"). Ms. Busch states that under FERPA, records containing "personally identifiable information" may not be released without a release from the student; consent is critical to compliance. Under 34 C.F.R.

§ 99.30, the consent must be in writing and signed by the student. The consent must also specify the records that may be disclosed, state the purpose of the disclosure, and identify the party to whom disclosure may be made. Ms. Busch notes that no consents were provided with respect to the disclosure of the requested information. Under FERPA, "personally identifiable information" includes, but is not limited to the following information:

- (a) The student's name;
- (b) The name of the student's parent or other family members;
- (c) The address of the student or student's family;
- (d) A personal identifier, such as the student's social security number, student number, or biometric record;
- (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
- (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 C.F.R. § 99.3.

We have reviewed all of the materials and information provided to us and have reached the conclusions set forth below.

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). Neb. Rev. Stat. § 84-712.05 is comprised of a number of categories of documents which may be kept confidential from the public at the discretion of the agency involved. In the present case, the University has claimed the provisions of FERPA and Neb. Rev. Stat. § 84-712.05(1) as its basis for denying access to the requested records. This subsection provides as follows:

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:

- (1) Personal information in records regarding a student, prospective student, or former student of any educational institution or exempt school that has effectuated an election not to meet state approval or accreditation requirements pursuant to section 79-1601 when such records are maintained by and in the possession of a public entity, other than routine directory information specified and made public consistent with 20 U.S.C. 1232g, as such section existed on February 1, 2013, and regulations adopted thereunder.

FERPA, 20 U.S.C. 1232g, requires the University to withhold records containing “personally identifiable information.” You have requested copies of records that the University has determined contain personally identifiable information which would allow a person to whom they are disclosed to identify the student or students named in the report. We have previously addressed whether the University could withhold records relating to sexual assault in a 2014 disposition letter involving the University and the Omaha World-Herald. See File No. 14-R-135; University of Nebraska-Lincoln; Kate Howard, Omaha World-Herald, Petitioner.¹ In that matter, we concluded:

UNL has met its burden that an exception to disclosure exists. We are persuaded that under the circumstances described, even with redaction, the requested records would contain personally identifiable information as to the students involved. Consequently, we believe that FERPA and the

¹ This disposition letter may be found on our website at: <https://ago.nebraska.gov/disposition-letters>.

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concomitant exception in Neb. Rev. Stat. § 84-712.05(1) provides a valid basis to withhold these records.

It is true that the scope of information sought in this earlier request was broader than your request, as you ask that the University provide you with documents which are nearly entirely redacted, except for the date when the complaint of assault was made. The University, nevertheless, has asserted that release of the requested records, even with such redaction, could reasonably lead to the identification of a student. Given the University's obligation to protect the privacy of personally identifiable student information, we will not second-guess its judgment or discount that concern. We therefore conclude it is not clear that the University's reliance on § 84-712.05(1) and FERPA as a basis to withhold the records sought in your petition is improper.

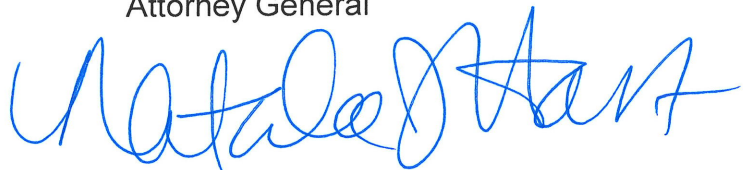
Your petition further states that the University should provide you with documents which are redacted with the exception of the date of the complaint under Neb. Rev. Stat. § 84-712.06, which provides that "[a]ny reasonably segregable public portion of a record shall be provided to the public as a public record upon request after deletions of the portions which may be withheld." The University's position, of course, is that even disclosure of this limited information could lead to the identification of a student. Thus, as there is no "reasonably segregable" public portion of the requested records, § 84-712.06 does not apply.

CONCLUSION

For the reasons explained above, we conclude that the University has not clearly 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: Erin Busch

02-692-29