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January 18, 2019

Via email at [REDACTED]
Matthew Luczynski

RE: *File No. 19-R-102; Omaha Public Power District; Matthew Luczynski
Petitioner*

Dear Mr. Luczynski:

This letter is in response to your correspondence emailed to our office on January 2, 2019, in which you sought our assistance in obtaining certain public records from the Omaha Public Power District ("OPPD"). We construed your correspondence to be a petition for review under Neb. Rev. Stat. § 84-712.03 (Cum. Supp. 2018) of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018) ("NPRS"). When we receive petitions of this nature, our normal practice is to contact the entity involved and advise it of the opportunity to provide a response to this office. In this case, we sent a copy of our letter and your petition to Stephen M. Bruckner, OPPD legal counsel, who submitted a written response to us on January 10, 2019. We have considered your petition and the OPPD response in accordance with the provisions of the NPRS, and our findings in this matter are set forth below.

RELEVANT FACTS

You are employed by OPPD at its Fort Calhoun Nuclear Station. You indicate that you verbally requested a copy of your "department personnel file," but your request was verbally denied by your supervisor. On December 19, 2018, you submitted a written request "to challenge the policy and the denied request."¹ On December 28, it appears that you sent a written reminder to OPPD officials about your request and the requirement to respond within the statutory time frame set out in Neb. Rev. Stat. § 84-712(4).

¹ We note that you submitted your public records request on a form entitled "Condition Report Summary," which, according to Mr. Bruckner, is a form used at facilities licensed by the Nuclear Regulatory Commission to report facility conditions or other actions taken by the licensee. Mr. Bruckner indicates that "[i]t is not customary for a Condition Report to be used in connection with a request for documents under the [NPRS]."

OPPD subsequently responded to your request, stating as follows:

Per HC: Human Capital has determined that the official personnel file of an employee is maintained at Corporate Headquarters are not public records. Any other files maintained, we would argue, are working management files. It is our view that an employee has the ability to review their official personnel file at any time, upon making the proper arrangements to do so by calling the Human Capital Service Center. It is also our view that an employee can request to review their working file within their Department by making the proper arrangements to do so by notifying their direct Supervisor.

In your petition, you state that you are “seeking a copy of my department file and any other personnel file non-exempt from the statute upon reasonable requests.” You also disclosed your reasons for obtaining a hard copy of these particular records.² You indicate that the “[d]epartment personnel file aka ‘perfeva [sic] or x-file’ is maintained and accessed by shift supervisors, who would be the custodians at Fort Calhoun Nuclear Station, not the corporate secretary at energy plaza who is listed in our company procedures.”

In his response, Mr. Bruckner states that OPPD recognizes that its records are subject to the NPRS, and that OPPD vigorously protects access to the personnel files of its employees. Mr. Bruckner informs us that the “Prevera system is an electronic file that allows [facility] supervisors to track positive comments on employee performance as well as late arrivals, absences and other employee activity.” He states that the Prevera files are not part of an employee’s official personnel file, which are maintained at OPPD’s headquarters in downtown Omaha. He informs us that pursuant to OPPD policy, public records request are typically handled by an individual in OPPD’s corporate office, and that it is “very rare” for the district to receive such a request from an employee. Mr. Bruckner represents that “OPPD has taken internal actions to educate [facility] supervisors that requests for District records should be brought to the attention of the appropriate employees for disposition.”

Mr. Bruckner further states that under Neb. Rev. Stat. § 84-712.05(7), public bodies, like OPPD, may withhold “personal information in records regarding personnel of public bodies other than salaries and routine directory information.” He notes that OPPD officials offered to allow you access to review your personnel file. However, OPPD is relying on § 84-712.05(7) as its basis to not provide you copies of the file materials.

² Neb. Rev. Stat. § 84-712 of the NPRS does not require any showing by a person requesting access to public records of the reason for his or her review of those records. See *State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993). The reason why you want to obtain a hard copy of your personnel file is immaterial in determining whether you have been denied access to public records, and we do not consider this information in our analysis.

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Mr. Bruckner states that it is OPPD's position that you have not been denied access to public records and that it complied with the provisions of the NPRS.

DISCUSSION

The basic rule for access to public records is set out in Neb. Rev. Stat. § 84-712(1) (2014). That provision states that

[e]xcept as otherwise expressly provided by statute, all citizens of this state and all other persons interested in the examination of the public records as defined in section 84-712.01 are hereby fully empowered and authorized to (a) examine such records, and make memoranda, copies using their own copying or photocopying equipment in accordance with subsection (2) of this section, and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business and (b) except if federal copyright law otherwise provides, obtain copies of public records in accordance with subsection (3) of this section during the hours the respective offices may be kept open for the ordinary transaction of business.

The purpose of this statute is "to guarantee that public government records are public." Introducer's Statement of Purpose for LB 505, 72nd Nebraska Legislature (1961). Under § 84-712, it was intended that all public records of the state, its counties, and its other political subdivisions should be open to inspection, except where the Legislature has otherwise provided that the record shall be confidential. Judiciary Committee Statement on LB 505, 72nd Nebraska Legislature (1961). However, while the NPRS do provide for access to public records and documents, they are not absolute. They also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983).

As noted above, OPPD is relying on the exception to disclosure set out in Neb. Rev. Stat. § 84-712.05(7) as its basis to deny you a copy of your personnel file. That provision states, 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:

(7) Personal information in records regarding personnel of public bodies other than salaries and routine directory information

Neb. Rev. Stat. § 84-712.05(7) (Cum. Supp. 2018).

This office has previously considered whether a public body can rely on the exception in § 84-712.05(7) as a basis to withhold personal records requested by one of its employees. In our disposition letter in *File No. 18-R-102; Nebraska Department of Revenue; Grace Willnerd, Petitioner*, issued January 18, 2018,³ we considered the department's denial of an employee's request for records containing information about her absence from work due to a medical situation involving a family member. The department denied the request under § 84-712.05(7), asserting "that records relating to an employee's [family] would constitute personal information under any standard." Disposition letter at 2. The department also noted that the fact the employee was requesting personal information about herself did not alter its analysis as to what could be withheld under the NPRS. The department further indicated that it "would apply the same rationale" in response to an identical request made by a member of the public. *Id.*

Upon review, we agreed with the department. We noted that the records at issue involved personal, private information pertaining to a department employee and did not contain salary or routine directory information. We also discussed the Nebraska Supreme Court decision in *Steckelberg v. Nebraska State Patrol*, 294 Neb. 842, 885 N.W.2d 44 (2016), a case cited by the department to support its decision to withhold the requested records under § 84-712.05(7). *Steckelberg* involved a State Patrol trooper who sought access to records relating to an interview and selection process for a position within the State Patrol, a position he interviewed for but did not get. In determining that the State Patrol could rely on § 84-712.05(7) to withhold the requested records, the court stated:

Steckelberg's first argument . . . misses the mark. The State Patrol did produce an affidavit stating that the records were not kept with an employee's personnel record, but were kept separately by the State Patrol's human resources division. But § 84-712.05(7) exempts "[p]ersonal information in records regarding personnel." The district court found that the information in the records sought did contain personal information. And the information was about employees, otherwise known as personnel, of the State Patrol. There is no requirement in § 84-712.05(7) that in order to be exempt, the records must be kept within an employee's personnel record, as used as a term of art; *the records need only be personal information about personnel, defined as persons employed by an organization.*

Steckelberg, 294 Neb. at 849-850, 885 N.W.2d at 50 (internal citations omitted) (emphasis added).

³ Accessible at <https://ago.nebraska.gov/sites/ago.nebraska.gov/files/doc/18-R-102%3B%20Nebraska%20Department%20of%20Revenue%3B%20Grace%20Willnerd%2C%20Petitioner.pdf>.

There is nothing in your request or petition that would warrant a different result from that reached in *Steckelberg* or File No. 18-R-102. The records you seek contain personal information about you, an OPPD employee. It also seems to us that if certain records *not* kept in an employee's personnel file could be withheld under § 84-712.05(7), as determined by the court in *Steckelberg*, then certainly a personnel file may be withheld as well. Consequently, we conclude that OPPD may continue to rely on the exception in § 84-712.05(7) as its basis to deny you a copy of your personnel file. However, to the extent your personnel file contains salary and routine directory information, we believe that OPPD has an obligation to provide you a copy of those records.

Finally, we will briefly address OPPD's handling of your request. Under Neb. Rev. Stat. § 84-712(4) (2014), requests for public records must be submitted in writing. The public body which is the custodian of the records then has four business days after actual receipt of the request to respond to the requester in some fashion as provided in the statute. While it appears that OPPD's response to your written request was not made in a timely fashion, we believe that your use of the Condition Report Summary form, which is a facility-specific form used to report conditions and actions occurring at the facility, likely attributed to the delay. We would also point out that OPPD officials failed to provide you the information required under Neb. Rev. Stat. § 84-712.04 (2014) when responding to your request.⁴ However, in that regard Mr. Bruckner represents to this office that, in the future, public records requests submitted by employees will be directed to the appropriate personnel for timely disposition.

⁴ This statute provides that if a member of the public is denied access to a public record, he or she should receive the following information from the public body in writing:

1. A description of the contents of the records withheld and a statement of the specific reasons for the denial including citations to particular statutes and subsections relied upon as authority for the denial correlated to specific portions of the records at issue.
2. The name of the public employee or official who made the decision to deny the request.
3. Notification to the requester of any administrative or judicial right of review under § 84-712.03.

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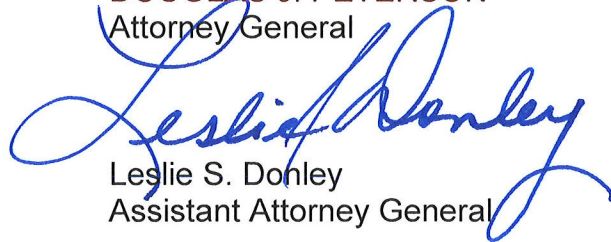
CONCLUSION

Based on the foregoing, OPPD may continue to rely on the exception in § 84-712.05(7) to deny you a copy of your personnel file. Since we believe that the application of the exception is appropriate under the circumstances presented, no further action is warranted and we are closing our file.

If you disagree with our analysis of this matter, you may wish to consult with your private attorney to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Stephen M. Bruckner

49-2148-29