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November 21, 2022

Via email at [REDACTED]
Andre R. Barry
Cline Williams Wright
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233 South 13th Street
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Lincoln, NE 68508-2095

RE: *File No. 22-R-163; Nebraska Department of Health and Human Services;
Andre R. Barry obo Anthem Healthy Blue, Petitioner*

Dear Mr. Barry:

This letter is in response to your public record petition emailed and received by this office on November 4, 2022. You have requested that this office review “an ongoing denial of rights” by the Nebraska Department of Health and Human Services (“DHHS”) relating to two public record requests submitted to the agency on behalf of your client, Anthem Healthy Blue (“Healthy Blue”). In accordance with our normal practice, we requested that DHHS provide us a response to your petition, which we received on November 16. On November 18, DHHS officials provided us further clarification as to the documents produced in response to the requests. We considered your petition and DHHS’s responses in accordance with the provisions of the Nebraska Public Records Statutes (“NPRS”), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2022). Our findings in this matter are set forth below.

BACKGROUND AND RELEVANT FACTS

On April 18, 2022, DHHS issued Request for Proposal No. 112209 O3 (“RFP”), seeking “a qualified bidder to provide a full-risk, capitated Medicaid Managed Care program for physical health, behavioral health, pharmacy, and dental services.”¹ You

¹ As discussed further below, the RFP and related documents may be accessed on the Department of Administrative Services website at

indicate that Healthy Blue is an incumbent provider and submitted a bid in response to the RFP. On September 23, 2022, DHHS announced its intent to award contracts to three providers. Healthy Blue was not one of the providers named. Healthy Blue questioned whether selected bidders should have been disqualified, and submitted the following public records request to DHHS that same day:

1. *The complete procurement file for the RFP, including but not limited to the following—*
 - a. *All bids, replies, responses, proposals, best and final offers, clarification requests, and other documents submitted in response to the RFP, together with all exhibits and attachments to those documents.*
 - b. *All instructions and training materials provided for purposes of evaluating RFP proposals.*
 - c. *All questions posed by bidders or potential bidders, and all answers to questions from bidders or potential bidders.*
 - d. *All transcripts, emails, instant messages, chats (e.g., Teams chats), notes, memos, spreadsheets, slides, or other documents created, reviewed, or relied upon in connection to communications with bidders or potential bidders or the evaluation of bids or proposals.*
 - e. *All evaluations, scoring sheets, rankings, notes, analyses, and other documents used in evaluation of proposals, together with all evaluator entries or comments for all bidders both before and after oral presentations.*
 - f. *All documents used by any bidder in connection with the oral presentations conducted by DHHS.*
 - g. *Documents sufficient to show all individuals who served on the RFP evaluation committee or who served as consultants or advisers in connection with the award of contract(s) pursuant to the RFP.*
 - h. *All communications by or with bidders or potential bidders maintained as part of the file.*
 - i. *All communications by or with employees of the State of Nebraska or its consultants regarding the procurement.*
 - j. *All intents to award or award notices that have been issued.*
 - k. *All contracts (and drafts thereof) that have been drafted or executed.*
2. *All recorded communications and other documents (including correspondence, emails, text messages, instant messages, chats, messages sent using social media, and audio or video files) exchanged between those who evaluated responses to the RFP and those who submitted responses to the RFP.*
3. *All recorded communications and other documents (including correspondence, emails, text messages, instant messages, chats, messages sent*

using social media, and audio or video files) exchanged between DHHS and bidders or potential bidders relating to the RFP.

4. All recorded communications (including correspondence, emails, text messages, instant messages, chats, messages sent using social media, and audio or video files) exchanged between and among the persons involved in scoring the RFP proposals and/or selecting the final awardees.

5. All communications between elected or appointed officials, or representatives of elected or appointed officials, and DHHS that relate to the RFP, responses to the RFP, or any person who responded to the RFP.

6. All documents constituting, summarizing, or otherwise describing or discussing negotiations related to the RFP.

7. All documents that DHHS or its representatives provided to any person who responded to the RFP in connection with the RFP.

8. All documents, whether created by DHHS or any other party, that refer or relate to any irregularities with respect to the RFP process or the evaluation of responses to the RFP. For purposes of this request, "irregularities" include (a) all deviations from the evaluation process set out in the RFP; (b) all deviations from statutory requirements, administrative rules or procurement policy with respect to the evaluation of responses to the RFP; (c) any actual or potential bias by anyone involved in the evaluation process; (d) any acts or communications that relate to any appearance of impropriety by anyone involved in the evaluation process; and (e) any effort to influence the evaluators by means not consistent with the procedures set out in the RFP.

9. Any bid protests and responses thereto submitted in connection with the procurement.

10. All documents produced to any other bidder in connection with the procurement.

Wesley D. Nespor, Agency Assistant Legal Counsel, timely provided you a time and cost estimate on September 29. The estimate was broken down in three categories: HHS Emails; HHS WebEx Messages; and HHS Document Search. Based on estimates from the Office of the Chief Information Officer, DHHS estimated that the cost to produce emails and WebEx messages for the 99 individuals identified in the RFP process, with no search terms, to be \$151,131.73. The document search estimate totaled \$2,188.40. The earliest practicable date in which to fulfill your request was May 14, 2024. You subsequently withdrew the requests for emails and WebEx messages on September 29 and 30, respectively, and prioritized production of the scoring sheets and evaluator notes

at this time. We understand that responsive records were provided to you on a rolling basis beginning September 30.

By letter dated October 19, Mr. Nespor provided you additional records responsive to your request, including certain emails maintained by the DHHS Director of Procurement and Grants. Mr. Nespor advised that under § 84-712(3)(a), DHHS was not required to provide you copies of public records if the records were available on the custodian's website. Thus, DHHS provided you a link to access "[p]ublic versions of the bidders' proposals, the RFP materials, questions and answers, notice of intent to award, and materials related to the protest" See footnote 1. Mr. Nespor advised that DHHS was withholding "drafts of the RFP and other documents relating to the RFP that were not publicly posted," relying on Op. Att'y Gen. No. 91054 (June 17, 1991) as its basis to do so. Mr. Nespor further advised that

[t]he following information has been redacted: Attorney-client communications under Neb. Rev. Stat. §§ 84-712.05(4) and 27-503(2), passwords and links to sharepoint sites and meetings. Passwords and links are redacted pursuant to Neb. Rev. Stat. § 84-712.05(9).

On October 27, you emailed DHHS Public Records and "request[ed] an unredacted copy of the Technical Proposal in response to RFP 112209 O3 from Molina Healthcare," noting that a redacted copy is posted on the DHHS website and that "there is no statutory basis that would justify the redactions."² DHHS staff responded on November 2, indicating that "[d]ue to the workload demands on agency personnel," DHHS would "be unable to provide a response until November 30, 2022." You immediately challenged the delay, noting that the proposal was requested in the September 23, 2022, letter, and should have been provided on October 21 along with other documents produced on that date. Later that day, DHHS Public Records attorney, Thomas Skutt, Jr., informed you that the proposal was being reviewed "to avoid the disclosure of '...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). A response to your request will be provided after the review is complete." In response to DHHS's possible application of the exception to withhold the redacted portions of the proposal, you stated:

There is a clear public interest in full disclosure of what Molina told DHHS about its history of contract performance, criminal and regulatory investigations, and sanctions. This public interest defeats any claim that the redacted information is exempt from disclosure as "proprietary or commercial information." See *Aksamit Resource Mgmt. v. Neb. Pub. Power Dist.*, 299 Neb. 114 (2018).

² For the record, we note that Healthy Blue's bid proposal also contained significant redactions as well.

YOUR PETITION

Your petition challenges DHHS' handling of your requests based on three grounds. First, you assert that an unredacted copy of the Molina proposal should have been provided to you in response to the September 23 request, which expressly sought “[a]ll bids, replies, responses, proposals, best and final offers, clarification requests, and other documents submitted in response to the RFP, together with all exhibits and attachments to those documents.” You state that DHHS did not directly provide copies of responses and proposals, but did make those documents publicly available on a webpage “dedicated to the RFP.” You further state that in making this information publicly available, “DHHS redacted significant portions of Molina’s technical proposal, including portions addressing Molina’s ‘Contract Performance, and Criminal or Regulatory Investigations and Sanctions.’” You argue that the delay to November 30 is “patently disingenuous” given that the Molina proposal undoubtedly exists, DHHS has had it for months, and that “DHHS failed to identify any basis to withhold any portions of the report in its response to our September 23 . . . request” You further argue that § 84-712.05(3) does not provide a basis to withhold a redacted version of Molina’s proposal and that the “public interest defeats any argument that this information is exempt from disclosure as ‘proprietary or commercial information.’”

Second, you take issue with DHHS' reliance on Op. Att’y Gen. No. 91054 to withhold any drafts of the RFP and documents relating to the RFP. You state that “in the interest of time,” you are not asking us to reconsider our opinion. However, you have asked us to *examine* all drafts and other related documents not made publicly available “to determine whether they qualify to be withheld pursuant to the test in [our opinion].” You further reserve the right to legally challenge our opinion in the future.

Third, you assert that certain documents you requested in September still have not been produced, and have asked us to “prioritize” our review and your receipt of the following:

- 1. DHHS has not produced any documents, evaluator comments, communications, or information related to scoring of numerous Corporate Overview sections. Information was provided for only 4 out of 10 sections—Sections 2, 8, 9, and 10.*
- 2. DHHS has failed to produce any evidence related to how and when the decision was made to score some questions pass/fail, as opposed to scoring them.*
- 3. As to 42 questions that were scored, DHHS has failed to produce any records related to its decision to assign a particular number of points to each question.*
- 4. DHHS has failed to produce any records of communications with evaluators. While we withdrew our initial request for emails in response to DHHS’s estimates*

of time and expense to review emails, it is not credible to suggest that there were no documents other than emails used to communicate with evaluators, particularly when DHHS contends that it conducted multiple rounds of training.

5. DHHS has failed to produce any agendas or minutes of any meetings related to evaluation provided. The record produced to this point indicates guidance and training to the evaluators may have been provided through several meetings; however, neither agendas nor minutes were provided from those meetings.

You state that DHHS did not assert an exception to withhold these records nor did it indicate that additional time was necessary to fulfill your request for these records. Consequently, you argue that “DHHS should be required to produce all these documents immediately to the extent they exist.”

AGENCY RESPONSE

DHHS represents that it is conducting a review of Molina’s proposal to determine whether it contains information claimed to be proprietary and confidential by Molina. Mr. Skutt clarifies that pursuant to the RFP,³ Molina, not DHHS, marked certain information in its proposal as proprietary. He states that DHHS Public Records is reviewing the entire 1,176-page proposal under § 84-712 *et seq.*, and that his office “has not denied the separate October 27, 2022 request at all.” Mr. Skutt advises us that DHHS informed Molina about the request for an unredacted version of the proposal, and has received a letter from attorney Edward M. Foxx II, which sets out Molina’s position regarding the redacted portions. Mr. Skutt states that once the review is completed, his office “will decide what, if any, redactions will remain.”

Mr. Skutt concedes that DHHS Public Records withheld “certain preliminary notes and drafts from the October 19, 2022 response” on the basis of Op. Att’y Gen. No. 91054. Mr. Skutt also takes the position that the September 23 request did not ask for “preliminary drafts.”

With respect to the other documents you argue were requested but not produced,

³ Page one of the RFP states, in pertinent part:

If the Bidder wishes to withhold proprietary or other commercial information from disclosure, the Bidder must identify the proprietary information, mark the proprietary information according to State law, and submit only the proprietary information in a separate file named conspicuously "PROPRIETARY INFORMATION". The Bidder may submit a detailed written document showing that the release of the proprietary information would give a business advantage to named business competitor(s) and explain how the named business competitor(s) will gain an actual business advantage by disclosure of information. The mere assertion that information is proprietary or that a speculative business advantage might be gained is not sufficient. (See Attorney General Opinion No. 92068, April 27, 1992) THE BIDDER MAY NOT ASSERT THAT THE ENTIRE PROPOSAL IS PROPRIETARY.

Mr. Nestor advises that, in many instances, records responsive to those items do not exist. For example, as to request no. 1, while there were ten corporate overview sections required to be included in the proposals, each section was not individually scored. He states that “[w]hat was scored included the stability of the organization, corporate experience and performance, personnel and management approach, and subcontractors. The evaluators were trained on how to glean from the 10 segments of the proposal the information necessary to score the proposals.” In those instances where certain decisions were discussed in emails or WebEx communications, that portion of the request was withdrawn. He states that “[i]n-person meetings regarding which sections to score and which to designate as pass/fail were not recorded and no separate minutes exist.” Internal verbal discussions were not recorded. And because these were not public meetings, no minutes were kept. The training PowerPoint provided to you served as the agenda, and no minutes were kept of the trainings. Finally, Mr. Nestor represents to this office that

very few documents were redacted by DHHS. One was a copy of the handwritten notes of the Procurement Director that were notes of his meetings with DHHS General Counsel Botelho or Contracts Attorney Steve Johnson. The others were Webex threads or emails with live meeting links and passwords to agency meetings that were withheld for security purposes so that outsiders could not gain access to future internal meetings.

DISCUSSION

We will begin by clarifying our role in enforcing the NPRS. Under Section § 84-712.03, the Attorney General’s involvement is predicated on a denial of “any rights granted by sections 84-712 to 84-712.03” We are required “to review [a petition] to determine whether a record may be withheld from public inspection or whether the public body that is custodian of such record has otherwise failed to comply with such sections, including whether the fees estimated or charged by the custodian are actual added costs or special service charges as provided under section 84-712.” In making our determination, there is no statutory mechanism for the Attorney General to conduct an *in camera* review of records. Under § 84-712.03(2), that procedure is reserved for the courts.

In addition, while reviewing petitions filed with our office, we do not consider the reason or purpose for a records request. “The public records statutes apply ‘equally to all persons without regard to the purpose for which the information is sought.’ As a general rule, citizens are not required to explain why they seek public information.” *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 801, 943 N.W.2d 231, 247 (2020) (quoting *State ex rel. Sileven v. Spire*, 243 Neb. 451, 457, 500 N.W.2d 179, 183 (1993)). In reviewing this file, we noticed an expectation on your part that DHHS must produce public records in an expedited fashion in light of the pending procurement protest. This is not the case. The fact that your client is engaged in a bid protest has no bearing on

DHHS's production of records under § 84-712(4), which allows it to delay fulfilling a request beyond the four business days "due to the significant difficulty or the extensiveness of the request."⁴ With these clarifications in mind, we will address the three items in your petition.

Request for an Unredacted Molina Proposal

As discussed above, DHHS Public Records is in the process of reviewing Molina's proposal to determine what information is subject to the exception in § 84-712.05(3). Upon completion of its review, DHHS Public Records will determine what information, if any, may continue to be withheld. It gave Molina an opportunity to state its position on the redacted information, has received a response from its legal counsel, and is in the process of analyzing it. DHHS advised that it needed until November 30 to complete this review. We find this delay to be neither unreasonable nor disingenuous. Since DHHS has made no decision as to the disclosure of the redacted portion of the proposal, it is our position that you have not been denied access to public records that would warrant our review of this issue at this time. Consequently, we will decline to take any further action regarding your access to an unredacted copy of the Molina proposal until after DHHS completes its review and a final agency decision is made as to the redactions.

Request to Examine Draft Documents

As noted above, to the extent you have requested us to examine draft RFP documents, we do not have access to those records nor do we have the authority to request them under § 84-712.03. As to the continued viability of Op. Att'y Gen. No. 91054, we will call your attention to a recent disposition letter issued by this office in response to a request by Omaha World-Herald reporter Joe Dejka for student assessment data.⁵ The Nebraska Department of Education, relying on our opinion, asserted that since the data was in draft form, disclosure was not required under § 84-712. However, Mr. Dejka argued that our opinion actually supported his position since the test scores had been disseminated to school districts for validation and had, therefore, "left the agency."

We noted that while the data may have been disseminated outside of the department, the data was not in final form on the date of the records request nor on the date of our response. Only individually identifiable student data was sent to school districts for the purpose of review for revisions or corrections. Following completion of the school districts' reviews, NDE staff began masking student data to ensure that

⁴ See our disposition in *File No. 22-R-121; Secretary of State; Susan Bliss, Petitioner*, May 23, 2022 ("The legislative history [of 2000 Neb. Laws LB 628] indicates that public bodies must be given adequate time to respond to a request for public records, taking into account available facilities, equipment, and personnel. Staff is not required to abandon their other public duties to respond to a request.").

⁵ See *File No. 22-R-157; Nebraska Department of Education; Joe Dejka, Omaha World-Herald, Petitioner*, November 9, 2022.

individual students are not identified. We concluded that the state assessment data requested by Mr. Dejka was not in final form and, as a result, was not subject to disclosure under § 84-712. We further stated:

Finally, for more than thirty years, this office, as well as numerous governmental agencies and officials, have relied on Op. Att’y Gen. No. 91054 as a basis to withhold records considered to be “drafts.” “Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction.” *Capitol City Telephone, Inc. v. Nebraska Dep’t of Revenue*, 264 Neb. 515, 527, 650 N.W.2d 467, 477 (2002). “This is particularly so when the Legislature has failed to take any action to change such an interpretation.” *Id.* Since there has been no legislative action altering the conclusion reached in Op. Att’y Gen. No. 91054, this office will continue to rely on our opinion as a basis to exclude drafts of documents from disclosure under § 84-712.

Disposition in *File No. 22-R-157* at 6 (emphasis added).

Other Records Not Produced

According to DHHS officials, records responsive to the five requests listed above either do not exist or are contained in email or WebEx messages that are no longer part of this request. Mr. Nespore represents that some decisions were discussed and made during in-person meetings that were not recorded. Meetings conducted were not subject to the Open Meetings Act, so there are no agenda or minutes *per se*. As discussed on pages 4 and 7, DHHS officials represent that a very limited number of records were actually withheld by the agency. The reason DHHS did not assert an exception or request more time to produce records is simply because there were no responsive records to produce or responsive records fell outside the scope of the public records request. In any event, we find no basis to conclude that DHHS failed to provide you records relating to the five requests in violation of § 84-712.

CONCLUSION

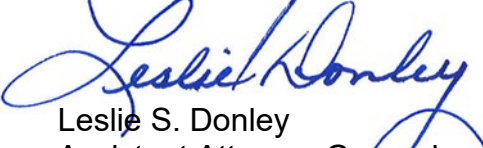
Based on the foregoing, we find that DHHS has not denied you access to public records since no decision has been made as to the applicability of § 84-712.05(3) to the redacted portions of the Molina proposal. Consequently, we will decline to take further action at this time. Also, our review of this file demonstrates that DHHS has provided you all records response to your September 23 request, as amended, except for a limited number of records withheld under the exceptions in § 84-712.05(4) and (9). Finally, we must decline your request to examine any draft RFP or related documents in the context of Op. Att’y Gen. No. 91054 since § 84-712.03 provides no basis to access those records and conduct such a review.

Andre R. Barry
November 21, 2022
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If you disagree with the conclusion reached in this disposition letter, you are free to pursue the other legal remedies available to you under Neb. Rev. Stat. § 84-712.03 of the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Wesley D. Nespor (via email only)
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49-3103-30