

STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
TIERONE FAX (402) 471-4725

JON BRUNING
ATTORNEY GENERAL

DALE A. COMER
ASSISTANT ATTORNEY GENERAL

May 18, 2007

Mr. Thomas R. Burke
Davis Wright Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533

Re: *07-R-124; Adams County Historical Society; Hastings Regional Center.*

Dear Mr. Burke:

This letter is in response to your earlier correspondence dated April 30, 2007, which we received on May 3, 2007. You requested our assistance in obtaining certain records from the Hastings Regional Center ("HRC"), under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (1999, Cum. Supp. 2006). We considered your letter to be a petition under § 84-712.03, and our response to your petition is set out below.

FACTS

Our understanding of the facts in this case is based upon your correspondence and the materials which you sent with it. We also discussed this matter with David McGath at the Nebraska Department of Health and Human Services.

You represent the Adams County Historical Society ("ACHS"). In a letter dated April 30, 2007, you wrote to Marj Colburn at the Hasting Regional Center and requested access to and copies of "all records in the possession, custody or control of the Hastings Regional Center/Nebraska Department of Health and Human Services ["HHS"], reflecting information about individuals who are buried on the grounds of the Regional Center in Hastings, Nebraska." ACHS states that more than 1,000 individuals have been buried on the HRC grounds during the period of time from 1888 through the 1950's. All of the graves are presently unmarked.

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On May 1, 2007, Nancy Kinyoun, Health Information Manager at the HRC, sent you an email in which she denied access to the records at issue on the basis of Neb. Rev. Stat. § 83-109 (1999), 42 CFR Part 2 and the Federal HIPAA statutes. You also confirmed that denial with David McGath at HHS on the same day. However, you indicated to Mr. McGath at that time that you are not seeking access to any patient or former patient health care records. Instead, you seek the burial records maintained at HRC.

We received your public records petition on May 3, 2007. You still seek access to the burial records maintained at HRC. We understand that there are records at HRC which contain the names of the former patients buried on the grounds along with a listing of where those individuals are buried.

ANALYSIS

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 therefrom, and to obtain copies of records in certain circumstances. In that context, "public records" are defined as "all records and documents, regardless of physical form, of or belonging to this state" Neb. Rev. Stat. § 84-712.01 (Cum. Supp. 2006). However, the right to view or obtain copies of public records is conditioned by § 84-712, which states that such access to public records exists "[e]xcept as otherwise expressly provided by statute." As a result, we have frequently indicated that every record in state government is a public record which interested persons have a right to see or to obtain copies of unless the agency which is the custodian of that record can point to a specific statute which allows or requires it to be kept confidential. One such source of statutory confidentiality is § 84-712.05, which sets out a number of categories of records which may be kept confidential at the discretion of their custodian agency, including medical records, student records, investigatory records, and the like. With respect to § 84-712.05, we have indicated in the past that there is nothing on the face of that statute which creates a limiting time period for its operation. That is, there is nothing in that statute which limits its application to current investigations, current medical records, etc.

In the present case, it appears to us that the burial records at issue are public records under the pertinent Nebraska statutes for the reasons stated above. Therefore, we must determine if there is any statutory basis for the HRC to keep those records confidential. There are two opinions of this office which have relevance to that latter inquiry.

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In our Op. Att'y Gen. No. 116 (July 22, 1985), we considered whether records, including the names of patients, maintained by a county ambulance service were public records subject to disclosure under the Public Records Statutes. We concluded that the ambulance records, and in particular the fiscal records of the ambulance service, were public records subject to disclosure. However, we also concluded that:

It is our opinion that the names of patients, and any treatment provided to them by the ambulance service, fall within the definition of medical records "in any form concerning any person." Accordingly, that information may be withheld from the general public.

Op. Att'y Gen. No. 116 (July 22, 1985) at 4. Our conclusion regarding the names of patients was based upon § 84-712.05 (2), which allows medical records, other than records of births and deaths, to be kept confidential.

Subsequently, in our Op. Att'y Gen. No. 96019 (March 8, 1006), the question at issue was whether law enforcement agencies and the state Department of Public Institutions at that time could release the name and identifying information of an involuntarily committed patient to the press and to the general public to aid in the apprehension of that patient who had walked away without permission from a DPI facility. In that opinion we stated that "the names of patients and identifying information fall within records kept on a subject or a patient within the meaning of Neb. Rev. Stat. §§ 83-1068 (1994) and 83-109 (1994)." Op. Att'y Gen. No. 96019 (March 8, 1006) at 3 (emphasis added). On that basis, we concluded that those patient names could not be released. Section 83-109 is one of the confidentiality statutes relied upon by HRC in the present instance.

On the basis of our two opinions cited above, we believe that the patient names contained in the burial records at issue in this instance are medical records which can be kept confidential under § 84-712.05 (2). In addition, those names of former patients are patient records subject to § 83-109 which may not be disclosed other than to the persons set out in that statute. For those reasons, we do not believe that the HRC improperly denied you access to the patient names contained in the burial records in question.

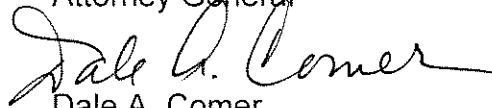
Since we have concluded that access to the patient names contained in the burial records in this case was not improperly denied, we plan no further action with respect to your petition, and we are closing this file. If you disagree with our analysis,

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you may wish to review the Public Records Statutes to determine what additional remedies, if any, are available to you and to your client.

Sincerely yours,

JON BRUNING
Attorney General

A handwritten signature in cursive script that reads "Dale A. Comer". The signature is written in black ink and is positioned above the printed name and title.

Dale A. Comer
Assistant Attorney General

cc. David McGath

05-509-21