

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA ex rel,)
AMY A. MILLER and)
ACLU OF NEBRASKA FOUNDATION,)
)
Relators,)
)
vs.)
)
SCOTT FRAKES, in his official capacity)
as DIRECTOR OF THE NEBRASKA)
DEPARTMENT OF CORRECTIONAL)
SERVICES,)
)
Respondent.)

Case No:

**COMPLAINT FOR
WRIT OF MANDAMUS**

**Expedited Proceeding
Pursuant to Neb.Rev.Stat. §84-712.03(3)**

COMES NOW the Relators, Amy A. Miller and the ACLU of Nebraska Foundation, pursuant to Neb. Rev. Stat. § 84-712.03(1)(a), and for their cause of action and claim for relief against the Respondent, Scott Frakes ("Respondent"), allege that Relators are entitled to a preemptory writ of mandamus requiring the Respondent, in his capacity as Director of the Department of Correctional Services, to provide copies of and/or allow inspection of certain records requested by Relators in accordance with the Nebraska Public Records Act. In support of this Complaint, Relators hereby state and allege as follows:

INTRODUCTION

1. Amy A. Miller and the ACLU of Nebraska Foundation ("Relators") bring this Complaint for a Writ of Mandamus to compel the Director of the Nebraska Department of Correctional Services ("Director" or "Respondent") to describe and disclose records requested by Relators pursuant to the state Public Records Act, Neb.Rev.Stat. §84.712 et seq. The records in question generally relate to

This is a true and correct
Original filed by the
Clerk, District Court
Lancaster County, NE
on 12.1.17

Respondent's attempts to obtain pharmaceuticals or other substances for the purposes of carrying out lethal injection executions;

2. No other Nebraska state agency has been the subject of more scandals and problems in the last several years than the Nebraska Department of Correctional Services (Department) and the state prison system. One of the subjects of controversies involves the efforts of the Department and state officials to obtain lethal injection drugs. The actions of the state has resulted in the expenditure of state moneys without receipt of such drugs; clashes between the state and federal authorities regarding the importation of drugs; and disputes between the state and drug manufacturers that have provided the state with drugs;
3. One recent controversy was a 2015 attempt by the Department and officials to obtain lethal injection drugs to attempt to carry out executions. In 2015, Chris Harris and Harris Pharma entered into an "agreement" with the state in which it promised delivery of sodium thiopental. Nebraska officials have never received the sodium thiopental, despite the payment of over \$54,000 in public funds for it. This matter only came to light as a result of open records requests by advocates and members of the press, pursuant to the Nebraska Public Records Act, which were very similar to the request at issue in this matter;
4. Nebraskans expect government officials to remedy problems and to not repeat them. The only reliable means to ensure oversight of government is for the public to be able to examine the activities and efforts and state officials. This state has a proud tradition of open government as is proclaimed outside an entrance to our

Capitol: “The Salvation of the State is Watchfulness of the Citizen.” The Nebraska Public Records Act is a statutory embodiment of this principle;

5. This fundamental concept of open government is at issue in this case. The taking of a person’s life is the most extreme use of state power. The circumstances surrounding the death penalty are certainly matters of public concern and the means of the death penalty should not be implemented in the shadows. Citizens and the press are entitled to access to complete information, not selective or edited information;

PARTIES

6. Relator Amy A. Miller is a citizen of the State of Nebraska;
7. Relator ACLU of Nebraska Foundation is a non-profit, non-partisan organization that works to defend and strengthen the individual rights and liberties guaranteed in the United States and Nebraska Constitutions through policy advocacy, litigation, education, and community empowerment. A fundamental component of the protection of these rights is the concept of open government in which citizens have the right to access documents and proceedings of the government to allow for effective oversight of its actions. Relator ACLU of Nebraska has thousands of members and supporters Nebraska who are interested in examination of the public records at issue in this matter;

8. Respondent is the duly appointed Director for the Nebraska Department of Correctional Services for the State of Nebraska. Respondent is the custodian of the records requested by the Relator at issue in this Complaint;

JURISDICTION AND VENUE

9. Relators are authorized to bring this action pursuant to Neb.Rev.Stat. §84-712.03(1)(a);
10. Venue is proper in this Court and this Court has jurisdiction pursuant to Neb.Rev.Stat. §84-712.03;

ALLEGATIONS

11. Neb.Rev.Stat. §84-712.01(1) provides that “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” (emphasis added);
12. Neb.Rev.Stat. §84-712(1) also provides 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 (b) obtain copies of public records”;
13. Neb.Rev.Stat. § 84-712.04 (1) provides that “[a]ny person denied any rights granted by sections 84-712 to 84-712.03 shall receive from the public body which

denied the request for records at least the following information: “(a) a description of the contents of the records withheld and a statement of the specific reasons for the denial, **correlating specific portions of the records to specific reasons for the denial**, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial. . . . and (c) [n]otification to the requester of any administrative or judicial right of review under section 84-712.03.” (emphasis added);

14. In an email correspondence and letter correspondence dated October 27 2017, Relators requested copies of records regarding relating to lethal injection drugs and related records from pharmaceutical manufacturers, distributors, brokers, suppliers, and/or pharmacies; officials from other states or the federal government; United States Drug Enforcement Administration (DEA); and documentation relating to the use of public funds (hereinafter “suppliers”). A true and accurate copy of Relators’ written request is attached to this Complaint as Exhibit A;
15. Since 2015, Relators have made regular and repeated Nebraska Public Records Act requests which are nearly identical to the requests at issue in this case, marked as Exhibit A. Respondent has complied with all prior requests;
16. In an email correspondence and written correspondence dated November 2, 2017 Respondent, through a representative, notified Relators that it was unable to fulfill the request within four business days and estimated that it would complete the request by November 22, 2017. A true and accurate copy of Respondent’s November 2, 2017 written response is attached as Exhibit B;

17. In an email correspondence and written correspondence dated November 15, 2017 Respondent, through a representative, granted or responded in part to the Relators' request for documents. A true and accurate copy of Respondent's written response is attached to this Complaint as Exhibit C;
18. In an email correspondence and written correspondence dated November 22, 2017 Respondent, through a representative, denied the Relators' request for documents, claiming that while Respondent does possess records responsive to Relators' request as to the identity and information about suppliers, these records will not be released because the records "consist of attorney work product, are subject to the attorney-client privilege, are not public records and/or are confidential and exempt from disclosure under Neb. Rev. Stat. §83-967(2)". A true and accurate copy of Respondent's written response is attached to this Complaint as Exhibit D;

CLAIM FOR RELIEF Violation of Neb. Rev. Stat. § 84-712.

**The Requested Records are not Protected by Attorney-Client Privilege and are not
Attorney Work Product**

19. Relators incorporate the allegations contained in paragraphs 1 through 18 as though set forth here in full;
20. The Relators are a citizen of this state and a person interested in the examination of public records for purposes of Neb. Rev. Stat. § 84-712(1);
21. The Relators are "fully empowered and authorized" to examine the requested public records under Neb. Rev. Stat. § 84-712(1);

22. Neb.Rev.Stat. § 84-712.05(4) authorizes the withholding of certain records requested by the Relators, if certain records exist. This exception provides that “[r]ecords which represent the work product of an attorney and the public body involved which are related to preparation for litigation, labor negotiations, or claims made by or against the public body or which are confidential communications as defined in section 27-503.”;
23. Neb.Rev.Stat. § 27-503(1)(d) provides that “[a] communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the **client** or those reasonably necessary for the transmission of the communication.” (emphasis added);
24. Neb.Rev.Stat. § 27-503(1)(a) defines client as “a person, public officer, or corporation, association, or other organization or entity, either public or private, **who is rendered professional legal services by a lawyer**, or who consults a lawyer with a view to obtaining professional legal services from him.” (emphasis added);
25. Neb.Rev.Stat. §27-503(2) and (3) provide that the client may claim the privilege.
26. The communications or correspondence with suppliers or records relating to the identity of suppliers described in Relators’ October 27, 2017 request do not constitute communication with clients under the definition of §27-503;
27. The communications or correspondence with suppliers or records relating to the identity of suppliers described in Relators’ October 27, 2017 request are not attorney work product under Nebraska law;

28. The Nebraska Public Records Act, including Neb.Rev.Stat. §84-712 and §84-712.01, was duly enacted by the Nebraska Legislature, and applies to the Nebraska Department of Correctional Services;
29. Respondent has a clear duty to provide the requested documents pursuant to the Nebraska Public Records Act.

CLAIM FOR RELIEF Violation of Neb. Rev. Stat. § 84-712.

The Entities relating to the Requested Records are not Members of the Execution Team

30. Relators incorporate the allegations contained in paragraphs 1 through 18 as though set forth here in full;
31. Neb.Rev.Stat. §83-967(2) provides that “[t]he identity of all members of **the execution team**, and any information reasonably calculated to lead to the identity of such members, shall be confidential and exempt from disclosure pursuant to sections 84-712 to 84-712.09 and shall not be subject to discovery or introduction as evidence in any civil proceeding unless extraordinary good cause is shown and a protective order is issued by a district court limiting dissemination of such information.”;
32. Nebraska statutes do not define who makes up “the execution team”. Instead Neb.Rev.Stat. §83-965(2)(c) (d) and (e) give the Director the authority to “designate an execution team composed of one or more executioners and any other personnel deemed necessary to effectively and securely conduct an execution, (d)

- describe the respective responsibilities of each member of the execution team, (e) describe the training required of each member of the execution team.”;
33. The Nebraska Administrative Code Title 58 Chapter 11 regarding Execution Protocols defines “execution team” and the qualifications and duties of the team;
34. The suppliers described in Relators’ October 27, 2017 request are not members of the execution team; are not state personnel; and the Director does not have the authority to describe their respective responsibilities or training;
35. The Nebraska Public Records Act, including Neb.Rev.Stat. §84-712 and §84-712.01, was duly enacted by the Nebraska Legislature, and applies to the Department;
36. To the extent that any requested record reveals the identity of a member of the “execution team” Neb.Rev.Stat. §84-712.06 requires the Department to retract or delete only the identity and produce the balance of any and all records requested;
37. The Respondent, is required to correlate “specific portions of the records to specific reasons for the denial, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial.” Respondent has failed to do so;
38. Respondent has a clear duty to provide the requested documents pursuant to the Nebraska Public Records Act.

PRAYER FOR RELIEF

WHEREFORE, the Relators pray:

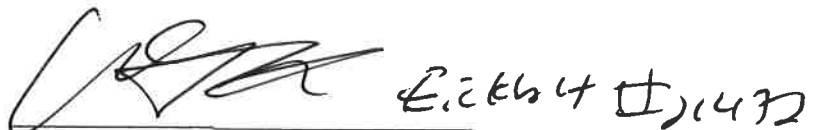
1. That the Court issue a preemptory writ of mandamus requiring Respondent to provide access to and copies of the records requested by the Relators in Exhibit A, pursuant to Neb.Rev.Stat. §84-712, or alternatively;
2. That the Court issue an Order to Show Cause why Respondent declines to provide such access by filing an Answer to this Complaint for Writ of Mandamus which responds to the allegations of Relators by a date certain;
3. That the Court expedite this matter pursuant to Neb.Rev.Stat. §84-712,03(3) and set this matter for hearing as soon as practicable;
4. That the Court issue an Order awarding attorney fees and costs to Relators pursuant to Neb.Rev.Stat. §84-712.07;
5. That the Court grant Relators any other relief the Court deems just and proper.

Respectfully submitted,

AMY A. MILLER, Relator,

ACLU of Nebraska Foundation, Relator,

By:



Christopher L. Eickholt, #21472

Eickholt Law LLC

721 South 14th Street

Lincoln, Nebraska 68508

Phone: 402-310-5663

spike@eickholtlaw.com



October 27, 2017
BY EMAIL AND MAIL DELIVERY

Director Scott Frakes
Nebraska Department of Correctional Services
P.O. Box 94661
Lincoln NE 68509

Dear Director Frakes:

AMERICAN CIVIL
LIBERTIES UNION of
NEBRASKA
FOUNDATION

134 S. 13TH ST. #1010
LINCOLN, NE 68508
T/ 402.476.8091
F/ 402.476.8135

LEGAL HELP LINE
1.855.557.ACLU (2258)

www.aclunebraska.org

This is a request under Nebraska public records law. I am seeking documents relating to your attempts to obtain pharmaceuticals or other substances for the purposes of carrying out lethal injection executions. In the following request, “Department” refers to the Department of Correctional Services, and hereinafter “injection drugs” refers collectively to *any and all substances intended for use in an execution, including but not limited to sodium thiopental, pentobarbital, midazolam, potassium, paralytic drugs, and/or any ingredients of same.* At any reference to “injection drugs,” the intent is to obtain any document referring to any and all attempts to obtain such pharmaceuticals.

In the following request, “Documents” includes notes, memos, emails, text messages, faxes, letters or written items of any kind whether in paper format or electronic format. As a reminder, our request is intended to include notes of phone communications or emails memorializing phone conversations.

As you may know, Nebraska state law requires a response to an open records request to be made within four (4) days of receipt. If you need additional time, please advise.

The materials I am requesting are limited to the time period of June 15, 2017 to present time.

1. Any documents including email, letter, phone message or other communication with any and all potential **pharmaceutical manufacturers, distributors, brokers, suppliers and/or pharmacies**—whether domestic or foreign—showing efforts to obtain lethal injection drugs or discussing lethal injection drugs.
2. Any documents including email, letter, phone message or other communication with any **officials from other states or the federal government** regarding efforts to obtain lethal injection drugs or discussing lethal injection drugs.
3. Any documents including email, letter, phone message or other communication with **Chris Harris and or Harris Pharma.**

EXHIBIT A

4. Any documents including email, letter, phone message or other communication with **Benjamin England, FDA Imports, Alpha Brokers Corp. or any other third party entity** regarding efforts to obtain lethal injection drugs or discussing lethal injection drugs.
5. Any documents including email, letter, phone message or other communication between the Department and the **Governor, or Governor's office, or Governor's corrections advisory committees, or Governor's private political consultants** related to the efforts to obtain injection drugs.
6. Any documents including email, letter, phone message or other communication with any representatives of **the United States Food and Drug Administration (FDA)** in regards to obtaining a license for the importation and acquisition of injection drugs or any other matters relating to the importation and acquisition of injection drugs.
7. Any documents including email, letter, phone message or other communication with any representatives of **the United States Drug Enforcement Administration (DEA)** in regards to obtaining a license for the importation and acquisition of injection drugs or any other matters relating to the importation and acquisition of injection drugs.
8. Any documents including email, letter, phone message or other communication with any representatives of **the United States Customs and Border Protection (CBP)** in regards to obtaining a license for the importation and acquisition of injection drugs or any other matters relating to the importation and acquisition of injection drugs.
9. Any documentation showing **the expiration date** for the injection drugs currently in the Department's possession, including a copy of the packaging itself.
10. Any documentation with any party as to the **testing, potency, efficacy**, or other matters related to the injections drugs by any party including Chris Harris, Harris Pharmaceuticals, the DEA, the FDA, or independent testing entity.
11. Any documentation from any common carrier such as **the United States Postal Service, Fed Ex, UPS, or other commercial entity or private courier** related to the importation or acquisition of injection drugs or conveyance of public funds to purchase injections drugs.
12. Any documentation showing **the use of public funds** to purchase injection drugs including any invoice, purchase order, requisition, check, receipt or other similar record.
13. Any documentation showing **the use of public funds to pay for legal services** related to efforts to purchase injection drugs, including any invoice, contract, check, receipt or other similar record.

When the documents relevant to this request are ready, you may provide them in electronic form or, if you are providing in paper form, please advise and we will arrange pick up for fastest receipt.

I look forward to hearing from you:

A handwritten signature in black ink, appearing to read "Amy Miller". The signature is fluid and cursive, with a horizontal line extending from the end of the name.

Amy A. Miller
Attorney at Law

cc: Mr. David Grauman, NDCS Legal Counsel

NEBRASKA

Good Life. Great Mission.

DEPT OF CORRECTIONAL SERVICES



Pete Ricketts, Governor

November 2, 2017

Amy Miller
ACLU of Nebraska
134 S. 13th St. #1010
Lincoln, NE 68508

RE: Public Records Request

Dear Ms. Miller,

I am writing in response to the request for public records that you sent to Director Frakes on October 27, 2017. Your request is for "documents relating to your attempts to obtain pharmaceuticals or other substances for the purposes of carrying out lethal injection executions."

We are also processing multiple, voluminous requests from your office and additional counsel in the current pending litigation. As such, we are unable to fulfill your request within four business days. We estimate that we will be able to complete this request by November 22, 2017.

Sincerely,

Dawn-Renee Smith
NDCS Communications Director

EXHIBIT B

Scott R. Frakes, Director
Dept of Correctional Services
P.O. Box 94661 Lincoln, NE 68509-4661
Phone: 402-471-2654 Fax: 402-479-5623

corrections.nebraska.gov

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DEPT OF CORRECTIONAL SERVICES



Pete Ricketts, Governor

November 15, 2017

Amy Miller
ACLU of Nebraska
134 S. 13th St. #1010
Lincoln, NE 68508

RE: Public Records Request

Dear Ms. Miller,

I am writing in response to your email of November 15, 2017, wherein you request to prioritize or modify your request of October 27, 2017. Specifically, you have requested records that are clearly outside of any privilege or confidentiality be provided immediately with the remaining items provided following internal review. Below and attached are items that fit your criteria.

(1) Any documents including email, letter, phone message or other communication with any and all potential pharmaceutical manufacturers, distributors, brokers, suppliers and/or pharmacies – whether domestic or foreign – showing efforts to obtain lethal injection drugs or discussing lethal injection drugs.

- Letter from Pfizer

(2) Any documents including email, letter, phone message or other communication with any officials from other states or the federal government regarding efforts to obtain lethal injection drugs or discussing lethal injection drugs.

- Email (3) from the Association of State Correctional Administrators to Scott Frakes
- Notice of Inspection of Controlled Premises – US DOJ/DEA
- Drug Enforcement Administration – Closing Inventory
- DEA Form 225-A – Completed
- Controlled Substance Registration Certificate

(3) Any documents including email, letter, phone message or other communication with Chris Harris and or Harris Pharma.

- NDCS has no records responsive to this request.

EXHIBIT C

Scott R. Frakes, Director
Dept of Correctional Services
P.O. Box 94661 Lincoln, NE 68509-4661
Phone: 402-471-2654 Fax: 402-479-5623
corrections.nebraska.gov

(5) Any documents including email, letter, phone message or other communication between the Department and the Governor, or Governor's office, or Governor's corrections advisory committees, or Governor's private political consultants related to the efforts to obtain injection drugs.

- NDCS has no records responsive to this request

(6) Any documents including email, letter, phone message or other communication with any representatives of the United States Food and Drug Administration (FDA) in regards to obtaining a license for the importation and acquisition of injection drugs or any other matters relating to the importation and acquisition of injection drugs.

- NDCS has no records responsive to this request

(7) Any documents including email, letter, phone message or other communication with any representatives of the United States Drug Enforcement Administration (DEA) in regards to obtaining a license for the importation and acquisition of injection drugs or any other matters relating to the importation of injection drugs.

- See response to #2

(8) Any documents including email, letter, phone message or other communication with any representatives of the United States Customs and Border (CBP) in regards to obtaining a license for the importation and acquisition of injection drugs or any other matters relating to the importation of injection drugs.

- NDCS has no records responsive to this request

(9) Any documentation showing the expiration date for the injection drugs currently in the Department's possession, including a copy of the packaging itself.

- Inventory logs

(11) Any documentation from any common carrier such as the United States Postal Service, Fed Ex, UPS, or other commercial entity or private courier related to the importation or acquisition of injection drugs or conveyance of public funds to purchase injections drugs.

- NDCS has no records responsive to this request.

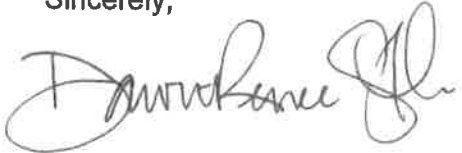
(13) Any documentation showing the use of public funds to pay for legal services related to efforts to purchase injection drugs, including any invoice, contract, check, receipt or other similar record.

- NDCS has no records responsive to this request

Amy Miller
ACLU of Nebraska
November 15, 2017
Page 3

If you believe records have been withheld contrary to Neb. Rev. Stat. § 84-712, you may pursue administrative or judicial remedies as outlined in Neb. Rev. Stat. § 84-712.03.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dawn-Renee Smith". The signature is written in black ink and is positioned above the printed name.

Dawn-Renee Smith
NDCS Communications Director

NEBRASKA

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DEPT OF CORRECTIONAL SERVICES



Pete Ricketts, Governor

November 22, 2017

Amy Miller
ACLU of Nebraska
134 S. 13th St. #1010
Lincoln, NE 68508

RE: Public Records Request

Dear Ms. Miller,

I am writing in response to your request for public records received on October 27, 2017. Your request is for "documents relating to your attempts to obtain pharmaceuticals or other substances for the purposes of carrying out lethal injection executions." Certain documents were provided to you on November 16, 2017.

We have completed our search for records responsive to your request, and have located additional records responsive to request number 9, which we have enclosed with this letter. There is no charge. With respect to request numbers 3, 5, 6, 8, 10, 11 and 13, we have no responsive records.

We have records responsive to request numbers 1, 2, 4, 7, 9 and 12 that will not be provided to you. These particular records consist of attorney – client communications; communication between an NDCS team member and a supplier; DEA forms; inventory logs; photos of packaging; invoices and purchase orders.

These documents constitute attorney work product, are subject to the attorney – client privilege, are not public records and/or are confidential and exempt from disclosure under Neb. Rev. Stat. § 83-967 (2). Consequently, per advice provided by legal counsel, Director Frakes is denying you access to these records on the basis of Neb. Rev. Stat. § 83-967(2); 84-712.01(1) and 84-712.05(4).

EXHIBIT D

Scott R. Frakes, Director

Dept of Correctional Services

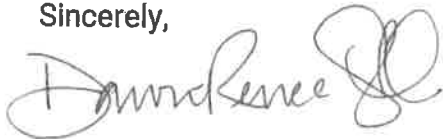
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corrections.nebraska.gov

Amy Miller
ACLU of Nebraska
November 22, 2017
Page 2

If you believe records have been withheld contrary to Neb. Rev. Stat. § 84-712, you may pursue administrative or judicial remedies as outlined in Neb. Rev. Stat. § 84-712.03.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dawn-Renee Smith". The signature is written in black ink and is positioned to the right of the word "Sincerely,".

Dawn-Renee Smith
Communications Director