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**IN THE NEBRASKA SUPREME COURT  
CASE NO. A-08-339**

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STATE OF NEBRASKA, ex rel. ADAMS )  
COUNTY HISTORICAL SOCIETY, )  
 )  
Appellant, )  
 )  
v. )  
 )  
NANCY KINYOUN, )  
 )  
Appellee. )

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**Appeal from the District Court of Adams County, Nebraska  
The Honorable Terri S. Harder, District Judge**

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**BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF  
THE PRESS, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE  
ASSOCIATION OF CAPITOL REPORTERS AND EDITORS, THE ASSOCIATED  
PRESS, THE NEBRASKA BROADCASTERS ASSOCIATION, THE NEBRASKA  
PRESS ASSOCIATION, THE RADIO-TELEVISION NEWS DIRECTORS  
ASSOCIATION, AND THE SOCIETY OF PROFESSIONAL JOURNALISTS IN  
SUPPORT OF APPELLANT.**

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## I. PROPOSITIONS OF LAW

1. The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and the regulations implementing it allow the release of health information where a state open records law or court requires the release. 42 USC § 201; *Abbott v. Texas Dep’t of Mental Health*, 212 S.W.3d 648, 662 (Tex. App. 2006); *Cincinnati Enquirer v. Daniels*, 844 N.E.2d 1181, 1188 (Ohio 2006); *Protection & Advocacy Sys. v. Freudenthal*, 412 F. Supp. 1211 (D. Wyo. 2006); 45 C.F.R. 160.103; Ky. Op. Atty. Gen. 08-ORD-166; HIPAA Frequent Questions, Permitted Use and Disclosure, Disclosures Required by Law, available at: <http://www.hhs.gov/hipaafaq/permitted/require/506.html>.
2. Death records are public records under Nebraska law. Neb. Rev. Stat. § 84-712.05(2); Neb. Op. Att’y. Gen. No. 04018.
3. Public release of potentially embarrassing information in a death record is not grounds for preventing public access to the record. *Tri-State Publ’g Co. v. City of Port Jervis*, 523 N.Y.S.2d 954 (N.Y. Sup. Ct. 1988); *The Homes News Publ’g Co. v. New Jersey*, 570 A.2d 1267 (N.J. Super. Ct. App. Div. 1990); Neb. Op. Att’y Gen. No. 04018.
4. States recognize a diminished expectation of privacy in death information as time passes. Ala. Code § 22-9A-21(f); Alaska Stat. 18.50.310(f) (2007); Tex. Gov’t Code. Ann.§ 552.115 (2007).
5. Nebraska allows for the discretionary release of medical information under its open records law. Neb. Rev. Stat. § 84-712.05.
6. Privacy interests can be weighed against the public interest in disclosure to determine whether to release requested information in cases where a discretionary release of

information to the public is allowed. *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976); *Carlson v. Pima Cty*, 687 P.2d 1242 (1984).

## **II. INTEREST OF AMICI**

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that work to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. The Reporters Committee's interest in this case is in preserving the news media's right to access public records for the purpose of reporting the news without obstruction by the government.

The following groups support the Reporters Committee's brief.

The American Society of Newspaper Editors is a nonprofit organization founded in 1922. It has a nationwide membership of approximately 600 persons who hold positions as directing editors of daily newspapers throughout the United States, with members recently being added in Canada and other countries in the Americas. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

The Association of Capitol Reporters and Editors was founded in 1999 and currently has approximately 200 members. It is the only national journalism organization for those who write about state government and politics.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's members include approximately 1,500 daily newspapers and 5,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and maintains bureaus in 240 cities

worldwide. AP news reports in print and electronic formats of every kind reach a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 121 countries.

The Nebraska Broadcasters Association was formed in 1934, with the purposes of advancing the best interests of the free, local, over-the-air, full service radio and television broadcast industry in the State of Nebraska, and in that regard: to optimize the business and regulatory environment in which the broadcast industry operates on a state level, on a regional level, and on a federal level; to advance the state of the art of broadcasting; to increase respect for and the credibility of broadcasting; to help each broadcast station to better serve the public interest; and to otherwise engage in activities and other undertakings, including but not limited to Noncommercial Sustaining Announcement Programs (NCSA), which serve those purposes.

The Nebraska Press Association was founded in 1873. Today it protects freedom of the press and promotes the overall business interests and professional development of its members.

The Radio-Television News Directors Association is the world's largest and only professional organization devoted exclusively to electronic journalism. RTNDA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTNDA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-

informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

### III. SUMMARY OF THE ARGUMENT

Appellant, the Adams County Historical Society, is seeking burial information for 957 individuals interred on the grounds of the Hastings Regional Center (“HRC”), a state mental hospital in Adams County. (Appellant Br. 6.) The individuals were buried between 1909 and 1959, in graves marked only with numbers. *Id.* The records at issue are maps of the graves and lists of residents with their dates of death and medical record numbers, which can be matched to the graves. *Id.* This information should be released to the Appellant under both federal law and Nebraska law. The requested death records fall within the ambit of public information and there is a strong public interest in access to these records that this Court should consider. Nebraska mandates access to public records, with limited exceptions. Federal privacy laws protecting health information do not prevent the release of such information where it is required by a state open records law. Yet, the trial court, in a case of first impression in Nebraska, incorrectly decided that access to these records was dependent solely on federal law and the information should not be released. *Amici* support the appellant’s request that the trial court’s opinion be reversed and the records released, aligning Nebraska with the states that have already considered these issues.

### IV. ARGUMENT

#### **A. Federal law does not prevent the release of health information where a state law requires its release.**

The interaction of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 USC § 201 and state open records laws has been weighed by numerous courts and the federal Department of Health and Human Services. The trial court’s decision in this case

strays from a consensus among appellate courts and state attorneys general by holding that HIPAA protects information without regard to a state's open records law. Every published court decision addressing this question has held that where a state open records law requires the release of information, HIPAA will not prevent that release. Were the trial court's decision to stand in this case, Nebraska would be out of step with every other court to consider this issue and the federal government's own advice on how to interpret its HIPAA regulations in light of state open records laws. *See* HIPAA Frequent Questions, Permitted Use and Disclosure, Disclosures Required by Law, available at: <http://www.hhs.gov/hipaafaq/permitted/require/506.html>.

The regulation implementing HIPAA's privacy safeguards, 45 C.F.R. § 160.103, prohibits the release of "individually identifiable health information" by an entity to which HIPAA applies. However, 45 C.F.R. § 164.512 allows the release of the same "individually identifiable health information" when the disclosure is required by law. Courts in Texas, Ohio, and Wyoming have interpreted that language to allow the release of health information where a state law requires the release. *See Abbott v. Texas Dep't of Mental Health*, 212 S.W.3d 648, 662 (Tex. App. 2006) ("If a request for protected health information is made under the [Texas] Public Information Act, then the exception to non-disclosure found in section 164.512(a) of the Privacy Rule applies, and the agency must determine whether the Act compels the disclosure or whether the information is excepted from disclosure"); *Cincinnati Enquirer v. Daniels*, 844 N.E. 2d 1181, 1188 (Ohio 2006) ("Ohio's Public Records Act requires that public records be 'made available'" thus the information sought is "subject to disclosure pursuant to the 'required by law' exception to the HIPAA privacy rule"). *See also, Protection & Advocacy Sys. v. Freudenthal*, 412 F. Supp. 1211 (D. Wyo. 2006) (HIPAA does not bar the release of information to state protection and advocacy officials where Wyoming law allows it). Many state attorneys general, including

Nebraska's, have also reached this conclusion. (Appellant Br. 13.) *See also* Ky. Op. Atty. Gen. 08-ORD-166. The decisions hold that state open records statutes are laws requiring disclosure, which are exempted from HIPAA. Thus, the question of release is ultimately dependent only on the analysis of a state law, contrary to the trial court's interpretation of the issues in this case.

**B. The requested records are death records within the meaning of Nebraska's open records law, and thus public.**

Death records are public by virtue of their exemption from the definition of medical records in Nebraska's open records law. The statute allows for the discretionary withholding of *medical records*, defining those as "records, *other than records of births and deaths* and except as provided in subdivision (5) of this section, in any form concerning any person." Neb. Rev. Stat. §84-712.05(2) (emphasis added). Death records, including death certificates, are expressly separate and distinct from medical records, and in the Nebraska Attorney General's opinion, must be accessible to the public. *See* Neb. Op. Atty. Gen. No. 04018.

Some of the information sought by Appellant is undisputed public information available through a death certificate, which contains a decedents' name, date of death, location of death (including the name of the facility or the home at which the decedent passed), cause of death, and time of death. However, this clearly public information only makes up a portion of the *burial* information sought and is insufficient as a response to the request, without more.

Moreover, Appellant's request is likely to be much less of an administrative burden for the records custodian and less invasive. The Appellant's narrow request will reveal only historical burial information, not specific information about everyone who died at HRC. The Appellant has even agreed to receive less than the amount of information on a death certificate — for example by not requesting the cause of death or medical conditions of the decedents. (Appellant Reply Br. 7.)

The State argues releasing the names of those buried at the Hastings Regional Center will reveal some medical information about them, i.e., that they had a mental illness, thus making the burial information a medical record. (Appellant Br. 19.) Such a revelation would invade the deceased or surviving family's privacy interest, the State reasons. *Id.* But revealing that the decedents had a mental illness is akin to revealing a decedent's cause of death, which is a public record in Nebraska. Other states have addressed whether such a revelation — even in instances where the cause of death would reveal the decedent had a stigmatizing illness — is enough to withhold death records under an open records law. They have found it is not, as has Nebraska's Attorney General. *See* Neb. Op. Att'y Gen. No. 04018 (declaring there is no authority to “prevent the Department from supplying a person's death certificate when the cause of death lists a communicable disease”). For example, in *Tri-State Publ'g Co. v. City of Port Jervis*, 523 N.Y.S.2d 954 (N.Y. Sup. Ct. 1988) a New York Court ordered the release of an AIDS patients' death certificate to a reporter because of the overwhelming public interest in the AIDS epidemic of the 1980s. The court also noted that the deceased have no privacy rights nor can survivors assert privacy rights on their behalf. *Id.*; *see also The Homes News Publ'g Co. v. New Jersey*, 570 A.2d 1267 (N.J. Super. Ct. App. Div. 1990) (requiring the state registrar to allow a reporter to search death records despite personal information contained in them). These cases, dealing with the same information at issue here, viewed the records as death records, as should this Court.

Even states that keep death certificates confidential immediately following an individual's death for privacy reasons eventually make those records public as the privacy interests diminish over time. *See, e.g.,* Ala. Code § 22-9A-21(f) (2007); Alaska Stat. 18.50.310(f)

(2007); Tex. Gov't Code. Ann. § 552.115 (2007). Likewise, the openness of such historical records is valued for the genealogical and demographic information they provide.

**C. There is a strong public interest in the release of these records, which the Court should consider.**

The privacy interests the State espouses in this case are minimal, particularly in light of the strong public interest in disclosure of the requested records. Even if the requested burial information revealed medical information (which it does not) about the deceased, Nebraska's statutes still allow for disclosure. *See* Neb. Rev. Stat. § 84-712.05 (saying only that it is permissive to withhold records, not that it is mandated they be withheld). While Nebraska's open records law has not been frequently interpreted by courts, in many states and at the federal level, where privacy interests are implicated in a discretionary release of information, courts weigh the interests at hand. *See, e.g., Dep't of Air Force v. Rose*, 425 U.S. 352 (1976); *Carlson v. Pima Cty*, 687 P.2d 1242 (1984) (allowing for the consideration of a substantial and irreparable private or public harm caused by the release of information). Here, the Nebraska legislature has accounted for these interests in crafting the statute by giving no discretion to officials to withhold death records. *See* Neb. Rev. Stat. § 84-712.05. It is only where actual medical records are at issue that withholding may be permissible. *Id.* Yet even where the lines between death and medical records are blurred, the balance of interests easily falls in favor of access to the records when the public interest in disclosure is considered.

The public interest in release of these names is strong, as the power of the state was at its ultimate height when it was presumably used to deprive some of these individuals of their liberty by incarcerating them at HRC without findings of criminal guilt. *See Asides & Insides, A battle over the dead*, Modern Healthcare, June 11, 2007 (“[I]n the early years, you could end up [at HRC] for many reasons, including senility, depression, mental retardation, even epilepsy”

according to historians). Indeed, this request is more akin to asking for a list of those held in a county jail against their will than residents of a hospital. When the state's power is used so forcefully, it must be clear to the public who it is used against to prevent misuse. This is not a country that finds value in depriving people of their liberty anonymously.

There is also a longstanding presumption of access to information about how government resources are expended. *See Grein v. Board of Education*, 216 Neb. 158, 164, 343 N.W.2d 718 (1984) (explaining the need for open meetings when the expenditure of public funds will be discussed); *The News-Press v. United States Dep't of Homeland Security*, 489 F.3d 1173 (11th Cir. 2007) (ordering the release of household addresses receiving FEMA aid following hurricanes). Residents at HRC hopefully benefited from state resources — dependent on Nebraska for their food, medical care, housing, and other minimal comforts. This favors access to these individuals' names.

Additionally, journalists have long played a role in exposing and rectifying mistreatment and inhumane conditions at mental institutions. *See* Nellie Bly, *Ten Days in a Mad-House*, (Ian L. Munro, Publisher, 1887); Stan Swofford, *Locked up and castrated for a crime he wasn't convicted of, a deaf man spends 67 years...trapped in an insane world*, Greensboro News & Record, Jan. 31, 1993, at A1 ("He was to become one of about 2,000 patients who were so crowded that some were occasionally housed in cages on the lawn."); John O'Conner, *TV: Willowbrook State School, 'the Big Town's Leper Colony,'* The New York Times, Feb. 2, 1972 at 78 (highlighting the findings of Geraldo Rivera and camera crews inside the home for children with mental disabilities). Even at institutions today, journalists serve the public by acting as watchdogs on these facilities. *See* Brendan Farrington, *Do nameless graves near reform school hint at atrocities?*, Orlando Sentinel, Dec. 10, 2008, at B1. By allowing access to the names of

those who are buried on hospital grounds, the public and the press can fulfill their role as a watchdog — and allow those who died at HRC to have a voice where they once had none. For example, records of the date of a resident's death may indicate that many people died at once, possibly the result of improper care. Death records could indicate how many people were held at a facility. The records could show whether many of the deceased share a common characteristic, or the death records may lead to more records, such as autopsy reports that show signs of abuse or toxins. They will lead families to be reunited with the resting place of loved ones. The records could also lead to the discovery of important genetic clues about one's family medical history. Perhaps, the release of this information will lead to discoveries and stories no one could predict — often the result when the press and the public at large begin to examine documents on the workings of their government.

The *Omaha World-Herald's* 2008 investigation of coroner's training and standards is another example of this type of reporting. See Karyn Spencer, *Fatal Flaws*, Omaha World-Herald, Feb.17-March 2, 2008, available at [http://www.omaha.com/index.php?u\\_page=2798&u\\_sid=10263668](http://www.omaha.com/index.php?u_page=2798&u_sid=10263668). The newspaper's two-week series used death certificates and autopsy reports in concluding that there are unsolved murder cases and that some coroners guess at causes of death because of Nebraska's lax regulations. *Id.*

The State asserts the deceased HRC residents would have an interest in not being known to have been housed at the HRC. But there is no evidence in the record that this is the case. (Appellant Br. at 19.) As time has passed, not only have the privacy interests of the residents expired but attitudes toward mental illness have changed. Many individuals at state hospitals throughout the United States were buried in numbered graves because of the stigma associated at the time with mental illness. See Scott S. Greenberger, *State is Pressed on Forgotten Graves*, *Bill*

*Would Fund Identification Effort*, Boston Globe, July 6, 2004, at B1; Kelly Patricia O’Meara, *Forgotten dead of St. Elizabeth’s*, Insight on the News, Aug. 6, 2001 at 14; William Childress, *Dignity for the Mentally Ill*, St. Louis Post-Dispatch, June 5, 1993 at D3. Today, the public interest and the enlightened government policies favor identification of those buried in these state-owned cemeteries. There are movements in other states to identify the long deceased and properly mark their graves, an attempt to come to terms with this dark period in the history of treating people with mental illness. In some states, legislatures have appropriated money for the restoration of these cemeteries and mandated the dead be identified. See Mark Peters, *Solemn event aims to release AMHI dead from anonymity, The names of thousands who died at the state mental hospital will be read one by one Thursday*, Maine Sunday Telegram, June 12, 2005, at B1; Scott S. Greenberger, *State is Pressed on Forgotten Graves, Bill Would Fund Identification Effort*, Boston Globe, July 6, 2004, at B1; Benjamin Shors, *List of dead to be published, Locke to sign bill to release names of those buried at state hospitals*, The Spokesman-Review, March 6, 2004, at A1. These policies fly in the face of the State’s privacy arguments.

The State cites various Nebraska statutes protecting the confidentiality of patients at mental institutions now; however these statutes deal with access to detailed information about a *living* patient. See Appellee Br. at 15. The statute most relied on by the State says exactly that — “A record of every patient or resident of every institution shall be kept complete from the date of his or her entrance to the date of his or her discharge or death;” the next clause of the same sentence addresses access to those records while the patient remains at the institution. Neb. Rev. Stat. § 83-109 (2007). Yet nothing in this part of the relevant statutory scheme addresses or mentions access to burial or death records of a deceased patient, let alone one who died decades ago. Through this lack of language and the explicit removal of death records from the medical

records exemption to the open records law, the legislature demonstrated its intent that these records be public, particularly given the strong public interest here and minimal privacy interests of the decedents.

## V. CONCLUSION

The trial court's decision must be overturned, as it improperly relies on HIPAA to withhold public records. HIPAA only protects health information to the same extent as Nebraska's open records law. In this case, Nebraska law requires the release of burial information for the long-deceased individuals buried on HRC's grounds. The public interest in this information is strong given the history of treatment of the mentally ill, the need for public oversight — even in retrospect — of government institutions, movements in other states to acknowledge those buried in similar cemeteries, and the history of the press in documenting the experience of those in mental institutions. The privacy interests here are minimal, given the historical nature of the records and the rudimentary directory information the Appellant is seeking. The records should be released and the trial court's decision overturned.

The Reporters Committee for Freedom of the Press, *et al.*,  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two true and correct copies of the above and foregoing Brief of *Amici Curiae* in Support of Appellant was sent by United States first class mail, postage prepaid, on this 8<sup>th</sup> day of January 2009, to each of the following:

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