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January 24, 2018

Chris Dunker
Lincoln Journal Star
PO Box 81609
Lincoln, NE 68501-1609

RE: *File No.17-R-145; University of Nebraska; Chris Dunker, Lincoln Journal Star, Petitioner*

Dear Mr. Dunker:

We are writing in response to your correspondence received by this office on November 21, 2017, in which you petitioned for our review of the response to your request for certain public records from the University of Nebraska ("University") under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2014, Cum. Supp. 2016). As is our normal practice with such requests, we contacted the University for a response to your petition; one was provided to us through its outside legal counsel, Mark Laughlin. We sent you a letter on December 5, 2017 indicating we needed additional time to complete our legal analysis. We have now completed that analysis and our findings are set forth below.

RELEVANT FACTS

Our understanding of the facts in this matter is based on your petition and the response we received from the University. On or about November 3, 2017, you sent the following request to the University:

I write to request access to and a copy of all communications, printed or electronic, sent or received between University of Nebraska administrators or members of the Board of Regents and senators of the Nebraska Legislature regarding a Friday, Aug. 25, 2017 incident outside the Nebraska Union where a UNL student representing Turning Points USA was confronted by university students and employees.

On November 9, 2017, the University, through Erin E. Busch, Director of University Records and Associate General Counsel, responded to your request, withholding “email correspondence responsive” to your request “pursuant to Neb. Rev. Stat. § 84-712.05(12) because the records contain constituent communications with a member of the Nebraska Legislature.” Your petition to this office followed on November 21, 2017 and you have asked us to review the denial by the University of the records you seek. The University, in its response, refers to the plain language of the statute in asserting that its denial of your request was proper.

DISCUSSION

The Nebraska Public Records Statutes (“NPRS”) generally allow interested persons the right to examine public records in the possession of public agencies in Nebraska during normal agency business hours, to make memoranda and abstracts from those records, and to obtain copies of records in certain circumstances. 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, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form shall remain a public record when maintained in computer files. Neb. Rev. Stat. § 84-712.01(1). Under those statutes, every record “of or belonging to” a public body is a public record which individuals may obtain a copy of unless the custodian of the record can point to a specific statute which allows the record to be kept confidential. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

Although the NPRS provide for access to public documents, they are not absolute. The NPRS also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). Neb. Rev. Stat. § 84-712.05 is comprised of twenty categories of documents which may be kept confidential from the public at the discretion of the agency involved. In the present case, the University has claimed the exception set out in § 84-712.05(12) as its basis for denying you access to the requested records. That subsection provides:

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:

(12) Correspondence, memoranda, and records of telephone calls related to the performance of duties by a member of the Legislature in whatever

form. The lawful custodian of the correspondence, memoranda, and records of telephone calls, upon approval of the Executive Board of the Legislative Council, shall release the correspondence, memoranda, and records of telephone calls which are not designated as sensitive or confidential in nature to any person performing an audit of the Legislature. A member's correspondence, memoranda, and records of confidential telephone calls related to the performance of his or her legislative duties shall only be released to any other person with the explicit approval of the member.

The University urges us to review whether it may withhold the requested records using only the language found on the face of Neb. Rev. Stat. § 84-712.05(12). In Nebraska, in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Swift and Co. v. Nebraska Dept. of Revenue*, 278 Neb. 763, 773 N.W.2d 381 (2009). The University asserts that the plain language of the statute clearly allows it to withhold the records you have sought under Neb. Rev. Stat. § 84-712.05(12). However, we do not believe that the statutory language is as clear as the University concludes.

In particular, while subsection (12) establishes an exception from disclosure under the NPRS for correspondence and other records related to performance of duties by a member of the Legislature, it provides that, apart from the release of records deemed necessary to audit the Legislature, such records "shall only be released to any other person with the explicit approval of the member." As the "explicit approval of the member" is required to release records beyond the context of a legislative audit, the statute is ambiguous as to whether correspondence between a member and a public body subject to the NPRS, such as an executive branch state agency, may be withheld by the agency. In order to resolve this ambiguity, resort to the legislative history of the exemption is warranted to determine the legislative intent in enacting the exception. *Goolsby v. Anderson*, 250 Neb. 306, 309, 549 N.W.2d 153, 156 (1996) ("To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question."); *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997) (Resort to legislative history is appropriate when statutory language is ambiguous.). To determine whether you have been improperly denied access to public records, we reviewed the legislative history of Neb. Rev. Stat. § 84-712.05(12).

The authority to withhold legislators' records was first placed into the NPRS following the passage of 1983 Neb. Laws LB 565 and allowed "[c]orrespondence, memoranda, and records of telephone calls related to the performance of duties by a member of the Legislature" to be withheld in response to a public records request. 1983 Neb. Laws LB 565. The Introducer's Statement of Intent for this bill states that it was

intended to allow Nebraska legislators to withhold their correspondence, memoranda, and telephone records from public scrutiny. A state senator has been placed in a position of trust by the electorate of his or her district, and is the sole state legislative representative for that electorate. As such, it is essential that constituents have access to their senator, and that the senator has sufficient freedom to carry out his or her duties adequately. If a senator's records are open to the public, this may inhibit a constituent from contacting his or her senator or from communicating with the senator candidly. The legislator's ability to function may also be impaired by the constant knowledge that any or all of his or her communications may be subject to public disclosure. Therefore, LB 565 is needed to ensure that Nebraska state senators can serve their constituents properly, and carry out their duties of office effectively.

Committee Records on LB 565, 88th Neb. Leg., 1st Sess. Statement of Intent (February 10, 1983). The legislative discussion held on this bill clearly indicates that senators contemplated that this subsection would apply to a senator's ability to withhold his or her communications with constituents. The impetus of the bill was to protect the privacy of individual members of a senator's constituency from public release of their correspondence with a senator. Senators shared concerns that without this subsection, individuals may not contact them if their correspondence, some of which may contain personal anecdotes, may be publicly available, impairing their ability to perform their duties as senators.

To a large extent, the correspondence of a constituent to a Senator is a private matter and the response by a Senator back to a constituent similarly is a private matter. . . . [W]hen people make communications to us, as Senators, that are done privately, that are clearly done privately, i.e., their letter and their telephone calls including our correspondence back, that to assure the free flow of information and ideas, it's important for us to be able to protect the confidentiality of the information and the informant. . . .

Committee Records on LB 565, 88th Neb. Leg., 1st Sess. 38 (February 10, 1983) (Statement of Senator Vard Johnson). Senator Johnson was the principal introducer of LB 565. During the floor debate, Senator Johnson went on to explain the purpose behind the bill:

You and I need to have the freest flow of information to us as legislators as we can possibly obtain. . . . [W]e receive a tremendous amount of private, personal correspondence from constituents. We want to be able to assure people that write us that what they say to us is private as they envision it being when they write those letters. . . . If we cannot assure them that type of privacy, then by the same token they may simply decline to write. We also want to be able to assure our constituents that when we write them

back, when we write them back our own correspondence is not subject to being picked up by the newspapers and television stations and broadcast throughout the world unless we as state senators want that to be done.

Floor Debate on LB 565, 88th Neb. Leg., 1st Sess. 2487 (March 30, 1983) (Statement of Sen. V. Johnson). See also *id.* at 2490 (Statement of Sen. Landis); *id.* at 2499 (Statement of Sen. Remmers); *id.* at 2504-2505 (Statement of Sen. Vickers); and *id.* at 2514 (Statement of Sen. V. Johnson).

In 1993, this subsection was amended in response to a request for legislative telephone records by the state auditor. 1993 Neb. Laws LB 579, § 6 added the following language:

The lawful custodian of such correspondence, memoranda, and records of telephone calls, whether created prior to, on, or after the effective date of this act, upon approval of the Executive Board of the Legislative Council, shall release such correspondence, memoranda, and records of telephone calls which are not designated as sensitive or confidential in nature pursuant to subsection (3) of section 81-1120.27 to the person the Executive Board of the Legislative Council has contracted with pursuant to section 1 of this act. A member's correspondence, memoranda, and other records of telephone calls related to the performance of his or her legislative duties shall only be released to any other person with the explicit approval of the member.

This bill was passed in direct response to a conflict between the Legislature and the state auditor at the time.¹ All discussion of the bill concerning the records of the members of the Legislature centered around providing records of phone calls between senators and their constituents to the state auditor and whether confidentiality would be maintained by the auditor of those records.² See generally Committee Records on LB 579, 93rd Neb. Leg., 1st Sess. 1-62 (February 10, 1993); Floor Debate on LB 579, 93rd Neb. Leg., 1st Sess. 1177-1209 (February 25, 1993). As with the discussion of LB 565 in 1983, the concern of the Legislature addressed by this bill was the privacy of their constituents. See Floor Debate on LB 579, 93rd Neb. Leg., 1st Sess. 1186 (February 25, 1993) (Statement of Sen. Hall) (“[W]e’ve got to remember that the people that we are here to serve are the same ones that we are here to protect in this case, those being the

¹ This bill was also introduced, in part, in response to Op. Att’y Gen. No. 92116 (October 9, 1992), in which we concluded that the NPRS exception from disclosure for legislative telephone records did not preclude the state auditor from accessing those documents in connection with a properly conducted audit authorized by statute.

² Three other bills were amended into what became LB 579 by the Government Committee in 1993: LB 229, LB 427, and LB 540. See 1993 Neb. Leg. Journal 3045; Floor Debate on LB 579, 93rd Neb. Leg., 1st Sess. 1177 (February 25, 1993) (Statement of Sen. Hall).

individuals who respect, demand and deserve confidentiality.”); Floor Debate on LB 579, 93rd Neb. Leg., 1st Sess. 2428 (April 1, 1993) (Statement of Sen. Hall) (“It’s when you involve the innocent third party, the individual that expects confidences and when the auditor is on record saying that he will not protect those, that’s where the whole, I guess, catalyst behind LB 579 came from as it relates to the phone records.”). The concern of the Legislature was that details regarding these calls would be released by someone not a party to the call, i.e, the auditor in his audit report, circumventing the ability of a state senator to withhold information about those calls from public view in order to protect the privacy of individual constituents. The only mention of the provision requiring “explicit approval of the member” before release of a senator’s correspondence, memoranda or telephone calls was a brief statement by Senator Hall upon introduction of this bill on the floor. “Again, we tie in the fact that the records are an individual member’s, and they are hers or his to deal with as they choose, within the provisions of LB 579 as it has been amended with the committee amendments.” Floor Debate on LB 579, 93rd Neb. Leg., 1st Sess. 1180 (February 25, 1993) (Statement of Sen. Hall).

The final substantive amendments to § 84-712.05(12), for purposes of this letter, occurred via 1995 Neb. Laws LB 509, which inserted “in whatever form” to the end of the first sentence and the word “confidential” modifying “telephone calls” to the final sentence.³ As with 1993 Neb. Laws LB 579, this bill was introduced and passed in direct response to actions of the state auditor as to the materials turned over by the Legislature during an audit.⁴ The auditor had placed summaries of phone call information in his audit report. The original form of these records, the listing of the phone calls, would have been confidential. However, that confidentiality was lost when the material was taken out of its original form and summarized for the auditor, leading to the addition of the “in whatever form” language to § 84-712.05(12). See Committee Records on LB 509, 94th Neb. Leg., 1st Sess. 7-8 (February 15, 1995); Floor Debate on LB 509, 94th Neb. Leg. 1st Sess. 3563-3565 (March 30, 1995) (Statements of Sen. Hall).

The legislative history for Neb. Rev. Stat. § 84-712.05(12) indicates to us that it was intended to be used by senators to withhold private communications with constituents. You have requested records from the University, which is an executive branch agency of the State of Nebraska. The University refers to the records withheld as “constituent communications with a member of the Nebraska Legislature.” “Constituent” is defined as “the residents in an electoral district” or “a member of a constituency,”⁵ which

³ These sentences then read: “Correspondence, memoranda, and records of telephone calls related to the performance of duties by a member of the Legislature in whatever form. . . .A member’s correspondence, memoranda, and records of confidential telephone calls related to the performance of his or her legislative duties shall only be released to any other person with the explicit approval of the member.”

⁴ This bill was also introduced in response to Op. Att’y Gen. No. 94080 (October 14, 1994), which again addressed the state auditor’s access to legislative phone records.

⁵ <https://www.merriamwebster.com/dictionary/constituent>

is “a body of citizens entitled to elect a representative.”⁶ This definition does not include public bodies. The University is not a “constituent” of the Legislature; it is a public body subject to the provisions of the NPRS.

The correspondence of a public body, unlike that of the citizenry, is subject to the NPRS and is open to inspection. While the University has utilized § 84-712.05(12) to withhold the records you seek, we believe the ability to withhold records under that subsection may be invoked only by members of the Legislature. The University has urged us to consider the language requiring explicit approval of the member to release a senator’s correspondence, memoranda, and records of confidential telephone calls as support for its position that the University may withhold the records you seek. However, we believe that provision applies to records requests which are made to the Legislature or senators, and requires each individual member to determine whether to release his or her own records. The exception also applies in a scenario in which records of the legislator are provided to someone other than the original recipient, such as providing records for an audit report. Further disclosure of those records beyond the purposes of the official audit would require explicit approval of the member of the Legislature. However, we do not believe the exception applies to correspondence written to another public body for which a public records request is then made to that public body. Once correspondence is sent from the member of the Legislature, the recipient of that correspondence becomes a custodian of the records. When the recipient is a public body, that public body is subject to the provisions of the NPRS, and may be required to release that record upon request. Only if a subsection of Neb. Rev. Stat. § 84-712.05 applies, other than subsection (12), may the recipient public body withhold the record.

If possible, a construction of a statute that would lead to “absurd, unconscionable, or unjust results” must be avoided. *In re Estate of Eickmeyer*, 262 Neb. 17, 22, 628 N.W.2d 246, 250 (2001). The “explicit approval of the member” required to invoke the exception makes no sense unless the records request is directed to the Legislature or individual senator. It simply can have no application to records in the hands of a public body or official possessing correspondence of other records sent or received by members of the Legislature. In order to avoid an absurd result, the exception must be construed as one which may be invoked only by the Legislature and its members.

Based on the foregoing, we do not agree with the University that it may withhold records pursuant to Neb. Rev. Stat. § 84-712.05(12). Since it has not claimed any other subsection under which the records you have requested may be withheld, it is our conclusion that the University must provide you with the correspondence you have requested.

⁶ <https://www.merriam-webster.com/dictionary/constituency>

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CONCLUSION

For the reasons explained above, we conclude the University has improperly denied you access to public records as to your request of November 3, 2017 for communications between the administrators of the University or members of the Board of Regents and members of the Nebraska Legislature. Consequently, we will request that the University release these records to you upon receipt of this letter.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Mark Laughlin, Esq.

02-676-29