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May 1, 2018

Debra A. Portz
[REDACTED]

RE: *File No. 18-R-113; Clerk of the Legislature; Debra A. Portz, Petitioner*

Dear Ms. Portz:

This letter is in response to your correspondence dated April 11, 2018, and received by this office on April 16, 2018, in which you sought our assistance in obtaining certain audio and video files from the Clerk of the Legislature, Patrick J. O'Donnell. On April 17, 2018, we forwarded a copy of your complaint to Mr. O'Donnell, and advised him of the opportunity to provide a response to this office. We received Mr. O'Donnell's response on April 23. We have considered your petition and Mr. O'Donnell's response under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2016) ("NPRS"). Our findings in this matter are set forth below.

FACTS

In a letter to Mr. O'Donnell dated March 26, 2018, you requested the following records "in accordance with Neb. Rev. Stat. § 84-712":

[A] copy of the archived videos of the floor debate (March 22 and 23, 2018) for LB295, in the 105th Legislature, first session, the Nebraska legislative bill to Adopt the Opportunity Scholarships Act and provide tax credits.

You indicated in your request that the written transcripts of the floor debate were not currently available. You asked that the records be made available to you electronically via the Internet or, alternatively, in a manner the Clerk's office determines to be "the simplest and least expensive process."

On April 3, 2018, Mr. O'Donnell timely responded to your request. He indicated that the Legislature does not make audio and video files available because they are not considered "official records." Rather, the audio and video files are used by legislative staff to produce the transcripts of legislative committee hearings and floor debate, which

are considered the official records of these proceedings. He states that “as a result, they are not considered public records themselves, but rather just electronic files used in the creation process of official public records.” Mr. O’Donnell advises that the transcripts are then made available to the public through the Legislature’s website or upon request to his office.

In his denial letter, Mr. O’Donnell noted ongoing concerns associated with the audio and video files, i.e., permanently retaining files in the face of costly storage fees, the need for additional personnel and technology to manage the files, and the lack of search capability in extremely large files. He indicates that the Legislature’s Executive Board has considered this issue twice in the last three years, and has not changed its policy denying release of archived video. Mr. O’Donnell asserts that making transcripts available via the Legislature’s “website is the most viable, cost-efficient way to serve the public and maintain our Legislature’s historical commitment to providing openness and transparency.” Finally, Mr. O’Donnell offered to provide you a rough draft transcript of the floor debate you requested by the “end of the week.”

In his response to this office, Mr. O’Donnell informs us that Nebraska Education Television [NET] retains the physical storage of the files at issue. Mr. O’Donnell raised concerns that even a minor increase in requests to view the archived video would impact the costs required to host the videos. If a video file was directly linked and happened to “go viral,” the costs to retrieve the video “would substantially exceed any implicit contractual obligations of NET.” Mr. O’Donnell also noted that making the video publicly available would implicate the Americans with Disabilities Act of 1990, as it relates to closed captioning, as well as require the Legislature to purchase additional computer equipment and software.

Mr. O’Donnell further argues that under the Nebraska Supreme Court case *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009), a party seeking a writ of mandamus under the NPRS must satisfy three elements,¹ including a showing that the requesting party has been denied access to a public record. He notes that under Neb. Rev. Stat. § 84-712(3)(e), a public body or record custodian is not required “to produce or generate any public record in a new or different form or format modified from that of the original public record.” Mr. O’Donnell asserts that denying access to the audio and video recordings is not a denial of access to a public records, but rather a denial to the *form* of the public record.

¹ Under *Evertson*, a party must first show that (1) he or she is a citizen of the state or other person interested in the examination of the public records and (2) that the document sought by the party is a public record as defined by § 84-712.01. 278 Neb. at 7, 767 N.W.2d at 758.

DISCUSSION

In Nebraska, public records include “all records and documents, regardless of physical form, of or belonging to” any branch of government. Neb. Rev. Stat. § 84-712.01(1) (2014). An exception exists “when any other statute expressly provides that particular information or records shall not be made public”² *Id.* In addition, Neb. Rev. Stat. § 84-712.05 contains twenty categories of public records that may be withheld at the discretion of the public body involved so long as those records have not been “publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties” Neb. Rev. Stat. § 84-712.08 also permits the suspension of certain provisions of the NPRS and the Open Meetings Act³ when the application of those provisions would result in the loss of federal funds, services or essential information available to a state agency.

According to the information provided, while the Legislature has access to the audio and video recordings, NET is responsible for both producing and storing the records. In this regard, we initially questioned whether NET would be the lawful custodian of the recordings and, therefore, the party responsible for requests made under § 84-712. However, in speaking with Mr. O’Donnell and officials at NET, we understand that the records are records “of or belonging to” the Nebraska Legislature,⁴ and that NET claims no right to the content.

It appears to us that Mr. O’Donnell’s chief argument is that making audio and video recordings available to the public would require his office to produce a public record in a new or different format from that of the original public record. He argues that the written transcripts constitute the official, public records, and the recordings are just a means to produce the transcripts. He further argues that his office is not denying anyone access to public records; it is just denying access to a particular format. We believe this argument fails for a number of reasons.

² See, e.g., Neb. Rev. Stat. § 77-3510 (Supp. 2017) (“The [homestead exemption] application and information contained on any attachments to the application shall be confidential and available to tax officials only.”); Neb. Rev. Stat. § 83-967 (2014) (“The 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”); Neb. Rev. Stat. § 29-2261 (Cum. Supp. 2016) (“Any presentence report, substance abuse evaluation, or psychiatric examination shall be privileged”); and Neb. Rev. Stat. § 71-503.01 (Cum. Supp. 2016) (Reports and resulting investigations from medical practitioners or other persons relating to certain communicable diseases “shall be confidential except as provided in this section, shall not be subject to subpoena, and shall be privileged”).

³ Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014, Cum. Supp. 2016, Supp. 2017).

⁴ Under a liberal construction of the “of or belonging to” language in § 84-712.01(1), public records “include[] any documents or records that a public body is entitled to possess—regardless of whether the public body takes possession. The public’s right of access should not depend on where the requested records are physically located.” *Evertson*, 278 Neb. at 9, 767 N.W.2d at 759.

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. *Farmers Cooperative v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017). As described above, public records include “all records and documents, regardless of physical form.” In this context, “record” may be defined as “[a] documentary account of past events, usu. designed to memorialize those events; information that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrieval in perceivable form.” BLACK’S LAW DICTIONARY 1023 (abridged 7th ed. 2000). “Physical” is described as “having material existence: perceptible especially through the senses and subject to the laws of nature.”⁵ “Form” relates to “one of the different modes of existence, action, or manifestation of a particular thing or substance: kind.”⁶ The audio and video recordings at issue constitute documentary accounts of legislative proceedings. The recordings are produced and stored in an electronic medium, and are retrieved by legislative staff to assist in creating transcripts. Thus, there is little question that a video recording of a legislative proceeding falls within the broad definition of public record set out in § 84-712.01(1). Moreover, we are unaware of any statute that would make the recordings confidential or not subject to the NPRS—i.e., not a public record.

Under *Evertson*, once the requesting party has satisfied all three elements for release of public records [*supra* at 2], “the public body opposing disclosure must show by clear and convincing evidence that § 84-712.05 or § 84-712.08 exempts the records from disclosure.” 278 Neb. at 8, 767 N.W.2d at 759. There is no exception in § 84-712.05 that would exempt the records from disclosure. In fact, legislation introduced during the 2018 legislative session sought to amend § 84-712.05 to add an exception to disclosure for “[a]udio and video recordings of the proceedings of the Legislature or of a committee or division of the Legislature.”⁷ This bill did not advance from the Executive Board. Section 84-712.08 provides no basis to withhold the recordings. Consequently, since the records at issue fall within the definition of public records set out in § 84-712.01(1), and there is no statute that would provide a basis to keep those records confidential, the audio and video recordings must be made available to the public under a request made under § 84-712.

We further conclude that the Clerk’s Office will not be required to produce the audio and video recordings in a new and different format from that of the original record when it produces records under § 84-712. They currently exist as a digital record, and they can be produced as a digital record, e.g., a digital file attached to an email. A new and different format, it seems to us, are the written transcripts created to further memorialize the recordings.

⁵ See <https://www.merriam-webster.com/dictionary/physical> accessed May 1, 2018.

⁶ See <https://www.merriam-webster.com/dictionary/form> accessed May 1, 2018.

⁷ See https://nebraskalegislature.gov/bills/view_bill.php?DocumentID=34287.

Finally, under Neb. Rev. Stat. § 84-712(3) of the NPRS, public bodies may charge for producing public records. There are two components to this charge. The first component is the “actual added cost” incurred by the public body in making the record(s) available:

For purposes of this subdivision, (i) for photocopies, the actual added cost of making the copies available shall not exceed the amount of the reasonably calculated actual added cost of the photocopies, which may include a reasonably apportioned cost of the supplies, such as paper, toner, and equipment, used in preparing the copies, as well as any additional payment obligation of the custodian for time of contractors necessarily incurred to comply with the request for copies, (ii) for printouts of computerized data on paper, the actual added cost of making the copies available shall include the reasonably calculated actual added cost of computer run time and the cost of materials for making the copy, and (iii) *for electronic data, the actual added cost of making the copies available shall include the reasonably calculated actual added cost of the computer run time, any necessary analysis and programming by the public body, public entity, public official, or third-party information technology services company contracted to provide computer services to the public body, public entity, or public official, and the production of the report in the form furnished to the requester.*

Neb. Rev. Stat. § 84-712(3)(b) (2014) (emphasis added). The second component relates to the labor expended by public officials and employees to make public records available. The particular statute at issue, § 84-712(3)(c), provides in pertinent part:

The actual added cost used as the basis for the calculation of a fee for records shall not include any charge for the existing salary or pay obligation to the public officers or employees with respect to the first four cumulative hours of searching, identifying, physically redacting, or copying. A special service charge reflecting the calculated labor cost may be included in the fee for time required in excess of four cumulative hours, since that large a request may cause some delay or disruption of the other responsibilities of the custodian's office, except that the fee for records shall not include any charge for the services of an attorney to review the requested public records seeking a legal basis to withhold the public records from the public.

We bring these provisions to your attention because of the likelihood that costs may be incurred by the Clerk's Office to produce the requested files. Please note that under § 84-712(3)(b)(iii) above, those charges may include the costs of a third-party vendor.

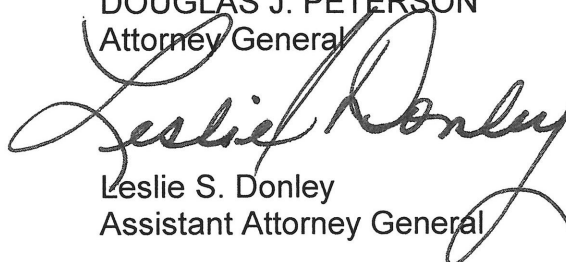
Debra A. Portz
May 1, 2018
Page 6

CONCLUSION

We conclude that the audio and video recordings of committee hearings and floor debate of the Nebraska Legislature, to the extent such recordings exist, are public records, and neither §§ 84-712.05 nor 84-712.08 provides a basis to withhold the records from public disclosure. Consequently, we will request that Mr. O'Donnell provide you a copy of these files at his earliest possible convenience. Finally, keep in mind that any request for copies of public records is subject to the cost provisions in § 84-712(3).

Sincerely,

DOUGLAS J. PETERSON
Attorney General

A handwritten signature in black ink, reading "Leslie S. Donley". The signature is written in a cursive style with a large, looping initial "L".

Leslie S. Donley
Assistant Attorney General

c: Patrick J. O'Donnell
Clerk of the Legislature

49-2007-29