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May 14, 2015

Via email and regular U.S. Mail
Michael C. Cox
KOLEY JESSEN PC, LLO
1125 South 103rd Street
Suite 800
Omaha, NE 68124

RE: *File No.15-R-118; City of Omaha and Mayor Jean Stothert; Omaha World-Herald, Petitioner*

Dear Mr. Cox:

This disposition letter is in response to the petition ("Petition") you submitted on behalf of the Omaha World-Herald Company, Inc. ("OWH"), under Neb. Rev. Stat. § 84-712.03 of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS"), against certain City of Omaha ("City") officials. We received your petition on April 29, 2015. Specifically, you have asked that this office determine "whether text messages sent or received by the Honorable Mayor Jean Stothert in conducting City of Omaha business are public records under the Nebraska public records statutes and as such whether there is a duty to preserve and produce the text messages." As is our normal practice with such requests, we contacted the party against whom the complaint was made. In this case, on May 1, we contacted Omaha City Attorney Paul D. Kratz, and requested a response to your petition, which we received on May 8. On May 13, we received the OWH's reply to the City's May 8, 2015, response. We have now completed our analysis of all of the documentation submitted. Our findings in this matter are set forth below.

As a preliminary matter, please note that opinions of the Attorney General are prepared in response to a specific legal question from a state agency or state official in instances where that agency or official has need of a legal opinion in the performance of their duties. The Attorney General may provide an opinion to state legislators on a question relating to proposed or pending legislation, or when the opinion request

"pertains directly to the performance of some function or duty by the Legislature itself."[1] The Attorney General may also provide opinions to county attorneys when the question posed relates to "all criminal matters and in matters relating to the public revenue." Neb. Rev. Stat. § 84-205(3) (2014). This disposition letter is limited to the discrete set of facts and circumstances in the context of the Nebraska Public Records Statutes, and in no way constitutes an opinion of the Attorney General. We have no statutory authority to provide opinions to private individuals, and we do not do so.

FACTS

Our understanding of the facts in this matter is based solely on information received from the parties. We have carefully reviewed the original request for public records, the City's denial letter, the OWH petition, the City's subsequent response to this office, and the OWH reply. Each document is briefly summarized below.

The Public Records Request

According to the Petition, on April 13, 2015, Roseann Moring, an OWH reporter, emailed a request for public records to City Attorney Kratz. Specifically, Ms. Moring requested

> to review or obtain copies of all text message correspondence between Mayor Jean Stothert and any Omaha City Council member or City of Omaha department head between March 23, 2015, and today.

Ms. Moring indicated that she could "review the text messages in the way that is the most convenient for you."

The City's Denial Letter

By letter dated April 21, 2015,[2] Mr. Kratz denied the request. Mr. Kratz indicated that while Mayor Stothert had given the OWH access to her "text messages for one particular day" (Petition at 2), the request was denied because text messages were not public records under the definition set out in Neb. Rev. Stat. § 84-712.01(1). According to Mr. Kratz, unlike email,

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1 Op. Att'y Gen. No. 157 (December 20, 1985) at 1.

2 While not raised as an issue by the OWH, we question the timeliness of the City's response in view of Neb. Rev. Stat. § 84-712(4), which requires, *inter alia*, that a response to a written request for public records be provided to the requester "as soon as is practicable and without delay, but not more than four business days after actual receipt of the request . . . ."

> text messages are created on mobile telecommunication devices. The message is sent using radio frequencies to a wireless telecommunication provider's receiver and is then routed through the provider's computer network, where it remains until the recipient's mobile communication device is ready to receive the text message. It is then transmitted using radio frequencies from a transmission station to the recipient's own mobile device. The text message does not pass through a computer server owned or operated by the sender or the recipient, but instead uses radio frequencies and bandwidth reserved by the Federal Communications Commission (FCC) licensed to telecommunication providers to establish public communication services. Any computer server the text message passes through or is stored on is owned and operated by the telecommunications provider and is deleted in three to seven days.

The City then applied the four-part test in the Nebraska Supreme Court case *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009), created by the court to determine whether records in a private party's possession are public records subject to disclosure, to support its position that text messages possessed by private, nongovernmental wireless telecommunication providers, such as Verizon and Sprint, are not records "of or belonging to" the public body. *Id.* at 11-12, 767 N.W.2d at 761.

In its denial letter, the City also argues that the Stored Wire and Electronic Communications and Transactional Records Access Act ("Stored Communications Act"), 18 U.S.C. §§ 2701-2712, limits the City's ability to compel a telecommunications provider to disclose text messages it may have in storage. In this regard, the City specifically relies on § 2702(a)(1), which states, in pertinent part: "[A] person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service . . . ." The City points out that while exceptions for disclosure exist under 18 U.S.C. § 2702(b), "disclosure to a government entity is only authorized by court order or warrant issued pursuant to jurisdictional rules of criminal procedure, or by the provider when it 'believes that an emergency involving danger of death or serious physical injury to any person' is imminent. 18 U.S.C. § 2702(b)(8)." The City further advises that while other sections (§§ 2703 and 2709) provide a basis for disclosure, "Congress created no exception for disclosure pursuant to the Federal Freedom of Information Act or a state equivalent." Finally, the City argues that the Stored Communications Act provides a statutory exception to disclosure referenced in the prefatory clause to § 84-712.01(1), i.e., "[e]xcept when any other statute expressly provides that particular information or records shall not be made public . . . ." The City asserts that since "the Stored Wire Act prohibits disclosure of wireless communications, text messages fall within the general exception contained in Neb. Rev. Stat. § 84-712.01(1) and are not public records."

The OWH Petition

The Petition specifically refutes the City's reliance on *Evertson* and the Stored Communications Act. The Petition sets out several key findings from *Evertson*, which the OWH believes *supports* the conclusion that the text messages at issue must be preserved and disclosed as public records. The OWH also points out that in *Evertson,* the court not only found that the report at issue was a public record, but that it could be lawfully withheld from disclosure under the investigatory records exception set out in § 84-712.05(5). The OWH argues that this exception does not apply in the present case, nor has the City relied on it, preferring instead to deny access to the text messages because they are not "of or belonging to" the City of Omaha.

With respect to the Stored Communications Act, the OWH asserts that the City's reliance on the act "fails because it entirely ignores that every public record at issue is, quite literally, in Mayor Stothert's hands until she knowingly and intentionally deletes them from her cell phone." Moreover, the recipient of the text message also has the record until deleted. The OWH suggests that there may be "various technological solutions" to preserve text messages, including using email instead, saving the texts, or transferring the texts to email. In addition, the OWH asserts that, depending on the cell phone service used by the mayor, her texts could be stored on "the cloud," and could be made readily available.

The OWH states that Mayor Stothert has admitted to "conducting city business using her text messages, yet she refuses to produce them, she rejects considering them public records, and she intentionally fails to preserve them." Further, the OWH states that the mayor downplays her texts, claiming they are for convenience and not for major city business. Mayor Stothert also considers texts to be more like a phone call than an email. The OWH argues that there are no qualifications in the definition of public records in § 84-712.01, "that exempt[] records subjectively described as a mere 'convenience' or not intended to be 'major city business.'" The OWH also argues that the characterization of texts as being more like a phone call than an email is inconsistent with the definition of public record. In this regard, the OWH argues that "a text message generates a viewable record that exists in physical form and can be maintained until deleted." Moreover, the fact that text messages do not travel through the City's servers does not mean they do not qualify as public records. According to the OWH, "[t]he text messages could be—and should be preserved—while on the phones and in the hands of Mayor Stothert and the City Council members."

The OWH further argues that the provisions of the Nebraska Records Management Act, Neb. Rev. Stat. §§ 84-1201 to 84-1227 (2014), notably § 84-1213(1), require that "[a]ll records made or received by or under the authority of or coming into the custody, control, or possession of state or local agencies in the course of their public

duties are the property of the state or local agency concerned and shall not be mutilated, destroyed, transferred, removed, damaged, or otherwise disposed of, in whole or in part, except as provided by law." The OWH asserts that there is an "implied duty inherent in the public records laws to preserve records so that citizens and other interested persons can inspect them as permitted," and that the laws would be rendered meaningless if the City could destroy records before members of the public could request access to them. The balance of the Petition contains guidance from other states, i.e., case law, attorney general opinions, and media reports.

The City's May 8, 2015, Response to Our Office

The City's response reiterates the arguments previously raised in its April 21, 2015, denial letter, relying again on *Evertson* and the Stored Communications Act. In addition, the City asserts that the functional equivalency test set out in *Frederick v. City of Falls City*, 289 Neb. 864, 857 N.W.2d 569 (2015), when applied to the circumstances here, results in the same conclusion as *Evertson*. The City also argues that the "United States Supreme Court has held there exists a reasonable expectation of privacy in the contents of mobile telecommunication devices, even if those devices are owned by a government entity" and cites to various § 1983 cases to support its position. The City also points out that the Nebraska Legislature has specifically exempted the City from the Records Management Act and, therefore, the City has no statutory duty "to obtain and preserve text messages."

The OWH's Reply

The reply letter from the OWH reiterates many of the arguments raised in its original Petition, and sets out what it sees as the critical flaws in the City's arguments. The reply also sets forth an argument to refute the City's stated position that it is exempt from the Records Management Act. In this regard, the OWH cites to § 18-1701,[3] which provides, in pertinent part, that "[a]ll cities and villages are empowered to provide for the disposition or destruction of public records when the records have been determined to be of no further legal, administrative, fiscal, or historical value by the State Records Administrator pursuant to sections 84-1201 to 84-1220 . . . ." The OWH asserts that this statute contemplates that *all* cities and villages look to the Records Management Act for guidance as to the proper disposition/destruction of public records. The City, the OWH points out, is not exempt from this provision. While the OWH agrees that cities of the metropolitan class have been exempted under the definition of "local political subdivision" in § 84-1202(3), this exemption does not extend to the definition of "local agency," which is subject to the act. The OWH argues that the City already looks to the Records Management Act for guidance in the disposition of records, and points to

[3] Chapter 18 of the *Revised Statutes of Nebraska* contains statutes applicable to all cities and villages in Nebraska.

section 2-291 of the Omaha Municipal Code, which authorizes the director of finance to destroy certain fiscal documents in accordance with the schedule established under the Records Management Act for city treasurers. Finally, the OWH cites for us § 14-816, a statute pertaining to the inspection of public records for cities of the metropolitan class, which appears to mirror, in substantial part, § 84-712 of the NPRS.

RELEVANT STATUTORY PROVISIONS

In Nebraska, the basic rule for open public records is found at Neb. Rev. Stat. § 84-712 (2014). That statute provides:

> Except 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 make memoranda, copies using their own copying or photocopying equipment in accordance with subsection (2) of this section, and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business and (b) except if federal copyright law otherwise provides, obtain copies of public records in accordance with subsection (3) of this section during the hours the respective offices may be kept open for the ordinary transaction of business.

"Public records" are defined as follows:

> 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) (2014) (emphasis added).

ANALYSIS

With these statutory provisions in mind, we will now address the City's arguments.

Evertson v. City of Kimball

We will consider first the City's assertion that the Nebraska Supreme Court case *Evertson v. City of Kimball* supports its position that the text messages at issue are not public records under the Nebraska Public Records Statutes.

In *Evertson,* two citizens sought a copy of a report resulting from an investigation of alleged discrimination by members of the city police department. The mayor of the City of Kimball, Nebraska, commissioned the investigation, and hired an independent investigator [Miller] from outside of the city to conduct it, who in turn hired two individuals [Tidyman and Sanchez] to assist him. The citizens knew that Sanchez was preparing a report for Tidyman, and requested a copy of the report from the city. The city indicated that no such report existed. The citizens then filed a mandamus action asking the court to order the city to disclose the Tidyman report. In response, the city claimed that the report was verbal, "and that it had not requested or paid for a written report." *Id.* at 4, 767 N.W.2d at 756. The city also claimed that any records relating to the investigation would fall under some of the exceptions to disclosure set out in § 84-712.05 of the NPRS.

Prior to trial, the court ordered the investigators to seal and produce to the court any discovered reports, and further ordered the parties not to review any reports pending the court's order as to disclosure. At trial, the court stated that Tidyman's submission contained interview notes, but did not include a report that would have been provided to the city. Later, the citizens discovered that Sanchez had produced a report, which summarized several interviews conducted in the course of the investigation and the city's arrest statistics. Sanchez agreed to mail the sealed report to the court for review.

The court eventually issued an order directing the city to produce the Sanchez report. The court found that Miller had hired Tidyman to conduct the investigation, and that Tidyman had hired Sanchez to conduct the interviews. Also, as a result of the investigation, the city terminated a city police officer. In addition,

> [t]he court also found that the City had falsely asserted that no written report existed. The court noted that the documents were produced as part of the investigation. It stated that the City had paid for the investigative documents, received the information, and knew that the documents existed. It concluded that the documents were therefore public records and that none of the raised statutory exemptions applied.

Id. at 5, 767 N.W.2d at 757. The court redacted names from the Sanchez report and attached it to its order.

The city appealed, asserting *inter alia*, that the district court erred when it determined the requested documents were public records belonging to the city. In support of this argument, the city relied on *Forsham v. Harris*, 445 U.S. 169 (1980), where the U.S. Supreme Court, construing the federal Freedom of Information Act, held that "an agency must create the records or exercise its right to obtain them before a requesting party can obtain an order for disclosure." *Id.* at 8, 767 N.W.2d at 759. In this context, the city argued that the "'of or belonging to' language in § 84-712.01 means a public body must have ownership of, as distinguished from a right to obtain, materials in the hands of a private entity." *Id.* at 9, 767 N.W.2d at 759.

The Nebraska Supreme Court rejected the city's argument, stating:

> [T]he City's narrow reading of the statute would often allow a public body to shield records from public scrutiny. It could simply contract with a private party to perform one of its government functions without requiring production of any written materials. **Section 84-712.01 does not require a citizen to show that a public body has actual possession of a requested record. Construing the "of or belonging to" language liberally, as we must, this broad definition includes 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.** Section 84-712.01(3) does not permit the City's nuanced dance around the public records statutes.

Id. at 9, 767 N.W.2d at 759-760 (emphasis added).

The Court then devised a test to determine whether a public body is entitled to records in the possession of a private party for purposes of disclosure. Borrowing from the Ohio Supreme Court,[4] the Court held:

> Specifically, under § 84-712.01, requested materials in a private party's possession are public records if the following requirements are met: (1) The public body, through a delegation of its authority to perform a government function, contracted with a private party to carry out the government function; (2) the private party prepared the records under the public body's delegation of authority; (3) the public body was entitled to possess the materials to monitor the private party's performance; and (4) the records are used to make a decision affecting public interest.

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4 *State ex rel. v. Krings*, 93 Ohio St. 3d 654, 2001 Ohio 1895, 758 N.E.2d 1135 (2001).

Id. at 12, 767 N.W.2d at 761. Applying the test to the circumstances involving the city and its investigation, the Court determined that the mayor delegated his own authority to investigate allegations of wrongdoing by members of the police department to Miller *et al.* The investigators created records under this delegated authority. Information in the records was used by the mayor in determining whether to terminate a member of the police department. There were no claims by the City that the mayor did not have the right to see copies of the investigation materials to monitor performance. In addition, the mayor admitted that he terminated the police officer because of the information contained in the investigation materials. In light of the foregoing, the Court concluded that the investigators' reports were public records under § 84-712.01(1). *Id.* at 12-13, 767 N.W.2d at 761-762.[5]

We believe our exposition above illustrates the flaws in the City's argument relating to *Evertson*. Here, the City starts with the premise that the wireless telecommunication providers are the custodians of the text messages at issue. Under this scenario, when the first prong of the *Evertson* test is applied, it fails because a public official is not delegating a government function when it contracts with a provider for cell phone service. In this regard, the City states that "a text message, as a record, document, or data, is not prepared under a delegation of public authority, because the contract for service is between two private entities, the individual and the provider."

We understand the argument that text messages are different than email in that they do not travel through or are stored on a server owned by the governmental entity. However, the City's argument completely ignores the fact that the actual custodian of the records are the public officials who draft, send and receive the text messages. There is no need to apply the *Evertson* test because it is inapposite to the facts. The test recently set out in *Frederick v. City of Falls City,*[6] which the City draws our attention to in its response to us, is similarly misplaced. There is no need to make a determination as to whether the City may obtain the text messages from the provider, a private entity, because those records are already held by public officials. *Evertson* and *Frederick* are nonetheless critical to our analysis because of their construction of the "of or belonging to" language in § 84-712.01(1), and the Court's holding in each case that this language "should be construed liberally to include documents or records that a public body is entitled to possess, regardless of whether the public body actually has possession of the documents." *Frederick* at 872, 857 N.W.2d at 575.

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[5] The Nebraska Supreme Court ultimately decided that while the investigators' reports were public records, the district court erred in not finding that the investigatory records exception in § 84-712.05(5) allowed the city to withhold the requested reports. *Id.* at 17, 767 N.W.2d at 765.

[6] 289 Neb. 864, 857 N.W.2d 569 (2015). In *Frederick*, the Nebraska Supreme Court devised a four-part functional equivalency test to determine whether a private entity which has an ongoing relationship with a governmental entity can be considered part of the governmental entity to the extent that its records are subject to disclosure under § 84-712.

Stored Communications Act

We believe that the City's argument with respect to the Stored Communications Act is also misplaced. Again, much like its argument relating to *Evertson*, the City starts with the premise that the provider alone is responsible for producing the text messages. The City would have us believe that certain provisions in the Stored Communications Act make obtaining a text message virtually impossible absent a court order, subpoena or warrant. And while the City did set out some of the exceptions for disclosure under § 2702(b) in its denial letter and subsequent response, it conveniently left out the exception that allows a provider to divulge the contents of an electronic communication "with the lawful consent of the originator or an addressee or intended recipient of such communication . . . ." 18 U.S.C. § 2702(b)(3) (emphasis added).

The City's argument suggests that text messages deleted by public officials, inadvertently or otherwise, are unrecoverable because the City has no way to compel the provider, who is now the sole custodian of the records, to disclose any communications under the Stored Communications Act. In this regard, the OWH points out, and we agree, that this scenario "is fraught with the potential for abuse, and it lacks the transparency and openness that are valued—indeed required—in our system of government." In any event, the Stored Communications Act does provide for access to the contents of electronic communications pursuant to § 2702(b)(3), and any representations to the contrary are specious at best.

Also, we do not believe that the provisions of the Stored Communications Act provide a statutory exception to disclosure referenced in § 84-712.01(1). The Stored Communications Act prohibits, *inter alia*, a person or entity providing an electronic communication service from knowingly divulging the contents of a communication stored by that service. The Stored Communications Act relates to the privacy of electronic communications and information, and seeks to prevent their unlawful use and disclosure, unless a specific exception applies. The Stored Communications Act does not, however, make electronic communications "confidential" for the purposes of § 84-712.01(1). As a result, we do not believe that the federal law supports the City's conclusion that the text messages at issue are not public records.

Expectation of Privacy Relating to Text Messages

An additional argument set forth by the City relates to the reasonable expectation of privacy guaranteed by the Fourth and Fourteenth Amendments. The City cites to *City of Ontario v. Quon*, 560 U.S. 746 (2010), a case involving a police department's review of text messages made by a department employee [Quon] on a city-owned pager. In response to several months of overages based on the pager service plan, the police chief undertook a search of text messages to determine whether the monthly

limits set by the service provider were (1) too low, or (2) whether the overages were a result of personal messages. Quon was subsequently disciplined when the subsequent search revealed that Quon had several messages that were not work related, and in some instances sexually explicit in nature. Quon alleged in his lawsuit that the department and certain department officials violated his Fourth Amendment rights and the Stored Communications Act by obtaining and reviewing a transcript of his text messages. The U.S. Supreme Court affirmed the decision of the trial court, finding that Quon had a reasonable expectation of privacy in the content of his messages. However, because the search of the text messages was reasonable, and related to a legitimate work-related purpose, Quon's Fourth Amendment rights were not violated. *City of Ontario* at 746-747.

It seems to us that the records at issue here are those pertaining solely to the City's business. There is no right of privacy for matters that are not private. And, by all accounts, no one is attempting to access text messages that may be personal in nature. Because we do not believe that *City of Ontario* or the other cases cited by the City have any application to the issue of whether text messages which relate to the public business are subject to disclosure under § 84-712, we did not analyze them further.

The Records Management Act

The final argument raised by the City relates to its exemption under the Records Management Act. The City states that this exemption imposes "no statutory obligation or duty . . . on the City of Omaha to obtain and preserve text messages sent on private mobile telecommunication devices." The exemption, according to the City, also imposes no obligation to maintain a formal records retention policy. The City does represent that it retains records as required by applicable federal and state law.

We have reviewed all of the statutory provisions cited by the OWH refuting the City's position in this regard. We have also reviewed the legislative history of the Records Management Act. Our review indicates that in 1969, during the committee hearing on LB 512, Mary Coronet, the City Clerk of Omaha, appeared and testified. She indicated that the pending legislation included a "home rule city which already after the passage of a new charter, started an orderly system of records retention." She raised concerns about the potential costs of microfilming and the overall lack of funds for storage, etc. Mrs. Coronet concluded her remarks by stating: "But these are my areas of concern, and I would appreciate it if we as a home rule city, since we started and do have an orderly records retention, if we would be eliminated." Committee Records on LB 512, 80th Leg., 12-13 (Feb. 21, 1969). Consequently, a committee amendment exempting cites of the metropolitan class was added to the bill, which was subsequently adopted by the Nebraska Legislature. We believe that 1969 Neb. Laws

LB 512, § 1, effectively removed the City of Omaha from the requirements of the Records Management Act.

However, this fact does not absolve the City from having its own policies and procedures with respect to the retention of the City's records. In this regard, on May 7, we requested that the City provide us a copy of its records retention schedule. We did not receive one, so on May 13 we contacted the City Attorney's Office to confirm whether a formal records retention policy existed. It appears that while various departments and divisions have retention schedules dealing with their own records, there is no single, overarching schedule for the City.

We are concerned that a metropolitan city like Omaha does not have such a policy. We are troubled by the notion that the City's exemption from the Records Management Act seemingly absolves them from the duty to adopt a policy relating to the orderly retention of the records at issue here, or any other records. We believe that the City has a clear obligation to maintain public records to provide public access. Any assertion by the City that it has no obligation to do so because it is exempt is extremely problematic. While we cannot dictate to the City what an appropriate retention schedule may be, we would suggest that it be adequately structured to allow citizens and other interested persons the opportunity to access public records.

Additional Considerations

We are aware of no Nebraska cases which discuss text messages in the context of the public records law. However, it has been the longstanding position of this office that *email* in a public official's personal email account is a public record subject to disclosure under the Nebraska Public Records Statutes when the email at issue relates to public business. This determination was based, at least in part, on Op. Att'y Gen. No. 97033 (June 9, 1997). In this opinion, the Attorney General was asked to determine the applicability of the NPRS to certain data, reports and information held by an HMO under contract with the Department of Health and Human Services. This opinion notably discussed the "of or belonging to" language in § 84-712.01(1) highlighted above. The Attorney General concluded, based on the plain language of the statute and authority in other jurisdictions, that "records 'of' or 'belonging to' state agencies under § 84-712.01 are those records 'owned' by the agencies or those records for which the state agencies possess title or an ownership interest." Op. Att'y Gen. No. at 3.

This opinion also addressed the location of the records and information at issue in the context of review and access under § 84-712. In that regard, the Attorney General stated:

> In general, the mere fact that a record is in the possession of a public officer or a public agency does not make it a public record. 76 C.J.S. ***Records*** § 99; 66 Am. Jur. 2d ***Records and Recording Laws*** § 3. Conversely, public records need not be in the physical possession of an agency to be subject to disclosure under state records acts. 76 C.J.S. ***Records*** § 99. As a result, it appears to us that the key question with respect to the Department's responsibilities under the Public Records Statutes regarding the HMO records at issue in this instance is not where those records are located or where Department employees view them. Rather, the key question goes to whether particular records at issue are records "of" or "belonging to" the Department. If they are records of the Department, then they are public records subject to disclosure regardless of their location. If they are not records of the Department, then they are not subject to the Public Records Act.

Op. Att'y Gen. No. at 6 (emphasis in original). Since that time, we have issued two disposition letters written in response to petitions filed with our office under § 84-712.03, which took the position that email pertaining to public business, but held on personal computers, is a public record subject to disclosure under § 84-712.[7]

In those instances, emails held on personal computers were also not stored on a governmental server. We are not persuaded that text messages, which are created, sent and received on cell phones and do not reside on governmental servers, are so different that they demand a different result. Consequently, to the extent text messages by and between city officials relate to the official business of the City of Omaha, they are public records subject to disclosure under § 84-712 of the NPRS.[8]

Based on the plain language of §§ 84-712 and 84-712.01(1) and the *Evertson* and *Frederick* cases, the question as to whether text messages are public records is, to us, not a hard question to answer. It seems to us the bigger issue is how will the City provide meaningful access to all public records for citizens.

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[7] See File Nos. 06-R-131 through 06-R-141, various political subdivisions, Michael Groene, Petitioner; and File No. 12-R-116, Gage County Board of Supervisors, Beatrice Daily Sun, Petitioner.

[8] Our office is not alone in this conclusion. *See, e.g., Nissen v. Pierce County*, 183 Wash. App. 581, 333 P.3d 577 (2014); *City of Champaign v. Madigan*, 992 N.E.2d 629 (Ill. Ct. App. 2013); *Flagg v. City of Detroit*, 252 F.R.D. 346 (E.D. Mich. 2008); Louisiana Attorney General Opinion No. 14-0163 (March 25, 2015); Texas Attorney General Opinion Nos. OR2013-09446 (June 6, 2013) and OR2012-11623 (July 26, 2012); Florida Attorney General Informal Advisory Legal Opinion (June 3, 2009); Oklahoma Attorney General Opinion No. 09-12 (May 13, 2009); and Arkansas Attorney General Opinion No. 2008-096 (May 28, 2008).

CONCLUSION

The Omaha World-Herald has asked us to determine "whether text messages sent or received by the Honorable Mayor Jean Stothert in conducting City of Omaha business are public records under the Nebraska public records statutes and as such whether there is a duty to preserve and produce the text messages." For the reasons set out above, we believe generally that text messages made in the course of public business by governmental officials are public records. As public records, they are subject to disclosure under § 84-712, unless the custodian of the records at issue can point to a specific statute that would allow the custodian of the record to keep the record confidential.

With respect to the specific circumstances presented in the Petition, it is our understanding that Mayor Stothert allowed the OWH to view her text messages for one day. However, this day was not within the range of dates set out in the April 13, 2015, request for public records, i.e., March 23 to April 13. As a result, to the extent any responsive text messages still exist, whether on a phone or with a service provider, we direct the City Attorney, by sending him a copy of this disposition letter, to produce those records to the OWH at his earliest possible convenience. If the City chooses to withhold any records based on a statutory exception, the City shall set out its basis for denial of any records in accordance with the provisions of § 84-712.04.

If you disagree with our legal analysis set out herein, you may wish to pursue what additional remedies may be available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

Leslie S. Donley
Assistant Attorney General

c: Paul D. Kratz
Omaha City Attorney

49-1316-29