



STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

DOUGLAS J. PETERSON
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

July 31, 2018

Kevin W. Malone
c/o Martha Behm
[REDACTED]

RE: *File No. 18-R-124; Douglas County District Court, Clerk of the District Court; Kevin W. Malone, Petitioner*

Dear Mr. Malone:

This letter is in response to your petition received by this office on July 16, 2018, in which you sought our assistance in obtaining an audio recording of your criminal trial conducted on May 4, 2017, from the Douglas County District Court. You are also seeking copies of any receipts which indicate when court documents in your criminal case were removed from the Clerk of the District Court's Office. We have considered your petition in accordance with the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2016¹) ("NPRS"). Our findings in this matter are set forth below.

BACKGROUND

Our understanding of the facts in this matter is based on your petition and our review of documents filed in Case No. CR16-2695 [*State of Nebraska v. Kevin W. Malone*], located in the JUSTICE trial court case management system.

On August 21, 2017, the Clerk of the Douglas County District Court ("Clerk") filed your request for a bill of exceptions ("BOE") in your criminal case. The court reporter, Ms. Megan Baldonado-Bellamy, mailed you a copy of the BOE on September 1. In a document dated June 19, 2018, and filed with the Clerk on June 25, captioned "Request for Production of Documents (video) (and audio recordings)," you asked the Clerk to provide you a CD containing "all video and audio recordings from the Omaha Police Departments [*sic*] evidence based web site www.evidence.com. . . ." On July 2, the Clerk

¹ See also 2018 Neb. Laws LB 193; 2018 Neb. Laws 859; and 2018 Neb. Laws LB 902.

filed your Motion for a Writ of Mandamus in your criminal case, in which you sought to obtain a CD copy of the audio recording for trial day May 4, 2017. In a letter dated July 5, and filed by the Clerk on July 16, you followed up on your motion, asserting, among other things, that the audio recording is a public record and that no exception in Neb. Rev. Stat. § 84-712.05 provides a basis to withhold the recording. You also sought

[p]aper copies of all signed receipts [sic] for court and supporting documents that were removed from the court under Ne Statute § 12-8 Removal of Ct [sic] Files for CR16-2695. This statute allows attorneys & bonded abstractors to check out transcripts, tapes, bill of exceptions and court files for a five day period. Before removal of signed receipt [sic] must be left with the clerk. This statute allows for copies for the public.

You subsequently filed your petition with this office. You indicate that the “audio recordings . . . are the basis for the bill of exceptions and therefore they are public records.” You further indicate that you submitted multiple requests for the audio recordings and receipts without success, and have asked our office “to compel the trial court to turn these over as stipulated in § 84-712.01 & § 12-8.”

DISCUSSION

Neb. Rev. Stat. § 84-712 sets out the basic rule for access to public records in Nebraska. That statute provides, in pertinent part:

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.

Neb. Rev. Stat. § 84-712(1) (2014) (emphasis added). Public records in Nebraska include “all records and documents, regardless of physical form, of or belonging to this state” and any other governmental body. Neb. Rev. Stat. § 84-712.01(1) (2014). However, while the NPRS generally allow interested persons in Nebraska the right to access public records, these statutes are not absolute. As indicated by the emphasized language in § 84-712 above, 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).

In the present case, Neb. Rev. Stat. § 25-1140 (2016) provides an exception to the basic access rule set out in § 84-712. This statute provides that

[u]pon appeal from the district court, the party appealing may order a bill of exceptions by filing in the office of the clerk of the district court a praecipe therefor within the time allowed for filing a notice of appeal. The procedure for preparation, settlement, signature, allowance, certification, filing, and amendment of the bill of exceptions shall be regulated and governed by rules of practice prescribed by the Supreme Court.

(Emphasis added.) In accordance with § 25-1140, and the power vested in the Supreme Court to prescribe rules of practice and procedure,² the Supreme Court adopted and promulgated Neb. Ct. R. App. P. § 2-105—*Bill of exceptions, making, preserving, transcribing, and delivery of record of trial or other proceeding*. Section A of the rule provides, generally, as follows:

(A) Making and Preserving Record.

(1) "Court reporting personnel," as defined in Neb. Ct. R. § 1-204(A)(1), shall in all instances make a verbatim record of the evidence offered at trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties. This record may not be waived.

(2) Upon the request of the court or of any party, either through counsel or pro se, the court reporting personnel shall make or have made a verbatim record of anything and everything said or done by anyone in the course of trial or any other proceeding, including, but not limited to, any pretrial matters; the voir dire examination; opening statements; arguments, including arguments on objections; any motion, comment, or statement made by the court in the presence and hearing of a panel of potential jurors or the trial jury; and any objection to the court's proposed instructions or to instructions tendered by any party, together with the court's rulings thereon, and any posttrial proceeding.

(Emphasis added.) The process set out in Neb. Ct. R. App. P. § 2-105 governs your access to a record of the trial court proceeding at issue here, not a request made under § 84-712 of the NPRS. Moreover, we are aware of no other provision of law or rule that

² See Neb. Const. art. V, § 25, which provides, in pertinent part: "For the effectual administration of justice and the prompt disposition of judicial proceedings, the supreme court may promulgate rules of practice and procedure for all courts, uniform as to each class of courts, and not in conflict with laws governing such matters."

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would require the District Court to provide you a copy of an audio recording of your trial.³ Since the NPRS do not apply to the records sought, you have not been denied any rights granted to you by those statutes.

Receipts Relating to Removal of Court Documents

Your second request relates to paper copies of all receipts for court documents in your criminal case “removed from the court under Ne Statute § 12-8 Removal of Ct [sic] Files, for CR 16-2695.” Upon review, we do not believe this request constitutes a valid request for public records for a couple of reasons. First, your reference to § 12-8 is inaccurate and likely confusing to anyone handling the request. For your information, “Ne Statute § 12-8” is not a statute. It is a local court rule pertaining to judicial District 12,⁴ not the Douglas County District Court.⁵ In addition, nowhere in your request for receipts do you indicate that you are requesting records under the NPRS.

CONCLUSION

We conclude that access to a verbatim record of a trial court proceeding is governed by Neb. Rev. Stat. § 25-1140 and Neb. Ct. R. App. P. § 2-105, and not a request for an audio recording made under § 84-712 of the NPRS. With respect to the receipts, we find that you failed to submit a valid request for public records and, as a result, the Clerk was under no obligation to respond.

³ We note that in a letter dated June 22, 2018, Judge Stratman informed you that access to audio recordings only applied to county court proceedings, not district court. See Uniform County Court Rules of Practice and Procedure, Neb. Ct. R. § 6-1405, *Recording of Court Proceedings; request for transcription; request for copy of digital recording*.

⁴ Rule 12-8 applies to the district courts in Banner, Box Butte, Cheyenne, Dawes, Duell, Garden, Grant, Kimball, Morrill, Scottsbluff, Sheridan, and Sioux counties.

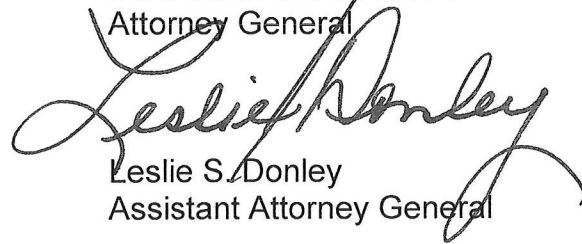
⁵ The Douglas County District Court has its own court rule pertaining to court files. See Rules of the District Court for the Fourth Judicial District, Rule 4-16 *Court Files*.

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Since neither of the issues raised in your petition requires further action by this office, we are closing this file. If you disagree with our analysis, you may wish to discuss this matter with your private attorney to determine what, if any, additional remedies might be available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Hon. Shelly R. Stratman (via email)
John M. Friend (via email)

49-2049-29