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March 10, 2020

Via email at taitd@energyandpolicy.org
Daniel Tait
Research and Communications Manager
Energy and Policy Institute

RE: *File No. 20-R-105; Nebraska Public Power District; Daniel Tait, Petitioner*

Dear Mr. Tait:

This letter is in response to your correspondence received by our office on February 10, 2020, in which you allege a potential violation of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018, Supp. 2019) ("NPRS"), by the Nebraska Public Power District ("NPPD"). We considered your correspondence to be a petition for review under Neb. Rev. Stat. § 84-712.03(1)(b) of the NPRS. Upon receipt of your petition, we contacted NPPD legal counsel, Lisa McFarland, and advised her of the opportunity to respond to the allegations raised in your petition. We received Ms. McFarland's response on behalf of NPPD on February 24, 2020. On February 25, we wrote to you indicating that we had conducted a preliminary investigation of your petition, and it appeared to us that NPPD had properly responded to your public records request. However, we indicated that our response would be delayed so that we could finalize our decision. We have now fully considered your petition and NPPD's response in accordance with the provisions of the NPRS, along with provisions of the federal Copyright Act, and our findings in this matter are set forth below.

We will begin by noting that your petition sets out several reasons why you need to obtain copies of the requested documents. However, the underlying reason for your public records request is not relevant in determining whether the public body has complied with the NPRS, and we do not consider it in our analysis. *See State ex rel. Sileven v. Spire*, 243 Neb. 451, 457, 500 N.W.2d 179, 183 (1993) ("The relator sought information pursuant to § 84-712, which applies equally to all persons without regard to the purpose for which the information is sought.").

RELEVANT FACTS

On November 4, 2019, you emailed Ms. McFarland a public records request seeking all electronic records of NPPD officials John McClure and Patrick Pope containing the following keywords: Nuclear Energy Institute, NEI and @nei.org. The time frame for your request was July 25, 2019 to November 3, 2019. Ms. McFarland responded to your request on November 7. She indicated that while NPPD did not intend to deny your request, she was unable, pursuant to Neb. Rev. Stat. § 84-712(1), to send you copies of most of the requested records since "NEI is not willing to waive their copyright rights to their materials." She indicated that you were welcome to examine responsive records on site as provided in § 84-712(1). Ms. McFarland indicated that she would continue to review the materials to determine which records could be provided to you.

You continued to exchange emails with Ms. McFarland between November 11 and December 12, during which you shared your respective positions on the copyright issue. In her email to you dated December 12, Ms. McFarland reiterated that NPPD was "not denying you access to any records we possess that are responsive to your request and believe that you may lawfully view them here at our office." She further represented that

> [t]here were a total of 67 emails that were deemed responsive to your public records request dated November 4, 2019. It was determined that almost all of the emails were materials were [*sic*] generated by Nuclear Energy Institute (NEI)—consisting of newsletters, industry summaries, strategic documents, meeting materials, and other communications between NEI and its members, of which NPPD is one. Five of the emails contained NPPD generated records, and these were provided to you with any NEI generated content redacted. You were invited to view all 67 emails in their complete format here at NPPD's main office in Columbus, Nebraska.

She concluded by providing you the other information required in Neb. Rev. Stat. § 84-712.04(1), as you requested.

ANALYSIS

We will begin by addressing whether the records you requested, i.e., electronic records of two NPPD officials containing certain keywords (Nuclear Energy Institute, NEI, @nei.org), are public records under the NPRS. In its response to this office, NPPD does not concede that the NEI materials are NPPD records that must be disclosed under the NPRS. In this regard, NPPD determined that it was unclear under Nebraska law and that the several Freedom of Information Act ("FOIA") cases that address what constitutes an agency record may or may not be persuasive. NPPD states that knowing that the "NPRS are to be construed broadly, we decided to err on the side of caution and did not debate with [you] as to whether the NEI materials were records or non-records of NPPD."

Two provisions of the NPRS are pertinent to this issue. First, Neb. Rev. Stat. § 84-712(1) (2014) 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.

(Emphasis added.) The purpose of this statute is "to guarantee that public government records are public." Introducer's Statement of Purpose for LB 505, 72nd Nebraska Legislature (1961). Under this statute, it was intended that all public records of the state, its counties, and its other political subdivisions should be open to inspection, except where the Legislature has otherwise provided that the record shall be confidential. Judiciary Committee Statement on LB 505, 72nd Nebraska Legislature (1961). Second, Neb. Rev. Stat. § 84-712.01(1) (2014) provides that

> [e]xcept 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.

In Nebraska, 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. *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018); *Farmers Cooperative v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017). In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Id.*; *Davis v. Gale*, 299 Neb. 377, 908 N.W.2d 618 (2018). It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *Aksamit*, 299 Neb. at 123, 907 N.W.2d at 308; *State v. Gilliam*, 292 Neb. 770, 781, 874 N.W.2d 48, 57 (2016). When the Legislature provides a specific

definition for purposes of a section of an act, that definition is controlling. *Farmers*, 296 Neb. at 356, 893 N.W.2d at 736.

The definition of "public records" encompasses "all records and documents, regardless of physical form, of or belonging to" governmental entities in Nebraska, including public power districts. Courts often turn to dictionaries to ascertain a word's plain and ordinary meaning. *Gilliam*, 292 Neb. at 781, 874 N.W.2d at 57. For example, "record" in this context may be defined as "2. information that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form." Black's Law Dictionary (11th ed. 2019), record. "Physical" is defined as "having material existence; perceptible especially through the senses and subject to the laws of nature."[1] "Form" relates to "one of the different modes of existence, action, or manifestation of a particular thing or substance: kind."[2] The phrase "of or belonging to," construed in *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009), "includes any documents or records that a public body is entitled to possess—regardless of whether the public body takes possession." *Id.* at 9, 767 N.W.2d at 759.

The broad definition of "public record" in § 84-712.01(1), taken in its plain and ordinary meaning, includes all records and documents belonging to governmental entities in Nebraska unless there is another statute that makes the records not public.[3] The records here are materials received by NPPD officials in the course of conducting NPPD business. Indeed, NPPD represents that the "NEI materials are only one example of the many NPPD membership materials, subscriptions, or publications" the utility receives to stay current with the industry so it can act in the best interest of its customers. It is not necessary that NPPD "create" the records or "author" the materials. More importantly,

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1 *See* https://www.merriam-webster.com/dictionary/physical last accessed March 10, 2020.

2 *See* https://www.merriam-webster.com/dictionary/form last accessed March 10, 2020.

3 *See, e.g.*, Neb. Rev. Stat. § 29-2261 (Cum. Supp. 2018) ("Any presentence report, substance abuse evaluation, or psychiatric examination shall be privileged . . . ."); Neb. Rev. Stat. § 32-301 (Cum. Supp. 2018) ("The digital signatures [relating to voter registration lists] in the possession of the Secretary of State, the election commissioner, or the county clerk shall not be public records as defined in section 84-712.01 and are not subject to disclosure under sections 84-712 to 84-712.09."); Neb. Rev. Stat. § 47-912 (Cum. Supp. 2018) ("Reports of investigations conducted by the office [of the Inspector General of the Nebraska Correctional System] are not public records for purposes of sections 84-712 to 84-712.09."); Neb. Rev. Stat. § 77-3510 (Cum. Supp. 2018) ("The [homestead exemption] application and information contained on any attachments to the application shall be confidential and available to tax officials only."); and Neb. Rev. Stat. § 83-967 (2016) ("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 . . . .").

NPPD is unable to point to a statute that expressly provides that records of this nature are not public.[4]

Since we have concluded that the records you seek are in fact public records, we will now address the copyright issue. To our knowledge, this is the first petition received by this office in which the public body involved has asserted federal copyright law as its basis for not providing copies of public records. The Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.* ("Act"),

> essentially grants the holder of a copyright an exclusive right to reproduce and distribute copies of his work. *See* 17 U.S.C. § 106. Under the Act as revised in 1976, this protection attaches automatically as soon as the work is "fixed" in any tangible medium; neither registration nor any type of designation or notice is necessary to trigger it. *See* 17 U.S.C. §§ 102, 405, 408. Thus, the potential for copyright protection exists in virtually every original work of authorship. Despite this sweeping grant of copyright entitlement, however, the revised Copyright Act specifically codifies the common law doctrine of "fair use," which permits the reproduction of copyrighted materials "for purposes such as criticism, comment, news reporting, teaching. . . scholarship, or research" without liability for infringement. 17 U.S.C. § 107.[5]

Our research identified no Nebraska cases that discuss the copyright provision in § 84-712(1). However, other courts have considered the application of the federal copyright law in the context of their own particular states' open records statutes. In *Pictometry International Corp. v. Freedom of Information Comm'n*, 307 Conn. 648, 59 A.3d 172 (Conn. 2013), Pictometry and the Connecticut Department of Information Technology entered into a licensing agreement to allow the Department of Environmental Protection ("DEP") to use aerial photographic images and associated data owned and copyrighted by Pictometry. In response to a public records request for the images and data, DEP indicated that the images were not public records because they fell under the "as otherwise provided by any federal law" exemption in the Connecticut Freedom of Information Act. However, DEP indicated that the requester could obtain the images by paying the $25 per image fee set out in the licensing agreement.

On appeal to the Connecticut Supreme Court, following a series of decisions beginning with proceedings before the Freedom of Information Commission, the court

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[4] *See, e.g.*, Neb. Rev. Stat. § 70-673 (2018), which allows the public power industry and the Nebraska Power Review Board to withhold competitive or proprietary information which would give an advantage to business competitors.

[5] FOIA Update: OIP Guidance: Copyrighted Materials and the FOIA, January 1, 1983, FOIA Update, Vol. IV, No. 4, 1983, accessible at https://www.justice.gov/oip/blog/foia-update-oip-guidance-copyrighted-materials-and-foia.

found that federal Copyright Act is a "federal law" for purposes of the federal law exemption in the Connecticut FOIA, stating that

> to the extent that the act and the Copyright Act impose conflicting legal obligations, the Copyright Act is a "federal law" for purposes of the federal law exemption. Accordingly, although the federal law exemption does not entirely exempt copyrighted public records from the act, it exempts them from copying provisions of the act that are inconsistent with federal copyright law.

Id. at 674, 59 A.3d at 187. The court further found that there was nothing in the Connecticut act that prohibited public agencies from charging the costs of copying copyrighted materials set out in a licensing agreement. *Id.* at 686, 59 A.3d at 194.

In *Ali v. Philadelphia City Planning Comm'n*, 125 A.3d 92 (Pa. Commw. Ct. 2015), Ali submitted a public records request to the commission under the Pennsylvania Right to Know Law ("RTKL") for certain revitalization and redevelopment records. The commission provided some of the records, but withheld other records, i.e., plans, architectural drawings, renderings, etc., that were subject to copyright protection. The commission took the position that "[t]he RTKL does not apply to documents that are prohibited from being disclosed pursuant to Federal law." *Id.* at 95.

In subsequent proceedings, both the Pennsylvania Office of Open Records and the trial court held that the copyrighted materials at issue were not public records because they were exempt under the Copyright Act. However, the Commonwealth Court disagreed, stating that in order to constitute an exception under provisions of the RTKL, "the federal statute must expressly provide that the record sought is confidential, private, and/or not subject to public disclosure." *Id.* at 100. The court further stated:

> Based on our review of the Copyright Act and our precedent, we conclude that Copyright Act is not a federal law that exempts materials from disclosure under the RTKL. It neither expressly makes copyrighted material private or confidential, nor does it expressly preclude a government agency, lawfully in possession of the copyrighted material, from disclosing that material to the public. That the Copyright Act grants exclusive rights to the copyright holder to authorize duplication of the copyrighted material does not alone persuade us that the Copyright Act is the type of federal law that the General Assembly intended to include within the scope of Section 305(a)(3)[6] of the RTKL.

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6 Section 305(a) of the RTKL presumes that all records in the possession of a Commonwealth agency or local agency are "public records" except where (1) the record is exempt under section 708; (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. § 67.305. Presumption.

Id. at 101-102.

The court noted that a conflict existed between the Copyright Act and the RTKL with respect to duplication, where the record at issue is protected by a copyright held by a third party and the third party does not consent to the duplication of the records. It found that due to the potential for additional burdens and costs, local agencies were under no obligation to seek out the copyright owner and secure a consent, and left it to local agencies to determine whether and how to secure such consent. The court held that when a local agency invokes the Copyright Act as a basis to limit access to a public record to inspection only, the absence of the copyright owner's consent to duplication should be presumed. *Id.* at 105.

The court further stated that

> the Commission appropriately invoked the Copyright Act as a basis to limit access to the records at issue by redacting copyrighted information from the duplicates that it provided to Ali in response to his RTKL request. For the reasons set forth above, however, we reject OOR's determination to the extent that it concluded that the redacted information is exempt or nonpublic under the RTKL. There is material difference between an exempt and/or nonpublic record, which an agency is not required to provide access to at all under the RTKL, and a public and nonexempt record that may be subject to limited access under the RTKL. Copyrighted information falls into the latter category. The Copyright Act limits the level of access to a public record only with respect to duplication, not inspection. The public record must, therefore, still be made available for inspection under the RTKL, allowing the public to scrutinize a local agency's reliance on or consideration of the copyrighted material.[7]

Id. at 105.

In *National Council of Teachers Quality, Inc. v. Curator of the University of Missouri,* 446 S.W.3d 723 (Mo. 2014), at issue was the disclosure of course syllabi copyrighted by faculty members at the University of Missouri. The council requested the syllabi under the Missouri Sunshine Law, but were denied by the university on the basis that the syllabi were exempt from disclosure under the law. At trial, the university took

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[7] We note that in support of your petition you cite *Weisberg v. U.S. Dept. of Justice*, 631 F.2d 824 (D.C. Cir. 1980), asserting that "[t]he court correctly reasoned that such a claim of copyright protection outside of statutory exemptions (in this case FOIA Exemption 3) would frustrate the purpose of the Act." However, with respect to the FOIA exemptions, the *Weisberg* court instead stated that "[w]e intimate no view with respect to these contentions concerning the proper relationship between FOIA and the copyright laws. We conclude instead that the district court should have sought the presence of the alleged copyright holder under Rule 19 before deciding this case. Because TIME was not a party, the district court has subjected the Government 'to a substantial risk of incurring . . . inconsistent obligations.'" *Id.* at 829.

the position that since the faculty held copyright ownership in their syllabi, any disclosure was protected by the Federal Copyright Act. The trial court agreed. On appeal, the Missouri Supreme Court concluded that

> in order to disclose the syllabi as requested by the NCTQ, the University would have to reproduce and distribute the syllabi. Thus, while the Federal Copyright Act does not explicitly protect against disclosure, it does protect against the means by which the requested disclosure would be obtained. Disclosing the syllabi to the NCTQ—through reproduction and distribution—would constitute a violation of the Federal Copyright Act. Therefore, the syllabi as requested are "protected from disclosure by [the Federal Copyright Act]." See § 610.021(14).

Id. at 728.

In response to various arguments raised by the council that the "fair use doctrine"[8] applied to the disclosure of the requested syllabi, the court stated:

> The NCTQ's "fair use" arguments fail. First, this court lacks the authority to determine whether a particular use of copyrighted materials constitutes fair use, as federal courts have "original jurisdiction of any civil action arising under [the Federal Copyright Act]." 28 U.S.C. § 1338; see *Pictometry Intern. Corp. v. Freedom of Info. Comm'n*, 307 Conn. 648, 59 A.3d 172, 192 (2013).
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> Second, such a fair use presumption would be contrary to law. As noted by the United States Supreme Court: "The drafters [of the Federal Copyright Act] resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561, 105 S. Ct. 2218, 85 L.Ed.2d 588 (1985).
>
> Finally, the nature of the fair use doctrine renders it inapplicable to the instant case. "Fair use is an affirmative defense" to a claim of copyright infringement. *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 599, 114 S. Ct. 1164, 127 L.Ed.2d 500 (1994). And "the burden of proving fair use is always on the party asserting the defense." H.R. Rep. No. 102–836, at 3 n. 3 (1992); *see Frontenac Bank v. T.R. Hughes, Inc.*, 404 S.W.3d 272, 284 (Mo. App. 2012). Consequently, fair use "is relevant only after a copyright owner has made out a prima facie case of infringement." H.R. Rep. No. 102–836, at 3 (1992).

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8 17 U.S.C. § 107.

> Furthermore, as a practical matter, the fair use doctrine does not work in the context of Sunshine Law requests. A Sunshine Law request is made and must be responded to before the actual use of the requested record occurs. And nothing in the Sunshine Law requires a request to include the requester's actual purpose for requesting the documents. Consequently, we agree with the University's argument that "[i]t would be untenable as a legal and practical matter to interpret the Sunshine Law to require a custodian of records to make a fact intensive decision on a mixed question of law and fact regarding future use when the custodian has no information about the use and no means to get more information."

Id. at 729-730.

You assert in your petition that like the federal Freedom of Information Act, the NPRS requires agencies to consider a variety of laws to determine whether access to a particular record may be limited. You further assert that "[i]n the present case materials described as 'newsletters, industry summaries, strategic documents, meeting materials, and other communications between NEI and its members' do not have copyright value." However, there has been no attempt here to limit access to the NEI materials by examining and applying other statutes. Moreover, whether certain materials have "copyright value" is irrelevant. NEI retains the copyright in its work product and, accordingly, "affords NEI the exclusive right to reproduce and distribute copies of NEI's works." Letter to L. McFarland from E. Ginsberg, NEI Senior Vice President, General Counsel, and Secretary, dated January 13, 2020. Based on the plain language in Nebraska statute 84-712(1), which provides that a requester may receive copies of public records "except if federal copyright law otherwise provides," and the authority set out above, we conclude that NPPD is prohibited under the federal Copyright Act from providing you copies of the NEI materials you seek.

CONCLUSION

Based on the foregoing analysis, we conclude that NPPD has not violated the NPRS by declining to provide you copies of the NEI materials on the basis of its compliance with the federal Copyright Act. Moreover, NPPD has indicated on multiple occasions that you may *inspect* the records at its offices in Columbus, Nebraska. Consequently, since no further action is warranted by this office, we are closing our file.

If you disagree with the analysis set forth above, you may wish to consult with your private attorney to determine what additional remedies, if any, may be available to you under the NPRS.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

Leslie S. Donley
Assistant Attorney General

c: Lisa McFarland (via email only)

49-2416