

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

December 22, 2020

Via email at mcavanaugh@leg.ne.gov
Senator Machaela M. Cavanaugh
District 6
State Capitol
Lincoln, NE 68509

RE: *File No. 20-R-139; Department of Administrative Services; Senator M. Cavanaugh, Petitioner*

Dear Senator Cavanaugh:

This letter is in response to the appeal dated and received by this office on December 7, 2020, in which you requested that we review the partial denial by the Department of Administrative Services ("DAS") of your public records request submitted to the agency on September 14, 2020. Upon receipt of your appeal, the undersigned discussed this matter with DAS General Counsel Amara Block and, at our request, Ms. Block provided us a copy of your public records request and DAS's response. We construed your appeal as a petition for review under Neb. Rev. Stat. § 84-712.03(1)(b) of the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018, Supp. 2019). Our findings in this matter are set forth below.

RELEVANT FACTS

On September 14, 2020, you submitted a public records request to DAS, seeking various records relating to TestNebraska. At issue here is your request for "any contracts signed pertaining to the creation, rollout, implementation, and ongoing execution of TestNebraska.com, and any and all correspondence in any form on the subject to date." By email sent September 18, Ms. Block indicated, among other things, that a copy of the signed contract between the state and Nomi Health LLC was available on the State Contracts Database.¹ However, Ms. Block indicated that certain draft contracts between the State of Nebraska and DOMO, Inc., Nomi Health, Inc., or Qualtrics, LLC would not be provided to you "because they are working documents that were not approved by upper

¹ See <https://statecontracts.nebraska.gov/>.

management and thus are not ‘records’ or ‘documents’ subject to disclosure, per Attorney General Opinion No. 91054.”

You state in your petition that our opinion indicates that “some draft documents, including contracts, need not go through a formal approval process before they are considered to be a public record and may be subject to disclosure.” In this context, you have asked us to consider DAS’s denial as it relates to “draft contracts, amendments and addendums” between the state and the three companies listed above. You further state “that these documents may indeed be public records and useful to the oversight efforts of the Legislature.”²

DISCUSSION

Neb. Rev. Stat. § 84-712(1) (2014) generally allows Nebraska citizens and other interested persons the right to examine public records in the possession of public agencies during normal agency business hours and to obtain copies of records in certain circumstances. Neb. Rev. Stat. § 84-712.01(1) defines “public records” to 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.” Access to public records is not absolute, however. 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).

The Attorney General opinion relied on by DAS—Op. Att’y Gen. No. 91054 (June 17, 1991)—involved a request from a state senator to the state Policy Research Office (“PRO”) for a report relating to the Central Interstate Low-Level Radioactive Waste Compact. PRO provided no materials in response to the request. The senator subsequently directed his request to Governor Nelson, seeking “access to reports, draft reports, or other forms of documents” purportedly prepared by the Department of Environmental Control (“DEC”) relating to the potential liability to the state in the event the low-level radioactive facility site was not licensed. The governor did not specifically respond to the request, so the senator sought our review under § 84-712.03. The governor then requested an Attorney General opinion as to whether the exceptions to disclosure in Neb. Rev. Stat. § 84-712.05(3) (trade secrets, other proprietary or commercial information) or subsection (4) (attorney work product) provided a basis to withhold the records “if the work involved is still in progress and if those materials may be used against the State in future litigation.” *Id.* at 2.

² Please note that 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.”).

In order to resolve the matter, our office requested and received the records at issue. Upon examination, we concluded that the two exceptions proposed by the governor did not apply. However, in response to the governor's "work in progress" inquiry, we articulated the following criteria to determine when materials prepared by public officials become "records and documents" subject to disclosure under § 84-712:

There is an obvious tension between a governmental agency's legitimate need to operate internally without interruption and intrusion on the one hand, and a legitimate concern that public documents might be hidden from view behind a "draft" label on the other. We believe that this tension should be resolved by determining what constitutes a record or a document under the Public Records Act on an individual, case-by-case basis. There may well be instances where certain materials are so embryonic that they do not constitute "records" or "documents" under the Act. For example, notes or drafts of documents prepared by lower level personnel within an agency which still remain subject to approval by upper management and which have not been issued by the agency. It seems to us that such preliminary materials do not constitute "records" or "documents" under the Public Records Act, and thus may be withheld from the public. In contrast, materials which have been through the formation process within the agency and which have left the agency are more obviously "records" or "documents" even though procedures may require further approval before formal issuance. This latter category of documents, while arguably involving materials in a "draft" form, still constitutes "records" or "documents" subject to disclosure.

Id. at 3. We noted that the records provided by the governor included a typed document prepared by DEC with numerous handwritten notes and suggestions added by PRO staff. We concluded that the "final official form" of the document had been jointly prepared and approved by DEC and PRO, and that the work on the document had ended. Applying these standards to the records sought by the state senator, we concluded the typed materials were in final form and had left the agency and, consequently, constituted a record or document subject to disclosure under the NPRS. However, we also concluded that the handwritten notes and comments appended to the document by PRO staff were not records or documents subject to disclosure since they had not been prepared in final form and had not left the agency. "In our view, they do not fit under the statutory definition of public record set out in § 84-712.01." *Id.* at 4.

In the present case, DAS represents that it withheld drafts of contracts between the state and Domo, Inc., Nomi Health, Inc., or Qualtrics, LLC because they were "working documents not approved by upper management." Ms. Block represented to our office that the drafts contained various proposed contractual terms that were negotiated by the parties, which may or may not have been accepted and incorporated in the final executed contract. Based on this representation, and applying the standards in Op. Att'y Gen. No. 91054 above, we are unable to conclude that the draft contracts at issue here were in "final official form," that the work on the draft contracts had ended, or that the documents

had been signed off and executed by upper management. They were as indicated in the denial letter, i.e., working documents. Consequently, we conclude that the draft contracts are not records or documents subject to disclosure under § 84-712 of the NPRS.

OTHER CONSIDERATIONS

We would like to take this opportunity to point out other considerations that informed our determination. First, we would remind you that although Neb. Rev. Stat. § 84-712.03 creates enforcement responsibilities for this office, there is no statutory mechanism for an *in camera* review of the documents by the Attorney General. Under § 84-712.03(2), that procedure is left for the district courts. Consequently, we must rely on representations from governmental agencies and officials with respect to the content of the records at issue.

Second, this disposition letter arises out of the Attorney General's express authority to enforce the NPRS. It was written in response to a discrete set of facts and circumstances presented in your petition and the related documentation, i.e., public records requests, agency response. Disposition letters in no way constitute an opinion of the Attorney General, which are expressly authorized under Neb. Rev. Stat. § 84-205(4) (2014).

Finally, for almost thirty years, this office (and numerous governmental bodies and officials) have relied on the conclusions reached in Op. Att'y Gen. No. 91054 to support a finding that certain drafts are not public records as defined in § 84-712.01(1). "Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction." *Capitol City Telephone, Inc. v. Nebraska Dep't of Revenue*, 264 Neb. 515, 527, 650 N.W.2d 467, 477 (2002). "This is particularly so when the Legislature has failed to take any action to change such an interpretation." *Id.* Since there has been no legislative action altering this conclusion, this office will continue to rely on our opinion as a basis to exclude certain drafts from disclosure as public records.

CONCLUSION

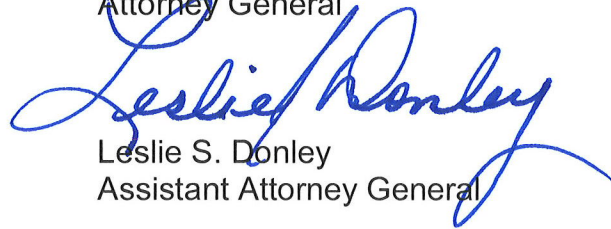
Based on the foregoing, draft contracts in the possession of DAS relating to TestNebraska are not records or documents subject to disclosure under § 84-712 of the NPRS. Those records are not in final official form, are documents in progress, and have not been approved and executed by upper management. In light of our conclusion, you have not been denied access to public records and DAS's response to you in this regard was appropriate.

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If you disagree with the conclusion reached in this disposition letter, you may wish to discuss these matters 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: Jason Jackson (via email only)
Amara Block (via email only)

49-2608-29