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NO.
STATE OF NEBRASKA
OFFICIAL
JAN 18 1994
DEPT. OF JUSTICE

DON STENBERG
ATTORNEY GENERAL

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DEPUTY ATTORNEYS GENERAL

DATE: January 11, 1994

SUBJECT: Access to Tape Recordings made by the Nebraska Equal Opportunity Commission during an Investigation

REQUESTED BY: Lawrence Myers, Director
Nebraska Equal Opportunity Commission

WRITTEN BY: Don Stenberg, Attorney General
Alfonza Whitaker, Assistant Attorney General

You have asked our opinion regarding whether or not the tape recordings made by the Nebraska Equal Opportunity Commission when conducting an investigation of employment or housing discrimination are discoverable and available to the parties once the NEOC has completed its investigation, if a party wishes to conduct a file review.

The basic rule for open public records in Nebraska is found at Neb. Rev. Stat. § 84-712 (1987). 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 . . . are hereby fully empowered . . . to examine the same, and to make memoranda . . . therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business.

Neb. Rev. Stat. § 84-712.01 (1987) defines public records for purposes of the public records statutes. Under that section, except where other statutes expressly provide that a record shall not be made public, public records are "all records and documents, regardless of physical form," of or belonging to the state and its various political subdivisions, departments, boards, and commissions. Given the broad definition of public records contained in this section, it is apparent that tape recordings would fall within the definition of "public records" in § 84-712.01.

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The public records statutes are not absolute, however, and they provide for exceptions to disclosure of public records by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). Neb. Rev. Stat. § 84-712.05 (1987) describes records which may be withheld from the public by their lawful custodian unless disclosed in open court, in an open administrative proceedings, in an open meeting, or pursuant to the duties of the public body. The exceptions in § 84-712.05 simply permit nondisclosure; they do not require confidentiality for those categories of records. *Burlington Northern R.R. Co. v. Omaha Public Power Dist.*, 703 F.Supp. 826 (D. Neb. 1988), *aff'd* 888 F.2d 1228 (8th Cir. 1989).

As the provisions for nondisclosure under § 84-712.05 merely permit the lawful custodian of public records to refuse disclosure, as opposed to mandating nondisclosure, the Department must determine whether, as a matter of policy, it will elect to refuse disclosure of records which may fall within any of the exceptions under § 84-712.05.

Among the materials exempted from the disclosure requirements of the public record statutes are those falling within the exception for:

> Records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, when the records constitute a part of the examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training, except that this subdivision shall not apply to records so developed or received relating to the presence of and amount or concentration of alcohol or drugs in the blood of any person.

Neb. Rev. Stat. § 84-712.05(5) (Supp. 1993) (Emphasis added).

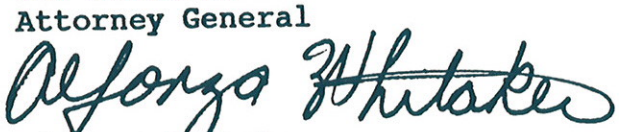
The tape recordings fall within the exception for investigatory records. The determination of whether information which qualifies for the exception will be disclosed upon request from the public must be made by the Department and not this office.

The NEOC must decide whether it desires, as a matter of policy, to declare that access to the tape recordings which fall

within the exception in § 84-712.05(5) will be refused if requested, as the provisions for nondisclosure of such information are permissive, not mandatory.

Sincerely,

DON STENBERG
Attorney General



Alfonza Whitaker
Assistant Attorney General

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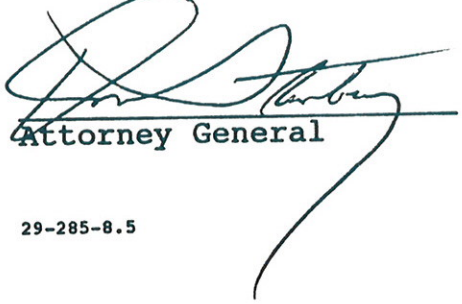

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