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January 20, 2011

Sharon Kelly
1430 East 11th Street
Ogallala, NE 69153

RE: *File No. 10-R-140; Public Records Petition; Kelly*

Dear Ms. Kelly:

This letter is in response to your petition received by us on October 22, 2010, in which you requested our assistance in obtaining certain public records belonging to the Keith County Attorney, J. Blake Edwards. As is our normal practice with such requests, we contacted the party against whom the complaint was made. Accordingly, we contacted Mr. Edwards by letter dated October 26, 2010, and asked him to provide us a response to your petition. We also asked Mr. Edwards to specifically address why he believed the requested documents were protected by the attorney-client privilege and the work product exception set out in Neb. Rev. Stat. § 84-712.05(4). On November 3, 2010, we received Mr. Edwards' response. Additionally, we contacted Harold "Pete" Peterson, the Keith County Emergency Manager, 911 Director and Network Administrator, and asked him to provide us information as to the requested documents at issue. Finally, we contacted Brenda Decker, the Chief Information Officer (CIO) for the State of Nebraska, and requested any information relating to your public records request. We received the documents which had been generated by OCIO staff, and sent to Mr. Peterson on November 10, 2010.

Due to our pending request with the OCIO, on November 9, 2010, we wrote to you advising that our response would be delayed due to our ongoing investigation. We have now concluded our investigation and have fully considered your petition for access to records under Neb. Rev. Stat. § 84-712.03 (the "Petition"), as well as Mr. Edwards' responses, and the information we received from Mr. Peterson and Ms. Decker. Our review was conducted in accordance with Nebraska Public Record Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010). Our findings in this matter are set forth below.

FACTS

It appears from the documentation provided to us that you initially sought the requested records from Mr. Peterson. While Mr. Peterson provided you some of the records, he advised you that he was "unable to comply with the balance of your request because [he was] not the appropriate records custodian." (Emphasis in original.) He advised that the County Attorney and the County Clerk were the officials to whom you should direct your request. In this regard, Mr. Peterson stated:

> The County Clerk controls copies of the memos directed to elected and appointed officials, and also controls a copy of the current policies adopted by the County Board.
>
> The County Attorney is the custodian and initial reviewing party of whether any internet access from his office is protected based on Section 84-712.05 of the Nebraska Revised Statutes.

Consequently, you filed a public records request with the County Attorney. You asked Mr. Edwards to direct Mr. Peterson to provide you with "the internet monitoring log and information related to unauthorized internet sites visited in January and February 2010." You also asked for "any and all reports from the state firewall in Keith County during this same timeframe."

Mr. Edwards timely responded to your request on October 20, 2010. In his response, he advised that

> I Blake Edwards, the Keith County Attorney, decline to give access to computer records as requested as they are being withheld pursuant to NRS §84-712.05(4).

In his response to us, Mr. Edwards informs us that shortly after he began his duties as county attorney, Commissioner Teaford spoke to him about the problems he had experienced with the previous county attorney regarding his availability during normal business hours. Commissioner Teaford inquired as to how many hours Mr. Edwards planned to be in the office building of the county attorney as opposed to being at his private practice office. Subsequently, Commissioner Teaford asked Mr. Edwards to consider working at the county attorney building during regular business hours. This arrangement would allow Mr. Edwards to house his private practice there without having to pay rent for a separate office. Mr. Edwards indicates that he accepted the offer "with the understanding that I would provide my own supplies and there would be no expense to the county." Shortly thereafter, Mr. Edwards made arrangements to connect his

personal computer to the Keith County Attorney router. His computer ID was also changed to be compatible with the state computer system.

Mr. Edwards then states:

> As I understand the Sharon Kelly request, she would like to access the records of my private computer used in my private practice. I assert Attorney Client privilege and the Attorney Work Product Doctrine in declining that request as all of my private research, letters, memos, etc. for my private practice are contained on this computer.
>
> I would also forward the same Statute in response to her requests for other records on the County Attorney (county owned) computers. The County owned computers contain information regarding Social Security Numbers, criminal records, police reports and other information not available to the public that is utilized by the County Attorney's office in conducting its business.

ANALYSIS

We will begin by discussing the basic parameters of the Nebraska Public Records Statutes. Generally speaking, these statutes allow interested persons in Nebraska the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts from those public records, and to obtain copies of public records in certain circumstances. However, while the Act provides for access to and copies of public records, it does not require public officials to answer questions, or to create records which do not otherwise exist.

Even though the Nebraska Public Records Statutes do provide for access to public documents, they are not absolute, and they also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). Section 84-712.05 is comprised of eighteen categories of documents which may be kept confidential from the public at the discretion of the agency involved. However, a public body opposing disclosure must show by clear and convincing evidence that Neb. Rev. Stat. § 84-712.05 [or § 84-712.08] exempts the records from disclosure. *Evertson v. The City of Kimball*, 278 Neb. 1, 8, 767 N.W.2d 751, __ (2009).

In our initial review of this matter, we questioned whether the records at issue were in fact records "of and belonging to" Mr. Edwards. It appeared to us that records relating to internet usage, monitoring logs, etc. would be records of and belonging to Mr.

Peterson, in his capacity as the Keith County network administrator. As such, Mr. Peterson would be the individual responsible for disclosing the records, or alternatively, withholding the records by citing an exception in § 84-712.05 of the NPRS. However, in the course of our investigation, we have considered alternative arguments which suggest that county officials should be the final arbiter to determine whether records relating to their offices' internet access may be withheld. These arguments also support the proposition that just because records may reside on the county's computer network, this fact alone does not make the records "of and belonging" to the network administrator. We find these arguments plausible. Since it is not entirely clear who is the actual custodian of the records in the present case, we will proceed with our analysis assuming that either county official may be the lawful custodian.

1. Mr. Peterson Is the Custodian of the Records

As indicated above, disclosure of public records under the NPRS is not absolute. We have reviewed all eighteen exceptions to disclosure listed in § 84-712.05, and were unable to identify any of the eighteen exceptions which would allow Mr. Peterson to withhold the records. As a result, under these circumstances no legal basis exists to withhold the requested records.

2. Mr. Edwards Is the Custodian of the Records

Assuming *arguendo* that the records belong to Mr. Edwards, based on the response we received from him in this matter, we do not believe that he met his burden required under *Evertson*, *supra*. The exception claimed, § 84-712.05(4), allows a public body [or public officer] to withhold

> [r]ecords which represent the work product of an attorney and the public body involved which are related to preparation for litigation, labor negotiations, or claims made by or against the public body or which are confidential communications as defined in section 27-503 [attorney-client privilege].

In his response, Mr. Edwards states, erroneously, that you were seeking access to records relating to his private practice, and asserts attorney-client privilege and attorney work product for those records. Mr. Edwards also asserts the attorney-client privilege and attorney work product as the reason to withhold records on the county computers. He claims that these computers contain social security numbers, criminal records, police reports, and other confidential information used by his office to conduct business. Mr. Edwards did not specifically address the records at issue—the internet monitoring log, and the list of internet sites, etc.

Mr. Edwards was given an opportunity to provide us a response which would support his decision to withhold the records. Asserting the attorney-client privilege and the attorney work product doctrine, with no information as to how the records relate to proposed or pending litigation, or constitute confidential communications between him and a citizen/client, is insufficient. Moreover, it is our understanding that the records at issue were produced by the OCIO ancillary to an issue over the county's internet service. The records do not relate to any lawsuit proposed or pending, nor do they memorialize confidential communications that Mr. Edwards may have had with a citizen of the county. Consequently, Mr. Edwards has not met his burden of showing that the requested records fall within the exception in § 84-712.05(4), and the records should have been disclosed to you. However, while we would normally order Mr. Edwards to produce the records, we believe it is unnecessary here for two reasons. First, Mr. Edwards is no longer the county attorney. Second, we understand from other sources that you have already received a copy of the public records at issue. As a result, we see no basis for further action by this office, and we are closing this file.

If you have any questions with respect to the foregoing, please do not hesitate to contact the undersigned.

JON BRUNING
Attorney General

Leslie S. Donley
Assistant Attorney General

cc: J. Blake Edwards
Harold "Pete" Peterson
Randy Fair
Sandra Olson

49-585-30