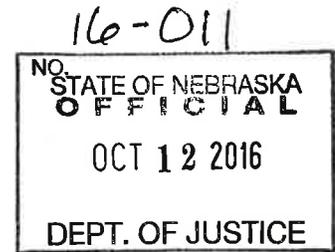




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DOUGLAS J. PETERSON
ATTORNEY GENERAL



SUBJECT: Allowance of an Additional Surcharge or Convenience Fee for Credit Card Payments Made Through Nebraska Interactive's PayPort Point-of-Sale Payment System

REQUESTED BY: John A. Gale
Secretary of State
Chairman, Nebraska State Records Board

WRITTEN BY: Douglas J. Peterson, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested an opinion from this office relating to a provision in Neb. Rev. Stat. § 81-118.01(6) (2014) and its impact on a service proposed by Nebraska Interactive, LLC ("Nebraska Interactive"). The Nebraska State Records Board ("Board") has contracted with Nebraska Interactive to operate the state's official website. Under the terms of the current contract, Nebraska Interactive provides users the ability to pay for services online. You indicate that these charges are processed using Elavon—the credit card processor under contract with the State Treasurer and the Director of the Department of Administrative Services pursuant to Neb. Rev. Stat. § 81-118.01(5) (2014). You state that

[a]s part of this process, the person using the website pays a surcharge or convenience fee that covers all of the charges imposed by Elavon and an additional sum to cover the expenses of Nebraska Interactive and provide a profit for Nebraska Interactive. All of this clearly complies with Neb. Rev. Stat. § 81-118.01 because it is an on-line electronic transaction.

However, you indicate that Nebraska Interactive is now proposing to the Board to expand its services by installing “swipe machines” to accept credit card payments at the physical locations of state agencies.¹

BACKGROUND

Your opinion request includes supporting documentation from Nebraska Interactive relating to the proposed service, referred to as “PayPort.” Nebraska Interactive describes PayPort as

a non-integrated, fully PCI [Payment Card Industry] compliant online system for offering payment at the point of sale. NIC provides PayPort as a full online service module that includes the ability to integrate input devices such as, credit card swipe devices as well as check imagers and scanners. The system includes a dynamic web page rendering engine that allows for customized input fields based on the agency and service. PayPort also provides a backend administration module for reporting, customer service and setup of cashiers, services and pricing.

The system can only be accessed by a computer having internet access and equipped with an internet browser. Nebraska Interactive represents that “[t]he purpose of PayPort is to provide an online service which is designed to align financial transactions to an agency’s business operations.” Benefits of the system include assisting “agencies with accounting standards and best practices, segregation of duties and fiscal accountability down to the user level.” The system “also provides the agencies with a scalable and comprehensive solution to provide online payment solutions to their constituents using a computer.” Nebraska Interactive indicates that PayPort uses its own “online Transaction Payment Engine (TPE) to securely send payment information electronically to . . . Elavon.” Such an arrangement provides state visibility into all state transactions, resulting in the “same flow of funds as all of [its] State online services.”

State agencies using the system would be provided an “Organization Administrator” online account for use by the primary agency stakeholder. Nebraska Interactive would train the “administrator to identify other user roles and permissions to determine the most efficient business processes based on what parts of the application the organization users can view or modify.” The system would allow approved organization users to input payment information using a keyboard, card swipe, check reader, or other input device. Nebraska Interactive states that “[r]egardless, of the input method the PayPort web page is required to be open [*sic*] on a computer.”

The PayPort system would be funded by adding a portal fee to transactions made on self-funded online services hosted, operated and maintained by Nebraska Interactive.

¹ You note that Elavon currently provides approximately two hundred “swipe machines” to state agencies under its current contract with the State of Nebraska.

The portal fee is 2.49% for credit card transactions and \$1.75 for electronic check. Currently, PayPort is utilized by over 120 cities and counties in Nebraska. Seven state agencies, including the Department of Health and Human Services, the Department of Agriculture, the State Patrol, and the Public Service Commission, currently use PayPort Web.

Finally, we note that you have also provided this office with a letter from Department of Motor Vehicles [DMV] Director Rhonda K. Lahm. In her letter, Director Lahm expresses her concerns about an interpretation from this office that would cause any business currently conducted online to revert back to the offices of the county treasurers or the DMV. In this regard, Director Lahm states that some counties use the PayPort system in performing their duties as agents of the DMV, and indicates that counties have historically determined and set up their own financial matters pursuant to Neb. Rev. Stat. § 60-3,158 (Cum. Supp. 2014) and Neb. Rev. Stat. § 13-609 (2012). Director Lahm asserts that “[a]ny deviation from that practice has the potential to severely impact their operations and cause significant increase in operational costs to the counties.” She further asserts that “[a]n interpretation which limits the options available for use of the portal by state agencies and their agents will have a negative impact on all of the entities which benefit by the Nebraska portal.”

RELEVANT STATUTE

Neb. Rev. Stat. § 81-118.01 (2014) provides, in pertinent part:

(1) Any state official or state agency may accept credit cards, charge cards, or debit cards, whether presented in person or electronically, or electronic funds transfers as a method of cash payment of any tax, levy, excise, duty, custom, toll, interest, penalty, fine, license, fee, or assessment of whatever kind or nature, whether general or special, as provided by section 77-1702.

* * *

(6) A state official or state agency obtaining, for each transaction, authorization for use of any credit card or charge card used pursuant to this section may, but is not required to, impose a surcharge or convenience fee upon the person making a payment by credit card or charge card so as to wholly or partially offset the amount of any discount or administrative fees charged to the state agency, but the surcharge or convenience fee shall not exceed the surcharge or convenience fee imposed by the credit card or charge card companies or third-party merchant banks which have contracted under subsection (5) of this section. The surcharge or convenience fee shall be applied only when allowed by the operating rules and regulations of the credit card or charge card involved or when authorized in writing by the credit card or charge card company involved. When a person elects to make a payment to a state agency by credit card or charge card and such a surcharge or convenience fee is imposed, the payment of such surcharge or convenience fee shall be deemed voluntary

by such person and shall be in no case refundable. If a payment is made electronically by credit card, charge card, debit card, or electronic funds transfer as part of a system for providing or retrieving information electronically, the state official or state agency shall be authorized but not required to impose an additional surcharge or convenience fee upon the person making a payment.

(Emphasis added.)

QUESTION PRESENTED

You have posed the following question:

If a state agency wishes to use a swipe machine provided by Nebraska Interactive with the approval of the State Records Board, are the transaction fees that may be charged to the person presenting the credit card at the state agency's office limited to "the surcharge or convenience fee imposed by the credit card or charge card companies . . . which have contracted under subsection (5)" (i.e., Elavon) of Neb. Rev. Stat. § 81-118.01 or can the agency impose an additional surcharge or convenience fee over and above the amount imposed by Elavon?

(Emphasis in original.) Our response to your question is set out below.

ANALYSIS

The legal question presented is whether the proposed PayPort system is part of a system for providing or retrieving information electronically, thus authorizing a state official or agency to charge the additional fee provided under § 81-118.01(6).² Several

² In Op. Att'y Gen. No. 04028 (October 27, 2004), the Attorney General discussed, at your request on behalf of the Board, whether a conflict existed between the language at issue in § 81-118.01(6) and § 84-1205.02. At that time, § 84-1205.02 authorized the Board to "establish reasonable fees for electronic access to public records . . . [which] shall not exceed the statutory fee for distribution of the public records in other forms." In your opinion request letter, you asked whether the Board could approve a convenience fee for electronic government services above the base statutory fee set in law. In our analysis, we noted that § 81-118.01(6) contained no reference to the Board, nor required any process similar to the one mandated in § 84-1205.03 for those state agencies who sought to charge a fee for electronic access to their public records. As part of our analysis, we stated that "[t]he convenience fee at issue is a fee that may be imposed by a state official or state agency to offset the amount charged to the state agency *by a credit card company for financial transactions.*" (Emphasis added.) Upon further review, we believe this statement mischaracterizes the precise nature of the fee, which relates to the cost incurred by a state official or agency for making *electronic* payments available to the

canons of statutory construction are pertinent to our analysis. “In the absence of anything to the contrary, 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. *Swift and Company v. Nebraska Department of Revenue*, 278 Neb. 763, 773 N.W.2d 381 (2009). “When construing a statute, an appellate court must look to the statute’s purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.” *Henery v. City of Omaha*, 263 Neb. 700, 705, 641 N.W.2d 644, 648 (2002). A fundamental principle of statutory construction is to attempt to ascertain legislative intent and to give effect to that intent. *Spence v. Terry*, 215 Neb. 810, 814, 340 N.W.2d 884, 886 (1983). “To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question.” *Goolsby v. Anderson*, 250 Neb. 306, 309, 549 N.W.2d 153, 156 (1996).

The plain language of the provision at issue allows a state official or state agency to impose an additional surcharge for financial transactions processed *electronically*. In this regard, *Merriam-Webster’s [Online] Dictionary* defines “electronic” in part as “operating through the use of many small electrical parts (such as microchips and transistors); produced by the use of electronic equipment; *operating by means of a computer: involving a computer or a computer system.*”³ (Emphasis added.) As described above, the proposed PayPort system is an online system, only accessible by a computer with internet access and equipped with an internet browser. The system uses the NIC⁴ payment engine to electronically send financial information to the state’s processor, Elavon. State agency personnel must go online to access and configure their individual PayPort websites. Regardless of the mode of payment, e.g., keyboard entry, swipe machine, etc., the system must be accessed via computer.

We also examined the legislative history of the language at issue in § 81-118.01(6) for guidance in responding to your question. In his introduction to LB 945 during the 2002 legislative session, Senator Wickersham stated:

LB 945 . . . is an outgrowth of an interim study that this committee conducted over the last summer. The study had to do with e-government and the bill has to do with a facet of e-government, and that is specifically being able to pay for things over . . . with electronic means. Now, we’ve spent a

user, not a transaction fee. To the extent this or any other statement implicates a credit card transaction or processing fee, also authorized in § 81-118.01(6), those statements are expressly disproved. We ultimately concluded that based on the plain language of the statute, state officials and agencies were authorized to impose the fee, not the Board.

³ <http://www.merriam-webster.com/dictionary/electronic> (accessed September 6, 2016).

⁴ NIC is the parent company of Nebraska Interactive.

considerable amount of time in the past. I think it was a bill that Senator Cudaback introduced allowing governments to accept payments with credit cards, charge cards, debit cards, et cetera, but the authorization in that case did not extend to the use of electronic means to make those payments. And that is becoming more and more common.

Committee Records on LB 945, 97th Leg., 2nd Sess. 3 (January 24, 2002) (Statement of Senator Wickersham). The issue for local and state government, according to Senator Wickersham, was figuring out who would pay for the electronic payments and electronic fund transfers. He noted that in the case of property tax payments, accepting less than the levied amount would constitute an impermissible commutation of tax. He stated:

So, the method . . . the thought behind the bill is that first of all, you have to authorize the payments. Secondly, you have to have a way to address the charges and the way that is proposed in the bill is that whomever is accepting the electronic payment. Now this would apply both to the state and to local governmental subdivisions, is entitled or may charge a fee. Obviously, it is very difficult to offer a service if you're not going to be in some ways reimbursed or made whole for that service, although it's not required that in all cases, the state or local government would charge a fee. For the most part, it's permissive, although as I've indicated, there are some areas in which you could not reduce the amount that you're receiving. . . . That is the general purpose and thrust of the bill.

Id. at 4.

Later during the 2002 session, provisions of LB 945 relevant to your inquiry were amended into LB 994. In explaining his amendment [AM3686] on select file, Senator Wickersham stated:

What [LB 945] does is allow county treasurers and others to accept payment in electronic forms. . . . Now, if persons want to participate and make their payments electronically, then they would pay the fee. If they don't, they won't so it isn't anything that is mandatory, but the fact of the matter is that the counties needed authorization simply to charge the fee. . . .⁵

Floor Debate on LB 994, 97th Leg., 2nd Sess. 14328 (April 16, 2002) (Statement of Senator Wickersham).

Applying older, static law to newly evolved situations and circumstances can present difficult issues of statutory interpretation. This is particularly true when attempting

⁵ While Senator Wickersham's brief floor debate centered on giving *counties* the authority to charge fees for electronic payments, state officials and agencies were similarly impacted by the amendment. See 2002 Neb. Laws LB 994, § 31.

to reconcile older law with emerging technology. Obviously, Senator Wickersham and the 2002 Legislature could not foresee the advances in e-commerce in the intervening years since the enactment of the legislation at issue here and today. However, in this instance, those issues are not as apparent. The purpose of the statute is to authorize state officials and agencies to charge a fee when allowing electronic payments of credit and debit cards, and electronic fund transfers. The proposed service is an electronic, online application which allows users to pay state agencies, boards and commissions by credit cards, debit cards, and electronic fund transfers. The statute does not distinguish between transactions made remotely or at the point of sale. The plain language of the statute, read in conjunction with the legislative history set out above, leads us to conclude that the proposed service falls within the parameters of Neb. Rev. Stat. § 81-118.01(6) and, therefore, the additional fee or surcharge may be legally imposed.

We will briefly address other considerations in allowing Nebraska Interactive to offer its PayPort system to state officials and agencies. It is our understanding that previous attempts by Nebraska Interactive to offer PayPort (formerly known as “Over the Counter Payment Solutions”) to state agencies were rejected by the Board due to the fact that Nebraska Interactive utilized its own merchant bank to process credit card payments. This arrangement was eventually determined by our office to contravene § 81-118.01(5). See Op. Att’y Gen. No. 15010 (August 10, 2015). That obstacle has been obviated with the execution of the current contract between the Board and Nebraska Interactive, wherein Nebraska Interactive is required to use the state’s credit card processor. The issue as to whether PayPort constituted an “electronic system,” which would allow Nebraska Interactive to offer the service and assess the additional surcharge via a portal fee, was never raised according to documentation provided to this office.

Moreover, in 2012, the Legislature amended the Records Management Act, Neb. Rev. Stat. §§ 84-1201 to 84-1227 (2014), to include the following intent language:

The Legislature declares that:
* * *

(7) New technology has allowed state agencies to offer electronic information and service through various means, including the portal;

(8) *As technology becomes available, state and local agencies should continue to explore providing electronic information and services to individuals, businesses, and other entities*⁶

Neb. Rev. Stat. § 84-1201 (2014) (emphasis added). In addition, Neb. Rev. Stat. § 84-1205.02 was amended to allow the Board to establish reasonable fees not only for electronic access to public records, but also for electronic information and services. See 2012 Neb. Laws LB 719, § 12. Since we have concluded that § 81-118.01 does not bar the implementation of the PayPort system, authorizing its use by state officials and

⁶ See 2012 Neb. Laws LB 719, § 7.

agencies appears to be consistent with the clear public policy of the state to expand portal operations when emerging technology becomes available. Finally, in light of our conclusion herein, there should be no adverse impact on any of the governmental entities that currently or may seek to benefit from the state's portal.

CONCLUSION

Based on the foregoing, we conclude that the proposed PayPort system falls within the parameters of a service contemplated by the language in § 81-118.01(6). And since Nebraska Interactive is currently using the state's credit card processor, the Nebraska State Records Board has no legal basis to preclude Nebraska Interactive from offering the service to interested officials and agencies in state government. Under the plain language of the statute, state officials and agencies will ultimately decide whether to offer the service to their constituents.

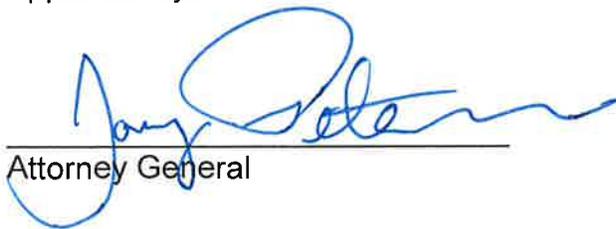
Very truly yours,

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