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NO.
STATE OF NEBRASKA
OFFICIAL
OCT 14 1994
DEPT. OF JUSTICE

DATE: October 14, 1994

SUBJECT: Confidentiality of Senators' Phone Records

REQUESTED BY: Senator Tim Hall

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

In conjunction with the audit of the Legislative Council by the Auditor of Public Accounts, you have requested the opinion of this office concerning several questions related to the confidentiality of phone records of Nebraska State Senators.

The first question presented is "at what point in the audit process do senators' long distance telephone records lose their exempt status?" This question is preceded, in your letter, by your legal conclusion that "Neb. Rev. Stat. Section 84-712.05(11) (Supp. 1993), specifically exempts from the Public Records Act `correspondence, memoranda and records of telephone calls related to the performance of duties by a member of the Legislature."

The first question presented, as well as the legal conclusion on which it is premised, reflects a basic misunderstanding of the operation of the Public Records Act. Legislative phone expense records are not "exempt" from the Public Records Act. Such records clearly fall within the definition of "public record" as defined in Neb. Rev. Stat. § 84-712.01 (1987). They are, however, specifically made subject to a provision under which the custodian of such records may withhold them from public viewing. Neb. Rev. Stat. § 84-712.05(11) (Supp. 1993). Our long standing view of the operation of the Public Records Act is supported not only by the clear text of the statutes, but also by the Legislative History of

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§ 84-712.05(11). The Committee Statement for LB 565, dated February 10, 1983, stated as follows:

> LB 565 would add another category of public documents that may be excluded from public disclosure, under the public records laws, by their 'lawful custodian.' Included in this new category are correspondence, memoranda and records of telephone calls generated by a state senator in the performance of his or her duties.

Committee Records of LB 565 (Neb. Laws 1983) (emphasis added).

As was made clear by the Order of the Lancaster County District Court in ***Breslow v. Primeau*** (Docket 496, Page 039), dated April 18, 1994, the Auditor of Public Accounts is not the equivalent of the "public" and has independent constitutional authority to review records of expenditures of State funds. In addition, the Auditor has statutory authority to review Legislative phone records under Neb. Rev. Stat. § 84-304, as upheld in ***Breslow v. Primeau***. Finally, as documents falling within the definition of "public records" under § 84-712.01, Legislative phone records are also specifically available to the Auditor of Public Accounts under Neb. Rev. Stat. § 81-1117.02(2) (1987) for audit purposes.

The general issue presented by your question was also the subject of Attorney General Opinion No. 92116 (October 8, 1992). The following analysis was set forth in that opinion:

> Neb. Rev. Stat. § 84-712 (Reissue 1987) 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, . . . are hereby fully empowered and authorized to examine the same, and to make memoranda and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business.
>
> Under Neb. Rev. Stat. § 84-712.01 (Reissue 1987), "public record" is defined as:
>
> > . . . 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.

Obviously, these statutes would allow members of the public to review the phone records of state legislators, and we said as much in Opinion of the Attorney General No. 46, March 14, 1983. Therefore, in 1983, the Legislature added subsection 11 to Neb. Rev. Stat. § 84-712.05 (Reissue 1987). Section 84-712.05 generally creates a list of categories of documents which may be withheld from the public at the discretion of the governmental agency involved. Subsection 11 of that section adds "[c]orrespondence, memoranda, and records of telephone calls related to the performance of duties by a member of the Legislature" to the list of documents which may be kept confidential. As a result of Subsection 11, members of the public can be denied access to the telephone records of state legislators. . . .

While the Public Records Statutes clearly allow legislative phone records to be kept confidential in the face of access requests from the public, other statutes also have a bearing on . . . access to phone records for audit purposes. Specifically, Neb. Rev. Stat. § 81-1117.02 (Reissue 1987) deals with the release of computer file data, which presumably includes phone records, by DAS. Subsection (2) of Section 81-1117.02 provides:

> Any data which is a public record in its original form shall remain a public record when maintained in computer files and shall be provided to the Legislative Fiscal Analyst pursuant to section 50-420 and shall be made available to the Auditor of Public Accounts solely for use in the performance of audits prescribed by law.

(emphasis added). Subsection (2) therefore appears to allow . . . access to computerized telephone records for audit purposes.[1]

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[1]We note that "public record" for purposes of section 81-1117.02 is defined in § 81-1117.04, independently from the public records statutes in § 84-712.

> We do not believe that the Public Records Statutes, and in particular § 84-712.05 (11), form the basis to deny . . . access to legislative telephone records in light of § 81-1117.02(2). First of all, the application of section 84-712 itself is conditioned by the prefatory language in that statute which indicates that the Public Records Statutes apply "[e]xcept as otherwise expressly provided by statute." Moreover, courts will not give an interpretation to one statute which effectively nullifies another statute unless that is the clear legislative intent. ***Georgetowne v. Ltd. Partnership v. Geotechnical Services, Inc.***, 230 Neb. 22, 430 N.W.2d 34 (1988). If . . . [the Auditor is] denied access to the phone records in question on the basis of section 84-712.05(11), then section 81-1117.02(2) has, in essence, been nullified. We see no clear legislative intent to bring about that result.
>
> As a result, we agree . . . that section 84-712.05(11) must be read to prevent public access to legislative telephone records. We do not believe that statute also applies to deny . . . access to those documents in connection with a properly conducted audit which is authorized by statute. We would note that our conclusion with respect to this issue is generally consistent with a previous informal opinion of this office dated December 7, 1979, in which we determined that the Division of Communications and the Central Data Processing Division of DAS had a duty under section 81-1107.02 to release telephone call detail information to the Auditor of Public Accounts for the purpose of conducting audits.

Attorney General Opinion No. 92116 (Oct. 8, 1992).

In sum, there is no "point in the audit process" at which "senators' long distance telephone records lose their exempt status" since they are never exempt from the Public Records Act, and are always available to the Auditor of Public Accounts for audit purposes. Members of the general public may be denied access to the records at the discretion of the custodian of the records, and, as discussed more fully below, certain calls may be designated as confidential by Senators.

The second question presented is "If . . . I respond to the [Auditor's request for certain information regarding certain telephone calls] . . . do I waive any confidentiality rights I might have to those records[?]" This question is followed by a related query: "Does the fact that the telephone records are

referenced in subsequent correspondence cause them to lose their exempt status?" Again, these questions are premised on a misreading of the applicable statutes. Records cannot lose "exempt status" which they never had. Correspondence between Senators and the Auditor fall within the broad definition of "public records." Such correspondence may be withheld from the public by Senators under § 84-712.05(11). However, this statute does not permit the Legislature to withhold records of expenditures of state funds or related information from the Auditor of Public Accounts. ***See Breslow v. Primeau***. Nor does it prohibit disclosure by the Auditor of misuse of public funds, or disclosure of documents for which he is the custodian. The Auditor may lawfully withhold certain information concerning Legislative phone records from the public, and has, in fact, promised to do so with regard to the information sought from you.

Finally, you inquire as to the "legal authority and reasoning behind the conclusion reached in Mr. Comer's September 16, 1994, letter that the release of Senator Wesely's records by the State Auditor was authorized." The letter in question advised the Auditor of Public Accounts that "your letter of inquiry to Senator Wesely together with the details of specific long distance telephone records which are the subject of your inquiry [regarding irregularities in Senator Wesely's phone records] are public records under the pertinent Nebraska statutes which you may release to the public." (Letter from Assistant Attorney General Dale Comer to Auditor John Breslow, dated September 16, 1994).

As discussed in detail above, the phone records of Legislators fall within the statutory definition of "public records." ***See*** Neb. Rev. Stat. § 84-712.01.[2] However, they may be withheld from the public by their custodian. ***See*** § 84-712.05(11). Furthermore, pursuant to Neb. Rev. Stat. § 81-1120.27(3) (1993 Supp.) Legislators may conceal certain "sensitive or confidential" phone call records from the Auditor (except as to the date and the amount of the expenditures). However, audit reports and related correspondence may clearly be released to the public by the Auditor of Public Accounts, as there is no prohibition against such release under Nebraska law. In fact, Neb. Rev. Stat. § 84-712.05 (1993 Supp.) specifically provides that records which are otherwise qualified to be withheld from the public, including Legislative phone expense records, may be "disclosed by a public entity

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[2]Section 1 of LB 579 provided, in part, "The records used and compiled pursuant to this section shall not be considered public records for purposes of section 84-712 to 84-712.09." However, section 1 of LB 579 was declared unconstitutional in ***Breslow v. Primeau***.

pursuant to its duties." The phone records of Senator Wesely referenced in the September 16 letter (concerning 365 calls to campaign offices and campaign ad agencies) were not designated by Senator Wesely as confidential. The 15 longer and more expensive calls to campaign offices which Senator Wesely attempted to conceal from the Auditor were not discussed in the September 16 letter. These 15 calls became public information during a criminal investigation, not through public release by the Auditor.

Finally, § 84-712.05(11) authorizes only the withholding from the public of "records of telephone calls related to the performance of duties by a member of the Legislature." (Emphasis added). Campaign related calls are not related to the performance of legislative duties. In addition, pursuant to § 81-1120.27(3) only calls which the Legislator or the caller would "reasonably expect" not to be disclosed may be designated as confidential. It is our opinion that Senators could not "reasonably expect" nondisclosure of calls which violate state law. Furthermore, the ability to designate calls as confidential and withhold information from the Auditor applies to Senators, not to Legislative employees conducting non-legislative business. *See* § 84-1120.27(3). Thus, it is likely that even information concerning the 15 calls which were not the subject of the September 16 letter could also have been disclosed by the Auditor of Public Accounts pursuant to Neb. Rev. Stat. § 84-712.05 (disclosure pursuant to duties) and § 84-304(1)(c)(iii) (Supp. 1993) (duty to report irregularities and misuse of public funds or property).

As this office has stated repeatedly over the course of the past two years, if the Legislature wishes to prevent public disclosure of certain information concerning Legislative phone records by the Auditor, it may do so by adopting statutory penalties for improper disclosure of legally confidential information. As was stated in the State of Nebraska's Reply Brief In Support of Motion for Summary Judgment as to Respondent Hall and the Respondent Class of State Legislators, p.8 (December 3, 1993), "There are other means for the protection of confidential information such as sanctions for its improper disclosure." "As the Attorney General stated at the hearing on this Motion for Summary Judgment, the Legislature could properly enact legislation to prohibit improper disclosure of confidential information obtained by the Auditor in the course of auditing the Legislature." *Id.* at 34. Any such legislation would, of course, have to adequately respect the Auditor's constitutional duties, as well as

allow proper disclosure of information to law enforcement authorities.[3]

Sincerely yours,

DON STENBERG
Attorney General

Steve Grasz
Deputy Attorney General

Approved by:

Attorney General

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[3]We would note that no such protection now covers highly confidential communications of the State Patrol, Governor, Supreme Court, Attorney General's Drug Prosecution or Child Protection Unit or any other agency; yet, to our knowledge, no improper disclosures have occurred. We further note that all information released by the Auditor to law enforcement authorities was properly released. But for the passage of time and the consequent running of the applicable statute of limitations, criminal charges would likely have resulted from the phone calls in question.