STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
FAX (402) 471-3297

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#91054

STATE OF NEBRASKA
OFFICIAL
JUN 17 1991
DEPT. OF JUSTICE

DATE: June 14, 1991

SUBJECT: Public Records Act; Public Access to Governmental Work in Progress

REQUESTED BY: E. Benjamin Nelson
Governor of Nebraska

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

You have requested our Opinion as to certain aspects of our state Public Records Act, Neb.Rev.Stat. §§ 84-712 et seq. (Reissue 1987), with respect to access to particular documents by a state senator. We will respond to your Opinion request below, after we have set out, in some detail, the facts as we understand them based upon correspondence from the senator and discussions with your counsel.

Senator Rod Johnson wrote to the state Policy Research Office (PRO) in February, 1991, requesting an update on a certain study done previously by the Department of Environmental Control (DEC) which gave estimates as to the possible liability exposure the State could experience should it withdraw from the Central Interstate Low-Level Radioactive Waste Compact. Senator Johnson also wrote to Dennis Grams, Director of DEC, in February, 1991, requesting technical assistance and information in that area. Neither of those requests sought specific documents, but rather both requests sought information and assistance from those agencies.

On April 16, 1991, you wrote to Senator Johnson and indicated that DEC would not do a financial analysis of the costs of withdrawing Nebraska from the Central Interstate Low-Level Radioactive Waste Compact. On that same date, Senator Johnson

L. Jay Bartel, J. Kirk Brown, Laurie Smith Camp, Elaine A. Chapman, Delores N. Coe-Barbee, Dale A. Comer, David Edward Cygan, Mark L. Ells, James A. Elworth, Lynne R. Fritz, Royce N. Harper, William L. Howland, Marilyn B. Hutchinson, Kimberly A. Klein, Donald A. Kohtz, Sharon M. Lindgren, Charles E. Lowe, Lisa D. Martin-Price, Lynn A. Melson, Harold I. Mosher, Fredrick F. Neid, Paul N. Potadle, Marie C. Pawol, Kenneth W. Payne, LeRoy W. Sievers, James H. Spears, Mark D. Starr, John R. Thompson, Susan M. Ugai, Barry Waid, Terri M. Weeks, Alfonza Whitaker, Melanie J. Whittamore-Mantzios, Linda L. Willard

wrote to PRO and requested copies of a report which, by his understanding, had been prepared in response to his earlier February request for information. No materials were subsequently provided to Senator Johnson in response to his request.

Senator Johnson then wrote to you on May 16, 1991, under the provisions of the Public Records Act, and requested access to reports, draft reports, or other forms of documents which he understood were prepared by DEC and which reportedly contained information "regarding potential costs Nebraska may incur in the event that the present regional low-level radioactive waste facility site is not licensed." You did not respond specifically to that request, so Senator Johnson wrote to us on May 28 asking us to order access to the records in question under § 84-712.03. On June 3, 1991, you requested our Opinion as to whether governmental work in progress must be released under the Public Records Act.

In order to resolve this matter, we requested copies of the papers at issue from you in a letter dated June 3, 1991. You have now provided us with copies of those materials. Based upon our examination of those papers, and for the reasons stated below, we believe that portions of those records should be made available to the public including Senator Johnson.

Our state Public Records Act is found at Neb.Rev.Stat. §§ 84-712 et seq. (Reissue 1987). Section 84-712 provides that persons interested in the examination of public records are "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." Section 84-712.01 defines public records. Section 84-712.05 lists certain categories of documents which may be withheld from the public by the lawful custodian of the records.

In your Opinion request of June 3, 1991, you asked whether materials may be withheld from the public pursuant to § 84-712.05(3) and § 84-712.05(4) if the work involved is still in progress and if those materials may be used against the State in future litigation. The subsections of § 84-712.05 referenced in your letter deal with trade secrets or proprietary commercial information and with work product of public bodies prepared for litigation respectively.

We do not believe that the materials you provided to us fall under the exemptions contained in § 84-712.05(3) or § 84-712.05(4). Those materials do not appear to contain commercial or proprietary information, nor do they appear to involve work product prepared for any clearly anticipated litigation. However, your reference to work in progress raises what we believe is the pertinent

question with respect to the papers at issue. Specifically, at what point in time do materials prepared by public officials become "records and documents" which are subject to disclosure under the Public Records Act?

Section 84-712.01(1) contains a definition of public record as follows:

> Except where any other statute expressly provides that particular information or records shall not be made public, public records shall 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.

This definition was added to the Public Records Act in 1979. See LB 86, Eighty-Sixth Nebraska Legislature, First Session, 1979. Neither the statutory definition nor the legislative history of LB 86 gives any guidance as to whether materials in incomplete form are "records and documents" for purposes of § 84-712.01. Moreover, there are no Nebraska cases which shed any light on this issue.

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.

In the present instance, you have provided us with a typed document which is appended with a number of handwritten notations, comments, and suggestions. It is our understanding that the typed document was drafted and prepared by DEC and sent to PRO for suggestions or revisions. The handwritten comments are from staff at PRO. In any case, the final official form of this document would have been jointly prepared and approved by both DEC and PRO. Work on this document and this project has ceased.

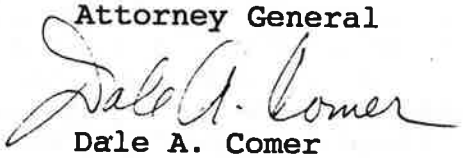
In our view, the typed materials from DEC constitute a "record" or "document" which must be disclosed under the Public Records Act. They were prepared in final form within the agency, and they left the agency. To say that they are merely a "draft" ignores the broad nature of the definition of public records found in the statutes and the public policies favoring open access to governmental records.

On the other hand, the handwritten comments and notes from PRO are not a "document" or "record" subject to disclosure. They have not been prepared in final form, and they have not left the agency involved. In our view, they do not fit under the statutory definition of public record set out in § 84-712.01.

As a result, we believe that the public may see the typed version of the report from DEC minus the handwritten notes appended at PRO. If no "clean" copy of the DEC report exists, you may wish to excise the PRO comments in some fashion.

Sincerely yours,

DON STENBERG
Attorney General



Dale A. Comer
Assistant Attorney General

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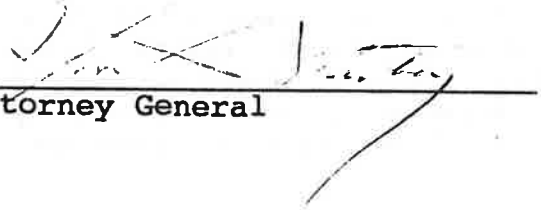

Attorney General