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

#92077

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SUBJECT: Application of the Public Records Act to Executive Records Placed in the State Archives.

REQUESTED BY: Allen J. Beermann
Secretary of State and as State Records Administrator

WRITTEN BY: Don Stenberg, Attorney General
Fredrick F. Neid, Assistant Attorney General

You have asked our Opinion regarding the appropriate characterization, administration of, and accessibility to certain gubernatorial documents and records acquired by the State Archives, a division of the Nebraska State Historical Society. The records you have described include documents and other records of the Governor's Office during the administration of Robert Kerrey which were placed in the State Archives. At the time of transfer of the executive records, an agreement was entered into between former Governor, Robert Kerrey, and James A. Hanson, then Director of the State Historical Society. Briefly summarized, the agreement evidences transfer of the records to the State Archives, sets out terms for release of materials and records, and provides for the disposition of business papers and manuscript material.

PERSONAL AND POLITICAL PAPERS

The first question you have asked relates to handwritten or typed notations by the Governor or staff member appearing on a document deemed to be a public record. The specific inquiry is whether the notation may constitute a personal and political paper of the official.

L. Jay Bartel
J. Kirk Brown
David T. Bydalek
Laurie Smith Camp
Elaine A. Chapman
Delores N. Coe-Barbee
Dale A. Comer
David Edward Cygan
Mark L. Ells
James A. Elworth
Laura H. Essay
Lynne R. Fritz
Royce N. Harper
William L. Howland
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Lynn A. Melson
Harold I. Mosher
Fredrick F. Neid
Paul N. Potadle
Marie C. Pawol
Kenneth W. Payne
Jan E. Rempe
James H. Spears
Mark D. Starr
John R. Thompson
Barry Waid
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

At the outset, we point out that there is limited legal precedent in this state concerning whether a record or writing would constitute a personal or political paper and this term is not defined in Nebraska statutes. The term, "personal and political papers," is included in Neb. Rev. Stat. § 84-1215(2) (Reissue 1987) and it has been long-held that language in a statute should be interpreted in its plain, ordinary, and popular sense to determine legislative intent. In construing a statute, the Legislature's intent is to be obtained primarily from the language used in the statue, which must be given effect according to its plain obvious meaning. City of Curtis v. Maywood Light Co., 137 Neb. 119, 288 N.W. 503 (1939); Georgetowne Ltd. Partnership v. Geotechnical Services, Inc., 230 Neb. 22, 430 N.W.2d 34 (1988). WEBSTERS UNABRIDGED DICTIONARY (2d ed.) defines the word "personal" to mean private, individual, affecting individuals, peculiar or proper to a certain person or to private actions or character; and, "political," to mean engaged in or taking sides in politics, as political parties, of or characteristic of political parties or politicians. We believe that these definitions apply to the term, personal or political papers, for purposes of making that determination.

To determine whether specific material would constitute a personal and political paper, analysis of the content of the notation is necessary. If the notation is relevant or germane to the record itself, the notation would not be of a personal or political nature. The National Governors Association has recognized the complexity of the issues and a Management Note of the Association includes the following commentary:

> Therefore, while a Governor may feel that some of the records produced during his or her tenure in office are in fact private, he or she may recognize that this view, if challenged, may not prevail. Extreme discretion should be used when creating or filing confidential or politically sensitive material. Serious consideration should be given to keeping files that are wholly political in nature at home or in rented political party space. Furthermore, if the public records law of a particular state is unclear or fails to address executive office records at all, executive staffs will benefit by treating office records as official public records and working with the state archives and/or records management office in the protection and disposition of these records.

Executive Chambers Records: A Guide for Governors, State Service Reports 11 (September 1989).

Accordingly, it would appear that if the extraneous notation is relevant to the document itself, the notation would not be of a personal and political nature and the record should be viewed in its entirety as an official public record. Accepting for purposes of this analysis that the content of the notation is of a personal and political nature, then the notation would constitute a personal and political paper. Suffice it to say that we believe that a notation typewritten or manually inscribed may be deemed a personal or political paper.

NOTATIONS IN VARIOUS FORMAT

Certain informal commentary in various format have been described and you inquire whether the commentary would be included in the definition of personal and political papers as stated in Neb. Rev. Stat. § 84-1215(2) (Reissue 1987).

The four classes of notes or writings in various format you have described include: (1) Notes handwritten on Post-It note pads and placed on official correspondence; (2) Intra-office electronic mail print out sheets (from the AGNET system); (3) Handwritten notes that are paper clipped to typewritten correspondence, and; (4) Handwritten notes in margins of typewritten correspondence. We believe the classes of commentary, regardless of format, would comprise personal and political papers if the content of the notation were of that characterization.

FACTORS FOR DETERMINATION

The issue has been raised whether content of the notation or record would be the determining factor in deciding whether the material is a public record or a personal and political paper. Obviously, a document that is a public record would continue to be a public record regardless whether notation or comment of an extraneous nature is attached or inscribed in some fashion. Consequently, the content of the material is a determining factor. The format of the document also may be a deciding factor depending on the nature of the document. This question is of highly factual nature and a generalized response is not appropriate to address a specific situation. Regarding the issue whether a writing would constitute a political or personal paper, it is apparent that the nature of the content would be the controlling factor.

RESTRICTIONS ON ACCESS

You also inquire whether "reasonable restrictions" may be placed on access to the records which include notation or comment which would constitute a personal and political paper. The restrictions you have described permit release of the public

documents. After review, it is our conclusion that reasonable restrictions may be placed on access to personal and political papers of a former government official which have been posited in the State Archives.

The term, public records, is defined in Neb. Rev. Stat. § 84-712.01 (Reissue 1987) which states:

> (1) 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.
> (2) Sections 84-712 to 84-712.03 shall be liberally construed whenever any state, county or political subdivision fiscal record, audit, warrant, voucher, invoice, purchase order requisition, payroll, check, receipt or other record of receipt, cash or expenditure involving public funds is involved in order that the citizens of this state shall have full access to information on the public finances of the government and the public bodies and entities created to serve them.

At the time the personal and political papers were acquired by the State Archives, the papers became records belonging to the state thereby subjecting the records to access by the public under the provision of Neb. Rev. Stat. § 84-712 (Reissue 1987). While access to public records is for the most part mandated under Nebraska law, the right to access is not absolute. See Orr v. Knowles, 215 Neb. 49, 337 N.W.2d 699 (1983). Further, the statutes require access unless otherwise expressly provided by statute. Other statutes expressly provide for exceptions regarding disclosure or access to public records.

We believe it is noteworthy that the subject records are the papers and documents of a former Governor. The Governor is a constitutional officer and the chief executive of the state and the records take on added significance for this reason. The importance of gubernatorial papers has been recognized and described in the following manner:

> But who am I to tell archivist about the importance of records? I can however, tell you something about the office of Governor. It is both an office of authority

> from which policies are promulgated and an office of information to which reports on the administration of the policies are sent. It is also the office to which the public most often submits petitions. Thus it is unique in state government the one place where the records of decision, direction, and execution come together. As such, it is the most important record making and record keeping office in a state. A Governor is perhaps the most personal officer of state government in the eyes of the people. He is their representative; they put him there, and they can send him home. Consequently he is attuned to the people; he seeks their continued good will; he courts them in his efforts to persuade the legislature to approve his program.

Scott, Robert N. "Governor's Record: Public Records." The American Archivist 33 (1970): 5-10 at 6.

In recognition of the importance of gubernatorial documents and records of other officials, our Legislature through express legislative act has encouraged that personal and political papers of officials be placed in the State Archives. Neb. Rev. Stat. § 84-1215(2) (Reissue 1987) states: "Members of the Legislature and other officials are encouraged to offer their personal and political papers of public interest to the state archives for preservation subject to any reasonable restrictions concerning their use by other persons." This express provision authorizes restrictions to access to personal and political papers posited with the State Archives and recognizes a class of records described as personal and political papers. It is obvious that a purpose of providing reasonable restrictions on access to personal and political papers is to encourage placement of this class of documents in the State Archives.

STANDARDS FOR DETERMINATION

The last question you have posed relates to notations appearing on public records which may constitute a personal and political paper. Regarding this issue, your first specific inquiry is "What is the standard for determining whether the notation is a part of the public record or is a personal and political paper." We have found no precise legal standard which serves to distinguish between a public record and a personal or political paper. We believe a particular document may constitute both a public record and a personal or political paper. Conceivably, a copy of official correspondence regarding official state business may include handwritten notation of a personal and political nature. Again, we re-iterate that this question is of a highly factual nature and each record would necessarily be reviewed to determine whether the

content of the handwritten or typed notation is of a personal or political nature. For purposes of this analysis, if the notation were of a political and personal nature, the document in question would have the dual status as a public record and a personal and political paper.

You further inquire who may make this determination. In the first instance it is the duty of the lawful custodian of the records to make the determination. See Neb. Rev. Stat. § 84-712.05 (Reissue 1987). The records are in the physical custody of the State Archives and the State Archivist is the official charged with duties for administration and preservation of archival records under Neb. Rev. Stat. § 84-1214.01 (Reissue 1987).

However, as concluded in this Opinion, reasonable restrictions may be placed on access or release of personal and political papers. By express agreement between the Historical Society and former Governor Kerrey, the parties provided for the disposition of personal documents of the former Governor. The agreement in part provides that "[A]ll material with manuscript annotations, either incorporated or attached thereto, requires approval by J. Robert Kerrey or his authorized representative before release." The agreement and the terms and conditions included appear to be reasonable restrictions concerning release of personal and political papers to other persons. As a practical matter, a representative of former Governor Kerrey may participate in the decision regarding access to personal and political papers as a means of fulfilling the terms of the agreement and to give effect to the statute authorizing reasonable restrictions.

You next inquire concerning the time period a decision must be made with the realization that "the public record laws require the custodian of public records to turn over public records upon request, and the public records laws do not authorize delays in making such documents available." We believe that timely response must necessarily be made to a request for public records. What constitutes a timely response may vary depending on the type of record requested or volume of records requested. Generally, access or response to the request should be completed expeditiously. We appreciate the difficulty of completing expeditious response if there is uncertainty regarding whether access to the records is restricted. This is problemsome and we have no legal solution to this administrative question except that it would be beneficial to classify the records to the extent possible so that timely response may be made.

We point out that the public records laws permit that portions of segregable records may be withheld. Neb. Rev. Stat. § 84-712.06 (Reissue 1987) states that "[A]ny reasonably segregable public

portion of a record shall be provided to the public as a public record upon request after deletion of the portions which may be withheld." This provision for the most part should serve to resolve the specific questions you have asked through removal of personal and political notation from a public record.

CONCLUSION

The analysis set forth in this Opinion is intended to give effect to provisions of the Public Records Act and the Records Management Act as well as the agreement entered into by the former Governor and the State Historical Society. Admittedly, it is acknowledged and widely recognized that the issues you have raised are difficult to resolve from an administrative viewpoint. It is of importance to note that the statutes acknowledge a class of records termed personal and political papers of state officials and that access to these materials may be reasonably restricted. Further, the statutes expressly encourage placement of these records in the State Archives.

For these reasons, we believe that records which include content of a personal and political nature constitute personal and political papers for application of the provisions of section 84-1215(2) which authorizes reasonable restrictions concerning use of the papers by other persons.

Sincerely yours,

DON STENBERG
Attorney General

Fredrick F. Neid
Assistant Attorney General

Approved By:

Attorney General

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