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NB.
STATE OF NEBRASKA
OFFICIAL
MAY 13 1994
DEPT. OF JUSTICE

DATE: May 11, 1994

SUBJECT: Application of the Nebraska Public Records and Public Meetings Statutes to Selection of Employees and Officers by the Nebraska Department of Education and the State Board of Education

REQUESTED BY: Joe E. Lutjeharms
Nebraska Commissioner of Education

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

You have requested our opinion on a series of questions involving the Nebraska Public Records Statutes, *Neb. Rev. Stat.* §§ 84-712 through 84-712.09 (1987, Cum. Supp. 1992 and Supp. 1993) and the Nebraska Public Meetings Statutes, *Neb. Rev. Stat.* §§ 84-1408 through 84-1414 (1987, Cum. Supp. 1992 and Supp. 1993), and the impact of those statutes on the process of filling various executive positions within and associated with the Nebraska Department of Education (the Department). We will respond to each of your questions in turn.

Your first two questions grow out of the search for an individual to fill the position of Executive Director of the Nebraska Special Education Accountability Commission. You indicated that you recently filled that position on contract, and that you have received a request for access under the Public Records Statutes to a list of names of the applicants for that position. You have posed two questions with respect to that position.

1. "Is the Department required to disclose the list of unsuccessful applicants for contract or permanent employee positions that it fills?"

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Section 84-712 of the Public Records Statutes states that, "except as otherwise expressly provided by statute, all citizens of this state, and all persons interested in the examination of the public records . . . are hereby fully empowered . . . to examine the same, and to make memoranda . . . therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business." Under Section 84-712.01, public records are broadly defined as all records and documents, regardless of physical form, of or belonging to the state and its various political subdivisions, departments, boards and commissions. Section 84-712.05 also allows governmental entities to keep certain enumerated categories of public records confidential including such items as investigative reports, attorney/client communications, medical records, personnel records, etc.

The Public Records Statutes, therefore, give interested parties in Nebraska a broad general right to view public documents at the governmental offices in possession of those documents during normal business hours, and to make notes or memoranda therefrom. The Public Records Statutes, on the other hand, do not require public officials to provide copies of public records, to answer questions, or to create documents which do not otherwise exist. In particular, the Public Records Statutes do not require agencies to create abstracts or lists in response to a public records request. Op. Att'y Gen. No. 87104 (October 27, 1987).

In specific response to your initial question, we do not believe that the Department is required to prepare or disclose lists of unsuccessful applicants for the contract or permanent employee positions that it fills unless such lists already exist. However, if such lists do exist, then they are public records which may be reviewed by the public, since we do not believe that they fall under any of the categories of documents which may be kept confidential under Section 84-712.05. Moreover, to the extent that your initial question is simply an inquiry as to whether the identities of applicants for Department positions may generally be kept confidential, it is our view that the answer to that question is "no," if those identities may be ascertained from records or documents in the possession of the Department.

2. "Are the materials submitted by such unsuccessful applicants, including resumes, letters of recommendation, and possibly transcripts, public records?"

If resumes, letters of recommendation and transcripts of unsuccessful applicants for Department positions are in the possession of the Department, then we believe that they fall under the broad definition of public record set out in Section 84-712.01 discussed above. Consequently, those documents may be viewed by

the public unless they may be kept confidential under Section 84-712.05 or some other statute which expressly makes them confidential. We do not believe that any of categories of documents enumerated in Section 84-712.05 apply to resumes or other materials submitted in connection with an application for public employment, and we are unaware of any other statutes which provide that those kinds of materials may be kept confidential. As a result, they may be viewed by the public.

Your next series of questions involves the hiring process for a new Commissioner of Education who will be selected as your replacement prior to your retirement early next year. It is our understanding that the State Board of Education (the Board) has made some decisions in this area which might make your questions moot to some extent. However, since the questions presented in your opinion request have been raised previously by other agencies, and since we believe it might be useful to provide our opinion on those issues for future reference, we will respond to your additional questions.

3. "Would the same answers you have provided to the previous questions [set out above] apply to records of applicants for the Commissioner's position?"

We are unaware of any reason, under the Public Records Statutes, to distinguish the application process for Commissioner of Education from the application process for other positions to be filled by the Department and the State Board of Education. Consequently, our answers to your previous questions discussed above apply equally to the application materials of applicants for the Commissioner's position.

4. "Is written correspondence between the Board members and applicants or other Board members involving the search for a new Commissioner a public record?"

If written correspondence between the members of the State Board of Education and applicants for the Commissioner of Education position or between members of the Board involving the search process are in the possession of the Department or the office of the Board, then they are public records under the definition above and must be made available to the public under the Public Records Statutes since such correspondence does not appear to fit under any of the categories of documents which may be kept confidential under Section 84-712.05. On the other hand, a private letter from a Board member to an applicant or from one Board member to another concerning an applicant which was not provided to the Department or to the office of the Board would not constitute a record "of or belonging to the state" under Section 84-712.01, and would not be a "public record." With regard to this question, we would caution

that any extensive correspondence among Board members involving their views of particular applicants or potential action by the Board could constitute an impermissible attempt to circumvent the Public Meetings Statutes under Section 84-1410 (4).

5. "Must State Board discussions and deliberations regarding the selection of a Commissioner be in public?"

Section 84-1409 provides that the Public Meetings Statutes shall apply to "all independent boards, commissions, bureaus, committees, councils, subunits, or any other bodies, now or hereafter created by the Constitution of Nebraska, statute or otherwise pursuant to law." Section 84-1408 of those statutes also provides, in pertinent part:

> It is hereby declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret.
>
> Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies . . .

Even more specifically, ***Neb. Rev. Stat.*** *§* 79-327 (2) (1987) states that:

> The public shall be admitted to all meetings of the State Board of Education except to such closed sessions as the board may direct in accordance with sections 79-327, 84-1408 to 84-1414, and 85-104. The Board shall cause to be kept a record of all public meetings and proceedings of the board.

The selection of a new Commissioner of Education is a statutory duty of the State Board of Education under ***Neb. Rev. Stat.*** *§§* 79-325 and 79-328 (1987 and Cum. Supp. 1992), and it appears to us that the selection process is clearly part of the public business of the Board. Under the statutes quoted above, the deliberations and discussions for that public business should be done in public, and in compliance with the Public Meeting Statutes and Section 79-327.

6. "Must State Board interviews with individual applicants be in public if a quorum does the interviewing?"

If a quorum of the State Board is present to conduct an interview of an applicant for the Commissioner's position, we believe that a strong argument can be made that a meeting of the

Board has occurred, particularly if there is any discussion of the merits of the candidate in question. Our Supreme Court has indicated that the guiding principle with respect to closed sessions of a public body is, "[i]f a public body is uncertain about the type of session to be conducted, open or closed, bear in mind the policy of openness promoted by the Public Meetings Laws and opt for a meeting in the presence of the public." ***Grein v. Board of Education of the School District of Fremont***, 216 Neb. 158, 168, 343 N.W.2d 718, 724 (1984). As a result, it is our view that interviews with individual applicants should be in public when a quorum of the Board is present. Those interview sessions should be handled like any other meeting of the Board.

We would note, however, that Section 84-1410 does allow closed sessions of a public body to prevent needless injury to the reputation of an individual. There may be occasions during the interview process where candid discussion by the Board or the candidate could elicit responses which might be injurious to the reputation of an individual, and those circumstances might warrant a closed session of the Board to deal briefly with those issues. However, a closed session of a public body is not appropriate merely because matters requiring a closed session might arise. Rather, a closed session is permitted only when such matters have arisen and must be dealt with. Op. Att'y Gen. No. 11 (January 20, 1983). As a result, while the interviews of candidates for the Commissioner of Education position might require some brief closed sessions to discuss potentially injurious matters, the bulk of those interviews conducted by a quorum of the Board should be done in open session in a public meeting.

Sincerely yours,

Dale A. Comer
Assistant Attorney General

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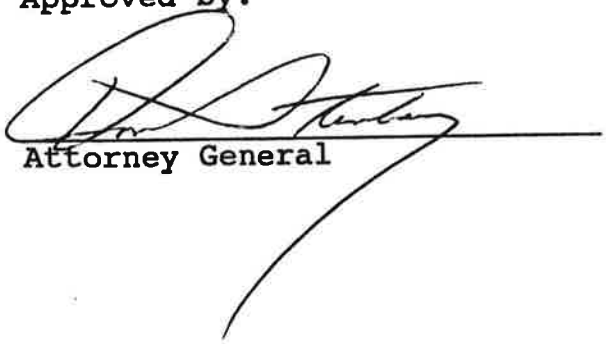
Approved by:



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