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September 19, 2016

Via email and regular U.S. Mail
Dr. Paul Von Behren
1180 Timberwood Drive
Ames, NE 68621

RE: *File No. 16-R-133; Nebraska State Senators Kathy Campbell, Ernie Chambers, Mike Gloor, Galen Hadley, Bob Krist, John Kuehn, and Heath Mello; Dr. Paul Von Behren, Petitioner*

Dear Dr. Von Behren:

This letter is in response to your petitions submitted to this office under Neb. Rev. Stat. § 84-712.03 of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS"). In your petitions, which we have consolidated for purposes of this disposition, you seek our review of the denial of certain records by the seven state senators enumerated above. We received your first correspondence in this matter on September 1, 2016. You subsequently submitted copies of all of the public records requests made to the seven senators, and the responses you received from six of the senators, i.e., Senators Campbell, Gloor, Hadley, Krist, Kuehn and Mello. We have now completed our analysis and have fully considered your petitions for access to these records. Our findings are set forth below.

RELEVANT FACTS

Our understanding of the facts in these matters is based solely on your petitions and the responses you received from the six senators.

In your correspondence, you indicate that on August 29, 2016, you hand delivered your public records requests to the senators' offices. Specifically, your request sought the following records:

1. Browsing history of your state-issued computer from August 1, 2015 until present, (including any deleted files/records/history that fall within the dates specified).

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2. Any and all emails and text messages, (including any deleted files/records/history that fall within the dates specified) referencing Senator Kintner in any manner from April 1 2016 until present.

3. Any and all materials or research or documents, (including any deleted files/records/history that fall within the dates specified) concerning Executive Board actions relating to Senator Kintner from you or your staff from April 1, 2016 until present.

4. Any and all phone records from your office, (including any deleted files/records/history that fall within the dates specified) related to Executive Board action concerning Senator Kintner from April 1, 2016 until present.

Sometime on or around September 2, you received nearly identical responses to your requests from Senators Krist, Gloor, Hadley, Kuehn and Mello.[1] For example, in his letter to you, dated August 30, 2016, Senator Krist stated:

> Please reference your letter, dated August 29, 2016, requesting certain information from my office.
>
> As you may be aware, Neb. Rev. Stat. Section 84-712.05(12) states that correspondence, memoranda, and records of telephone calls relating to the performance of duties by a member of the Legislature are privileged records and may be withheld from the public by the lawful custodian.
>
> As such, I respectfully decline to honor your request for such information as it relates to the performance of my duties as a member of the Legislature. This is consistent with normal practice of other Legislative members who have received similar requests.

On September 12, 2016, you received Senator Campbell's response, which was dated and postmarked September 9, 2016. Her response was essentially the same as the responses you received from the other five senators.

You received no response from Senator Chambers.

DISCUSSION

The basic rule for open public records in Nebraska is found at Neb. Rev. Stat. § 84-712 of the Nebraska Public Records Statutes. That statute provides, in pertinent part:

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[1] We note that you provided this office Senator Krist's response on September 2, and the other four letters on September 7. While you were unable to provide us the exact date of receipt relating to these four senators, whose letters were dated August 31, 2016, you represent that receipt was "by Friday, September 2, or within a reasonable time allowing for mail delivery."

> **Except as otherwise expressly provided by statute**, all citizens of this state and all other persons interested in the examination of the public records as defined in section 84-712.01 are hereby fully empowered and authorized to (a) examine such records, and make memoranda, copies using their own copying or photocopying equipment in accordance with subsection (2) of this section, and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business and (b) except if federal copyright law otherwise provides, obtain copies of public records in accordance with subsection (3) of this section during the hours the respective offices may be kept open for the ordinary transaction of business.

(Emphasis added.) "Public records" are defined as follows:

> **Except when 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.

Neb. Rev. Stat. § 84-712.01(1) (2014) (emphasis added).

Section 84-712 expressly provides that the right to examine or obtain copies of public records exists "[e]xcept as otherwise provided by statute." The definition of "public records" in § 84-712.01(1) provides an exception from that definition "when any other statute expressly provides that particular information or records shall not be made public . . . ." Thus, in those instances where records requested under the NPRS are excepted from disclosure by statute, there is no right of access. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

In the present case, Senators Campbell, Gloor, Hadley, Krist, Kuehn, and Mello cited the exception in Neb. Rev. Stat. § 84-712.05(12) as their basis to withhold the requested records. That subsection provides, in pertinent part:

> The following records, unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties, may be withheld from the public by the lawful custodian of the records:

> * * *
>
> (12) Correspondence, memoranda, and records of telephone calls related to the performance of duties by a member of the Legislature in whatever form. The lawful custodian of the correspondence, memoranda, and records of telephone calls, upon approval of the Executive Board of the Legislative Council, shall release the correspondence, memoranda, and records of telephone calls which are not designated as sensitive or confidential in nature to any person performing an audit of the Legislature. A member's correspondence, memoranda, and records of confidential telephone calls related to the performance of his or her legislative duties shall only be released to any other person with the explicit approval of the member . . . .

We are aware of no Nebraska cases which discuss the exception provided in § 84-712.05(12). However, Attorney General opinions issued in 1992 and 1994, which discuss the exception in the context of audits of the Legislative Council by the Auditor of Public Accounts, provide some guidance. In Op. Att'y Gen. No. 92116 (October 8, 1992), the Attorney General stated:

> Obviously, [§§ 84-712 and 84-712.01] 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 . . . .[2]

Id. at 2; Op. Att'y Gen. No. 94080 (October 14, 1994) at 3. Consequently, your request directed to each senator for "[a]ny and all phone records from your office" would fall squarely within the exception. However, the exception applies only to phone records and does not provide a basis to withhold any records responsive to the other three items set out in your request.

We further note that the responses you received assert that the telephone records are "privileged" and, therefore, may be withheld under the claimed exception. Pursuant to Neb. Rev. Stat. § 27-501 (2008) of the Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 through 27-1103 (2008, Cum. Supp. 2014, Supp. 2015), no person has the

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[2] The exception became subsection (12) in 2002. *See* 2002 Neb. Laws LB 276, § 7.

privilege to refuse to be a witness, refuse to disclose any matter, refuse to produce any object or writing, or prevent another from being a witness or disclosing any matter or producing any object or writing, unless the rules, federal or state statutes or constitutional provisions provide a claim of privilege.[3] The Legislature has enacted a number of evidentiary privileges that are part of the Nebraska Evidence Rules, e.g., lawyer-client, physician-patient, husband-wife, trade secrets. The Legislature has also enacted other privileges which appear throughout the *Revised Statutes of Nebraska,* e.g., Neb. Rev. Stat. § 20-146 (2012) (the journalist-source privilege); Neb. Rev. Stat. § 77-376 (Supp. 2015) (the privilege against release of tax information); and Neb. Rev. Stat. § 38-3330 (Cum. Supp. 2014) (the veterinarian privilege). The exceptions in § 84-712.05 apply to requests for public records made under § 84-712. Ultimately, whether the exceptions constitute evidentiary privileges has not been definitely addressed by the Nebraska courts, so no clear answer exists.

However, while we generally disagree with the senators' assertion that the exception in the public records law makes their telephone records "privileged" *per se*, we recognize that members of the Legislature possess a privilege derived from art. III, § 26, of the Nebraska Constitution. This provision states that "[n]o member of the Legislature shall be liable in any civil or criminal action whatever for words spoken in debate." While no Nebraska court has interpreted this particular provision, courts in other jurisdictions have interpreted such clauses. In *Copsey v. Baer*, 593 So. 2d 685 (La. Ct. App. 1991), plaintiffs sought copies of the work files relating to two legislative bills under the Louisiana public records law. The request was denied on the basis that the requested material was privileged under La. Const. art. III, § 8, which established a privilege for legislative speech and, further, that the senators involved declined to waive the privilege. *Id.* at 685. The court determined that the issue was not whether the exceptions to disclosure under the public records law applied but whether the privileges clause applied vis à vis Louisiana's Right to Direct Participation Clause [La. Const. art. XII, § 3], which mandates the public's right to examine public documents, "except in cases established by law." *Id.* at 687. In other words, "[d]oes La. Const. art. III, § 8, grant immunity to the disclosure of legislative records?" *Id.* The court determined that the privileges clause was such a law and would prevail over the public records provision. The court concluded

> that "[r]educed to its essentials, the Copseys' demand for legislative files in this case calls for an inquiry into the motivations behind the preparation and introduction of legislative instruments into the Louisiana Legislature, an inquiry that goes to the very core of the legislative process." Accordingly, we find that the files requested are legislative acts, exempt from the provisions of Louisiana's public records law, as "otherwise specifically provided by" La. Const. art. III, § 8.

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[3] See generally *Mangrum on Nebraska Evidence*, Vol. 3, 2015 ed., at 330.

Id. at 689. To the extent the phone records of the state senators may be considered "privileged" is due to the fact that art. III, § 26 of the Nebraska Constitution establishes a legislative privilege, not because § 84-712.05(12) provides a basis to withhold the records. Further, we conclude that Neb. Const. art. III, § 26 grants the senators involved here immunity from the disclosure of any records responsive to the other three items in your request.[4]

TECHNICAL DEFECTS

Although we have concluded that the senators may withhold the requested records for the reasons stated above, we must point out certain technical defects which we have identified in their responses. First, the response letter provided to you by all six of the senators does not comport with the requirements in Neb. Rev. Stat. § 84-712.04, which states, in pertinent part:

> (1) Any person denied any rights granted by sections 84-712 to 84-712.03 shall receive in written form from the public body which denied the request for records at least the following information:
>
> (a) A description of the contents of the records withheld and a statement of the specific reasons for the denial, correlating specific portions of the records to specific reasons for the denial, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial;
>
> (b) The name of the public official or employee responsible for the decision to deny the request; and
>
> (c) Notification to the requester of any administrative or judicial right of review under section 84-712.03.

Neb. Rev. Stat. § 84-712.04 (2014). In this regard, the response letters do not include a description of the identified and withheld records, the name of the individual responsible for the decision to deny your request, or the required notification of your right to administrative or judicial review. We will advise the senators that, in the future, strict adherence to the statute is required in the event access to public records is denied by their offices.

Second, Senator Campbell's response was untimely. Neb. Rev. Stat. § 84-712(4) (2014) of the NPRS requires that, upon receipt of a written request for access to or copies

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[4] *See also Arizona v. Arpaio*, 314 F.R.D. 664 (2016) (Immigrant advocacy organization was unable to overcome qualified state legislative privilege to compel production of state senator's emails sought under a subpoena.); Steven F. Huefner, *The Neglected Value of Legislative Privilege in State Legislatures*, 45 Wm. and Mary L. Rev. 221 (2003).

of a public record, the custodian of that record must provide the requester an estimate of the expected cost of the copies and one of the following three things as soon as is practicable and without delay, but not more than *four business days* after actual receipt of the request:

> (a) access to or, if copying equipment is reasonably available, copies of the public record, (b) if there is a legal basis for denial of access or copies, a written denial of the request together with the information specified in section 84-712.04, or (c) if the entire request cannot with reasonable good faith efforts be fulfilled within four business days after actual receipt of the request due to the significant difficulty or the extensiveness of the request, a written explanation, including the earliest practicable date for fulfilling the request, an estimate of the expected cost of any copies, and an opportunity for the requester to modify or prioritize the items within the request.

Under § 84-712(4), Senator Campbell was required to respond to your request no later than Friday, September 2, 2016—four business days after actual receipt of the request. As previously noted, Senator Campbell's response was dated and postmarked September 9. We will remind the senator of the statutory timeframe, and suggest that, in the future, if she is unable to respond to a request for public records within the four business days "due to the significant difficulty or the extensiveness of the request," she has the option under the statute to delay the process, and set a reasonable time in the future to produce (or deny) any responsive records.

Third, Senator Chambers failed to respond to your request for public records. It is our understanding that Senator Chambers does not have a state-issued computer, so he would not be subject to any of your requests relating to computer records, e.g., browsing history. And as discussed above, Senator Chambers could withhold any telephone records pursuant to the exception in Neb. Rev. Stat. § 84-712.05(12). Notwithstanding the foregoing, Neb. Rev. Stat. § 84-712(4) mandates a response to your request in some manner, if only to advise that no responsive records exist. Not responding at all is not an option under the statute.

CONCLUSION

We conclude that the records requested under item four of your public records request may be properly withheld under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(12). We further conclude that a legislative privilege exists which provides an additional basis to withhold the remainder of the requested records.

If you disagree with the analysis we have set out above, you are free to pursue the remedy available to you under Neb. Rev. Stat. § 84-712.03(1)(a) (2014) of the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

Leslie S. Donley
Assistant Attorney General

c: Senator Kathy Campbell
Senator Ernie Chambers
Senator Mike Gloor
Senator Galen Hadley
Senator Bob Krist
Senator John Kuehn
Senator Heath Mello

49-1654-29

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September 21, 2016

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Dr. Paul Von Behren
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RE: *File No. 16-R-133; Nebraska State Senators Kathy Campbell, Ernie Chambers, Mike Gloor, Galen Hadley, Bob Krist, John Kuehn, and Heath Mello; Dr. Paul Von Behren, Petitioner*

Dear Senators and Dr. Von Behren:

We are writing in response to information received by this office from Senator Krist and Senator Chambers since the issuance of our disposition in the above referenced matter. In our letter, dated September 19, 2016, we stated that it was our understanding that Senator Chambers did not have a state-issued computer. However, according to Senator Krist, the senator does have a computer. This information does not change our analysis and answer to Dr. Von Behren, in which we concluded that a legislative privilege exists under Neb. Const. art. III, § 26, which would allow the senators involved to withhold records responsive to request item numbers 1-3.

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In addition, Senator Chambers advises our office that he did not receive Dr. Von Behren's public records request. Senator Chambers further advises that had he received the request, he would have responded accordingly.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

Leslie S. Donley
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49-1655-29