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DATE: August 26, 1992

SUBJECT: Authority of the Attorney General to Discuss the State's Legal Business with Members of the Legislature and the News Media

REQUESTED BY: Senator Howard Lamb

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

You request our opinion whether the Attorney General may discuss the State's legal business with members of the Legislature, the news media and the people of Nebraska. You specifically ask whether other state executive officials may prohibit the Attorney General from engaging in such discussions. Our detailed opinion on this issue is attached and is incorporated by reference. Our opinion is summarized as follows:

> We conclude that the Attorney General, under the Constitution and laws of the State of Nebraska, as an independently elected constitutional officer and as the State's Chief Legal Officer, charged by law with control of the State's litigation, has the independent power to determine what information in his possession (not defined by law to be a public record) should be disclosed and what information should be kept confidential in the interest of the people of the State of Nebraska. No elected or appointed official of the executive branch of Nebraska state government has been granted the constitutional authority to impose a "gag" order upon the Attorney General.
>
> Under the Constitution and laws of the State of Nebraska, no executive branch official may restrict the release of information by the Attorney General. The disclosure of information by the Attorney General pursuant to the power vested in him by his clients, the people of Nebraska, does not constitute any ethical violation for breach of confidence because the release of information to the people is clearly authorized by law. The Attorney General may, of course, assert any applicable privilege on behalf of the State if he determines it is in the best interest of the State to do so.

Because of the very direct, personal interest the Attorney General has in this question, I thought it advisable to seek an outside review and comment on the opinion by an expert on this subject.

The expert whose assistance I sought is Dean Dave Frohnmayer. Dean Frohnmayer is currently the Dean of the University of Oregon School of Law. Prior to becoming Dean of the law school, he served for nearly 11 years as the Attorney General of the State of Oregon. Prior to that, he taught constitutional law at the University of Oregon in Eugene for 10 years. Dean Frohnmayer is a 1962 graduate of Harvard College, magna cum laude, and received Bachelor and Master of Arts degrees from Oxford University in England, where he studied on a Rhodes Scholarship. He received his law degree from the University of California at Berkeley in 1967 and served as a member of the Board of Editors of the California Law Review. In addition, he is a prize winning author on U.S. Constitutional issues and a contributing author of the book, "State Attorneys General, Powers and Responsibilities."

Dean Frohnmayer is a former president of the National Association of Attorneys General. In 1985, Dean Frohnmayer received the University of Oregon's Pioneer Award for Outstanding Contributions to the State in politics and law. In my opinion, by education and experience, Dean Frohnmayer is the nation's leading expert on questions such as the one which you have asked.

Dean Frohnmayer's concurring opinion is attached for your reference and is hereby included as a part of this official opinion of the Attorney General.

Yours truly,

Don Stenberg
Attorney General

DS:bs

cc: Clerk of the Legislature

Under the Constitution and laws of the State of Nebraska, no executive branch official may restrict the release of information by the Attorney General. The disclosure of information by the Attorney General pursuant to the power vested in him by his clients, the people of Nebraska, does not constitute any ethical violation for breach of confidence because the release of information to the people is clearly authorized by law. The Attorney General may, of course, assert any applicable privilege on behalf of the State if he determines it is in the best interests of the State to do so.

The reasons for our conclusion may be summarized as follows. A private attorney representing a private client may not institute or settle litigation without the client's consent. The Attorney General of Nebraska, on the other hand, is authorized by common law and by statute to make those decisions, and all other decisions relating to litigation, for and on behalf of his clients, the people of the State of Nebraska, without the approval of the Governor or any other state official.

As early as 1887, the Nebraska Supreme Court recognized the authority of the Attorney General to proceed with the prosecution of a case over the objections of the state officials he was nominally representing. Under the Constitution and laws of the State of Nebraska, state officials cannot prevent the Attorney General from filing suit, cannot overrule the Attorney General's decisions on litigation strategy, and cannot prevent the Attorney General from settling lawsuits. It therefore axiomatically follows that those officials are not his clients in any traditional private law sense.

Under Nebraska law the Attorney General is both the authorized decision maker, so far as the State's legal business is concerned, and the State's attorney. As the State's legal decision maker, the Attorney General may release such information as he determines to be in the public interest.

In addition, as an independently elected constitutional officer the Attorney General's professional employment requires that he keep his clients, the people of Nebraska, informed concerning the State's legal business. Moreover, the people, through duly enacted laws, have declared it to be the policy of the State of Nebraska to conduct public business in public thereby authorizing the very disclosures at issue here.

Given the vast authority entrusted to the Attorney General, it is easy to understand why Nebraska Attorney General C.A. Sorensen reported to Governor Arthur J. Weaver on January 1, 1931, as follows:

> . . . in Nebraska the attorney general, in addition to the many constitutional and statutory powers and duties vested in him, is charged with the general duties and functions of guarding the rights and interests of the public vested in the office by the common law, and the office has long been recognized as one of great responsibility, in many respects equaling in importance that even of the governor.

I. Discussion

Under Canon 4 of the Code of Professional Responsibility, DR 4-101(B) provides: "[A] lawyer shall not knowingly: (1) Reveal a confidence or secret of his client." This generally prohibits an attorney from public discussion of information received in the course of representing a client, without the client's consent. The foundation of this provision is the attorney-client relationship. Thus, to ascertain the applicability of this provision to the legal relationships between the Nebraska Attorney General and the state officials and agencies receiving legal services from the Attorney General, we address the following issues: (1) who the Attorney General ultimately represents; and (2) who is responsible to and who has the authority to control the State's litigation. To address these questions it is essential to examine the role and duties of the Attorney General.

A. The Role and Duties of the Attorney General

The role of the Attorney General has been described in general terms as follows:

> The Attorney General is one of the elected constitutional officers of the State of Nebraska. The duties and authority of the office are derived from the State Constitution, statutory enactments, and the common law. Generally speaking, the Attorney General is responsible for the representation of the state in all legal matters, both civil and criminal, where the state is named as a party or may have an interest in the outcome of the litigation or dispute.

1979-80 Report of the Attorney General (foreword by Attorney General Paul L. Douglas).

Pursuant to Article IV, Section 1 of the Constitution of the State of Nebraska, the Attorney General is an executive officer. See State ex rel. Caldwell v. Peterson, 153 Neb. 402, 407, 45 N.W.2d 122 (1950); State ex rel. Howard v. Marsh, 146 Neb. 750, 753, 21 N.W.2d 503 (1946); Opinion of the Attorney General No. 89033, April 4, 1989. Therefore, the Attorney General has those powers provided in Article IV, section 1 of the Constitution of the State of Nebraska. This section provides that "Officers in the executive department of the state shall perform such duties as provided by law." Id. In Nebraska, the "law" includes constitutional provisions, statutory enactments and the common law.

1. Common Law and Constitutional Duties

Under common law the Attorney General has inherent power and authority to initiate and defend actions, to make decisions regarding strategy, and to negotiate and enter into settlements.

The common law is specifically "adopted and declared to be the law within the State of Nebraska" where it is "applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state." Neb.Rev.Stat. §49-101 (Reissue 1988).

In addition to the statutory codification of common law powers, the common law authority of the Attorney General has been repeatedly recognized by the Nebraska Supreme Court. "By the great weight of authority, it is now held that the Attorney General is clothed and charged with all the common-law powers and duties except in so far as they have been limited by statute. . . . As the chief law officer of the state, he may, in the absence of some express legislative restriction to the contrary exercise all such power and authority as public interests may from time to time require." State v. State Board of Equalization and Assessment, 123 Neb. 259, 243 N.W. 264 (1932). See also Babcock, 19 Neb. at 239.

In State v. Finch, 128 Kan. 665, 280 P. 910 (1929) (followed by the Nebraska Supreme Court in State Board of Equalization and Assessment, 123 Neb. at 262) the court set forth a detailed discussion on the powers and duties of the office of the Attorney General. The court concluded "the Attorney General's powers are as broad as the common law unless restricted or modified by statute." Id. at 1375.

As recently as 1984, the Nebraska Supreme Court found the Attorney General has "inherent powers" in addition to those provided by statute. State v. Douglas, 217 Neb. 199 at 237-238, 349 N.W.2d 870 (1984) ("We recognize that the Attorney General has some duties which are not purely statutory and are sometimes referred to as the common-law duties of the office.") (citing State Board of Equalization and Assessment, 123 Neb. at 242).

Thus, the Nebraska Supreme Court has rejected those decisions holding that constitutional provisions providing for powers and duties "prescribed by law" mean the Attorney General is without common law powers. See, e.g., In re Sharp's Estate, 63 Wis.2d 254, 217 N.W.2d 258, 262 (Wis. 1974); Shute v. Frohmiller, 53 Ariz. 483, 90 P.2d 998, 1001 (Ariz. 1939). Instead, Nebraska follows the majority rule as recently set forth in Ex parte Weaver, 570 So.2d 675 (Ala. 1990).

In Ex parte Weaver, the Alabama Supreme Court construed a constitutional provision identical to that in the Nebraska Constitution regarding the duties of the Attorney General. The court's analysis is clearly applicable to the Attorney General of Nebraska.

> Article V, Sec. 137, of the Alabama Constitution provides: "The attorney general . . . shall perform such duties as may be prescribed by law." It has been suggested that this wording restricts the authority of the attorney general. However, this is not the general rule. The Supreme Court of Utah in Hansen v. Barlow, 23 Utah 2d 47, 456 P.2d 177 (1969), adopted the reasoning of the Supreme Court of Montana in State ex rel. Olsen v. Public Service Comm'n, 129 Mont. 106, 283 P.2d 594 (1955), as to the general rule. The Utah Supreme Court noted that Article VII, Sec. 18 of the Utah Constitution provides: "The Attorney General shall be the legal adviser of the State Officers and shall perform such other duties as may be provided by Law." 23 Utah 2nd at 48, 456 P.2d at 178. This section of the Utah Constitution is similar to Article V, Sec. 137, of the Alabama Constitution. The Utah Supreme Court, as the Montana Supreme Court had done, reasoned that this language, rather than limiting the powers of the attorney general, grants the attorney general the powers that were held by him at common law:

> It is the general consensus of opinion that in practically every state of this Union whose basis of jurisprudence is the common law, the office of attorney general, as it existed in England, was adopted as a part of the governmental machinery, and that in the absence of express restrictions, the common-law duties attach themselves to the office so far as they are applicable and in harmony with our system of government.
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> Hansen v. Barlow, 23 Utah 2d 47, 456 P.2d 177, 178 (1969).

Id. at 684. See also State of Fla. ex rel. Shevin v. Exxon Corp, 526 F.2d 266, 269 (5th Cir. 1976), cert. den., 429 U.S. 829 (1976).

The common law powers of the Attorney General are broad and well recognized. As the chief law officer of the State, the Attorney General is generally authorized to exercise whatever legal authority the public interests may require. He is empowered to make any disposition of the State's litigation which he deems for its best interest. In a 1989 opinion, Attorney General Robert Spire wrote:

> The Attorney General and his designees are vested with broad common law and statutory powers to carry out the duties of the Office. The inherent power and authority of the Attorney General to initiate and defend actions, to make decisions regarding strategy, and to negotiate and enter into settlements was addressed in State Board of Equalization and Assessment, 123 Neb. 259, 242 N.W. 609, (cited with approval in Douglas, 217 Neb. 199, 349 N.W.2d 870). There, the Nebraska Supreme Court held that the Attorney General is the principal law officer of the state. Id. at 262. In this regard, the court stated:
>
> > We find that a late case, which is in line with the weight of authority, is State v. Finch, 128 Kan. 665, 66 A.L.R. 1369, which traces the powers and duties of the Office of the Attorney General at common law from the earliest times to the present time, and holds: `Ordinarily the Attorney General, both under common law and by statute, is empowered to make any disposition of the state's litigation which he deems for its best interest. (Emphasis added.)

Id. at 261. Moreover, the court stated that the Attorney General is clothed and charged with all common law powers and duties except to the extent that they are limited by statute; and, as the chief law officer of the state, he is authorized to exercise all such power and authority as the public interests may require, absent some express legislative restriction to the contrary. Id. at 261-262; Douglas, 217 Neb. at 237.

These common law powers and duties were later codified by the Nebraska Legislature. Neb.Rev.Stat. §84-202 (Reissue 1987) provides:

> The Department of Justice shall have the general control and supervision of all actions and legal proceedings in which the State of Nebraska may be a party or may be interested, and shall have charge and control of all the legal business of all departments and bureaus of the state, or of any office thereof, which requires the services of attorney or counsel in order to protect the interest of the state. (Emphasis added.)

Opinion of the Attorney General No. 89033, April 10, 1989 at 4. After its initial adoption, §84-202 was reenacted by the Legislature in 1943 and again in 1953. Under the rules of statutory construction, "The Legislature is presumed to have known the effect which the statute originally had and by its enactment to have intended that effect to continue. Halstead v. Rozmiarek, 167 Neb. 652, 66, 94 N.W.2d 37 (1959). Thus, §84-202 must be construed as encompassing common law powers and duties consistent with the Nebraska Supreme Court's decisions cited above.

2. **Statutory Duties**

In addition to the previously quoted statute (§84-202), other statutory provisions also delineate powers of the Attorney General. Neb.Rev.Stat. §84-203 provides, "The Attorney General is authorized to appear for the state and prosecute and defend, in any court or before any officer, board or tribunal, any cause or matter, civil or criminal, in which the state may be a party or interested."

In addition, section 84-205 (Supp. 1991) provides:

> The duties of the Attorney General shall be:
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> (1) To appear and defend actions and claims against the state;
> . . .
>
> (4) At the request of the Governor, the head of any executive department, the Secretary of State, State Treasurer, Auditor of Public Accounts, Board of Educational Lands and Funds, State Department of Education or Public Service Commission, to prosecute any official bond or any contract in which the state is interested which is deposited with any of them and to prosecute or defend for the state all civil or criminal actions and proceedings relating to any matter connected with any such officers' departments if after investigation, he or she is convinced there is sufficient legal merit to justify the proceeding. Such officers shall not pay or contract to pay from the funds of the state any money for special attorneys or counselors-at-law unless the employment of such special counsel shall be made upon the written authorization of the Governor or the Attorney General;
> . . .
>
> (9) To appear for the state and prosecute and defend all civil or criminal actions and proceedings in the Court of Appeals Supreme Court in which the state is interested or a party. When requested by the Governor or the Legislature, the Attorney General shall appear for the state and prosecute or defend any action or conduct any investigation in which the state is interested or a party before any court, officer, board, tribunal or commission. . . .

The Attorney General is also required, under certain circumstances, to sue the same state officials to whom he provides legal services:

> When the Attorney General determines, after such investigation as shall be necessary, that any agency of state government charged with the implementation of any act of the Legislature is failing or refusing to implement such act, he shall notify the agency head by

> letter of such determination. If, within ten working days of the receipt of such letter, it is not established to his satisfaction that steps to implement the act are being expeditiously taken, and there is no valid reason for failing to do so, such as failure of an appropriation, the Attorney General shall file an action in the appropriate court to compel implementation. In any such action the department head or the agency head shall defend the action. The costs and a reasonable attorney's fees as fixed by the court shall be paid out of the appropriation to the department.

Neb.Rev.Stat. §84-216 (Reissue 1987).

B. The Duty of the Attorney General to Represent the Public

Although the Attorney General provides legal services to the various agencies and officials of the State, the Attorney General is the "public's" or "people's" lawyer and must simultaneously represent the legal interests of the public and the State as a whole. The role of the Attorney General as the public's lawyer has long been recognized.

In State v. Public Service Commission, 283 P.2d 594 (Mont. 1955), the court stated, "`Obviously there can be no dispute as to the right of an attorney general to represent the state in all litigation of a public character. The attorney general represents the public and may bring all proper suits to protect its rights.'" Id. at 599 (quoting 5 Am.Jur., Attorney General, §8, p.238) (emphasis added). In Conn. Com'n v. Conn. Freedom of Information Commission, 387 A.2d 533 (Conn. 1978), the court stated "the real client of the attorney general is the people of the state." Id. at 538 (emphasis added). See also Secretary of Administration and Finance v. Attorney General, 326 N.E.2d 334, 338 (Mass. 1975) ("The Attorney General represents the Commonwealth as well as the Secretary, agency or department head who requests his appearance. (Citation omitted). He also has a common law duty to represent the public interest.")

The role of the Attorney General as the public's lawyer has long been recognized in Nebraska as well. In the 1929-30 Report of the Attorney General dated January 1, 1931, Attorney General C.A. Sorensen reported to Governor Arthur J. Weaver on the duties of the Attorney General and the history of the office.

> The office of the attorney general is one of the most ancient and important that has come down to us from the Anglo-Norman system of government. As early as 1253

mention is made of attornatus regis or the King's attorney, and it is certain that the office had already long been in existence at that time. It was not, however, until the year 1472 that the first formal patent of appointment was issued.

The functions of the attorney general were, from the first, recognized as of great constitutional importance. He was considered not only the legal representative of the crown but also the parens patriae or guardian of public interests. His duty was not solely nor even primarily to represent and protect the rights of the King but to represent and protect the rights of the public in all matters tinged with a public interest.

When the American colonies, after having established their independence, proceeded to form a federal government, they recognized that, although the new government would not tolerate a king, a necessity still existed for a public officer similar to that of the British officer the attorney general, who should be charged with the protection of public rights and the enforcement of public duties. Accordingly, in organizing the judicial business of the government, they made provision for an attorney general of the United States who should be at the head of the department of justice, and whose duties and functions were essentially the same as those of the attorney general of Great Britain, but who should receive his commission by appointment from the president.

When the government of Nebraska was organized it was, of course, modeled closely after that of the federal government except that provision was made that the attorney general should be an elective and not an appointive office.

Thus in Nebraska the attorney general, in addition to the many constitutional and statutory powers and duties vested in him, is charged with the general duties and functions of guarding the rights and interests of the public vested in the office by the common law, and the office has long been recognized as one of great responsibility, in many respects equaling in importance that even of the governor. As head of the state's department of justice he is, within the scope of his department, independent of and co-ordinate with all other executive officers.

> By reason of his independent status as principal law officer of the state and head of the department ofjustice the attorney general has authority to initiate actions in the name of the state on his own motion without authorization of the governor or other state officer. This important power was jealously guarded by the common law and has been carefully preserved by constitutional and statutory enactments.

(Emphasis supplied).

In the 1931-32 Report of the Attorney General dated January 4, 1933, Attorney General C.A. Sorensen reported to Governor Charles W. Bryan on the then "recent" case of State ex rel. Sorensen, Attorney General v. State Board of Equalization and Assessment, 123 Neb. 259, 242 N.W. 609 (1932). In this case, the Nebraska Supreme Court stated, with respect to the Attorney General,

> As the chief law officer of the state, he may, in the absence of some express legislative restriction to the contrary exercise all such power and authority as public interests may from time to time require.
>
> The attorney general is the principal law officer of the state.

Id. at 261-62.

Unlike executive officers who are appointed, the Attorney General is an independent constitutional officer. In the 1935-36 Report of the Attorney General dated January 7, 1937, Attorney General William H. Wright discussed a proposed constitutional amendment which would have made the office of Attorney General an appointed rather than elected position. Wright supported the idea of making the Attorney General an appointee of the Supreme Court, but opposed allowing the Governor to make such an appointment. His discussion clearly points out the independence of the Attorney General, especially in light of the fact the Attorney General remains an elected constitutional officer today.

> If he were to be appointed by the Governor, there is apt to be a tendency on his part to arrive at his decisions in accordance with the wishes of the party who appointed him. For example, -- if the Governor should be advocating or sponsoring any particular type of legislation, the Attorney General might feel that loyalty required him to give an opinion on the validity of such legislation which upheld the ideas of the Governor who appointed him. Such an Attorney General would not be

> able to give an opinion independent of all outside influences. Then, too, it could be possible, as has been demonstrated in other states, for a Governor to demand that his appointee prepare opinions in keeping with the views of the Governor. In other words, there is a possibility that an Attorney General who was appointed by the Governor might be nothing more than the Governor's "yes man". His opinions might be merely the Governor's opinions given over the signature of the Attorney General. . . .
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> Under the present Constitution the Governor and the Attorney General are members on the Pardon Board, . . . If the Attorney General were to be appointed by the Governor and still remained as a member of such Boards, the effect would be the giving of an additional vote to the Governor in the conduct of the affairs of such Boards. Either through fear of removal, or through loyalty to the person responsible for his appointment, there would be a strong tendency on the part of the Attorney General to vote with the Governor, or to adopt the Governor's views.
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> On the Pardon Board, for instance, where there are only three members, such a system would make it possible for the Governor to have full power to grant or to deny pardons to inmates of the penal institutions. The present Pardon Board was created in order to take away from the Governor his pardoning powers and the effect of the constitutional amendment setting up the present Pardon Board might be destroyed by making the Attorney General the appointee of the Governor.

Thus, the Attorney General of Nebraska is an independent constitutional officer who has the duty to represent and protect the rights of the public. The clients of the Attorney General are the people of the State. The Attorney General's ethical obligation is therefore to the public and not to any one state official. The duty of the Attorney General is to uphold the laws and constitution put in place by the people, not to represent the personal desires of individual office holders. In a dispute between the Governor and the Public Service Commission, for exam e, the Attorney General must give his loyalty to the constituti and laws, not to an individual executive or group of executives.

C. Applicability of DR 4-101(B) to the Attorney General

DR 4-101(B) of Canon Four is not all-encompassing. A prerequisite to its application is the existence of an attorney-client relationship. Therefore, the identity of the "client" is a threshold determination. As previously discussed, the Attorney General's client is the public and his duty is owed to upholding and defending the constitution and laws adopted by the people. Furthermore, several exceptions to DR 4-101(B) are set forth in Ethical Consideration 4-2.

1. The Attorney-Client Relationship

It is clear from the previously cited authorities the Attorney General, because of the nature of his or her office, is not in an ordinary attorney-client relationship with state agencies and officials.

The applicability of the Code of Professional Responsibility to the attorney general was the subject of Conn. Com'n v. Conn. Freedom of Information Commission, 387 A.2d 533 (Conn. 1978). The court discussed the "unique status, powers and duties of the attorney general and his assistants and his dual position as a constitutional officer of the state and at the same time an attorney and member of the Connecticut bar and, as such, bound by the ethical standards which govern the legal profession." Id. at 535. In finding the attorney general had committed no professional impropriety, the court stated:

> The attorney general of the state is in a unique position. He is indeed sui generis. As a member of the bar, he is, of course, held to a high standard of professional ethical conduct. As a constitutional executive officer of the state . . . he has been entrusted with broad duties as its chief civil law officer and . . . he must . . . fulfill his `public duty, as Attorney General, and his duty as a lawyer to protect the interest of his client, the people of the State.' This special status of the attorney general - where the people of the state are his clients - cannot be disregarded in considering the application of the provisions of the code of professional responsibility to the conduct of his office.
>
> We find merit in the observations and the conclusions of the Illinois Supreme Court . . . in [E.P.A. v. Pollution Control Board, 372 N.E.2d 50, 52-53] . . . That court observed: `. . . the Attorney General's

> powers encompass advising and representing the State and all agencies in all legal proceedings. In addition, although an attorney-client relationship exists between a State agency and the Attorney General, it cannot be said that the role of the Attorney General apropos of a State agency is precisely akin to the traditional role of the private counsel apropos of a client . . . The Attorney General's responsibility is not limited to serving or representing the particular interests of State agencies . . . but embraces serving or representing the broader interest of the State.
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> . . .
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> Clearly, the relationship between the Attorney General and [the state agencies] is quite different from that between private counsel and a client who retains him.

Id. at 537-538. See also State v. Mississippi Public Service Com'n, 418 So.2d 779, 782 (Miss. 1982).

In Ex parte Weaver, 570 So.2d 675 (Ala. 1990), the court set forth a detailed analysis of the powers of the office of attorney general and discussed the unique character of the office in terms of the legal role of the attorney general. The Weaver court quoted extensively from Feeney v. Commonwealth, 373 Mass. 359, 366 N.E.2d 1262, 1265 (1977). In Feeney, the Supreme Court of Massachusetts addressed the question "whether the power of the Attorney General to establish a coherent legal policy for the Commonwealth includes the authority to chart a course of legal action which is opposed by the administrative offices he represents."

> The authority of the Attorney General, as chief law officer, to assume primary control over the conduct of litigation which involves the interests of the Commonwealth has the concomitant effect of creating a relationship with the State officers he represents that is not constrained by the parameters of the traditional attorney-client relationship. The language of G.L. c. 12, §3, its legislative history and the history of the office indicate that the Attorney General is empowered when he appears for State officers to decide matters of legal policy which would normally be reserved to the client in an ordinary attorney-client relationship.

Weaver, 570 So.2d at 681 (quoting Feeney, 366 N.E.2d at 1266) (emphasis added).

The Weaver court concluded,

> This Massachusetts Supreme Court decision explains the unusual nature of the office of the attorney general and the reason that that office is empowered to control the litigation of state agencies. It further recognizes that the attorney general's relationship to the heads of state agencies is not the ordinary attorney-client relationship.

Weaver, 570 So.2d at 681 (emphasis added). See also Schnapper, Legal Ethics and the Government Lawyer, 32 Record of the Ass'n of the Bar of the City of N.Y., 649, 654 (1977) ("The relationship of agency officials to government counsel is not that of client and attorney in any ordinary sense. . . .") ("It is the law, and not the whims of persons momentarily in the employment of the executive branch, which embodies the interests and desires of the client whom a government attorney is retained to represent.").

Even in the United States government, where the Attorney General is appointed (subject to Senate confirmation), a 19th Century holder of that office, Caleb Cushing long ago took the official position that the Attorney General "is not a counsel giving advice to the government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation." Cushing, Report of the Attorney General, S. Excc. Doc. No. 55, 33rd Cong. 1st Sess. 6 and H.R. Exec. Doc. No. 95, 33rd Cong. 1st Sess. 6 (1854), cited with approval in Zimmerman v. Schweiker, 575 F.Supp. 1436, 1440 (E.D.N.Y. 1983).

The fact that the Nebraska Attorney General is not in a traditional attorney-client relationship with state agencies and officials is virtually self-evident when one considers the role of the Attorney General. First of all, the Attorney General may sue the same state officials to whom he provides legal services. See Neb.Rev.Stat. §84-216.

> The Attorney General represents the public interest, and as an incident to his office he has the power to proceed against public officers to require them to perform the duties that they owe to the public in general, to have set aside such action as shall be determined to be in excess of their authority, and to have them compelled to execute their authority in accordance with law.

State v. Public Service Commission, 283 P.2d 594, 600-601 (Mont. 1955) (quoting Attorney General v. Trustees of Boston, El.R.Co., 67 N.E.2d 676, 685).

Second, legal opinions issued by the Attorney General to state officials are public records. Nebraska Attorneys General have published such opinions since at least 1891 (over 100 years). In a traditional attorney-client relationship such opinions would be confidential.

Third, the Attorney General has charge and control of all litigation in which the State has an interest. See Neb.Rev.Stat. §84-202. This principle was recognized by the Nebraska Supreme Court as early as 1887. In State v. F.E. & M.V.R.R., 22 Neb. 313, 35 N.W. 178 (1887), the court held the attorney general could proceed with the prosecution of a case against the protest of the Board of Transportation which he was representing. "The Attorney General is thus the law officer of the State, and intrusted by law with the management and control of all cases in which the state is a party or interested. The majority of the state board of transportation, therefore, cannot control his action. . . ." Id. at 318. This same principle was expressed recently in Weaver, 570 So.2d at 679.

> Ordinarily the attorney general, both under the common law and by statute, is empowered to make any disposition of the state's litigation which he deems for its best interest. His power effectively to control litigation involves the power to discontinue if and when, in his opinion, this should be done. Generally, therefore, the attorney general has authority to direct the dismissal of proceedings instituted in behalf of the state.

Weaver, 570 So.2d at 680 (quoting 5 American Jurisprudence 240, §11) (emphasis added).

The Weaver court held the attorney general had the authority to move to dismiss proceedings brought by the state insurance department over the objection of the commissioner of insurance. "The investment of such discretion is based on the premise that the attorney general should act on behalf of the public interest, or as the `people's attorney.'" Weaver, 570 S.2d at 677. Thus, unlike the usual situation where an attorney is bound to conduct litigation according to the wishes of the client, the Attorney General has charge and control of the State's litigation. See also Frohnmayer v. State Acc. Ins. Fund Corp., 660 P.2d 1061 (Or. 1983) (all the State's legal affairs are under the charge, control and supervision of the Attorney General and state agencies may not hire

outside counsel without the Attorney General's approval); Schnapper, Legal Ethics and the Government Lawyer, 32 Record of the Ass'n of the Bar of the City of N.Y., 649, 651, 653 (1977).

Fourth, the Attorney General may be requested to pursue litigation by state officials with potentially divergent interests. Pursuant to Neb.Rev.Stat. §84-205(9) (Supp. 1991), the Attorney General may be requested to prosecute and defend actions at the request of the Governor or the Legislature. This provision is structurally incompatible with any notion, for example, that the Governor is the Attorney General's client in the ordinary sense. The Governor's wishes may or may not be the same as the Legislature. The Attorney General clearly represents the public interest and not only that of the Governor.

Fifth, by tradition the Governor of Nebraska appoints a legal counsel to the Governor. The current Governor has done this and the current Attorney General held this position under Governor Charles Thone (Paul Douglas being the Attorney General at that time.) The Governor's legal counsel serves directly under the Governor, and is his or her official personal counsel. The Governor may establish a traditional attorney-client relationship with such counsel and have full attorney-client privilege. The existence of this arrangement further evidences the independence of the Attorney General and his role as the public's lawyer rather than the Governor's.

Sixth, the separation of powers under the Nebraska Constitution makes an ordinary private sector type attorney-client relationship impossible for the Attorney General with respect to other elected or appointed state officials. The Nebraska Constitution clearly provides for the separation of governmental powers into three branches or divisions. Neb.Const. Art. II, §1. The Nebraska Constitution further divides the duties of the executive branch and gives certain executive powers to the Governor, Attorney General, Treasurer, Public Service Commission, Board of Regents, etc. See, e.g., Neb.Const. Art. IV, §§1, 20, 28; Art. VII, §§2, 6. The separation of powers principle exists to prevent tyranny and abuse of power. This principle underlies the unique position of the Attorney General with respect to other state officers or agencies to which he provides legal services. An ordinary private sector type attorney-client relationship is not consistent with this principle in the context of the Attorney General's representation of other state officers or agencies. See Schnapper, Legal Ethics and the Government Lawyer, 32 Record of the Ass'n of the Bar of the City of N.Y., 649, 653 (1977) ("The very

purpose of providing for the election of such legal counsel [referencing an elected attorney general] is to assure their independence from other elected and appointed officials.").

In sum, the Attorney General represents the people of the State and not simply the State official or agency to which he may be providing legal services.

> The role of the Attorney General when he represents the Commonwealth and State officers in legal matters is markedly different from the function of the administrative officials for whom he appears. Not only does the Attorney General represent the Commonwealth as well as the members of the Commission and the Personnel Administrator in accordance with G.L. c. 12, §3, `[h]e also has a common law duty to represent the public interest. . . Thus, when an agency head recommends a course of action, the Attorney General must consider the ramifications of that action on the interests of the Commonwealth and the public generally, as well as on the official himself and his agency. To fail to do so would be an abdication of official responsibility.

Weaver, 570 So.2d at 681 (quoting Feeney, 366 N.E.2d at 1266) (emphasis added). See also Secretary of Admin. & Fin. v. Attorney General, 326 N.E.2d 334, 338 (Mass. 1975); D'Amico v. Board of Medical Examiners, 520 P.2d 10, 21 (Cal. 1974).

A few courts have held the Attorney General is in a traditional attorney-client relationship with state officials and agencies. However, such decisions are clearly a minority view. In State ex rel. Caryl v. MacQueen, 385 S.E.2d 646 (W.Va. 1989), a dispute arose involving the Attorney General and the Tax Commissioner. The court stated:

> We are concerned, however, about the Attorney General's cavalier attitude regarding the dissemination of information to which he became privy in the course of his position as Attorney General. Thus, we choose to address the remaining issue of whether the relationship between the Attorney General and the State Tax Commissioner is that of an attorney to client, which would have precluded the Attorney General from disclosing the . . . tax compromise information existing in his files.

Id. at 647.

The court concluded "the relationship between the Attorney General and the Tax Commissioner is clearly one of an attorney to his client and shall be treated as such by the Attorney General with regard to the confidentiality of the information." Id. at 649.

The MacQueen decision appears to be the result of the West Virginia Supreme Court taking sides in a political dispute rather than the result of a reasoned legal analysis. First of all, and perhaps most importantly, the MacQueen court cites no legal authority whatsoever for its conclusion. Second, the issue of confidentiality was not even before the court. See id. at 650, McHugh, J. dissenting. Third, the MacQueen court incorrectly stated, "we find [no] authority for the Attorney General's proposition that he acted as an independent executive officer." Id. at 648. The authorities are numerous to the contrary.

The reason the MacQueen decision is at odds with the vast majority of cases, and cannot be relied upon as precedent, is that West Virginia has adopted a unique view of the authority of its attorney general. In Manchin v. Browning, 296 S.E.2d 909 (W.Va. 1982), the court held that, "the Attorney General of West Virginia does not possess the common law powers attendant to that office in England and in British North America during the colonial period." The court based its holding on the historical development of the office of the attorney general in West Virginia. The office was part of the judicial branch of government under a previous constitution. The court held "his return to the executive department did not revive the common law powers of the office." Id. at 915. The court then concluded:

> The [West Virginia] Legislature has thus created a traditional attorney-client relationship between the Attorney General and the State officers he is required to represent. It is well settled that in the control of litigation, the Attorney General has the duty to conform his conduct to that presented by the rules of professional ethics . . . As a lawyer and an officer of the courts of this State, the Attorney General is subject to the rules of this Court governing the practice of law and the conduct of lawyer, which have the force and effect of law. . . .
>
> Among the codified rules of this Court to which the Attorney General must conform his conduct is the Code of Professional Responsibility which is applicable to all

> lawyers in this state. Briefly, the Code mandates that the Attorney General . . . shall preserve the confidence and secrets of a client. . . .

Id. at 920.

The Manchin court acknowledged that in other jurisdictions "the Attorney General retains the common law powers and duties of his office," and that in other jurisdictions [including Nebraska] attorneys general "ha[ve] exclusive control of litigation." Id. at 921, n.6. This is particularly significant since the court in MacQueen based its conclusion that the West Virginia Attorney General was in an attorney-client relationship with the Tax Commissioner, in part, on the fact that "the Tax Commissioner, like any other client in an attorney-client relationship, was not required to accept that advice [of the attorney general]." MacQueen, 385 S.E. 2d at 648-49. The Manchin court recognized this was contrary to the majority rule, and specifically cited a Nebraska case as an example. Manchin, 296 S.E.2d at 921, n.6 (citing State ex rel. Board of Transportation v. Fremont, E. & M.V.R. Co., 22 Neb. 313, 35 N.W. 118 (1887)).

Even under the unique circumstances present in West Virginia, one justice wrote a scathing dissent to Manchin. He stated "let me disassociate myself entirely from any suggestion of impropriety the Attorney General may infer from the majority's lengthy peroration on professional ethics. To the extent that the majority finds in the Code of Professional Responsibility guidance about the political role of the office of the Attorney General, I disagree." Id. at 923, Neely, J., dissenting. In his dissent, Justice Neely noted "Sir William Holdsworth explains at some length the political forces which, by the end of the fifteenth century in England, `have caused the king's attorney to become an official wholly different from the ordinary professional attorney, and have thus given to his office a wholly unique character.'" Id. at 923, n.1. "His primary duty has always been, is now, and should always be to the State. In this sense, State officials are not entitled to the services of the office of the Attorney General in a traditional attorney-client relationship." Id. (emphasis added).

Another case taking a minority view was Tice v. Department of Transp., 312 S.E.2d 241 (N.C. App. 1984). In Tice, the court held the attorney general of North Carolina could not enter a consent judgment without the consent of the agency involved. "We believe . . . that the legislature intended that when the Attorney General represents a state department . . . the traditional attorney-client relationship should exist." Id. at 245. As discussed above, this is contrary to the majority view. It is not clear that Tice even

represents the law in North Carolina, as it is a decision of an intermediate appellate court. In Martin v. Thornburg, 359 S.E.2d 472 (N.C. 1987), the North Carolina Supreme Court stated, "In the absence of explicit legislative expression to the contrary, the attorney general possesses entire dominion over every civil suit instituted by him in his official capacity . . ., and his authority extends as well to control of defense of civil suits against the state, its agencies, and officers. Id. at 479 (quoting 7A C.J.S. Attorney General §12 (1980)). See also Hendon v. North Carolina State Bd. of Elections, 633 F.Supp. 454 (W.D.N.C. 1986). In Hendon, the court distinguished Tice. The court also noted,

> Because the common law is in full force and effect in North Carolina . . . and bearing in mind the axiom that statutes in derogation of the common law must be strictly construed . . . the court must resolve any ambiguity in North Carolina statutory provisions defining the reach of the Attorney General's authority in favor of a broader scope consistent with the common law.

Id. at 458-59 (quoting Nash County Board of Education v. Biltmore, 464 F.Supp. 1027 (E.D.N.C. 1978), aff'd, 640 F.2d 484 (4th Cir. 1981) (emphasis added).

In Indiana State Highway Com'n v. Morris, 528 N.E.2d 468 (Ind. 1988), one judge wrote a concurring opinion in which he discussed the attorney-client relationship. "The relationship of attorney and client clearly applies to the Attorney General and the state agencies he presents, and the attorney-client privilege should protect communications exchanged in that relationship." Id. at 474, Shepard, C.J. concurring. Aside from the fact that the opinion is only a concurring opinion and is entirely dicta, the more important point is that the judge's conclusion is in the context of the state's right to prevent disclosure of documents to adverse parties. The judge did not discuss the attorney-client relationship in terms of the Attorney General's ability to voluntarily disclose information, but rather in terms of the State's ability to prevent discovery, by legal opponents, of documents provided to the attorney general by agencies in anticipation of litigation. There is no question the Attorney General, on behalf of the State, may withhold documents or information from discovery in this context.

Finally, in Robinson v. State, 63 N.W.2d 521 (N.D. 1954), the court held the attorney general could not compromise a subrogation claim of the Workmen's Compensation Bureau.

> [W]e have reached the conclusion that the relationship of the Attorney General and the Workmen's Compensation Bureau with respect to litigation in which the Bureau is involved is no more or less than the ordinary relationship of attorney and client and that it should be governed by the rules which govern that relationship.

Id. at 524. This holding, of course, is contrary to the majority rule and, more important, is contrary to Nebraska law. See State v. State Board of Equalization and Assessment, 123 Neb. 259, 261 (1932); State v. F.E. & M.V.R.R., 22 Neb. 313, 35 N.W.178 (1887).

In sum, the majority rule is that the Attorney General represents the public generally, and not just the particular agency or official which may be involved. See Weaver, 570 So.2d at 683 (quoting E.P.A. v. Pollution Control Bd., 372 N.E.2d 50 (1977)) ("He or she is the law officer of the people"). As the Weaver court noted, "the Attorney General's responsibility is not limited to serving or representing the particular interests of state agencies . . . but embraces serving or representing the broader interests of the State." Id.

The unique character of the office of the Attorney General obviously precludes the existence of an ordinary private sector type "attorney-client" relationship as contemplated by Canon 4 of the Code of Professional Responsibility. The Attorney General is sui generis.

2. Exceptions to DR 4-101(B)

Several exceptions to Canon Four are recognized in the Code of Professional Responsibility. Ethical Consideration 4-2(EC 4-2) provides:

> The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law.

As previously noted in this opinion, a private attorney representing a private client may not institute or settle litigation without the client's consent. The Attorney General, on the other hand, is authorized by common law and by statute to make those decisions, and all other decisions relating to litigation, for and on behalf of his clients the people of the State of Nebraska. Therefore, as the authorized decision maker for his

clients, the Attorney General is authorized to consent to the disclosure by his office of such information as he considers in the best interest of the people of the State of Nebraska.

Also, the Attorney General's professional employment requires that the Attorney General keep his clients, the people of Nebraska, informed concerning the legal matters in which they have an interest. See In re Conduct of Lasswell, 673 P.2d 855, 858 (Or. 1983) (recognizing the right of an attorney who is an elected public official to account to the public for the conduct of his or her office and related law enforcement activities). Therefore, under EC 4-2 the Attorney General is authorized to disclose information to the public in order to carry out his duties as their lawyer.

EC 4-2 also authorizes disclosure of information when authorized or required by law. Under Nebraska law, the business of the State is generally to be conducted publicly. Neb.Rev.Stat. §84-1408 provides as follows: "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." The Nebraska Supreme Court has quoted this provision and has concluded §84-1408 is "a statutory commitment to openness in government." Grein v. Board of Education, 216 Neb. 158, 162-163, 343 N.W.2d 718 (1984).

The Legislature has in effect authorized and/or required that the State's legal business be conducted in public to the maximum extent possible without unreasonably endangering the legal interests of the people of Nebraska.

II. Conclusion

The legal relationships between the Attorney General of Nebraska and state agencies and officials to whom he provides legal services are not traditional "attorney-client relationships" as contemplated under Canon 4 of the Code of Professional Responsibility. Thus, DR 4-101(B) is not applicable in this context.

In legal matters, the Attorney General is the authorized decision-maker for his clients, the people of the State of Nebraska. As the Chief Legal Officer of the State, charged with the control of the State's litigation, the Attorney General has the power and responsibility to decide what information (not defined by law to be a public record) is to be kept confidential and what information is to be disclosed in the interest of the people of the

State of Nebraska. If these decisions adversely affect the State's legal proceedings the Attorney General is answerable to his clients, the people of Nebraska at the next election.

To the extent any confusion exists on the part of government officers, agents, boards, or commissions as to the matter of legal representation and communication, this opinion shall serve as notice that such representation and communication is subject to discretionary disclosure by the Attorney General pursuant to the Attorney General's constitutional, statutory and common law powers and duties as outlined in this opinion.

Respectfully submitted,

DON STENBERG
Attorney General

Steve Grasz
Deputy Attorney General

Approved By:

Attorney General

3-472-3

cc: Clerk of the Legislature

DAVE FROHNMAYER
2875 Baker Blvd.
Eugene, Oregon 97403

August 7, 1992

The Honorable Don Stenberg
Attorney General
State Capitol
P.O. Box 98920
Lincoln, NE 68509

Dear General Stenberg:

You have asked me to provide an independent review of your pending opinion on the powers of the Nebraska Attorney General. That opinion examines the scope of the authority of the Nebraska Attorney General to comment publicly on the state's legal business. I am pleased to respond.

Your opinion is scholarly and exhaustive. It canvasses the major authorities in the field, authorities with which I have long been familiar.

I concur with the legal conclusions you have reached. Although your opinion is grounded in Nebraska law, as properly it must be, your conclusions are consistent with the majority view of authorities in other jurisdictions that have examined related issues.

Let me summarize my observations as follows:

I. CONSTITUTIONAL CONSIDERATIONS: FREEDOM OF SPEECH

At the outset, let me note unequivocally that the very subject matter at issue is the legality of restraints on public comment by a public official about matters of public concern. This subject matter lies at the heart of protections for freedom of speech embodied in the First Amendment to the United States Constitution and the provisions of Article I, section 5 of the Constitution of the State of Nebraska.

While I have not discovered a case dealing precisely with the authority of a governor or a state bar disciplinary committee to sanction the public speech of a state legal officer, there exist obvious limitations on any such authority. It is settled law that there is a strong presumption against the validity of any prior restraint of speech related to public affairs. It is also axiomatic that any government rule or restriction seeking to sanction such speech must be narrowly construed to avoid constitutional conflicts.

Consequently, a person or tribunal seeking to inhibit comment on public affairs by a government official would face a heavy and wholly proper presumption of unconstitutionality.

II. THE ATTORNEY GENERAL AS CONSTITUTIONAL OFFICER

Your opinion canvasses the legal consequences of the status of the Nebraska Attorney General as an independently elected constitutional officer.

This status is extremely important, because it fundamentally alters the structure of attorney-client relationships. Traditional bar and court-imposed disciplinary rules governing attorney-client communications in the private sector simply are inadequate vehicles by which to limit the constitutional and common law responsibilities of the attorney general. Your opinion thoroughly explores the historical and constitutional origins and scope of these powers.

The Nebraska Constitution and laws make the attorney general accountable to the people of Nebraska not to any separately elected official. Both the legislature and the governor may call upon the services of the attorney general, as your opinion clearly notes. Consequently, no one branch of government may claim exclusive dominion over the attorney general's actions. It clearly follows that no officer or branch of government may bind the attorney general to silence if communication of information by the attorney general is essential to serve the legal needs of independent branches and officers of state government, let alone the needs of an informed public to which the attorney general is accountable.

The thrust of your opinion may be summarized in another way. Let me put the premises and conclusions in this fashion.

It is claimed that the governor may assert an attorney-client privilege to prevent the attorney general from discussing potentially vital matters of public concern with Nebraska officials, media or citizens.

For purposes of analysis, your opinion demonstrates that there is no lawyer, no client and no privileged communication under these facts which would trigger an ethical violation. The governor is not a "client" in a traditional sense because under your law the people of Nebraska and the state as an entity are the attorney general's ultimate clients. The attorney general is not a lawyer who may be prohibited from revealing "confidences" in the private law sense of that term. Unlike the private sector, by Nebraska law the attorney general -- not the governor or other agency official -- controls the conduct of litigation, the legal policy of the state, the settlement of claims and the assertion of any applicable privileges relating to those legal matters. Finally, in view of the declaration of openness in government which is set forth by statute as the public policy of Nebraska, the kinds of communications which might be characterized as "confidential" in the private sector are strictly limited in the conduct of public business.

Your opinion properly recognizes that traditional privileges of nondisclosure can continue to be claimed, for example the attorney-client privilege, privileges related to the criminal investigatory process, and exemptions from public disclosure codified in laws relating to public records, evidence and the like. However, it is the attorney general, and not any other executive official who possesses authority and discretion to assert these claims.

III. COMMON LAW POWERS

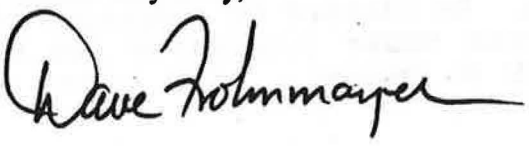
The conclusions you reach concerning the attorney general's constitutional status are fortified by the existence of common law powers possessed by your office. These powers are very broad in Anglo-American jurisprudence, and they provide an independent footing for the conclusions you reach. You quite properly distinguish the West Virginia case of State ex rel. Caryl v. MacQueen, 385 S.E. 2d 646 (W.Va. 1989). MacQueen is clearly a minority view; it was accompanied by a scathing and persuasive dissent; and it originated in a state which, unlike Nebraska, has clearly refused to recognize the attorney general's common law powers. See Manchin v. Browning, 296 SE 2nd 909 (W.Va. 1982).

IV. CONCLUSION

The authority of the attorney general which your opinion examines is innate in the structure of a separation of powers state government. It follows from the constitutional and common law powers of the Nebraska Attorney General. It is consistent with the statutory policy of open government and the political imperative of electoral accountability. Finally, it is consistent with the majority view of courts and other legal authorities which have previously examined this and related issues.

I would be pleased to amplify these views should they be helpful to you. However, there is little that usefully can be added to your comprehensive legal analysis.

Yours very truly,



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DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

DATE: August 6, 1992

SUBJECT: Authority of the Attorney General to Discuss the State's Legal Business with Members of the Legislature and the News Media

REQUESTED BY: Senator Howard Lamb

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

You request our opinion whether the Attorney General may discuss the State's legal business with members of the legislature, the news media and the people of Nebraska. You specifically ask whether other state executive officials may prohibit the Attorney General from engaging in such discussion.

Our opinion is consistent with every principle of open constitutional government and the personal accountability of elected officials for their actions. We conclude that the Attorney General, under the Constitution and laws of the State of Nebraska, as an independently elected constitutional officer and as the State's Chief Legal Officer, charged by law with control of the State's litigation, has the independent power to determine what information in his possession (not defined by law to be a public record) should be disclosed and what information should be kept confidential in the interests of the people of the State of Nebraska. No elected or appointed official of the executive branch of Nebraska State government has been granted the Constitutional authority to impose a "gag" order upon the Attorney General.