



STATE OF NEBRASKA  
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January 23, 2024

Christopher M. Payne



RE: *Public Record Matter Involving the Nebraska Department of Correctional Services*  
Our File No. 20241015

Dear Mr. Payne:

This letter is in response to your correspondence received by this office on January 18, 2024, in which you sought our assistance regarding a public records request submitted to the Nebraska Department of Correctional Services (NDCS) on December 3, 2023. We have considered your request in accordance with the Nebraska Public Records Statutes as set forth in Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2022). Our findings in this matter are set forth below.

Per your petition and the attached materials, and information we received from NDCS Public Records Manager Kathleen Kokensparger, you submitted a request for copies of NDCS Policy 205.01 and TSCI Procedure 205.01.01. In addition to these policies, you also requested copies of the court opinions for the following cases: *Evertson v. City of Kimball*, 278 Neb. 1 (2009); *Sisney v. Kaemingk*, 15 F.4th 1181 (8th Cir. 2021); and *Benning v. Commissioner, Georgia Department of Corrections*, 71 F.4th 1324 (11th Cir. 2023). Per the response from NDCS, Ms. Kokensparger indicated that the Department would fulfill your request for the policies upon written authorization to pay the copy costs. However, Ms. Kokensparger denied the request for the court opinions on the basis that NDCS was not the custodian of such court opinions.

### **DISCUSSION**

The basic rule for open public records in Nebraska is found at Neb. Rev. Stat. § 84-712 (2014). This statute provides, in pertinent part:

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.

“Public records” in Nebraska

[i]nclude 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.

Neb. Rev. Stat. § 84-712.01(1) (2014) (emphasis added). In addition, Neb. Rev. Stat. § 84-712(4) requires requesters to submit written requests for public records to the *custodian* of the records sought.

NDCS has asserted that it is not the custodian of the requested court opinions. In response, you have asserted in your petition to this office that NDCS should be treated as the legal custodian of these court opinions on the basis that NDCS is “entitled to possess [these documents],’ regardless of whether or not they actually possess them.” You draw support for this proposition from the Nebraska Supreme Court opinion *Evertson v. City of Kimball*, 271 Neb. 1, 767 N.W.2d 751 (2009) [“*Evertson*”].

In *Evertson*, the Nebraska Supreme Court adopted a test “to determine whether a public body is entitled to documents in a private party’s possession for purposes of disclosure.” *Id.* at 12, 767 N.W.2d at 761. Under the test, the following requirements must be met:

(1) The public body, through a delegation of its authority to perform a government function, contracted with a private party to carry out the government function; (2) the private party prepared the records under the public body’s delegation of authority; (3) the public body was entitled to possess the materials to monitor the private party’s performance; and (4) the records are used to make a decision affecting public interest.

*Id.* at 12, 767 N.W.2d at 761.

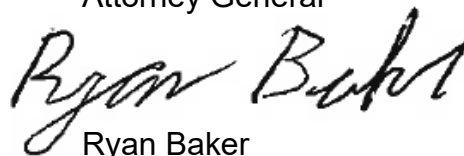
Having considered the issues in this matter, we decline to order NDCS to provide the requested court opinions because NDCS is not the custodian of those documents. First, while the provision of legal resources to inmates may or may not be considered a governmental function of NDCS, we need not address that aspect of *Evertson*. Westlaw does not prepare opinions under an alleged delegation by NDCS of any obligation to provide legal resources to inmates. Westlaw simply catalogues and maintains a database for legal resources for which NDCS contracted to obtain access to such resources. Further, NDCS does not monitor Westlaw's cataloguing of these legal resources. Consequently, the requested court opinions are not public records "of or belonging to" NDCS, nor is the NDCS the custodian of those opinions. Thus, we decline to order NDCS to provide such records.

### CONCLUSION

In summary, we conclude that the requested court opinions are not public records "of or belonging to" NDCS. NDCS is therefore not required to make these court opinions available to you under the Nebraska Public Record Statutes. Since no further action by this office is necessary, we are closing this file. If you disagree with the conclusion reached above, you may seek to review and determine any additional remedies that may be available to you under the Nebraska Public Records Statutes.

Sincerely,

MIKE HILGERS  
Attorney General



Ryan Baker  
Assistant Attorney General

c: Kathleen Kokensparger