



STATE OF NEBRASKA  
**Office of the Attorney General**

2115 STATE CAPITOL BUILDING  
LINCOLN, NE 68509-8920  
(402) 471-2682  
TDD (402) 471-2682  
FAX (402) 471-3297 or (402) 471-4725

**DOUGLAS J. PETERSON**  
ATTORNEY GENERAL

18-006

STATE OF NEBRASKA  
OFFICIAL

SEP 28 2018

DEPT. OF JUSTICE

**SUBJECT:** Whether the Nebraska Legislature's Archived Videos of Committee Hearings and Floor Debates Are "Public Records" Under the Nebraska Public Records Statutes

**REQUESTED BY:** Senator Suzanne Geist  
Nebraska State Legislature

**WRITTEN BY:** Douglas J. Peterson, Attorney General  
Leslie S. Donley, Assistant Attorney General

You have requested an opinion from this office with respect to the "archived videos of committee hearings and floor debate" of the Nebraska Legislature. You indicate that you are contemplating introducing legislation that would explicitly make the videos public records, but would like us to clarify whether legislation is needed. In your opinion request letter, you state that Patrick J. O'Donnell, Clerk of the Nebraska Legislature, testified on Legislative Bill 1018,<sup>1</sup> a bill you introduced during the 2018 legislative session. Mr. O'Donnell stated that the Nebraska Legislature has "significant quantities of digitized files that are maintained both on our server system as well as backup files at NET

<sup>1</sup> LB 1018 contained three components. First, it established that audio and video recordings of legislative proceedings are not the "official records" of the proceedings and are not "admissible in any proceeding as evidence of legislative history, actions, or intent." Second, it created a requirement for "[a]ny government web site offering access to audio and video recordings" of legislative proceedings to notify users that the recordings "shall not be used for political or commercial purposes." Third, the bill added "[a]udio and video recordings of the proceedings of the Legislature or of a committee or division of the Legislature" to the list of public records that could be withheld from disclosure at the discretion of the lawful custodian. See Neb. Rev. Stat. § 84-712.05. LB 1018 did not advance from committee.

[Nebraska Educational Television],” and that the Legislature owned the files.<sup>2</sup> You further indicate that transcribers and committee clerks have access to the archived videos, “but other legislative employees, senators and the public are denied access.”

### PREVIOUS DISPOSITION

On May 1, 2018, this office issued its disposition in *File No. 18-R-113; Clerk of the Legislature; Debra A. Portz, Petitioner* (“Portz”).<sup>3</sup> This letter was written in response to a petition submitted to our office under Neb. Rev. Stat. § 84-712.03(1)(b) (2014, 2018 Neb. Laws LB 193) of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 to 84-712.09 (2014, Cum. Supp. 2016<sup>4</sup>) (“NPRS”). Under § 84-712.03(1)(b), any person denied any rights granted under §§ 84-712 to 84-712.03 may petition the Attorney General to determine whether the petitioner has been denied access to public records, or whether the public body involved is otherwise not in compliance with the provisions of the NPRS.

The petitioner in *Portz* had submitted a public records request to the Clerk of the Legislature seeking a copy of archived videos of floor debate for legislative bill 295 for two days in March 2018. The petitioner noted that written transcripts of the floor debate were not currently available. Mr. O’Donnell denied the request, indicating that the Legislature does not make audio and video files available because they are not considered “official records.” Mr. O’Donnell explained that the audio and video files are not public records themselves, but are electronic files used by legislative staff to create transcripts of the proceedings. According to Mr. O’Donnell, the *transcripts* constitute the official public records of legislative committee hearings and floor debate. The transcripts are then made available to the public through the Legislature’s website or upon request to the Clerk’s office. In lieu of providing a copy of the video, Mr. O’Donnell offered to provide the petitioner a rough draft transcript.

In addition to his position that audio and video recordings of legislative proceedings do not constitute “public records,” Mr. O’Donnell noted other concerns associated with producing the audio and video files in his denial letter, including: (1) the costly storage requirements and the need for staff to manage the files; (2) issues associated with authenticating the files for administrative and judicial proceedings; (3) lack of staff to handle requests for the files if offered to the public; (4) lack of technology (hardware, software, and trained staff) to manage the files; and (5) the lack of search capability for extremely large files. Mr. O’Donnell also argued that Neb. Rev. Stat. § 84-712(3)(e) did not require his office to produce public records in a different format from that of the original public record. Mr. O’Donnell indicated that the Legislature’s Executive Board considered this issue twice in the last three years, and has not changed its policy denying release of

<sup>2</sup> See Hearing of the Executive Board on LB 1018, 105<sup>th</sup> Neb. Leg., 2<sup>nd</sup> Sess. (Jan. 31, 2018) at 12.

<sup>3</sup> Accessible at <https://ago.nebraska.gov/sites/ago.nebraska.gov/files/doc/18-R-113%3B%20Clerk%20of%20the%20Legislature%3B%20Debra%20A.%20Portz%2C%20Petitioner.pdf>.

<sup>4</sup> See also 2018 Neb. Laws LB 859 and 2018 Neb. Laws LB 902.

archived video. He asserted that making transcripts available via the Legislature's "website is the most viable, cost-efficient way to serve the public and maintain our Legislature's historical commitment to providing openness and transparency." *Portz* at 2.

Upon review, we determined that the audio and video recordings of committee hearings and floor debate fell within the definition of public records set out in the NPRS. We also determined that there was no statutory basis to withhold the recordings. We rejected the notion that producing copies of the recordings would require the Clerk's office to produce records "in a new or different format modified from that of the original public record," noting that the recordings currently exist as a digital record and could be produced as a digital record. Under these circumstances, the written transcripts represent a new and different format, not the recordings themselves. As a result of our findings, we directed Mr. O'Donnell to produce the requested recordings to the petitioner at his earliest possible convenience.

### DISCUSSION

The relevant statute governing public records is set out in Neb. Rev. Stat. § 84-712 (2014). That statute provides, in pertinent part, that

[e]xcept 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.

This basic language guaranteeing access to governmental records has been in existence since 1866. In 1979, the Nebraska Legislature enacted the following definition of "public records":

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.

1979 Neb. Laws LB 86, § 2,<sup>5</sup> codified at Neb. Rev. Stat. § 84-712.01(1) (2014).

However, access to records is not absolute. An exception exists “when any other statute expressly provides that particular information or records shall not be made public . . . .”<sup>6</sup> In addition, Neb. Rev. Stat. § 84-712.05 currently contains twenty-one categories of public records that may be withheld at the discretion of the public body involved so long as those records have not been “publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties . . . .” Neb. Rev. Stat. § 84-712.08 permits the suspension of certain provisions of the NPRS and the Open Meetings Act<sup>7</sup> when the application of those provisions would result in the loss of federal funds, services or essential information available to a state agency.

In Nebraska, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018); *Farmers Cooperative v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017). In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Id.*; *Davis v. Gale*, 299 Neb. 377, 908 N.W.2d 618 (2018). It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *Aksamit*, 299 Neb. at 123, 907 N.W.2d at 308; *State v. Gilliam*, 292 Neb. 770, 781, 874 N.W.2d 48, 57 (2016). When the Legislature provides a specific definition for purposes of a section of an act, that definition is controlling. *Farmers*, 296 Neb. at 356, 893 N.W.2d at 736.

The definition of “public records” encompasses “all records and documents, regardless of physical form, of or belonging to . . . any . . . branch . . . .” Courts often turn to dictionaries to ascertain a word’s plain and ordinary meaning. *Gilliam*, 292 Neb. at

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<sup>5</sup> “The whole theory [of LB 86] is, the documents prepared by public agencies are public except if another statute already makes them not public or if they are listed in these particular seven exceptions [enumerated later in the bill].” Hearing of the Government, Military and Veterans Affairs Committee on LB 86, 86<sup>th</sup> Neb. Leg., 1<sup>st</sup> Sess. (Feb. 9, 1979) at 4.

<sup>6</sup> See, e.g., Neb. Rev. Stat. § 29-2261 (2016, 2018 Neb. Laws LB 841 and LB 1034) (“Any presentence report, substance abuse evaluation, or psychiatric examination shall be privileged . . . .”); Neb. Rev. Stat. § 32-301 (2016, Supp. 2017, 2018 Neb. Laws LB 1065 [eff. 7/1/2019]) (“The digital signatures [relating to voter registration list] in the possession of the Secretary of State, the election commissioner, or the county clerk shall not be public records as defined in section 84-712.01 and are not subject to disclosure under sections 84-712 to 84-712.09.”); Neb. Rev. Stat. § 47-912 (Supp. 2017) (“Reports of investigations conducted by the office [of the Inspector General of the Nebraska Correctional System] are not public records for purposes of sections 84-712 to 84-712.09.”); and Neb. Rev. Stat. § 77-3510 (Supp. 2017, 2018 Neb. Laws LB 1089) (“The [homestead exemption] application and information contained on any attachments to the application shall be confidential and available to tax officials only.”).

<sup>7</sup> Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014, Cum. Supp. 2016, Supp. 2017).

781, 874 N.W.2d at 57. For example, “record” in this context may be defined as “1. [a] documentary account of past events, usu. designed to memorialize those events. 2. information that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form.” BLACK’S LAW DICTIONARY 1301 (10<sup>th</sup> ed. 2014). “Physical” is defined as “having material existence: perceptible especially through the senses and subject to the laws of nature.”<sup>8</sup> “Form” relates to “one of the different modes of existence, action, or manifestation of a particular thing or substance: kind.”<sup>9</sup> The phrase “of or belonging to,” construed in *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009), “includes any documents or records that a public body is entitled to possess—regardless of whether the public body takes possession. The public’s right of access should not depend on where the requested records are physically located.” *Id.* at 9, 767 N.W.2d at 759. The word “branch” denotes a “division of an institution [the executive, legislative, and judicial branches of government].” BLACK’S LAW DICTIONARY 199 (10<sup>th</sup> ed. 2014).

The archived video recordings of committee hearings and floor debate are documentary accounts of legislative proceedings. The recordings are produced and stored in an electronic medium. The recordings are retrieved by legislative staff for the purpose of preparing written transcripts of the proceedings. While NET broadcasts and streams the proceedings, and maintains a copy of the broadcasts, the Nebraska Legislature retains ownership of the content. See *infra* at 1. In this regard, there is no question that the recordings are “of or belonging to” the Nebraska Legislature. It is also axiomatic that the Nebraska Legislature is a branch of Nebraska state government. “The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial . . . .” Neb. Const. art. II, § 1. “The legislative authority of the state shall be vested in a Legislature consisting of one chamber.” Neb. Const. art. III, § 1. Applying the plain and ordinary meaning of these terms to the definition of public records in § 84-712.01(1) leads us to conclude, without equivocation, that recordings of legislative proceedings are public records.

Moreover, we are unaware of any other statute that would make the recordings not a public record.<sup>10</sup> And there is no exception in § 84-712.05 that would allow the Clerk, at his discretion, to withhold the recordings from disclosure. This fact is plainly evidenced by the attempt to add “[a]udio and video recordings of the proceedings of the Legislature or of a committee or division of the Legislature” to § 84-712.05 during the last legislative session. The waiver provisions in § 84-712.08 do not apply to the Nebraska Legislature. Consequently, since the recordings at issue fall within the definition of public records set

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<sup>8</sup> See <https://www.merriam-webster.com/dictionary/physical> last accessed September 18, 2018.

<sup>9</sup> See <https://www.merriam-webster.com/dictionary/form> last accessed September 18, 2018.

<sup>10</sup> See *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 127, 907 N.W.2d 301, 310 (2018) (Concluding that the district’s competitive information could not be withheld under the exception in § 84-712.05(3) of the NPRS, but noting that it would not hesitate to apply the “other statute” exception in § 84-712.01(1), “and the general principle favoring a specific over a general statute,” to exclude the information from disclosure.).

out in § 84-712.01(1), and there is no statute that otherwise provides that the records are not public records or, alternatively, are public records but may be withheld, the recordings must be made available to a Nebraska citizen or other interested person in response to a request made under § 84-712.

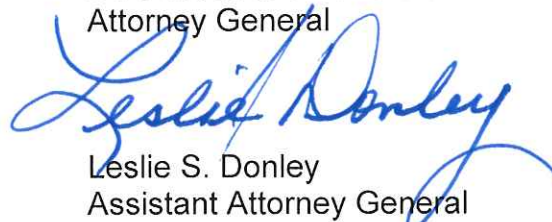
"[T]he Legislature exercises a power constitutionally committed to it by enacting statutes to declare what is the law and public policy." *State ex rel. Veskrna v. Steel*, 296 Neb. 581, 598, 894 N.W.2d 788, 800 (2017). "In enacting the public records statutes, the Legislature has determined that the welfare of the people is best served through liberal public disclosure of the records of the three branches of government." *Id.*; *Aksamit*, 299 Neb. at 122, 907 N.W.2d at 307 (2018). "Nebraska, like the federal government and many other states, has broad public records laws that generally provide open access to governmental records." *State ex rel. Adams Cty. Historical Society v. Kinyoun*, 277 Neb. 749, 754, 765 N.W.2d 212, 217 (2009). In view of these legal principles, the Legislature's long-held policy that the recordings of committee hearings and floor debate are not public records is untenable. Consequently, we would strongly suggest that the Legislature take affirmative steps, either independently or in conjunction with NET, to resolve the ongoing issues and concerns relating to producing copies of the recordings in response to public records requests made pursuant to § 84-712. Alternatively, the Legislature should consider legislation which would allow the Clerk to withhold the recordings at his discretion.

### CONCLUSION

Based on the foregoing, we conclude that archived video of floor debate and committee hearings are public records under the NPRS. No other statutory provisions exist which would allow the recordings to be kept confidential. Consequently, in light of our conclusion, there is no need for you to pursue clarifying legislation on this matter at this time.

Sincerely,


DOUGLAS J. PETERSON  
Attorney General



Leslie S. Donley  
Assistant Attorney General

Senator Suzanne Geist  
Page 7

Approved by:

  
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Attorney General

pc: Patrick J. O'Donnell  
Clerk of the Nebraska Legislature

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