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Office of the Attorney General

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August 24, 2018

Via email at mlombardo@centurylink.net
and Regular U.S. Mail
Marc Lombardo
P.O. Box 27657
Ralston, NE 68127-0657

RE: *File No. 18-R-127; Nebraska Supreme Court, Clerk of the Supreme Court,
Douglas County District Court, Clerk of the Douglas County District Court;
Marc Lombardo, Petitioner*

Dear Mr. Lombardo:

This letter is in response to your petition received by this office on August 16, 2018, in which you requested that we review “the denial of requests for copies of records material to [your] appeal of civil action CI-15-9561, Marc Lombardo v. Michael J. Sedlacek, M.D.” Also, on August 16, 2018, you emailed the undersigned and requested that we expedite our review of the denial by the Clerk of the Supreme Court “for the electronic copy of the bill of exceptions” We have considered your petition, and all of your supporting documentation, in accordance with the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2016¹) (“NPRS”). Our findings in this matter are set forth below.

BACKGROUND

According to your petition, you submitted requests for records with the following entities and individuals: The Nebraska Supreme Court; the Clerk of the Supreme Court; the District Court of Douglas County (Judge Horacio J. Wheelock); the Clerk of the Douglas County District Court; and the court reporter assigned in CI15-9561, Karen Cicirello. You have categorized the records sought in your various requests as follows:

1. The paper and electronic record of the bill of exceptions Case Nos. A-16-776, S-17-146.

¹ See also 2018 Neb. Laws LB 193; 2018 Neb. Laws 859; and 2018 Neb. Laws LB 902.

2. The electronic record of the docket sheet. Records defining symbols used thereon.
3. Each, if any, opinion “released by the Court” on Case No. S-17-146, certified as such.
4. Various records made use of by members of the Court in their review of the appeal.
5. Various trial court records material to the appeal.

You indicate that you received the following responses:

1. The trial court has not provided any responsive records.
2. The court reporter has not provided any responsive records.
3. The clerk of the district court has not provided any responsive records.
4. The clerk of the Supreme Court (1) responded to several of my requests by stating that “there is no record responsive”; (2) denied my request for a copy of the electronic bill of exceptions; and (3) denied my request for records regarding member votes on my appeal.
5. The Supreme Court stated that the Clerk is the custodian of the records I requested.

We note that you did not provide this office any additional information as to why you believe you were denied access to public records or in what manner these entities violated the NPRS.

Before we begin, under Neb. Rev. Stat. § 84-712.03(1)(b), any person who has been denied rights under §§ 84-712 to 84-712.03 may petition this office for relief. Upon receipt of a petition, we are required “to determine whether a record may be withheld from public inspection or whether the public body that is custodian of such record has otherwise failed to comply with such sections” In our investigation of a petition, we do not consider why the petitioner may be seeking the record at issue.² Our review focuses on whether the record may be withheld and whether the public body is in compliance with the law. Part of that review also includes determining whether the petitioner has complied with the provisions in § 84-712 to effectuate a valid public records request. Please keep in mind that any statute or regulation that falls outside of the NPRS also falls outside of our enforcement authority.

² See *State ex rel. Sileven v. Spire*, 243 Neb. 451, 457, 500 N.W.2d 179, 183 (1993) (“The relator sought information pursuant to § 84-712, which applies equally to all persons without regard to the purpose for which the information is sought.”).

DISCUSSION

Neb. Rev. Stat. § 84-712 sets out the basic rule for access to public records in Nebraska. That 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.

Neb. Rev. Stat. § 84-712(1) (2014) (emphasis added). Public records in Nebraska include “all records and documents, regardless of physical form, of or belonging to this state” and any other governmental body. Neb. Rev. Stat. § 84-712.01(1) (2014).

The process to request public records is set out in Neb. Rev. Stat. § 84-712(4). That subsection provides, in pertinent part:

(4) Upon receipt of a written request for access to or copies of a public record, ***the custodian of such record*** shall provide to the requester as soon as is practicable and without delay, but not more than four business days after actual receipt of the request, an estimate of the expected cost of the copies and either (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. . . . (Emphasis added.)

While the NPRS generally allow interested persons in Nebraska the right to access public records, these statutes are not absolute. As indicated by the emphasized language in § 84-712(1) above, the NPRS also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). In the present

case, Neb. Rev. Stat. § 25-1140 (2016) provides an exception to the basic access rule set out in § 84-712. This statute provides that

[u]pon appeal from the district court, the party appealing may order a bill of exceptions by filing in the office of the clerk of the district court a praecipe therefor within the time allowed for filing a notice of appeal. ***The procedure for preparation, settlement, signature, allowance, certification, filing, and amendment of the bill of exceptions shall be regulated and governed by rules of practice prescribed by the Supreme Court.***

(Emphasis added.) In accordance with § 25-1140, and the power vested in the Supreme Court by the Nebraska Constitution to prescribe rules of practice and procedure,³ the Supreme Court adopted and promulgated Neb. Ct. R. App. P. § 2-105—*Bill of exceptions, making, preserving, transcribing, and delivery of record of trial or other proceeding*. Accordingly, the process set out in Neb. Ct. R. App. P. § 2-105 governs your access to the bill of exceptions in your civil case, not a request made under § 84-712 of the NPRS.

We note that in several instances you have requested that the entities involved provide you *certified* copies. You rely on Neb. Rev. Stat. § 25-1280 (2016) as the basis for your requests, which provides that

[e]very state, county or political subdivision officer having the custody of a public record or writing is bound to give any person on demand a certified copy thereof on payment of the legal fees therefor. Where fees are not otherwise expressly provided by statute, the fee shall be thirty cents per hundred words if the copy is a typewritten copy, and the cost of the mechanically reproduced copy when the copy is made by photographic or offset process. In addition thereto a fee of one dollar shall be charged for the certificate of the officer.

However, the only requirement in the NPRS relating to certified copies is found in Neb. Rev. Stat. § 84-712.02 (2014). This statute requires public bodies to provide to claimants before the U.S. Department of Veterans Affairs, upon request, certified copies of pertinent records free of charge. Otherwise, there is no provision that requires a custodian of public records to provide certified copies under a request made pursuant to § 84-712.

With respect to access to audio recordings, Uniform County Court Rules of Practice and Procedure, Neb. Ct. R. § 6-1405—*Recording of Court Proceedings; request for transcription; request for copy of digital recording*, allows any person to request a copy of the audio record of county court proceedings in cases where the proceedings have

³ See Neb. Const. art. V, § 25, which provides, in pertinent part: "For the effectual administration of justice and the prompt disposition of judicial proceedings, the supreme court may promulgate rules of practice and procedure for all courts, uniform as to each class of courts, and not in conflict with laws governing such matters."

been digitally recorded, except for "restricted hearings" (defined in § 6-1405(D)). To be clear, this provision only applies to *county court* proceedings. Your access to a verbatim record of a hearing in district court is through the bill of exceptions. We are aware of no other provision of law or rule that would require the district court to provide you a copy of the audio recording you seek.

With these statutory and regulatory provisions in minds, we will now address the requests made to the five entities identified above. Our conclusions with respect to those requests are set out below:

I. Trial Court

On July 27, 2018, you emailed a request for records to Judge Wheelock, the judge who presided over your civil case. You requested certified copies of the following records: (1) the court's copy of your letters sent to the court dated September 9 and 26 and October 13, 2016; (2) the court's copy of an exhibit index in C15-9561; (3) the court's hearing schedule for four dates in 2016 (i.e., April 28, June 13, July 25, September 15) and January 13, 2017; and (4) the court's copy of a brief in support of motion for summary judgment submitted by the defendant in C15-9561.

The Clerk of the District Court is the custodian for the records you seek, not Judge Wheelock. In addition, there is no requirement in the NPRS that requires Judge Wheelock, or any judge, to provide a certified copy of a court document in response to a request made under § 84-712. As a result, we find no violation of the NPRS with respect to your record request directed to Judge Wheelock.

II. Court Reporter

On January 24, 2018, you emailed Ms. Cicirello "request[ing] a certified and authenticated identical duplicate of the authentic original audio recording for the hearing held on 2016-09-15" in your civil case. On January 25, Ms. Cicirello advised you that there was "no audio file available." Later that day, you asked Ms. Cicirello if she made a record of the hearing by shorthand and again asked whether an audio recording of the hearing had been made. Ms. Cicirello responded that she "made a record by shorthand. An audio file is not available."

On July 3, 2018, you requested that Ms. Cicirello provide you "certified copies" of certain pages from the bill of exceptions in C15-9561, as follows:

Volume I: Page 7, 13-14
Exhibit 23: Pages 1-5
Volume II: Pages 69-70, 73, 75-77
Volume III:
Exhibit 35: Pages 1, 6-8, 10, 12-13, 19

As noted above, access to audio files only relates to county court proceedings, not district court. Your access to a verbatim record of the hearing at issue is governed by § 25-1140 and Neb. Ct. R. App. P. § 2-105, not § 84-712. In addition, Neb. Ct. R. App. P. § 2-105(B)(3)(d) expressly provides that

[u]pon receipt of the bill of exceptions, the clerk of the district court shall forthwith file it and notify all parties or their attorneys of record and the Clerk of the Supreme Court of the date of such filing. **When filed with the clerk of the district court, such bill of exceptions becomes the official bill of exceptions in the case and shall not be altered or marked in any fashion or be disassembled for any purpose. . . .**

(Emphasis added.) As you can see, the rule strictly prohibits disassembling the bill of exceptions once it is filed with the clerk of the district court. There is simply no statute or regulation that authorizes you to receive records from the bill of exceptions as requested. Since the NPRS do not apply to your requests for an audio file of a district court proceeding or records pertaining to the bill of exceptions, no violation of those statutes occurred.

III. Clerk of the Supreme Court

On July 16, 20 and 31, 2018, you submitted three requests to Wendy Wussow, Clerk of the Supreme Court, with respect to your Supreme Court case, No. S-17-146. The items in your requests were as follows (reproduced as written):

July 16, 2018

1. each opinion released by the Court with regard to this appeal, if any
2. each unique unaltered abstract that members of the Court made use of in their review of this appeal
3. primary brief of Appellant that the Court made use of in its review of this appeal
4. journal of the Court for this appeal

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5. Bill of Exceptions E-mail (listed under the heading "Court Record" on Docket Sheet);
6. for each member of the Court, all records of that member's vote, or the lack thereof, in regard to the 2018-03-23 opinion in this appeal;
7. materials which define the following as they are used on the Docket Sheet: "*", "***", "B/E Test"; and
8. the order dated 2018-03-23 along with associated metadata (e.g. date and time of entry, author or authors).

July 31, 2018

9. CLERK OF THE COURT – BILL OF EXCEPTIONS – ELECTRONIC RECORD for Case No. S-17-776
10. CLERK OF THE COURT – BRIEFS, Brief for Appellant, dated July 3, 2017, for Case No. S-17-776
11. CLERK OF THE COURT – APPEARANCE DOCKET for Case Nos. S-17-776 and A-16-776
12. CLERK OF THE COURT – COMPLETE RECORD – SUPREME COURT for Case No. S-17-776
13. CLERK OF THE COURT – EXHIBITS – ELECTRONIC RECORD for Case No. S-17-776

You asked that Ms. Wussow certify copies of item numbers 1, 3, 4, 6, 8, 10, 11 and 12.

In correspondence dated July 25, July 27, and August 6, 2018, Ms. Wussow responded to your requests, indicating for each item whether the record was available and the costs associated with producing and/or certifying responsive record(s). She clarified that the Clerk of the Court is not the lawful custodian of the bill of exceptions. With respect to item numbers 2, 3, 4, 7, 8, 11 and 12, she advised that her office had no responsive records. She offered you free access at any time to view responsive records at a terminal located in the Clerk's office.

In your petition, you take issue that Ms. Wussow “(1) responded to several of my requests by stating that ‘there is no record responsive’; (2) denied my request for a copy of the electronic bill of exceptions; and (3) denied my request for records regarding member votes on my appeal.” Through the years, this office has taken the position that public bodies and officials do not have to create records which do not already exist in response to a request for public records.⁴ Ms. Wussow's responses to those items in your requests for which she had nothing responsive is consistent with that position. With respect to your access to the electronic bill of exceptions, Ms. Wussow's response accurately reflects language set out § 2-105(B)(3)(b)(i), which specifies that an electronic bill of exceptions “shall be for the exclusive use of the Supreme Court and authorized court personnel.”

Finally, we will address your request for “all records of [each Supreme Court] member's vote, or the lack thereof, in regard to the 2018-03-23 opinion in this appeal[.]” In her response to this item, Ms. Wussow indicated that “vote sheets” are confidential records. Upon review, we agree.

In *State ex rel. Veskrna v. Steel*, 296 Neb. 581, 894 N.W.2d 788 (2017), the Nebraska Supreme Court considered whether Judicial Branch Education (“JBE”) records

⁴ See Op. Att'y Gen. No. 94035 (May 13, 1994); Op. Att'y Gen. No. 87104 (October 27, 1987).

pertaining to child custody and parenting time were subject to disclosure under the NPRS. Steel argued, among other things, that the judicial deliberation privilege extended to JBE records. The court noted that the privilege “protects the deliberative process of a judge from intrusion.” *Id.* at 602, 894 N.W.2d at 802. However, the court concluded that the JBE records did not fall under the privilege because, “[f]undamentally, the records do not relate to particular cases under deliberation.” *Id.* at 603, 894 N.W.2d at 803.

Although the court refused to apply the privilege to the records in *Veskrna*, it did formally adopt the privilege, stating:

We find that the proper constitutional balance requires a narrowly tailored, albeit absolute, judicial deliberations privilege. . . . The privilege

covers a judge's mental impressions and thought processes in reaching a judicial decision, whether harbored internally or memorialized in other nonpublic materials. The privilege also protects confidential communications among judges and between judges and court staff made in the course of and related to their deliberative processes in particular cases.

Id. at 603, 894 N.W.2d at 803. The records at issue in *Veskrna* (i.e., the JBE seminars presented, the names of the presenters, the seminar materials), are in stark contrast to records which reflect how members of the Supreme Court decided your appeal. Moreover, there is no question that the vote sheets relating to Case No. S-17-146 pertain to a “particular case[] under deliberation”—a critical element necessary to apply the privilege, and a fundamental defect identified in *Veskrna*. Since we conclude that the vote sheets fall squarely within the judicial deliberation privilege, those records may be kept confidential.⁵

IV. Clerk of the District Court

On July 6, 2018, you emailed a request to staff at the Clerk of the District Court seeking

certified copies of the following pages of the official bill of exceptions on case CI-15-9561:

Volume I: Page 7, 13-14
Volume I: Exhibit 23: Pages 1-5
Volume II: Pages 69-70, 73, 75-77
Volume III: Exhibit 35: Pages 1, 6-8, 10, 12-13, 19

⁵ We would also point out that there was a unanimous decision in Case No. S-17-146, i.e., Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke. Judges Wright and Kelch did not participate.

George Watterson, File Department Supervisor, responded to your request on July 9. Mr. Watterson indicated that “[p]ursuant to § 2-105, Bill of exceptions, When filed with the clerk of the district court, such bill of exceptions becomes the official bill of exceptions in the case and shall not be altered or marked in any fashion or be disassembled for any purpose.” He offered to provide you information to contact the court reporter, and invited you to stop into the office if you wished to view the bill of exceptions. Notwithstanding Mr. Watterson’s response, on July 19 you emailed the same request to John M. Friend, Clerk of the District Court. In a series of emails sent July 20 between you and Mr. Friend and other court personnel, you were advised that (1) the Clerk has custody of the bill of exceptions and it is available for viewing, (2) the bill of exceptions is the work product of the court reporter, (3) the bill of exceptions cannot be unbound and taken apart for copying, (4) you would need to contact the court reporter for further assistance relating to your request, and (5) the Clerk is only able to certify documents present in the court file or the case management system.

Despite all of the information provided to you by Mr. Friend and staff, you sent Mr. Friend a request by certified letter dated August 6, 2018, requesting certified copies of the following:

2. the following pages from the official Bill of Exceptions for Case No. CI-15-9561:

Pages 1-19 (Volume I);
Exhibit 23 Pages 1-5 (Volume I);
Pages 44-46, 63-77 (Volume II); and
Exhibit 35: Pages 1-19 (Volume III).

It appears that you received no response from the Clerk’s office.

As discussed in section II above, you are not entitled to receive certified copies of pages taken from a bill of exceptions that has been filed with the clerk of the district court. Neb. Ct. R. App. P. § 2-105(B)(3)(d) strictly prohibits disassembling the bill of exceptions. Court personnel advised you repeatedly that they could not unbound the bill of exceptions to copy and recertify specific pages for you. Since § 84-712 of the NPRS is inapplicable to your requests to the Clerk of the District Court, there is no violation of the NPRS.

V. Nebraska Supreme Court

On August 8, 2018, you submitted a request for records relating to Case No. S-17-146 to the Nebraska Supreme Court, addressed to The Honorable John R. Freudenberg. Judge Freudenberg responded to your request on August 13, 2018, advising you that “[t]he custodian of appellate court records is the Clerk of the Nebraska Supreme Court and Court of Appeals. For the Bill of Exceptions, the custodian would be the trial court.” Since neither Judge Freudenberg nor any member of the Court is the lawful custodian of

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the records in your request, there is no obligation to produce records under Neb. Rev. Stat. § 84-712. Thus, no violation of the NPRS occurred with respect to this particular request.

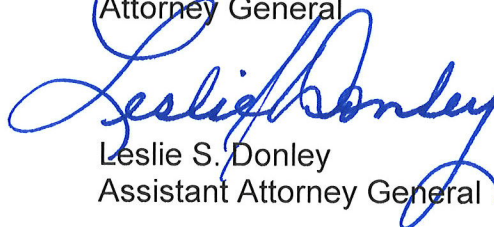
CONCLUSION

For all of the reasons stated above, we conclude that you have not been denied access to public records, nor is there any evidence in your supporting documentation to suggest that any of the entities involved here violated the provisions of the NPRS. As a result, no further action by this office is warranted, and we are closing this file.

If you disagree with the conclusion reached in this disposition letter, you are free to pursue the other legal remedies available to you under Neb. Rev. Stat. § 84-712.03 of the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Hon. John R. Freudenberg
Hon. Horacio J. Wheelock (via email)
Wendy Wussow (via email)
John M. Friend (via email)
Karen Cicirello (via email)

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