

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

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

June 5, 2020

Via email at [REDACTED]
Cathy Johnson

RE: *File No. 20-MR-115; Platte County Agricultural Society Board of Directors;
Cathy Johnson, Complainant/Petitioner*

Dear Ms. Johnson:

This letter is in response to the complaint dated May 18, 2020, and received by this office on May 21, 2020, in which you allege violations of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014, Cum. Supp. 2018, Supp. 2019) ("Act"), and the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018, Supp. 2019) ("NPRS"), by the Platte County Agricultural Society Board of Directors ("Board"). Upon receipt of your complaint, we forwarded it to the society's general manager, Brian Palmer, and requested responses to each portion of your complaint. Pursuant to our request, on June 4, we received a response to the public records portion of your complaint from attorney Elizabeth J. Lay, whose firm serves as general counsel to the society. We have considered your complaint and the Board's response in accordance with the provisions of the NPRS. Our findings in this matter are set forth below.

RELEVANT FACTS

You currently serve as a member of the Board. This matter involves the purported denial of two records: (1) a letter from the City of Columbus regarding installing a sidewalk on the society's property; and (2) the audio recording for the February 24, 2020 Board meeting. In correspondence provided to this office, you indicate that you requested a copy of each item, but was denied access by the Board.

With respect to the first item, Ms. Lay states that the Board "is a public entity for the purposes of the Public Records Act and that, unless excepted by statute, documents requested under the Act shall be produced as per the requirements of the Act" She further states that you have a right to view this particular document in your capacity as

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Board member and a member of the public. However, Ms. Lay indicates that while certain references in your correspondence, e.g., the April 23, 2020 email from you to Board chair Brock Pillen, indicate your desire to view the letter, a question exists as to whether you submitted a written request under the NPRS for the document. Ms. Lay further indicates that upon receipt of the correspondence from the undersigned, the Board provided you a copy of a letter from the City of Columbus addressed to the "Platte County Agri Society," dated October 17, 2019, in response.

You subsequently contacted the undersigned this morning to advise that the letter provided to you was not the letter you were seeking. The actual letter at issue is referenced in the February 24, 2020, meeting minutes under "Communications," as follows: "Brian [Palmer] reported a letter from the city was received regarding the sidewalk that is required to be put in from the aquatic center south to 17th street and then in front of Mory's Haven." You indicated that you would be submitting a written request for this particular record.

With respect to the audio recording, Ms. Lay indicates that the Board "does not utilize an 'official electronic recording of the Board' for the purposes of satisfying any public function within the Society." She states that the Board has taken no action in the past with respect to recording regular Board meetings. Ms. Lay indicates that Mr. Palmer's prescribed job duties includes attending meetings and preparing meeting minutes. To assist him in preparing the minutes, Mr. Palmer records each meeting using a personal tape recorder. The written minutes are subsequently approved by the Board at a meeting and become the "official record." Ms. Lay indicates that "[o]nce the meeting minutes are transcribed, ready for approval by the Board of Directors and made available to the public for inspection, the recording of the proceedings is erased."

It is the Board's position that Mr. Palmer's informal recordings of the Board meetings constitutes "'work product' outside the scope of the Public Records Act." She indicates that "[t]he process of how the minutes are handled, the method that is used to facilitate correct, accurate information to the public, and the retention methods of such records are an administrative function of the Society under the authority of the General Manager. Ms. Lay further cites to an opinion of this office in which we conclude that certain draft documents which remain in the agency and are subject to approval by upper management are not "records" or "documents" under the NPRS. See Op. Att'y Gen. No. 91054 (June 17, 1991). Finally, she states that while the official minutes which have been finalized and approved are public records, "the work product, including preliminary drafts and informal electronic recordings made by the General Manager during the ordinary course of his job duties, is not."

DISCUSSION

Generally speaking, the NPRS allow interested persons in Nebraska the right to examine public records in the possession of public agencies during normal agency

business hours, to make memoranda and abstracts from those public records, and to obtain copies of public records in certain circumstances. Procedural provisions relating to requesting and responding to requests for public records are set out in Neb. Rev. Stat. § 84-712(4) of the NPRS. Subsection (4) requires, in pertinent part, that

[u]pon 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.

Since there is some dispute as to whether you made a written request for the letter and because of the uncertainty as to which letter you were seeking, we will merely take this opportunity to point out the statutory process set out above. It seems to us that any individual who serves on a board or commission should be able to obtain records relating to the business of the board or commission without the need to submit a public records request to the public body. However, to the extent this is the Board's policy, we would stress compliance with § 84-712 by all parties.

With respect to the audio recordings, the Board has taken the position that the audio recordings are not public records. We disagree. Neb. Rev. Stat. § 84-712.01 (2014) defines "public records" as "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. . . ." Mr. Palmer uses the recordings to help him prepare the meeting minutes—which we understand is one of his prescribed duties. The fact that Mr. Palmer uses a personal device to record the meetings is irrelevant. *See File No. 15-R-118; City of Omaha and Mayor Jean Stothert; Omaha World-Herald, Petitioner* (text messages sent and received by city officials while conducting city business are public records subject to disclosure).

In addition, we find no merit to the Board's assertions that the recordings constitute "work product" or are "preliminary drafts." Generally speaking, work product relates to "[t]angible material or its intangible equivalent, in unwritten or oral form, that was either prepared by or for a lawyer or prepared for litigation, either planned or in progress. Work

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product is generally exempt from discovery or other compelled disclosure.” Black’s Law Dictionary (11th ed. 2019), work product. There is no question that an audio recording of a public meeting would not fit this definition. We also fail to see how the opinion cited applies to an audio recording of an open meeting. The recording is not a preliminary draft subject to approval by upper management. Once created, it is a record subject to disclosure under § 84-712(4); there would be no statutory basis to withhold it.

Finally, we will point out that under Neb. Rev. Stat. § 2-261 “[c]ounty agricultural societies shall comply with the Open Meetings Act and the Records Management Act.” Certain provisions of the Records Management Act, Neb. Rev. Stat. §§ 84-1201 to 84-1227 (2014, Cum. Supp. 2018, Supp. 2019), require agency compliance with records retention schedules. We note that under Schedule 24, Local Agencies, General Records, Item Number 24-57 “Meeting Minutes and Materials,” audio recordings are required to be retained for one year after minutes are approved.

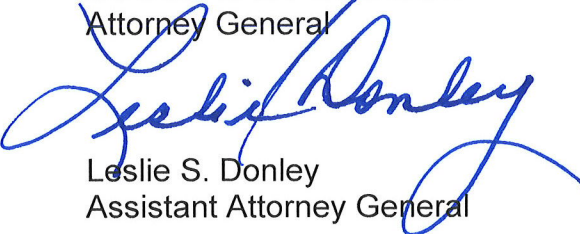
CONCLUSION

Based on the foregoing, we conclude that the Platte County Agricultural Society Board of Directors did not violate the NPRS with respect to your purported request for a letter from the City of Columbus. However, going forward, we will suggest to the Board, by forwarding a copy of this response to Ms. Lay, that this office expects full compliance with the provisions of the NPRS in the future. As to the audio recordings, we would strongly advise the Board to review the Records Management Act to ensure future compliance.

Since no further action is necessary by this office we are closing this portion of your file. If you disagree with the conclusions reached in this disposition letter, you may wish to discuss these matters with your private attorney to determine what, if any, additional remedies might be available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Elizabeth J. Lay (via email only)

49-2465-29