Public Access to Nebraska State Court Records and Proceedings

by Alan G. Gless
District Court Judge
Fifth Judicial District of Nebraska
June 13, 2007

This extended essay is intended for Nebraska state court judges of all levels, journalists whose work assignments require them to access court records, and clerks of all Nebraska courts -- an audience possessing a fairly wide range of legal sophistication and court-related background.[1] The real challenge here lies in writing for three disparate audiences who have very different interests.

If this essay mostly reads as if it's written for judges, giving them guidance on when they can withhold records, at least I tried. Court clerks likely most want to know which records they can give out and which ones they'd better discuss with their judges before releasing records they're not sure they can release.[2]

Journalists probably would prefer I focus this essay toward what records they can get on demand, which ones they could get with a little argument, and which ones would require a major court case or law change. Actually, this essay does serve those clerks' and journalists' purposes. It might not put things in those terms, but the messages are here; read on, and if you don't find what you're looking for, Email me, call me, write me, reach me through Janet Bancroft. I'll try harder on direct inquiries.

Discussion heard at the Judges and Journalists Conference[3] initially inspired this essay.

---

[1] Because of that wide range, I enlisted the assistance of: Leslie Reed of the Omaha World Herald; Nicole Miller, Esq., District Judges' Research Attorney; Jon C. Bruning, Esq., Nebraska Attorney General; Matt McNair, Esq., Chief Deputy Neb. Attorney General; Jacque Stewart, Clerk of the Seward County District Court; Hon. Sheila R. Beins, Clerk Magistrate, Seward County Court; Alan E. Peterson, Esq., and Shawn Renner, Esq., Counsel to the Nebraska Press Association; and, Janet Hammer Bancroft, Public Information Officer, Nebraska Supreme Court. Michael C. Cox, Counsel to the Omaha World Herald, became involved after the online appearance of the April 12, 2007 version of this essay. I thank all of them. I also absolve all of them of responsibility for any errors in this essay; I claim all errors as my own work.

This essay is limited to a discussion of the rules that apply to Nebraska's state courts. The federal courts have their own different set of rules overwhelmingly inapplicable to Nebraska state courts; we will not examine those differences in this essay.

[2] Keeping in mind, in the case of the clerks of the district courts, their legal advisors are their county attorneys, not their judges, but also keeping in mind they need to live in closer proximity to their judges.

[3] Conference sponsored by the National Center for the Courts and the Media Located Within the National Judicial College held in Lincoln on December 1, 2006.

Here's how: a journalist asked a question relating to what pretrial court records should be available to public access, or as intended in the question, specifically accessible to reporters. The ensuing discussion created one inescapable conclusion – someone needed to research and write on the general topic of press/public access to court records. Or, so I thought as I drove home wondering if I truly was clue-free in this area. Next came a fortuitously-timed phone conversation with Janet Bancroft, who gently nudged my developing curiosity and here's the result.

Law[4] tends not to lend itself to clear, definite rules; correct answers to legal questions usually must be prefaced by some limiting phrase like: it depends. But in the area of confidentiality of court records, we actually find a few clear, definite rules. Of course, we do need to wander about in Nebraska's statutes to find those clear, definite rules. And then, we also find a few slightly foggier areas.[5] No matter what the basic rules may be, the facts of any and every situation may change the application of the basic rules.

As a working constitutional proposition, whatever has "been revealed in open court proceedings or through public documents [such as case filings] . . . is public property. Our prior cases have foreclosed any serious contention that further disclosure of such information can be

---

[4] For purposes of this essay, "law" includes all federal and state constitutional provisions, statutes, case law, and all rules and policies adopted by the Nebraska Supreme Court.

[5] This essay briefly touches upon some of the rules established by constitutional provisions such as the first and sixth amendments and their state analogs, but does not discuss most of those rules. If you need to go to the top of the hierarchy of American law, you're in deeper than you want to be, and, this is an essay, not a treatise.

If you're looking for the constitutional rules, start with Press-Enterprise Co. v. Superior Court of California for the County of Riverside, 478 U.S. 1 (1986), and the cases cited at Nebraska State Bar Association, Nebraska Broadcasters Association, & Nebraska Press Association, Reporters' Guide to Media Law & Nebraska Courts 72-73 (2005).

suppressed before publication or even punished after publication."[6] As a working statutory proposition, ***all*** **Nebraska court records are public records, unless** a Nebraska statute, Nebraska Supreme Court precedent, or Nebraska Supreme Court rule or policy says otherwise.

NEB. REV. STAT. § 24-1001 sets the tone when it says: "All judicial proceedings of all courts established in this state must be open to the attendance of the public unless otherwise specially provided by statute." The first cross reference in the statute book then says: "Trial to establish paternity of child is not open to general public, see § 43-1412." That's quick.

[6] Nebraska Press Association v. Stuart, 427 U.S. 539, 596 (1976)(Brennan, Stewart, & Marshall, JJ., concurring), and cases cited there.

With specific reference to "records," as opposed to the more general "proceedings," Nebraska's statutory general rule on public accessibility versus permitted confidentiality appears in NEB. REV. STAT. § 84-712. The Nebraska definition of "public records" holds primary importance to an understanding of all the rest of chapter 84, article 7, the general statutes on the topic. Under Neb. Rev. Stat. § 84-712.01(1), *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 or any county[7]. . . Any record that falls within the definition of a public record in its original form remains a public record when maintained in computer files.

A few statutes expressly declare certain court records to be public records. Grand jury proceedings tend to occur behind shrouds of secrecy. But, under NEB. REV. STAT. § 25-1601, all excuses from grand jury service and the grounds for the excuses become public records, and, under NEB. REV. STAT. § 25-1627, the manner in which the key number was selected, the name of the judge present, and the date and the hour of selection of potential grand jurors become public records.

Under NEB. REV. STAT. § 84-712(1), *except as otherwise expressly provided by statute*, everyone interested in the examination of public records, has an enforceable right to examine public records and to make memoranda, copies using their own copying or photocopying equipment as provided in the statutes, and abstracts from public records, all free of charge, during respective public offices' normal business hours and purchase copies of public records as provided in the statutes during the offices' normal business hours, unless federal copyright laws prohibit copying.

The Nebraska Supreme Court defined both the concepts of "public access" and "public," in its INTERIM POLICY ON PUBLIC ACCESS TO COURT INFORMATION of 2003. "Public access" means the public can inspect and obtain a copy of the information in a court record.[8] For purposes of public access, "public" includes: any person and any business or non-profit entity, organization or association; any governmental agency for which there is no existing policy defining the agency's access to court records; media organizations; and entities which gather and disseminate information for whatever reason, and regardless of whether it is done with the intent of making a profit, without distinction as to the nature or extent of access.

The Special Rules on Public Access to Court Records

Recall that "*except when any other statute expressly provides that particular information or*

[7] The definition includes other public bodies, but in this essay we're concerned only with the state courts and the counties' district court clerks.

[8] NEBRASKA SUPREME COURT INTERIM POLICY ON PUBLIC ACCESS TO COURT INFORMATION § II.(E)(November 13, 2003).

records shall not be made public." Among its statutes that expressly provide that particular information shall not be made public, Nebraska recognizes several types of permanently confidential court records, several types of temporarily confidential court records, and includes some problem areas.

A. Permanently Confidential Court Records

Exception: Anything, even if described in this essay as permanently confidential, if it was made part of the record of a court proceeding of any kind and/or part of a court case file, or, a judge ordered its release, becomes publicly accessible.

Presentence Reports and Presentence Psychiatric Examinations. Under NEB. REV. STAT. § 29-2261(6), any presentence reports and psychiatric examinations of adult convicts remain permanently confidential court records. Let's say a judge conducting a sentencing hearing has received into evidence as an exhibit a presentence investigation report. Now we have an apparent conceptual tangle, but appearances can deceive. Receiving an item into evidence ought to make it a public record no matter how wrong it might be to receive it as an exhibit. But the more specific permanently confidential rule may control over the general rule. The Nebraska Supreme Court has not had to resolve the question yet.

Juvenile Court Records. Under NEB. REV. STAT. § 43-2,108, juvenile court records that remain permanently confidential include: medical, psychological, psychiatric, and social welfare reports; docket records *other than pleadings, orders, decrees, and judgments*; case files and records; reports and records of probation officers; and information supplied to the court by any individual or public or private institution, agency, facility, or clinic, which is compiled by, produced by, and in the possession of any court. Thus, the public can access only a very few juvenile court records. The publicly accessible juvenile court records include only the docket records of pleadings, orders, decrees, and judgments.

The interpretation just stated comes from a particular way of looking at § 43-2,108 (3), which provides in its entirety:

> As used in this subsection, confidential record information shall mean all docket records, other than the pleadings, orders, decrees, and judgments; case files and records; reports and records of probation officers; and information supplied to the court of jurisdiction in such cases by any individual or any public or private institution, agency, facility, or clinic, which is compiled by, produced by, and in the possession of any court. In all cases under subdivision (3)(a) of section 43-247, access to all confidential record information in such cases shall be granted only as follows: (a) The court of jurisdiction may, subject to applicable federal and state regulations, disseminate such confidential record information to any individual, or public or private agency, institution, facility, or clinic which is providing services directly to the juvenile and such juvenile's parents or guardian and his or her immediate family who are the subject of such record information; (b) the court of

> jurisdiction may disseminate such confidential record information, with the consent of persons who are subjects of such information, or by order of such court after showing of good cause, to any law enforcement agency upon such agency's specific request for such agency's exclusive use in the investigation of any protective service case or investigation of allegations under subdivision (3)(a) of section 43-247, regarding the juvenile or such juvenile's immediate family, who are the subject of such investigation; and (c) the court of jurisdiction may disseminate such confidential record information to any court, which has jurisdiction of the juvenile who is the subject of such information upon such court's request.

The first sentence of § 43-2,108 (3),

> [a]s used in this subsection, confidential record information shall mean all docket records, other than the pleadings, orders, decrees, and judgments; case files and records; reports and records of probation officers;[9] and information supplied to the court of jurisdiction in such cases by any individual or any public or private institution, agency, facility, or clinic, which is compiled by, produced by, and in the possession of any court,

expresses the general confidentiality rule. Other than the pleadings, orders, decrees, and judgments, everything else in the court's records remains confidential and publicly inaccessible. So much should be pretty clear.

The second sentence of § 43-2,108 (3),

> [i]n all cases under subdivision (3)(a) of section 43-247, access to all confidential record information in such cases shall be granted only as follows: (a) The court of jurisdiction may, subject to applicable federal and state regulations, disseminate such confidential record information to any individual, or public or private agency, institution, facility, or clinic which is providing services directly to the juvenile and such juvenile's parents or guardian and his or her immediate family who are the subject of such record information; (b) the court of jurisdiction may disseminate such confidential record information, with the consent of persons who are subjects of such information, or by order of such court after showing of good cause, to any law enforcement agency upon such agency's specific request for such agency's exclusive use in the investigation of any protective service case or investigation of allegations under subdivision (3)(a) of section 43-247, regarding the juvenile or such juvenile's immediate family, who are the subject of such investigation; and (c) the court of jurisdiction may disseminate such confidential record information to any

[9] Of some relevance to this interpretive journey, probation officers generally do not play any role in 3(a) cases. So, why exclude their non-existent records and reports from 3(a) cases, assuming § 43-2,108 (3) applies only to 3(a) cases, an interpretation the text will get you to in a bit (at p. 7)?

court, which has jurisdiction of the juvenile who is the subject of such information upon such court's request,

states by necessary implication that limited access can be granted to certain entities (and only to those entities, none which happens to be the public) only in cases arising under § 43-247 (3)(a).

Buttressing this way of looking at § 43-2,108 (3), one finds in § 43-2,108 (4):

> Nothing in subsection (3) of [§ 43-2,108] shall be construed to restrict the dissemination of confidential record information between any individual or public or private agency, institute, facility, or clinic, except any such confidential record information disseminated by the court of jurisdiction pursuant to this section shall be for the exclusive and private use of those to whom it was released and shall not be disseminated further without order of such court.

And then, one also finds support in the Practice Note to § 43-2,108 prepared and approved by the Legislature's Judiciary Committee (and included in the statute book pursuant to § 43-2,130), which provides:

> Records information, including dockets, case files, and calendar information are generally open to the public in cases filed under subdivisions (1), (2), (3)(b) of section 43-247. Access to medical, psychological, psychiatric, social and probation reports, which are not considered to be a usual part of the case record of proceedings, is limited by subsection (2) of this section.
>
> In cases filed under subdivision (3)(a) of section 43-247, court calendar information and specific docket information (pleadings, orders, decrees, and judgements) are open to the public for inspection. Access to and dissemination of other record information compiled in such cases is restricted as provided in subsection (3) of this section.
>
> Minute book usually includes dockets and journal entries.

NEB. REV. STAT. § 43-2,108 (2) referred to in the Practice Note provides:

> Except as provided in subsection (3) of this section, *the medical, psychological, psychiatric, and social welfare reports and the records of juvenile probation officers as they relate to individual proceedings in the juvenile court shall not be open to inspection, without order of the court*. Such records shall be made available to a district court of this state or the District Court of the United States on the order of a judge thereof for the confidential use of such judge or his or her probation officer as to matters pending before such court but shall not be made available to parties or their counsel; and such district court records shall be made

> available to a county court or separate juvenile court upon request of the county judge or separate juvenile judge for the confidential use of such judge and his or her probation officer as to matters pending before such court, but shall not be made available by such judge to the parties or their counsel. (Italics mine).

Thus, even § 43-2,108 (2) restricts from inspection by anyone, including even the parties or their counsel, without a court order, other than the juvenile court and the officials preparing such reports and records (the medical, psychological, psychiatric, and social welfare reports and the records of juvenile probation officers as they relate to individual proceedings in the juvenile court) and other courts in need of the information. In those other courts, again, not even the parties or their counsel may be granted access to those records. Notably, the phrase, "*as they relate to individual proceedings in the juvenile court*," contains no limitation to cases arising under any particular type of juvenile court jurisdiction (1, 2, 3(a), 3(b), 3(c), or 4). Therefore, § 43-2,108 (3) does not restrict the operation of the juvenile code's confidentiality provisions; what it does do lies in permitting limited access to certain types of records to specified persons, none of whom include any members of the public.

Readers should be made aware, assuming they're not already aware without me laying it out here, within some press circles, there is a competing interpretation of the juvenile code's confidentiality provisions. That interpretation runs along these lines:

NEB. REV. STAT. § 43-247 describes the jurisdiction of the juvenile courts and sets forth in enumerated paragraphs the specific matters of which it has original jurisdiction. That is significant in light of NEB. REV. STAT. § 43-2,108 which describes juvenile court files, what records are to be kept therein and what records are not open to inspection without order of the court.

Subsection 1 of Section 43-2,108 states that the juvenile court shall keep a minute book in which he or she shall enter minutes of all proceedings with the court in each case including appearances, findings, orders, decrees and judgments and any evidence which he or she feels it is necessary and proper to record. Juvenile court legal records shall be deposited in files and shall include the petition, summons, notice, certificates or receipts of mailing, minutes of the court, findings, orders, decrees, judgments, and motions.

All of the foregoing court records are clearly open under Nebraska law.

Subsection 2, however, restricts the openness of certain records including medical, psychological, psychiatric, and social welfare reports, and records of the juvenile probation officer as they relate to individual proceedings in the juvenile court unless those matters are entered into evidence in a juvenile court proceeding. No one in the press so far has ever contested the issue of openness with respect to these type of records.

According to this view, what is interesting, however, is subsection 3, which defines "confidential record information" as all docket records, other than the pleadings, orders, decrees

and judgments; case files and records; reports and records of probation officers; and information supplied to the court of jurisdiction and such cases by any individual or any public or private institution, agency, facility, or clinic which is compiled by, produced by, and in the possession of any court. The access to the above information is limited by the language of the statue and is not subject to disclosure absent court approval. However, it is significant that this subsection of NEB. REV. STAT. § 43-2,108 is specifically limited to cases under NEB. REV. STAT. § 43-247(3)(a) which deals with juveniles who are homeless, abandoned, etc. This view concludes that, significantly, § 43-2,108 (3) does not apply to subsection 1 or 2 of NEB. REV. STAT. § 43-247, which deal with juveniles who commit misdemeanors or felonies. The majority of the matters in which press members holding this competing interpretation of § 43-2,108 routinely seek juvenile court records generally involves juveniles who are alleged to be committing crimes.

As requested by the press members holding this competing view of the juvenile code's confidentiality provisions, I have revisited the discussion in the April 12, 2007, version of this, my Essay, and the characterization of juvenile court records in the April 12, 2007, version of my Checklist. I adhere to my earlier interpretation of § 43-2,108 (3), as fleshed out in this version of my Essay. I have adjusted my checklist to reflect other observations shared with me, but not to reflect the foregoing competing interpretation of § 43-2,108 (3).

Mental Health Commitments. In a special case type, juvenile courts create and maintain completely and permanently confidential records. That case type is defined by NEB. REV. STAT. § 43-247(3)(c) as a case involving a juvenile who is claimed to be mentally ill and dangerous, the juvenile court equivalent of district court's mental health board commitment proceedings. The public cannot access *any* juvenile court mental health commitment records, including pleadings, orders, decrees, and judgments under § 43-2,108(5). Nor, under NEB. REV. STAT. § 71-961 can the public access records on any adult subject committed under the authority of the Nebraska Mental Health Commitment Act.

Under *In re Interest of Michael M.*,[10] all records relating to appeals from mental health boards to the district courts must be kept confidential. The entire district court appellate files and all references to the mental health appeals must be kept as part of the records of the mental health boards and confidential.

In a closely related area, under NEB. REV. STAT. § 29-3706, when a person is acquitted on grounds of insanity: "The court may direct that the medical and psychiatric records not received into evidence at such proceedings be kept confidential and not be available for public inspection." But, all pleadings, evidence admitted, orders, judgments, and memoranda of findings and conclusions become and remain a part of the official, open, public record of the underlying criminal case. But, *State v. Cribbs*,[11] added an interesting gloss here: § 29-3706 "does not govern the release of records concerning persons acquitted on grounds of insanity, but merely makes all pleadings,

[10] 6 Neb. App. 560, 574 N.W.2d 774 (1998).
[11] 237 Neb. 947, 469 N.W.2d 108 (1991).

evidence, and orders part of the official record in the underlying case. The release of these records is governed by the common-law right of access to judicial records."

A pretrial determination that the accused is incompetent to stand trial now may result in mental health board proceedings against the accused. The Nebraska Mental Health Commitment Act's confidentiality provisions governing mental health boards' records apply in such cases.

Adoption Case Records. One other common type of case generates permanently confidential records. Adoption case records remain permanently confidential under NEB. REV. STAT. § 43-113.[12] Adoptions governed by the Nebraska Indian Child Welfare Act obtain slightly less confidentiality. Nebraska Indian Child Welfare Act adoption records may be released to the appropriate tribal authorities, but not to the general public under NEB. REV. STAT. § 43-1508.

State DNA Sample Bank and the State DNA Data Base Records. Under NEB. REV. STAT. § 29-4108, all DNA samples and DNA records submitted to the State DNA Sample Bank or the State DNA Data Base are confidential except as otherwise provided in the DNA Identification Information Act. Nebraska established its State DNA Data Base for DNA records and a State DNA Sample Bank as a repository for DNA samples from individuals convicted of felony sex offenses and other specified offenses and from individuals for purposes of assisting in locating and identifying missing persons and human remains. The act permits no public access to either the sample bank or the database.

Sexual and Domestic Abuse Victims' Confidential Communications to Advocates. In NEB. REV. STAT. §§ 29-4303 & 29-4304, Nebraska created a special testimonial privilege generally preventing the compelled testimonial disclosure of confidential communications made by victims of sexual and domestic abuse to victims' advocates. The idea behind the privilege is to assist victims of sexual and domestic abuse to get the help they need without the worry that their statements to their advocates will be easily available as testimony. Within a very limited range of exceptions to the privilege, a few admissibility questions can arise and can be decided through proceedings conducted in a closed court session.

Nebraska Sex Offender Registration Act. Information obtained under the Nebraska Sex Offender Registration Act is declared confidential, except the information the act requires or allows to be disseminated in order to accomplish the goals of the registration act. The courts do not have statutory authority to release information under the Nebraska Sex Offender Registration Act[13] beyond the facts of conviction, sentence, and that a particular offender must comply with the act. Any other information under the act must be sought from the state patrol or other law enforcement agencies.

---

[12] Two other case types do too, but I'll discuss those later in the section on sealed records and closed hearings.

[13] NEB. REV. STAT. §§ 29-4001 to 29-4014 shall be known and may be cited as the Sex Offender Registration Act.

Grand Juror Votes. NEB. REV. STAT. § 29-1415 provides: "No grand juror shall be allowed to state or testify in any court in what manner he or other members of the grand jury voted on any question before them, or what opinion was expressed by any juror in relation to such question."

That's pretty clear stuff with only a few, albeit large, foggy zones. Temporarily confidential court records possibly present a few more instances of fog.

B. Temporarily Confidential Court Records

Exception: Anything, even if described in this essay as permanently confidential, if it was made part of the record of a court proceeding of any kind and/or part of a court case file, or, a judge ordered its release, becomes publicly accessible.

Search Warrant Applications. The first other statute we will visit, NEB. REV. STAT. § 29-817, provides expressly that all search warrants shall be issued with all practicable secrecy and the complaint, affidavit, or testimony upon which it is based *shall not be filed with the clerk of the court or made public in any way until the warrant is executed*.[14] The statute also covers the fact of application for a search warrant with a temporary blanket of confidentiality. Once a search under the warrant is conducted, the fact of the application for the warrant becomes public information.

Theoretically, once a search under the warrant is conducted, the complaint, affidavit, or testimony upon which the search warrant is based also becomes public information. But the practicality of the situation and the theory of the situation don't really quite mesh. The authorized searchers must fill out an inventory of what items they took from the person or place searched. That process, in itself, can entail a short delay before public accessibility takes effect as a practical matter.

Then, the authorized searchers must file their "return," that is, their inventory and the warrant with their sworn statement of when they did the search and what they took. They file their return with the issuing judge or magistrate who files it all with clerk of the district court in the county where the warrant was issued, even when a supreme court, appellate court, or county court judge or a clerk magistrate issued the search warrant, as well as when a district court judge issued the search warrant. The filing in the district court clerk's office transforms the temporarily confidential record into a public record for practical purposes of public accessibility.[15]

---

[14] The only exception that could apply here would be a judge's release order. Don't expect any judge ever to order a public release of the information that a search warrant has been issued before the execution of the search warrant.

[15] No one would want the searchers to lose any of their required paperwork by sharing any of it with anyone else before filing the paperwork in the proper clerk's office just to make the theoretical transformation real.

Wiretapping and Other Electronic, Wire, or Mechanical Communications. The search warrant scenario describes a temporarily confidential court record. Under NEB. REV. STAT. § 86-290(1), wiretapping and other electronic, wire, or mechanical communications intercept applications and authorizations likely also receive at least temporary confidentiality. A strong argument can be made that wiretap and other electronic intercept records always remain permanently confidential court records. The intercept statutes don't definitely say one way or the other, but the implications seem to favor permanent confidentiality. See, e.g., NEB. REV. STAT. § 86-292. Despite that appearance, since the statutes don't specifically declare them confidential, maybe they're publicly accessible. No definite answer lies open to us currently.

Indictments, Informations, & Complaints. NEB. REV. STAT. § 29-1414 provides: "No grand juror or officer of the court shall disclose that an indictment has been found against any person not in custody or under bail, except by the issuing of process, until the indictment is filed and the case docketed." Under that statute, once the court files and dockets an indictment, the fact of indictment becomes public record. The issuance of an arrest warrant on an indictment discloses the fact of indictment, but does not become public record until the filing and docketing of the indictment, because the issuance of an arrest warrant need not immediately be made public.

The same rule should apply to complaints and informations under the intrepretive idea and, in the case of informations, the statutory rule, that whatever applies to indictments and can be applied to complaints and informations should be applied to complaints and informations.[16]

Here we find another instance in which the practicality of the situation and the theory of the situation don't really quite mesh. Envision this scenario: It's 2:30 a.m. on a Saturday morning. The sheriff's office calls. They're on the way to my home with a complaint and arrest warrant application. They arrive. They seek the arrest of someone neither in custody nor on bail. After swearing the affiant and reading the documents, I issue the requested arrest warrant. This complaint

---

[16] NEB. REV. STAT. § 29-1604 provides:

> The provisions of the criminal code in relation to indictments, and all other provisions of law, applying to prosecutions upon indictments to writs and process therein, and the issuing and service thereof, to motions, pleadings, trials and punishments or the execution of any sentence, and to all other proceedings in cases of indictments, whether in the court of original or appellate jurisdiction, shall in the same manner and to the same extent, as nearly as may be, apply to informations, and all prosecutions and proceedings thereon. See, also, State v. Nearhood, 233 NEB. 767, 448 N.W.2d 399 (1989).

Although NEB. REV. STAT. § 29-1604 mentions an "indictment," § 29-1604 applies equally to indictments, informations, and complaints. State v. Wehrle, 223 NEB. 928, 395 N.W.2d 142 (1986).

will not be filed and docketed until Monday morning at the soonest and that assumes Monday isn't a legal holiday. Does anyone realistically believe the facts of the presentation of the complaint to me and my issuance of the arrest warrant will be disclosed before the complaint is filed and docketed? Highly doubtful, but possible.

Transposed to the hypothetical, NEB. REV. STAT. § 29-1414 provides: No officer of the court shall disclose that a complaint has been issued against any person not in custody or under bail, except by the issuing of process, until the complaint is filed and the case docketed. As noted above referring to an indictment, the issuance of an arrest warrant on a complaint discloses the fact that a complaint has been issued (no warrant would issue without a precedent issuance, not necessarily filing, of a complaint), but the issuance of the complaint does not become public record until the filing and docketing of the complaint, because the issuance of the complaint need not immediately be made public.[17]

NEB. REV. STAT. § 29-1414 only prohibits grand jurors and court officers from disclosing the finding of indictments and the issuance of informations and complaints against persons not in custody or under bail, except by the issuing of process,[18] until the indictments, informations, or complaints are filed and the cases docketed. Obviously, if the targets of the indictments, informations, and complaints *are* in custody or under bail, then, no prohibition on disclosure applies, not even for the very brief periods preceding filings and docketings.

Thus, the temporarily confidential court records provisions also present a few foggy zones. Perhaps the "it depends" category will provide even more opportunities for misunderstanding.

C. It Depends – Permanently, Temporarily, & Maybe Not At All, Confidential Court Records

Exception: Anything, even if described in this essay as permanently confidential, if it was made part of the record of a court proceeding of any kind and/or part of a court case file, or, a judge ordered its release, becomes publicly accessible.

Jury Selection Lists. The identities of persons summoned to appear for grand jury and trial jury selection proceedings receive temporary and partial confidentiality under NEB. REV. STAT. § 25-1635, unless and until the persons are picked for actual service as grand or petit jurors. Even then, the judge may still maintain the confidentiality of the grand and trial jurors' identities.

NEB. REV. STAT. § 25-1637 provides:

---

[17] Unless, of course, we have reporters riding with every police officer, trooper, and deputy sheriff, every day all day and every night all night, or, unless we impose a duty on judges to call media offices at 3:15 a.m. on Saturday mornings to tell the media of the presentation of complaints and warrant issuances the judges just accomplished.

[18] Arrest warrants, generally, but also includes citations-in-lieu-of arrest issued by courts.

> The contents of any records or papers used by the jury commissioner or the clerk in connection with the [jury] selection process and not made public under Chapter 24, article 16, shall not be disclosed, except in connection with the preparation or presentation of a motion under subsection (1) [to quash the entire jury panel] of this section, until after all persons on the revised proposed juror list have been discharged.

Note, the records covered by § 25-1637 may be disclosed to the parties during the pendency of the motion.

Grand Jury Reports. Another statute may only temporarily or may permanently protect from public access grand jury reports (one of those "it depends" types). Under NEB. REV. STAT. § 29-1420, the report of a grand jury shall not be made public except when the report is filed, including indictments, or when required by statute. A grand jury is not required to prepare a report. If a grand jury does not indict anyone and does not prepare a report, nothing from that grand jury's proceedings may be released, with a very limited set of exceptions.[19]

But all of the report or a portion of a grand jury report may be released: if a district court judge finds that such a release will exonerate a person or persons who have requested such a release, NEB. REV. STAT. § 29-1420(1); if a district court judge transfers to another court in another jurisdiction any evidence a grand jury might have collected showing the commission of offenses in that other jurisdiction, NEB. REV. STAT. § 29-1420(2); or, a district court judge orders the release to a witness of that witness's own grand jury testimony, or any minutes, reports or exhibits relating to the witness's own testimony, NEB. REV. STAT. § 29-1407.01(2).

Victims and Witnesses in Criminal Cases and Parole Proceedings. NEB. REV. STAT. §§ 81-1848(2)(c) & 81-1850 protect from public access and disclosure the contact information of victims in criminal cases after conviction and sentence in parole and similar proceedings.

NEBRASKA SUPREME COURT INTERIM POLICY ON PUBLIC ACCESS TO COURT INFORMATION §§ VIII (B)(3) & VIII (B)(4) purport to carry the protection even further. Extending the privacy protection of the statutes probably cannot be described as "trumping" the statutes. This policy, a Nebraska Supreme Court rule, provides that information that is not to be accessible to the public includes the names and addresses of victims in criminal cases and the names and addresses of witnesses. The specific rules contained in this policy do not expressly limit themselves to witnesses[20] in criminal cases.

---

[19] The supreme court has dealt with this situation twice recently: *In re Grand Jury of Lancaster County*, 269 NEB. 436, 693 N.W.2d 285 (2005); & *In Re Grand Jury of Douglas County*, 263 NEB. 981, 644 N.W.2d 858 (2002). Both of those opinions contain interesting discussions of grand jury secrecy and disclosure.

[20] A nice little nitpicker question arises when a party to a case testifies and becomes a witness by doing so, does that render the party's name publicly inaccessible? An absurd result assuredly, but

Whether or not the Interim Policy was directed at creating greater confidentiality than the statutes seem to grant; and whether or not the rule has been cited anywhere at any time since its adoption; and, no matter who within the court system initially drafted the Interim Policy, it has been adopted. Those of us within the judicial system must comply with it until its changed, if it is.

I describe the protection of these supreme court rules as purported, because of conflicting laws and practices from an earlier era that remain in effect. Prosecutors must list in the charging instruments used to initiate criminal and juvenile law violation prosecutions (informations, complaints, and juvenile petitions) the names of the state's witnesses. The rules with regard to listing (endorsing) witnesses' names on charging instruments have not changed to conform with current ideas of privacy. If prosecutors do not endorse witnesses' names on their charging instruments, they may not call the witnesses to testify. In addition, immediately after a witness is asked whether they swear or affirm to tell the truth, the habitual first question to any witness in court lies in some variant of "state your name and address please?"

At the moment witnesses comply by stating either their names or their addresses, constitutionally, their statutory and rule-based privacy protection evaporates.

This problem is extended by filing practices involved in the issuance of subpoenae in all dockets, civil as well as criminal. A party to a case wants a witness subpoenaed for a hearing or trial. The party files with the appropriate clerk's office praecipes (requests) for the issuance of subpoenae. The praecipes show the witnesses's names and addresses at which the party believes the witnesses may be served. When subpoenae are served, returns of service get filed, again in the clerk's office. Unless clerks' offices have changed their filing practices to match the public access statutes and rules, the clerks file praecipes and returns in the publicly accessible case files, which also triggers constitutional public access and destroys the inaccessibility idea.

General Criminal History Information. More general criminal history information is covered by the Security, Privacy, and Dissemination of Criminal History Information Act.[21] NEB. REV. STAT. §§ 29-3518 strictly limits who may have direct access to the Criminal History Information system. NEB. REV. STAT. § 29-3523 imposes some limits on the type of criminal history information that can be disclosed and creates a way for people to seek removal of specified information from their criminal history.[22]

Despite some minor limits, the general rule of NEB. REV. STAT. § 29-3520 remains that "complete criminal history record information maintained by a criminal justice agency shall be a

---

the question reveals once again that language has its limits.

[21] NEB. REV. STAT. §§ 29-209, 29-210, 29-3501 to 29-3528, and 81-1423 shall be known and may be cited as the Security, Privacy, and Dissemination of Criminal History Information Act.

[22] See, also, NEBRASKA SUPREME COURT INTERIM POLICY ON PUBLIC ACCESS TO COURT INFORMATION § VIII(B)(1)(November 13, 2003).

public record open to inspection and copying by any person during normal business hours and at such other times as may be established by the agency maintaining the record." Someone in the legislature apparently forgot that NEB. REV. STAT. § 29-3509 defined "criminal justice agency" to mean courts and all other government agencies or any subunits thereof which perform the administration of criminal justice pursuant to a statute or executive order and which allocate a substantial part of their annual budgets to the administration of criminal justice, because NEB. REV. STAT. § 29-3521 specifies that court records of any judicial proceeding shall be considered public records for purposes of dissemination under the criminal history act.

At least two interesting practical problems can arise from classifying courts as criminal justice agencies under the criminal history act. Criminal justice agencies must maintain complete criminal history information as defined in the act. NEB. REV. STAT. § 29-3507 says:

> With reference to criminal history record information, complete shall mean that arrest records shall show the subsequent disposition of the case as it moves through the various stages of the criminal justice system; and accurate shall mean containing no erroneous information of a material nature.

One problem potentially created here, for example, lies in the facts that supreme court, court of appeals, and district court actions do not appear in county court records in felony cases. The escape from that problem lies in realizing that "courts," when read to mean the entire court system, will have the dispositions made at every level along the way, even though individual levels may not. The second problem lies in the reference to "arrest records." Arrest records do not necessarily become part of the courts' records, although they can. If they do, they're most likely publicly accessible.

In NEB. REV. STAT. § 29-3521, we discover an interesting statutory interpretation problem in the statutory mandate that public records for purposes of dissemination include wanted persons ads, original records of entry by criminal justice agencies, *court records of any judicial proceeding*, and certain records of traffic offenses maintained by the DMV. One reasonably may interpret that language not to override the more specific statutes declaring particular court records off-limits.

Likewise, enterprising counsel for persons with standing have ammunition in that language to argue the specific statutes might not apply. No one yet knows for sure what the supreme court would say about that, because no such case has reached the supreme court.

Mediation Communications. Under NEB. REV. STAT. § 25-2914, even mediation communications, while generally confidential, could become the subject of court records, and, therefore, publicly accessible, but the problem won't arise frequently. NEB. REV. STAT. § 25-2914 provides:

> Any verbal, written, or electronic communication made in or in connection with matters referred to mediation which relates to the controversy or dispute being

> mediated and agreements resulting from the mediation, whether made to the mediator, the staff of an approved center, a party, or any other person attending the mediation session, shall be confidential. Mediation proceedings shall be regarded as settlement negotiations, and no admission, representation, or statement made in mediation, not otherwise discoverable or obtainable, shall be admissible as evidence or subject to discovery. A mediator shall not be subject to process requiring the disclosure of any matter discussed during mediation proceedings unless all the parties consent to a waiver. Confidential communications and materials are subject to disclosure when all parties agree in writing to waive confidentiality regarding specific verbal, written, or electronic communications relating to the mediation session or the agreement. This section shall not apply if a party brings an action against the mediator or center, if the communication was made in furtherance of a crime or fraud, or if this section conflicts with other legal requirements.

Identity of Informers. Cases in which court records might be generated relating to the identity of informers under NEB. REV. STAT. § 27-510 don't arise very often,[23] but they do arise. If the trial judge denies the motion for disclosure under § 27-510, then, the record is sealed until and unless an appellate decision can be reached on the disclosure motion.[24] If the trial judge orders disclosure of the informer's identity, then, the chances of a court record relating to the informer's identity become very real, but not necessary. The disclosure could be made to defense counsel without a court filing identifying the informer. Any court filing identifying the informer could not be withheld from public access.

Adult Abuse Records. NEB. REV. STAT. § 28-377 declares confidential those records relating to abuse and collected under the Adult Protective Services Act. Such records would not frequently be disclosed in open court, but they could be. If they are disclosed in open court, they become publicly accessible. If they are not disclosed in open court, they remain publicly inaccessible.

Lawyer Disciplinary Proceeding Records. Records related to lawyer disciplinary proceedings under Rule 18 of the Nebraska Supreme Court Disciplinary Rules remain publicly inaccessible, except as outlined within the rule, as do the reports of alleged misconduct and grievances submitted to the Counsel for Discipline pursuant to Rule 22 of the Nebraska Supreme Court Disciplinary Rules. A rare case could come up outside the context of lawyer discipline, for example, a legal malpractice case, in which disciplinary records might become an issue, but what such cases might mean for public accessibility can wait until the cases come up.

With those crystal clear instances of permanently, temporarily, and maybe-not-at-all,

---

[23] When compared with the total caseload.

[24] *State v. Brown*, 5 NEB. APP. 889, 567 N.W.2d 307 (1997), and *State v. Lomack*, 4 NEB. APP. 465, 545 N.W.2d 455 (1996), don't address the public accessibility issue, but do provide interesting and useful procedural information on disclosure of informer identity.

confidential court records described, we move into some slightly foggier areas – not obscured, just a tiny bit hazier – created by the general statute, NEB. REV. STAT. § 84-712.05.

The General Statutory Rules on Public Access to Court Records

The opening language of NEB. REV. STAT. § 84-712.05 requires our close attention. NEB. REV. STAT. § 84-712.05 (in sixteen subsections) contains a list of records that ***may be withheld from the public unless disclosed in open court***. Two points about the emphasized language must be understood.

First, the statute ***permits*** non-disclosure; it ***does not require*** non-disclosure. **Second**, *if the information listed in § 84-712.05 that otherwise might be withheld from public access has been disclosed in open court, then, that* ***information that has been disclosed in open court cannot be withheld from public access***.[25]

So, as long as they haven't been disclosed in open court, in a public hearing, or in a public filing, what record types does § 84-712.05 allow, but not require, courts to withhold from public access?

Nebraska state courts can become the places where people challenge various types of actions or inactions of schools and educational institutions. Under NEB. REV. STAT. § 84-712.05(1), again, unless it has been disclosed, information the Nebraska state courts may withhold from public access includes: ***personal information in records regarding a student, prospective student, or former student of any educational institution or exempt school that has effectuated an election not to meet state approval or accreditation requirements pursuant to section 79-1601 when such records are maintained by and in the possession of a public entity, other than routine directory information*** specified and made public consistent with federal law, specifically 20 U.S.C. § 1232g, as that federal law existed on January 1, 2003.

Nebraska state courts routinely hear medical, health care facility, and health care provider malpractice actions. Again, unless disclosed in open court proceedings, Nebraska state courts may withhold from public access, under NEB. REV. STAT. § 84-712.05(2), ***medical records, other than records of births and deaths and except as provided in § 84-712.05(5)(investigation materials)***, in any form concerning any person; ***records of election to not be bound by the Nebraska Hospital Medical Liability Act* (§ 44-2821)**; and ***patient safety work product under the Patient Safety Improvement Act***. Closely related to this permissive provision of § 84-712.05(2), we find a more

[25] There's more than one might surmise here. The statute also says information that's been disclosed in an open administrative proceeding or open meeting or disclosed by a public entity pursuant to its duties, no longer can be withheld from the public's access. Say, we have a court action arising from one of those types of actions. If information that otherwise could have been withheld came out in those activities, then, the court cannot deem the information confidential in its proceeding either.

stringent provision in NEB. REV. STAT. § 25-12,123, which protects from discovery and introduction into evidence in civil cases, like malpractice actions, *the* ***record of proceedings conducted by health care peer review committees and substantially protects from forced disclosures the people who participated in the peer reviews***. If an extraordinary reason can be proved, a court can override the protection granted by § 25-12,123.

Nebraska state courts sometimes become the location of actions involving trade secrets and other kinds of academic, scientific and entrepreneurial research. Again, unless disclosed in an open court proceeding, under NEB. REV. STAT. § 84-712.05(3), Nebraska state courts can withhold from public access: ***trade secrets, academic and scientific research work that is in progress and unpublished, and other proprietary or commercial information that if released would give advantage to business competitors and serve no public purpose***.

Nebraska state courts routinely become involved in many cases in which law enforcement investigations and investigations by other public bodies form the core of the cases. Again, unless disclosed in an open court proceeding, under NEB. REV. STAT. § 84-712.05(5), Nebraska state courts can withhold from public access: ***records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, when the records constitute a part of the examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training***. **But**, Nebraska state **courts may not withhold** from public access under NEB. REV. STAT. § 84-712.05(5) **records so developed or received relating to the presence of and amount or concentration of alcohol or drugs in any body fluid of any person**.[26]

The investigatory records exception holds considerable potential for abuse. To prevent abuse, the exception must be read in connection with the criminal history statutes. When the two sets of laws are read together, it becomes clear that general information, such as frequently is contained in cover sheets to investigative reports cannot be withheld from public access. But the rest of the reports in which investigators describe witness interviews, evidentiary leads found and/or followed and such can be withheld from public access.[27]

Nebraska state courts routinely hear actions, such as divorces, mortgage foreclosures, fraud cases, identity theft cases, and collection and contract actions, in which a number of financial records become important to the courts' resolutions. Again, unless disclosed in open court proceedings, Nebraska state courts may withhold from public access, under NEB. REV. STAT. § 84-712.05(16): ***social security numbers; credit card, charge card, or debit card numbers and expiration dates; and financial account numbers supplied to state and local governments by citizens***. Records of these types also may become involved in various types of criminal and juvenile

[26] The current fatality accident blood test statutes also declare the drivers' blood test results public information. NEB. REV. STAT. §§ 60-6,102 & 60-6,103.
[27] See, Neb. Att. Gen. Determination, Case No. 92-R-106 (May 12, 1992).

cases.

NEB. REV. STAT. § 84-712.05 contains many other categories of information that normally are considered non-public information in daily life, but that, while infrequently, in certain circumstances, may come to be present in court records. For the sake of a little brevity, this essay explicitly discusses only those records that experience indicates could most commonly be found in court records. The same general condition applies to the other categories covered by § 84-712.05, that is:

> ***once non-public information is disclosed in open court, or by public filing, or otherwise, the information ceases to be non-public and Nebraska state courts may not withhold that information from public access***.

One last class of documents needs mention before we move on. When the criminally accused believe themselves indigent and unable to afford privately retained counsel in jailable offense cases, they have the right to seek appointed defense counsel. In paternity actions and child support enforcement actions, the right to appointed counsel also applies. Some trial courts use the supreme court's standardized financial affidavit/application for appointed counsel form; other trial courts attempt to substantiate applicants' indigence through local procedures.

The legislature adopted, and then never funded, a set of judicial district public defender statutes in which they provided the financial affidavits used to apply for appointed counsel must be kept confidential. The legislature also adopted county public defender statutes in which they did not include a confidentiality provision to cover the applicants' financial affidavits. No one in Nebraska uses a judicial district public defender system; everyone uses some form of county public defender system or else appoints counsel as needed.

Thus, are those affidavits, or other application documents that people file, seeking appointed counsel, confidential filings or not? Chief Justice Hendry once posited in a 2005 letter to me that those affidavits and other application documents are not confidential responding to a letter from me in which I posited they are confidential.[28] So, no one knows for sure, but wise applicants for appointed counsel should realize their affidavits might not be confidential.

Authority for Sealing Records or Closing Proceedings

The topic of Nebraska state court judges sealing records and closing proceedings bears a close relationship with the withholding of public access to court records. Records infrequently can be subjected to orders sealing them. Not even mental health commitment records can be sealed, even though they're deemed confidential.[29] Live in-court proceedings, other than those already discussed, may be closed to public access, even less frequently. Nebraska statutes provide far less

[28] Hard copies of described correspondence on file with author.
[29] *In re Interest of Michael M.*, 6 NEB. APP. 560, 574 N.W.2d 774 (1998).

authority to seal records and close proceedings than the statutory authority provided permissively to withhold public access to court records.

The statutes authorize the Nebraska Supreme Court to adopt civil case discovery rules and the supreme court has done so. NEBRASKA SUPREME COURT DISCOVERY RULES FOR CIVIL CASES R. 26(c) provides that, on motion, a Nebraska state court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including the sealing of discovery and submitting documents and information to the court under seal to be opened as directed by the court.[30]

In another one of those "it depends" types of statutes, the legislature provided for sealing records. If a judge issues an order under NEB. REV. STAT. § 43-2,105, setting aside a juvenile adjudication then, the judge also orders sealed all the court's records relating to the adjudication. But the judge can go much further and may include in the sealing order all records not only of the court, but also all records of law enforcement officers, county attorneys, or any institution, person, or agency which may have such records. For good cause shown the sealing order may be lifted. And further, an order sealing the records under § 43-2,105:

> does not prohibit law enforcement agencies from maintaining data to assist law enforcement officers, county attorneys, and sentencing judges in the investigation of crimes and the prosecution and sentencing of criminal defendants.

A memo, dated April 26, 2001, from now retired State Court Administrator Joseph C. Steele, addressed to all Nebraska state trial court judges advised:

> There are records (such as adoption records) or portions of records (such as presentence investigations) which are confidential by statute. Additionally, a judge will occasionally enter an order sealing all or part of a record. When you take such action, if you are not very clear in your order, it can cause confusion for the clerk of your court as well as the clerk of any court to which the case has been appealed.
>
> *Therefore, when you enter such an order please be very specific about which portion of the record is to be sealed, to whom such restrictions apply, and the recitation of the underlying authority for the order you have entered.* (Italics mine).
>
> Please also instruct your clerk and reporter that any portion of the record which you order sealed is to be physically separated in some way from that portion of the record which is a public record.[31]

Thus, orders sealing court records can be tricky things. A sealing order differs only in

[30] For specific statutory protection for trade secrets, *see, also,* NEB. REV. STAT. § 87-505.
[31] Hard copy and electronic copy on file with author.

degree from decisions under the statutes discussed above relating to withholding court records from public access.

Another special situation is covered by NEB. REV. STAT. § 71-6903, relating to actions seeking authority from courts to obtain an abortion without an under age female notifying her parents. Under § 71-6903(5), the proceedings in court pursuant to this section shall be confidential and held in camera. Further,

> All testimony, all documents, all other evidence presented to the court, the petition and any order entered, and all records of any nature and kind relating to the matter shall be sealed by the clerk of the court and shall not be open to any person except upon order of the court for good cause shown. A separate docket for the purposes of this section shall be maintained by the clerk of the court and shall likewise be sealed and not opened to inspection by any person except upon order of the court for good cause shown.

Note, under § 71-6903(5), the judge does not order the records sealed. The statute directs the clerk to seal all the records and to keep a separate sealed docket of this type of action. For good cause shown, a judge can lift the statutory sealing.

Beyond the statutes allowing withholding public access to specific court records discussed above, nothing in state law allows Nebraska state courts to seal records in criminal cases, with the temporary exception that applies to closing and closed proceedings. Ordering closed hearings in criminal cases can become even trickier than sealing records and withholding court records from public access generally speaking. The details of the minimum advisable procedure to close a proceeding appear in the NEBRASKA SUPREME COURT GUIDELINES FOR DETERMINING WHEN AND UNDER WHAT CONDITIONS A HEARING MAY BE CLOSED IN WHOLE OR IN PART TO THE PUBLIC.

Despite the word "guidelines" in the title of those provisions, lest anyone claim they really are only guidelines, NEB. REV. STAT. § 24-734(5) on the powers of judges says this:

> Nothing in this section shall be construed to exempt proceedings under this section from the provisions of the GUIDELINES FOR USE BY NEBRASKA COURTS IN DETERMINING WHEN AND UNDER WHAT CONDITIONS A HEARING BEFORE SUCH COURT MAY BE CLOSED IN WHOLE OR IN PART TO THE PUBLIC, adopted by the Supreme Court of the State of Nebraska . . . .

If that statutory language seems unconvincing, recall the guidelines' foundation: the United States Constitution and the Nebraska Constitution. Also, keep in mind, the GUIDELINES FOR USE BY NEBRASKA COURTS IN DETERMINING WHEN AND UNDER WHAT CONDITIONS A HEARING BEFORE SUCH COURT MAY BE CLOSED IN WHOLE OR IN PART TO THE PUBLIC are not the same thing as the NEBRASKA BAR-PRESS GUIDELINES FOR DISCLOSURE & REPORTING OF INFORMATION RELATING TO IMMINENT OR PENDING CRIMINAL LITIGATION discussed as not binding by both the Nebraska

Supreme Court in *State v. Simants*[32] and by the United States Supreme Court in *Nebraska Press Association v. Stuart*.[33]

The GUIDELINES FOR USE BY NEBRASKA COURTS IN DETERMINING WHEN AND UNDER WHAT CONDITIONS A HEARING BEFORE SUCH COURT MAY BE CLOSED IN WHOLE OR IN PART TO THE PUBLIC are a Nebraska Supreme Court rule adopted well after the United States Supreme Court explained what is necessary to support a pretrial hearing closure order.[34] That rule has not been subjected to United States Supreme Court criticism or denigration and is a binding rule.

The NEBRASKA BAR-PRESS GUIDELINES are voluntary standards adopted by members of the state bar and news media to deal with the reporting of crimes and criminal trials. The Bar-Press Guidelines provide an outline of the matters of fact that may appropriately be reported before trial and a list of items not generally appropriate for pretrial reporting, including confessions, opinions on guilt or innocence, statements that would influence the outcome of a trial, the results of tests or examinations, comments on the credibility of witnesses, and even evidence presented in the trial during moments of jury absence. Under the Bar-Press Guidelines, publication of an accused's criminal record should be "considered very carefully." The Bar-Press Guidelines also set out standards for taking and publishing photographs and set up a joint bar-press committee to foster cooperation in resolving particular problems that emerge.

The Bar-Press Guidelines carry no binding force. They're sort of an Emily Post for the press corps engaged in the reporting of crimes and criminal pretrial matters and trials. All they can do is express concepts of good sense, good taste, good manners, and good form, nothing more.

Returning to the GUIDELINES FOR USE BY NEBRASKA COURTS IN DETERMINING WHEN AND UNDER WHAT CONDITIONS A HEARING BEFORE SUCH COURT MAY BE CLOSED IN WHOLE OR IN PART TO THE PUBLIC, several parts of the closure guidelines merit attention in this essay. In the very first paragraph, the supreme court cautions:

> that as a general principle it is the view of the judiciary of the State of Nebraska that proceedings should be open to the public at all times and only closed, in whole or in part, where evidence presented to the court establishes that by permitting all or part of the proceeding to remain open to the public, *a party's right to a fair trial will be substantially and adversely affected and there are no other reasonable alternatives available to protect against such substantial and adverse effect*. (Italics mine).

Parts of Guidelines 4, 5, and 6 merit special emphasis for purposes of this essay. Guideline 4 establishes the factors a court considering closure should apply and the findings of fact it must

---

[32] 194 NEB. 783, 236 N.W.2d 794 (1975).
[33] 427 U.S. 539 (1976).
[34] Press-Enterprise Co. v. Superior Court of California for the County of Riverside, 478 U.S. 1 (1986).

render in order to close the proceedings involved and concludes in its last sentence:

> Except as otherwise provided by law, all matters heard by the court after the general public has been excluded shall nevertheless be on the record and shall be made available for public inspection within a reasonable time after a final judgment or verdict in the case has been rendered.

Thus, the general public can be excluded from the proceeding and the record can be withheld from public access for a time, but the record cannot be withheld from public access permanently. Guideline 5 reveals the descriptor, "after a final judgment or verdict in the case has been rendered," appearing in Guideline 4 carries a special meaning.

Guideline 5 allows a court considering closure to entertain the closure motion in a closed proceeding and concludes with a grant of authority to seal the record but only temporarily:

> A record shall be made of the hearing in camera. The trial court may order such proceedings sealed until after a final judgment or verdict in the trial court has been rendered. *The fact that the case in chief is pending on appeal before the Supreme Court of Nebraska shall not prevent the previously sealed [record] from being made available to the public upon request.* The sealed record, however, shall be made available for purposes of review by the Supreme Court or other court of competent jurisdiction pertaining to the decision to close the proceedings, in whole or in part. (Italics mine).

The last sentence of Guideline 6 not only states a standard of proof, but also clearly states the spirit supporting the closure guidelines:

> The fact that an accused or other witness may be embarrassed or be subject to public ridicule by reason of the public being present shall not be grounds upon which to close such matters, it being the intention of these guidelines *to prescribe extremely limited situations under which courts shall be closed to the general public and otherwise establish a general policy of permitting courts to be open to the general public, consistent with the accused's constitutional rights to a fair hearing*. (Italics mine).

In one type of Nebraska Probate Code proceeding, an action to declare someone incapacitated and in need of a guardian or conservator, the alleged incapacitated person can request and have a closed hearing on the question of whether they are incapacitated. The statute says the hearing may be closed only if the alleged incapacitated person (or that person's legal counsel) requests a closed hearing. Therefore, if the alleged incapacitated person does not request a closed hearing, the hearing cannot be closed.[35]

[35] NEB. REV. STAT. § 30-2619(d).

The probate code does not provide for closed hearings in establishing guardianships and conservatorships for minors and does not address sealing the records of any guardianship or conservatorship matters. That means the hearings cannot be closed and the records cannot be sealed with statutory authority. No supreme court rules or precedents allow closing such hearings either.

Just a Few Hypothetical Applications

Suppose: A trial court conducts a pretrial admissibility hearing in open court,[36] for this example, a suppression hearing challenging admissibility of statements made by an accused. The prosecutor proffers and the court admits into evidence, for the limited purpose of the suppression hearing, a copy of the written statement the accused made. After the hearing is concluded, a reporter assigned to cover the case asks the clerk or the court reporter for a copy of the accused's written statement.

If the reporter is willing to pay the copy costs, or to copy the statement with the reporter's own copying equipment in the clerk's office, no defensible obstruction can be raised – the reporter has an enforceable right to the requested copy.

What is disclosed (and sometimes when it is disclosed) in open court proceedings can be crucial. If the prosecutor had only identified the accused's statement by date, place, and to whom the statement was made, along with other evidence required to support its admissibility later during the trial, but had not offered the statement itself into evidence in the open court pretrial admissibility hearing, then, the reporter would have clear no right to the statement at that stage of the case. Of course, sometimes the circumstances surrounding the making of the statement require the prosecutor to offer the statement itself.

For another hypothetical, assume a prosecutor initiates a criminal case by filing a complaint (county court) or information (district court) without endorsing any witnesses' names on the charging instrument. The witnesses' names then remain publicly inaccessible. If the defense moves for disclosure, given the clear statutes on endorsement and discovery, the prosecutor must disclose the witnesses' names. If the prosecutor does so by a filing in the case file, the prosecutor violates the supreme court rule on maintaining the public inaccessibility of witnesses' names. Ways can be devised to save this hapless prosecutor, but none of them would comply with the endorsement statute. Trial judges can't resolve this problem; only the Nebraska Legislature and Nebraska

[36] "Pretrial admissibility hearings" can include: suppression hearings and voluntariness hearings to determine the admissibility of statements made by an accused during the investigation stages of a case; pretrial identifications, especially those made in a line-up procedure; hearings determining admissibility of expert evidence and testimonial competence of non-expert witnesses; and more.

Supreme Court can.

Another hypothetical question relates to divorce records. Suppose that, for some time before the JUSTICE system of computerized court records became available, a clerk of a district court provided lists of divorce decrees granted every week to a local reporter. The JUSTICE system now includes public access terminals in the court office area from which members of the public (recall "the public" includes reporters) may access any publicly accessible court records at no charge during normal business hours. The once helpful clerk decides she can no longer justify spending staff time (tax money) compiling the weekly divorce lists for the reporter. What options has the reporter?

(1) She can access the records herself through the public access JUSTICE terminal in the court office area at no charge during normal business hours. (2) Her paper can subscribe to JUSTICE and she can access the information at any time incurring the fees charged by the state. (3) She can file weekly written requests to the clerk to provide the lists and pay the statutory fees, which can include the court staff time spent satisfying the requests, the county's copy machine use, the county's printer and copier, paper, toner, ink, and any other cost of the production.

One final hypothetical question relates to student records. Assume a star athlete is kicked off his high school team because his grades aren't up to snuff. He files a civil action seeking his reinstatement. His grades would come under the student records exception. The school would never give them to a reporter.

If the grades are attached as an affidavit to the initial complaint, they've been transformed into a public filing, and, both constitutionally and statutorily, a publicly accessible court record that court clerks properly could not withhold. If the attorney asked for them to be kept confidential, a hybrid request for sealing, it shouldn't happen if they're already in a public filing and really shouldn't happen anyway. No statute or supreme court rule allows sealing such matters. The same result should flow from attaching the grades to a motion.

What if the grades are obtained via discovery? Answers to discovery (answers to interrogatories, requests for admissions, and requests for production) are not properly filed in the public case files, so, unless somebody improperly files them, they do not become part of the court's records. Once they're received in testimony or in an exhibit during a trial or public hearing, they're undeniably a public record.

They may be a public record that's often hard for a journalist to obtain at the very moment the journalist wants it, because it's in the judge's or court reporter's office and the journalist will need to track down the judge, the court reporter, or the lawyers, while they're in the middle of a trial to get ahold of the exhibit.

Ah well, publicly accessible may not mean easily accessible instantaneously whenever a journalist gets the urge to access a public record. However, judges do take recesses, judges and

court reporters can be found before and after trials, and clerks can ask judges and court reporters for exhibits during recesses; the situation is not desparate.

A Few Parting Thoughts Not Necessarily on Point

A tangentially related parting thought needs some discussion as well. In a kinder and gentler world with unlimited court resources, members of the public, including journalists, could phone, write, or Email court clerks, ask the clerks to do records searches for them, and the clerks could fulfill all the requests. In the real world with severely limited court resources and other menaces, court clerks cannot risk sending someone record search replies with errors or omissions and court clerks lack the time to decipher, let alone answer, the bucket loads of vague records requests. But where do these requests come from? They don't generally come from journalists, at least, not the bucket loads of vague records requests.

Out-of-district police officers, probation officers, and prosecutors and defense counsel, as well as military recruiters, have seemingly always needed to access court records, lots of court records, but their volume has increased. Genealogical researchers cut a new channel for the flood of record search requests some time ago. Then came identity theft concerns.

More recently, someone developed a truly bright idea (I suspect the feds, as generally only the feds can come up with such ideas). Many people who apply for various positions, licenses, permits, certificates, what have you, must demonstrate a clean criminal background. Obviously, the agencies requiring such information of applicants can save money by foisting on the state court system a new river of record search requests. They do that by sending the applicants themselves out to all the courts asking court clerks to search and then issue them certificates of searches conducted and no records found. This development made the flood too much to handle.

In August of 2006, the Nebraska State Court Administrator's Office issued an administrative policy addressing the county courts' problems posed by all of these record search requests. That policy provides:

> County court employees will not search for court records or provide information or documentation of court records for any person or agency. Except, court employees may provide photocopies and certified copies of court records specifically identified by case number by the requestor. All certified and photocopy fees are to be assessed and collected in accordance with § 33-126.05. Court employees will not provide or sign any certificate of any kind stating that they have searched and found no record.
>
> Persons seeking a court record of a matter which occurred in a particular county should be directed to the JUSTICE public access terminal located in the courthouse where the record or records occurred and provided with written instructions for accessing the JUSTICE record.

Individuals may also use the Justice Court Case One Time Search which allows access to information about court cases throughout Nebraska (except Douglas County District Court) for a $15.00 per search fee. The research and corresponding results are able to be viewed over a three day time frame.

Persons seeking court records from multiple counties or making a request by mail or telephone should be informed that JUSTICE court records may be obtained by subscribing to the internet service, Nebraska.gov. The service offers online internet access to all JUSTICE cases in the county and district courts in the state, except Douglas County District Court.

For information or to subscribe to Nebraska.gov, phone in Lincoln (402) 471-7185 or 1-800-7478177 or go to: http://www.nebraska.gov/subinfo.phtnil.

Any Nebraska governmental agency may request free access to Nebraska.gov from the Deputy State Court Administrator for Information Technology at (402) 471-3049.

The public may request from the Nebraska State Patrol a conviction-only record of arrest and prosecution record for individuals. There is a $15 dollar processing fee for searching the record. Contact the Nebraska State Patrol at (402) 471-4545.[37]

Thus, county court clerks labor under no obligation to provide research services to journalists and others on simple request by Email, phone, or even in person. Their obligation lies in the opposite direction. The county court clerks must point the inquiring journalists to the records that may not be withheld or show the journalists where the public access terminals and user manuals are located, but county court clerks cannot and district court clerks probably should not perform the searches for the journalists or any other member of the public.[38] If a journalist wants to invoke a clerk's *duty* to provide extended research services, the journalist can do so by written request specifying the information sought and paying the clerk's staff time, supplies used, and other items as provided in the statutes. The other, easier, route lies in making friends with court clerks who then might be inclined to provide more help with in-person requests, but still not with Email, phone, and mail requests, despite the administrative policies.

And Then, I Conclude With A Soapbox Stand (or two)

Someone probably should take the initiative to harmonize the older laws still on the books,

[37] See, Nebraska Administrative Office of the Courts Court Records Policy For Nebraska County Courts (August 2006, amended March 27, 2007).
[38] District court clerks may adopt policies of their own relating to records searches.

like the mandatory endorsement of witnesses' names on charging instruments, with the newly discovered privacy and identity theft concerns, reflected by such policies as the confidentiality of witnesses' names. Other privacy concerns also need to be addressed. One in particular comes to mind.

Nebraska statutes protect the confidentiality of sex offenders' information with the exception of the information the sex offender registration statutes require to be made public. However, neither the Nebraska Child Pornography Prevention Act[39] nor any other Nebraska statutes or court rules expressly allow trial courts to seal the evidence, now usually videos, sometimes old-fashioned photographs, of visual depictions of child pornography. Isn't the interest in protecting the privacy of victims of child pornography at least equal to protecting the privacy of sex offenders? Does the public (think National Enquirer and similar publications) really need access to videos and photos of children subjected to sexual victimization? In such a situation, lacking specific authority, no one should be too surprised if a trial judge openly exercises "inherent power" or the undeveloped common law of access to public records to protect the victims.[40]

[39] NEB. REV. STAT. §§ 28-1463.01 to 28-1463.05.

[40] No, we're not going to discuss inherent powers or common law access in this essay.