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June 2, 2020

Via email at [paula.lavigne@espn.com](mailto:paula.lavigne@espn.com)  
Paula Lavigne  
Reporter  
ESPN

RE: *File No. 20-R-114; University of Nebraska Medical Center; Paula Lavigne, Petitioner*

Dear Ms. Lavigne:

This letter is in response to your petition emailed to the undersigned on May 18, 2020, in which you requested our expedited review of certain records withheld and redacted by the University of Nebraska Medical Center ("UNMC") relating to your request for "public safety plans during the COVID-19 pandemic." Upon receipt of your petition, we contacted Erin E. Busch, Director University Records, and advised her of the opportunity to respond to the allegations raised in your petition. We received Ms. Busch's response on behalf of UNMC on May 28. Also on May 28, we received a response from attorney Trent Tanner, Hilgers Graben, on behalf of the Office of the Commissioner of Baseball ("MLB"). We have considered your petition, and the University's and MLB's responses, in accordance with the provisions of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018, Supp. 2019) ("NPRS"). Our findings in this matter are set forth below.

### RELEVANT FACTS

On May 4, 2020, you emailed Ms. Busch "request[ing] access to and a copy of any emails, including email attachments, exchanged between the account of [Ali.Khan@unmc.edu](mailto:Ali.Khan@unmc.edu) and anyone with MLB or MLBPA from April 1, 2020, to present." Ms. Busch confirmed receipt of your request that same day and indicated that she would be responding on or before May 8 (four business days after receipt of your request). On May 8, Ms. Busch advised you that the University would respond to your records request on or before May 15.<sup>1</sup> In an email sent to you on May 15, Ms. Busch provided you records

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<sup>1</sup> We note this correspondence for the record since your petition suggests that UNMC's response was untimely, i.e., "NU did not respond with records until May 15, 2020."

responsive to your request. However, Ms. Busch indicated that other records were being withheld or redacted as follows:

1. The withheld and redacted records contain: “[i]nformation solely pertaining to protection of the security of public property and persons on or within public property” and are withheld pursuant to Neb. Rev. Stat. § 84-712.05(8).
2. The withheld and redacted records contain: “[t]rade secrets, academic and scientific research work which is in progress and unpublished, and other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose” and are withheld pursuant to Neb. Rev. Stat. § 84-712.05(3).
3. The withheld and redacted records contain the work product of an attorney which is related to labor negotiations and which are confidential communications as defined in section 27-503 and are withheld pursuant to Neb. Rev. Stat. § 84-712.05(4).

The other information required under Neb. Rev. Stat. § 84-712.04 (2014) was provided.

You note initially in your petition

that NU’s redactions have been applied improperly as they do not pertain to actions or property owned or controlled by the state of Nebraska. The records pertain to discussions between a UNMC doctor and officials with Major League Baseball. The doctor was using his state email for consulting work, which may or may not be for pay to him personally or the university.

Your petition challenges each of the exceptions used by UNMC to withhold or redact responsive records. For example, you state that the security exception in § 84-712.05(8) “does not apply because the records do not pertain to government property in or outside Nebraska.” You further state that “MLB ballparks are not public property” and are “almost entirely privately owned and controlled.” With respect to the exception in § 84-712.05(3), you state the “[MLB’s] discussions about how to keep players, staff and spectators safe amid the coronavirus pandemic is not a trade secret.” You indicate that MLB representatives and representatives from other leagues have discussed sharing their safety plans to devise “the best solutions for all sports leagues” and that the plans have been widely discussed in media reports. In addition, you dispute any assertion that the records would “serve no public purpose” since the records center on what steps MLB will take to protect the communities in the 27 cities with MLB teams that are poised to begin operations in the next few weeks. You state that “[t]he public has a right to know what information has been exchanged about those plans.”

With respect to the UNMC's reliance on the exception in § 84-712.05(4), you indicate that to the extent there were any "labor negotiations," they did not involve any Nebraska employees, employees of Nebraska state government, or any public employees. You further indicate that "[n]one of the people on the redacted emails appears to be acting in a legal capacity, and by sending emails between MLB and UNMC they have already made any attorney-client privilege claim invalid."

According to the information we received from Ms. Busch and Mr. Tanner, MLB engaged Dr. Ali Khan,<sup>2</sup> through UNMC, as a confidential, scientific consultant and advisor to assist MLB in developing plans for the potential resumption of the 2020 baseball season. In exchange for Dr. Khan's services, MLB agreed to pay a substantial monetary retainer to UNMC. MLB and UNMC have entered into nondisclosure and consulting agreements, which contain provisions mandating the confidentiality of any information provided to UNMC by MLB, including the following:

[I]t is expressly agreed between the parties that the following information shall be deemed to be Confidential Information: . . . proposals related to the structure, schedule, location and all other elements regarding the playing of the Major League Baseball season in 2020. . . .

Under the agreements, Dr. Khan is providing advice and information to MLB attorneys engaged in labor negotiations with the Major League Baseball Players' Association ("MLBPA") related to player health and safety protocols due to the pandemic. Any resumption of play in 2020 is contingent on the agreement of MLB and the MLBPA, and negotiations are ongoing. Current estimates indicate that at least 7,500 individuals, including players, coaching staff, trainers, umpires, and other club, stadium and broadcast personnel, will be directly impacted by the resumption of the baseball season.

Dr. Khan's communications with MLB have primarily involved MLB's attorneys or personnel acting under the direction of MLB's attorneys. MLB has declined to make Dr. Khan available to media or allow him to publicly discuss substantive matters arising from his work under the agreements. The contractual relationship between MLB and Dr. Khan is ongoing.

Finally, according to the MLB's response, of the 29 Major League ballparks located in the United States, at least 75 percent are publicly owned, as well as almost all of the 23 spring training ballparks.

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<sup>2</sup> Dr. Khan currently serves as the dean of the UNMC College of Public Health.

## DISCUSSION

The NPRS generally allow Nebraska citizens and other interested persons the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts from those records, and to obtain copies of records in certain circumstances. 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. . . .” (Emphasis added.)

UNMC argues that certain documents provided to Dr. Khan and UNMC by MLB, i.e., draft plans and protocols, are not records “of or belonging to” UNMC. We agree. Records “of” or “belonging to” state agencies under § 84-712.01 are those records “owned” by the agencies or those records for which the state agencies possess title or an ownership interest. Op. Att’y Gen. No. 97033 (June 8, 1997). The mere fact that a record is in the possession of a public officer or a public agency does not make it a public record of that officer or agency. *Id.* Conversely, public records need not be in the physical possession of an agency to be subject to disclosure under the NPRS by that agency. *Id.* The key question with respect to access to particular records is whether those records are records “of” or “belonging” to the agency in question. *Id.*<sup>3</sup> Thus, to the extent MLB has provided any records to Dr. Khan and UNMC under the agreements, they remain the records of MLB and the other entities who prepared them, and are not subject to disclosure as public records.

Also at issue are the three exceptions relied on by UNMC to withhold and redact the requested records. Section 84-712.05 of the NPRS currently lists twenty-three categories of public records that may be withheld at the discretion of the records custodian “unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties . . . .” We will briefly address each exception below.

### Security Exception

The exception in Neb. Rev. Stat. § 84-712.05(8) pertains to

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<sup>3</sup> However, in *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009), the court rejected an argument that a public body must have ownership of, as distinguished from a right to obtain, materials in the hands of a private entity. In that case, the court indicated that the “of or belonging to” language in § 84-712.01 includes any documents or records that a public body is entitled to possess, regardless of whether the public body takes possession. See also *Huff v. Brown*, 305 Neb. 648, 941 N.W.2d 515 (2020).



[i]nformation solely pertaining to protection of the security of public property and persons on or within public property, such as specific, unique vulnerability assessments or specific, unique response plans, either of which is intended to prevent or mitigate criminal acts the public disclosure of which would create a substantial likelihood of endangering public safety or property . . . .

As discussed above, the purpose for MLB's engagement with Dr. Khan was to assist MLB in developing plans for the possible resumption of play during the 2020 baseball season. Additionally, a significant majority of the Major League Baseball parks and spring training facilities are publicly owned. According to Ms. Busch:

The withheld information contains assessments of vulnerability as well as recommendations on how to prevent the spread of disease among individuals on public property. Such information in the hands of a wrongdoer could put the safety and security of individuals on public property at risk and cannot be released to the public.

Since there is little question that the records at issue relate to the health and safety of individuals on public property in the face of the COVID-19 pandemic, it appears to us that the exception applies to withhold the records at issue. Moreover, contrary to your assertion, we are not convinced that the exception relates solely to public property in Nebraska.

### Trade Secrets

Neb. Rev. Stat. § 84-712.05(3) allows public bodies to withhold

[t]rade secrets, academic and scientific research work which is in progress and unpublished, and other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose . . . .

In the present case, UNMC is relying on the definition of trade secret set out in Neb. Rev. Stat. § 87-502 of the Nebraska Trade Secrets Act, Neb. Rev. Stat. §§ 87-501 to 87-507 (2014), which states:

(4) Trade secret shall mean information, including, but not limited to, a drawing, formula, pattern, compilation, program, device, method, technique, code, or process that:

(a) Derives independent economic value, actual or potential, from not being known to, and not being ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

UNMC argues that MLBPA could gain economic value during its negotiations with MLB if the various plans and protocols provided to Dr. Khan under the agreements were disclosed. Similarly, other professional sports leagues could gain an economic value with the disclosure of MLB's plans and protocols developed in conjunction with Dr. Khan and other consultants. Also, as indicated above, MLB has not made Dr. Khan available to the media nor allowed him to publicly discuss substantive matters arising out of the agreements. Provisions in the agreements expressly provide that the plans and protocols are MLB property and may not be disclosed without MLB authorization. Since UNMC has adequately established the economic value that may be derived by the players' union and other leagues, and took steps to secure the information, we conclude that reliance on the trade secret exception in this context is appropriate.

However, UNMC also takes the position that the plans and protocols developed by MLB in conjunction with Dr. Khan and others constitute "proprietary commercial information which if released would give advantage to business competitors and serve no public purpose." In this regard, UNMC states that the "MLB is not a public entity and the public does not have a right to access information regarding MLB's business dealings. Again, the return-to-play plans and strategies are the property of MLB and have nothing to do with the operation of the University. There is no public interest in the details of MLB's proprietary and commercial information."

In *Aksamit Resource Management LLC v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018), the Nebraska Supreme Court found that since the exception's components "give advantage to business competitors" and "serve no public purpose" were connected by the conjunction "and," "both requirements must be met for the exception to become operative." *Id.* at 124, 907 N.W.2d at 309. The court also found that

"[a] public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants." When we consider the meaning of the words "public purpose" in § 84-712.05(3), liberal public disclosure of the records of public entities is an important factor. The testimonies of Goss and the former NPPD employee articulated public purposes of the information well within political and economic realms; indeed, one can scarcely escape the intense public debate regarding the merits of fossil fuels versus renewable fuels.

*Id.* at 124-125, 907 N.W.2d at 309 (emphasis added.) The court concluded that while the public body involved established that releasing the requested information would give advantage to its competitors, it failed to establish by clear and convincing evidence that

disclosing the information would serve no public purpose. Consequently, the public body was not entitled to withhold the information under § 84-712.05(3).

Contrary to UNMC's arguments, we believe that any plan, strategy or protocol that discusses or proposes a resumption of life which existed prior to the COVID-19 pandemic would very much serve a "public purpose." While the competitive advantage component has been established here, we are unable to conclude that release of this information "would serve no public purpose" as required under *Aksamit*. Thus, we conclude that this part of the exception is inapposite to withhold the requested records.

#### Correspondence with MLB Attorneys Related to Labor Negotiations

Neb. Rev. Stat. § 84-712.05(4) pertains to

[r]ecords which represent the work product of an attorney and the public body involved which are related to preparation for litigation, labor negotiations, or claims made by or against the public body or which are confidential communications as defined in section 27-503 . . . .

UNMC represents that Dr. Khan's correspondence with MLB attorneys "is work product related to labor negotiations and attorney-client privileged." As discussed above, Dr. Khan has been providing advice and information to MLB attorneys engaged in labor negotiations with the MLBPA. Player health and safety protocols is a critical topic of negotiation. In addition, UNMC states that "[t]he withheld correspondence contains the mental impressions, conclusions, and opinions of MLB's attorneys."

In further support of its position, UNMC points to Neb. Rev. Stat. § 27-503(2) (2016), which provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (a) between himself or his representative and his lawyer or his lawyer's representative, or (b) between his lawyer and the lawyer's representative, or (c) by him or his lawyer to a lawyer representing another in a matter of common interest, or (d) between representatives of the client or between the client and a representative of the client, or (e) between lawyers representing the client.

Under these circumstances, MLB is the client, and Dr. Khan is a representative<sup>4</sup> of MLB's attorneys. Since MLB has not waived the privilege, UNMC may not disclose the records

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<sup>4</sup> See Neb. Rev. Stat. § 27-503(1)(c): "A representative of the lawyer is one employed to assist the lawyer in the rendition of professional legal services . . . ."

Paula Lavigne  
June 2, 2020  
Page 8

pertaining to the labor negotiations with the MLBPA. Therefore, we conclude that § 84-712.05(4) and § 27-503 were appropriately applied to withhold the requested records.

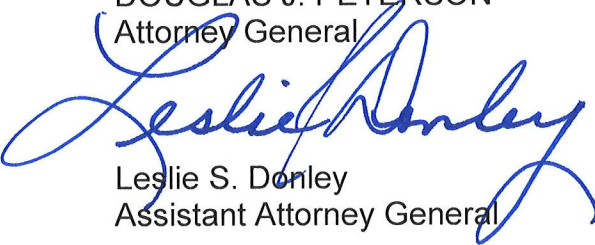
### CONCLUSION

Based on the foregoing, we conclude that any records produced or generated by MLB and transmitted to Dr. Khan remain the records of MLB, and do not become records "of or belonging to" the UNMC. We also conclude that all of the exceptions relied on by UNMC, except for the proprietary or commercial exception, provide adequate bases to withhold and redact the responsive records. Since we have concluded that the UNMC did not unlawfully deny your records request, no further action by this office is warranted. Accordingly, we are closing this file.

Finally, if you disagree with our analysis, you may wish to discuss this matter 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: Erin E. Busch (via email only)  
Trent Tanner (via email only)

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