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September 18, 2020

Via email at [al-amyn.sumar@nytimes.com](mailto:al-amyn.sumar@nytimes.com)  
Al-Amyn Sumar  
The New York Times Company  
1627 I Street NW  
Suite 700  
Washington, DC 20001

RE: *File No. 20-R-129; University of Nebraska; Alan Blinder, The New York Times Company, Petitioner*

Dear Mr. Sumar:

This letter is in response to the public records petition you submitted to our office on September 3, 2020, on behalf of Alan Blinder, a reporter with the *New York Times*. At issue is the denial by the University of Nebraska ("University") of two versions of a "playbook" prepared by the Big Ten Task Force for Emerging Infectious Diseases ("Task Force"). Upon receipt of your petition, we contacted Erin E. Busch, Director University Records, and advised her of the opportunity to respond to your petition. We received Ms. Busch's response on behalf of the University on September 14. We have considered your petition and the University's response in accordance with the provisions of the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018, Supp. 2019). Our findings in this matter are set forth below.

#### **RELEVANT FACTS**

On August 13, 2020, Mr. Blinder emailed Ms. Busch "requesting an opportunity to inspect or obtain a copy of any reports or recommendations prepared or distributed by the Big Ten Task Force for Emerging Infectious Diseases since March 2020 through the date of this request." Mr. Blinder also requested "copies of any medical protocols or recommendations submitted or prepared by the Atlantic Coast Conference, the Big 12 or the Southeastern Conference that may have been provided to the university by the Big Ten." Mr. Blinder noted that Chancellor Ronnie D. Green, Athletic Director Bill Moos, and Director of Athletic Medicine Lonnie Albers "may be in possession of the relevant records."

Ms. Busch responded to Mr. Blinder on August 19, indicating that the University would be responding on or before August 26. By email on August 26, Ms. Busch provided Mr. Blinder records responsive to his request. She noted that “[t]he University made redactions to draft playbooks,<sup>1</sup> because drafts are not ‘records’ subject to disclosure pursuant to the [NPRS].” Ms. Busch indicated that the University made other limited redactions based on the exceptions to disclosure in Neb. Rev. Stat. § 84-712.05(7) and (8). She further indicated that “[t]he University also redacted contact information for individuals not affiliated with the University or other public entities.”

On August 27, you contacted Ms. Busch questioning the withholding of the playbooks under the “draft” exception. After delineating the parameters of the Attorney General’s opinion<sup>2</sup> on drafts and the NPRS, you asked Ms. Busch to reconsider the issue. On August 28, Ms. Busch reiterated that the University properly withheld the draft playbooks. She pointed out that both documents contained language indicating that they were “working documents,” that the content was fluid and not finalized, and that the playbooks were subject to feedback. The May playbook, in particular, contained headings that indicated certain information would be filled in at a later date, e.g., “[Placeholder for other Considerations].”

Ms. Busch also argued that the draft playbooks are not records “of or belonging to” the University—language contained in the definition of public records in Neb. Rev. Stat. § 84-712.01(1). Relying on Op. Att’y Gen. No. 97033 (June 8, 1997), Ms. Busch stated: “The records you request are owned by the Big Ten and not the University. The draft Playbooks include plans and protocols of Big Ten institutions other than the University of Nebraska. Those plans and protocols are the records owned by the other Big Ten institutions and are not records ‘of or belonging’ to the University of Nebraska.” Lastly, Ms. Busch argued that assuming the drafts were records under the NPRS, and “of or belonging to” the University, the playbooks fell within the exception to disclosure in Neb. Rev. Stat. § 84-712.05(8): “Information solely pertaining to protection of the security of public property and persons on or within public property . . . .” With respect to the application of this exception, Ms. Busch stated that “[t]he draft Playbooks contain plans and protocols to protect the health and safety of individuals on public property—the public institutions within the Big Ten, the publicly owned practice facilities, and publicly owned stadiums and arenas. The draft Playbooks fall squarely within the exception . . . .”

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<sup>1</sup> It is our understanding that the playbooks contain health and safety protocols and recommendations for Big Ten schools with respect to practices and sporting events during the pandemic.

<sup>2</sup> Op. Att’y Gen. No. 91054 (June 17, 1991).

## DISCUSSION

The basic rule for access to public records in Nebraska is set out in Neb. Rev. Stat. § 84-712(1) (2014). This provision states that

[e]xcept as otherwise expressly provided by statute, all citizens of this state and all other persons interested in the examination of the public records as defined in section 84-712.01 are hereby fully empowered and authorized to (a) examine such records, and make memoranda, copies using their own copying or photocopying equipment in accordance with subsection (2) of this section, and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business and (b) except if federal copyright law otherwise provides, obtain copies of public records in accordance with subsection (3) of this section during the hours the respective offices may be kept open for the ordinary transaction of business.

Neb. Rev. Stat. § 84-712.01(1) states, in pertinent part:

Except when any other statute expressly provides that particular information or records shall not be made public, public records shall include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing.”

Neb. Rev. Stat. § 84-712.01(1) (2014). Both statutes provide access to public records except in those instances where records are exempt from disclosure by another statute. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 788, 943 N.W.2d 231, 240 (2020); *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 123, 907 N.W.2d 301, 308 (2018).

The University has propounded three theories to support its withholding the playbooks. First, since the playbooks are drafts, they are not considered records or documents under the NPRS. Second, even if the playbooks were considered public records, they are not records “of or belonging to” the University. Third, since the playbooks relate to the protection of the security of public property and persons on public property, they may be withheld under the exception to disclosure in § 84-712.05(8).

We will first address whether the playbooks are records of the University within the meaning of §§ 84-712 and 84-712.01(1). You assert in your petition that “the Playbooks are unquestionably documents ‘of or belonging to’ the University” under the definition in § 84-712.01(1). You point out that in *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d

751 (2009), the Nebraska Supreme Court liberally construed the “of or belonging to” language to “include[] any documents or records that a public body is entitled to possess—regardless of whether the public body takes possession.” *Id.* at 9, 767 N.W.2d at 759. You view the University’s assertion that the playbooks “‘are owned by the Big Ten and not the University’” as “dubious” and “irrelevant.” In this regard, you state that “[b]ecause the University is ‘entitled to possess’ the Playbooks, they are subject to disclosure.”

In *Evertson*, two citizens sought a copy of a written report relating to an investigation commissioned by the mayor and generated by outside investigators. The city indicated that no such report existed. The citizens then filed a mandamus action asking the court to order the disclosure of the report. The trial court eventually issued an order directing the city to produce a report generated during the investigation, finding that it was a public record and that no statutory exceptions to disclosure applied. *Id.* at 5, 767 N.W.2d at 757.

On appeal, the city relied on *Forsham v. Harris*, 445 U.S. 169 (1980), where the U.S. Supreme Court, construing the federal Freedom of Information Act, held that “an agency must create the records or exercise its right to obtain them before a requesting party can obtain an order for disclosure.” *Id.* at 8, 767 N.W.2d at 759. The city argued that the “‘of or belonging to’ language in § 84-712.01 means a public body must have ownership of, as distinguished from a right to obtain, materials in the hands of a private entity.” *Id.* at 9, 767 N.W.2d at 759. The Nebraska Supreme Court rejected this argument, stating:

[T]he City’s narrow reading of the statute would often allow a public body to shield records from public scrutiny. It could simply contract with a private party to perform one of its government functions without requiring production of any written materials. Section 84-712.01 does not require a citizen to show that a public body has actual possession of a requested record. Construing the “of or belonging to” language liberally, as we must, this broad definition includes any documents or records that a public body is entitled to possess—regardless of whether the public body takes possession. The public’s right of access should not depend on where the requested records are physically located. Section 84-712.01(3) does not permit the City’s nuanced dance around the public records statutes.

*Id.* at 9, 767 N.W.2d at 759-760.

The court then fashioned a test to determine whether a public body is entitled to records in the possession of a private party for purposes of disclosure.<sup>3</sup> Applying the test

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<sup>3</sup> The requirements of the test include: “(1) The public body, through a delegation of its authority to perform a government function, contracted with a private party to carry out the government function; (2) the

to the circumstances involving the city and its investigation, the court concluded that the investigators' reports were public records under § 84-712.01(1). *Id.* at 12-13, 767 N.W.2d at 761-762.

In *Huff v. Brown*, 305 Neb. 648, 941 N.W.2d 515 (2020), the Nebraska Supreme Court recently considered whether a county sheriff was required to produce records in response to a public records request even though the sheriff had indicated in his response to the requester that no responsive records existed. The district court granted mandamus with respect to those particular records reasoning that under *Evertson*, the sheriff was "entitled to possess" the records. *Id.* at 663, 941 N.W.2d at 525. The district court's order further required the sheriff to investigate whether he was entitled to possess the requested records, and either produce them, explain why he could not possess them, or identify any other custodian who may be entitled to possess the records. *Id.* at 664, 941 N.W.2d at 526.

In concluding that the district court had applied *Evertson* too broadly, the court stated:

In *Evertson*, the city's mayor had commissioned an investigation by a private entity and two citizens requested from the city a written report that was in the possession of the private entity. Although we ultimately concluded that the record was exempt from production based on a statutory exception, as a preliminary step we determined that the report was a "public record" under § 84-712.01 even though the city had declined to take possession. In reaching that conclusion, we set forth the language relied on by the district court to the effect that public records include documents the public body is entitled to possess.

However, *Evertson* must be understood in the context of a request for documents in the possession of a private entity. In *Evertson*, we set forth tests for determining whether records in the possession of a private party are public records subject to disclosure, and such tests generally focused on the public body's delegation to a private entity of its authority to perform a government function and the preparation of the records as part of such delegation of authority. Thus, it was in the context involving the public body's access to documents in the possession of a private entity that the "entitled to possess" language in *Evertson*, 278 Neb. at 9, 767 N.W.2d at 759, emerged.

*Id.* at 664-665, 941 N.W.2d at 526 (emphasis added).

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private party prepared the records under the public body's delegation of authority; (3) the public body was entitled to possess the materials to monitor the private party's performance; and (4) the records are used to make a decision affecting public interest." *Id.* at 12, 767 N.W.2d at 761.

We find the court's clarification above instructive in the present case. The University did not delegate its authority by contracting with the Task Force to carry out a government function. The playbooks were not developed by the Task Force under the University's delegation of authority.<sup>4</sup> Since the University did not contract with the Task Force to perform a government function, no "monitoring" of the Task Force is mandated. And while the University may use the playbook to make decisions affecting public interest, the playbook ultimately is a product of the Task Force, not the University.

Ms. Busch confirms that the University did not retain the Big Ten to create the playbook on behalf of the University. She states that the Big Ten created the playbook, and the universities within the Big Ten developed their own safety plans and protocol documents. And while the Big Ten provided copies of two versions of the playbook to the University, those records are records of the Big Ten and other Big Ten institutions. She states that "[t]he University properly withheld the Playbook documents because such documents are not records 'of or belonging to' the University."

This office has consistently taken the position that 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.* at 4. 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.*

While the Task Force provided versions of the playbook for the University's consideration and input, it is our opinion that those documents remain the records of the Task Force. Consequently, since the playbooks are not records of or belonging to the University, they are not subject to disclosure as public records under § 84-712. Finally, in light of the conclusion reached herein, it is not necessary to consider the other arguments presented by the University.

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<sup>4</sup> We note that you acknowledged in your petition that the playbooks "were created by a nongovernmental body." Sumar letter at 3.

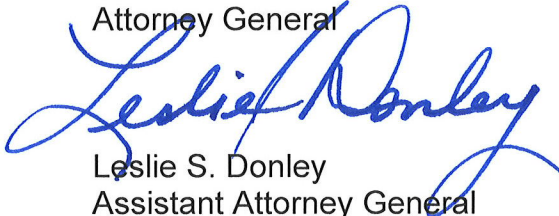
## CONCLUSION

Based on the foregoing, we conclude that the playbooks at issue are not records of or belonging to the University of Nebraska. As a result, the University has no obligation to produce the playbooks to Mr. Blinder in response to his public records request. Since we have concluded that the University did not unlawfully deny Mr. Blinder's 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 consider what other remedies are available to you under Neb. Rev. Stat. § 84-712.03 (Cum. Supp. 2018).

Sincerely,

DOUGLAS J. PETERSON  
Attorney General



Leslie S. Donley  
Assistant Attorney General

c: Erin E. Busch (via email only)

49-2566-29