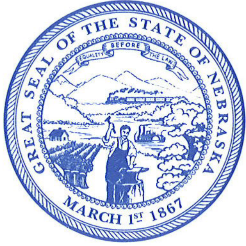


STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

DOUGLAS J. PETERSON
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

October 13, 2020

Via email at [redacted]
Andy Wittry
[redacted]

RE: *File No. 20-R-132; University of Nebraska; Andy Wittry; Petitioner*

Dear Mr. Wittry:

This letter is in response to your public records petition received by this office on September 28, 2020, in which you have requested that we review the denial by the University of Nebraska ("University") of a "slide deck" produced by the Big Ten Conference. 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 October 8. We 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 September 18, 2020, you emailed Ms. Busch requesting "a copy of any emails, as well as any related email attachments, sent to or from either: Chancellor Ronnie Green or AD Bill Moos, on Sept. 11, that include 'model,' 'slide' or 'deck.'" Following a brief delay, Ms. Busch responded to your request on September 27. She indicated that "[t]he University withheld one slide deck that is not a record 'of or belonging' to the University. *See* Neb. Rev. Stat. § 84-712.01 . . . ." Ms. Busch also provided a link to the Attorney General's disposition letter in File No. 20-R-114 (June 2, 2020), involving the University Medical Center and Major League Baseball.

You state in your petition that the slide deck at issue,

> titled in the email "FB Scheduling-TV Slide Deck - 9.11.2020-CURRENT.pptx," was created by the 14 Big Ten athletic directors, as noted by Northwestern AD Jim

> Phillips – "per our conversation this morning"; "reflect the despire" [*sic*]; "options available to us"; "*ACTION ITEM - Can you please let me know your thoughts on this information ASAP" – which shows that the slide deck is "of or belonging to the University," as Nebraska is one of the 14 schools that makes up the Big Ten Conference and one of the 14 contributors to the slide deck.

You assert that while the University may not have “exclusive possession” of the slide deck, the structure of the conference, particularly the Big Ten athletic directors group and the Council of Presidents/Chancellors (“COP/C”), along with the comments of Northwestern Athletic Director Jim Phillips, “show that the University of Nebraska has an ‘ownership interest’ over the slide deck, just like each of the 14 Big Ten institutions does.” You claim that this is consistent with the standard set out in File No. 20-R-114 referred to by Ms. Busch. You also assert that the COP/C’s governance over the Big Ten Conference “should establish that Nebraska, like every Big Ten institution, makes up one-fourteenth of the conference, and these individual universities and their presidents, chancellors and athletic directors, individually and collectively have ‘ownership interest’ over the conference and its documents, such as the slide deck in question. Withholding the slide deck is against the spirit, if not also the language, of § 84-712.01.”

Ms. Busch represents that the slide deck, i.e., PowerPoint presentation, relates to football scheduling models, and was drafted on behalf of the Big Ten for consideration by the COP/C. She concurs that the COP/C is the ultimate governing body over the Big Ten Conference. However, the COP/C has no governance over the University and, similarly, the University Board of Regents has no governance over the Big Ten Conference. She states that “[t]he Big Ten is an entity entirely separate from the University of Nebraska and records regarding the governance, financial affairs, and operations of the Big Ten are owned by the Big Ten.” Ms. Busch asserts that the “presentation is not a record ‘of or belonging’ to the University” and that “[t]he University does not possess title or ownership in the Big Ten’s PowerPoint presentation.” Consequently, Ms. Busch asserts, the presentation was properly withheld.

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(1) (2014). In Nebraska, “public records” are defined 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.

Neb. Rev. Stat. § 84-712.01(1) (2014) (emphasis added).

Last month, this office considered a public records petition submitted by the *New York Times* concerning the University's withholding of two "playbooks"[1] prepared by the Big Ten Task Force for Emerging Infectious Diseases. *See* disposition letter in *File No. 20-R-129; University of Nebraska; Alan Blinder, The New York Times Company, Petitioner* (September 18, 2020). Since the University took the position, among others, that the playbooks were not records "of or belonging to" the University, we will borrow liberally from our response to address the issue raised in your petition:

> 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

[1] According to the parties, the playbooks contained health and safety protocols and recommendations for Big Ten schools with respect to practices and sporting events during the COVID-19 pandemic.

> 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.[2] Applying the test 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

---

[2] 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 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.

> 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. <u>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</u>.

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

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. [FN omitted.] 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.

* * *

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. . . .

Disposition Letter in File No. 20-R-129 at 3-6.

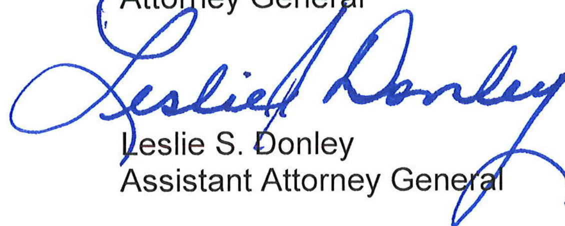
We come to the same conclusion in the present case. Applying the *Evertson* test to the requested presentation, there is no indication that the University delegated its authority by contracting with the Big Ten or the COP/C to carry out a government function. The presentation was not developed by the Big Ten or COP/C or any other entity under the University's delegation of authority. Since the University did not enter into a contract with the Big Ten or COP/C to perform a government function, no "monitoring" is required. Lastly, while it appears that the University received a copy of the presentation for informational purposes, and was asked to provide feedback, there is no indication that the University used the presentation "to make a decision affecting public interest." *Evertson* at 12, 767 N.W.2d at 761.

In Op. Att'y Gen. No. 97033, we concluded 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." Opinion at 2. On that basis, we do not believe that the University has any ownership interest in the presentation. The fact that the Big Ten provided the University access to the presentation does not make it a University record; it is still a Big Ten Conference record. Consequently, since the presentation is not a record "of or belonging to" the University, it does not fall within the definition of public record set out in § 84-712.01(1), and the University's withholding in this context was appropriate.

Since we have concluded that the University did not unlawfully deny your request, no further action by this office is warranted. Accordingly, we are closing this file. If you disagree with the conclusion reached above, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under the NPRS.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Erin E. Busch (via email only)

49-2576-29