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July 12, 2011

Matthew T. Sanderson
Playoff PAC
1 Thomas Circle, NW Suite 1100
Washington, D.C. 20005

RE: *File No. 11-R-114; University of Nebraska-Lincoln; Petitioner Sanderson, Playoff PAC*

Dear Mr. Sanderson:

This letter is in response to your petition received by us on April 14, 2011, in which you requested our assistance in obtaining certain records belonging to the University of Nebraska-Lincoln (the "University"). As is our normal practice with such requests, we contacted the party against whom the complaint was made. In this case, we contacted William F. Lynch III, Director, University Records Management, and requested a response to your petition, which we received on April 26, 2011. On April 28, 2011, we wrote to you advising that our response would be delayed due to our ongoing investigation. We have now concluded our investigation and have fully considered your petition for access to records under Neb. Rev. Stat. § 84-712.03, as well as the University's response. Our review was conducted in accordance with Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010). Our findings in this matter are set forth below.

FACTS

Our understanding of the facts in this matter is based on your petition and the information contained in the University's response.

On February 21, 2011, you submitted via e-mail a public records request to Joel D. Pedersen, Vice President and General Counsel, University of Nebraska-Lincoln. In your e-mail, you requested the following information:

- All public records, including but not limited to, correspondence, itineraries, and travel agendas, related to the Arizona Sports

Foundation's (a.k.a. Fiesta Bowl) annual "Fiesta Frolic" trip and any other meetings or trips sponsored in whole or in part by the Arizona Sports Foundation or any affiliate;

- All public records, including but not limited to, contracts, memoranda, and correspondence pertaining to the activities and operations of the Bowl Championship Series and its affiliates; and
- All public records related to college football post-season contests, college football playoffs, and Playoff PAC.

Mr. Lynch responded to you the same day. He requested that you specify the relevant date or date ranges and the specific University officers relating to your request. Mr. Lynch also advised that under § 84-712, the University could charge you for the costs associated with fulfilling your public records request. He also advised you of the opportunity to narrow or prioritize your request.

On February 22, 2011, you clarified your request. You indicated that you were requesting documents from January 1, 2009 to February 21, 2011, and that you were seeking records "created, received or held" by six University official/employees, including Chancellor Harvey Perlman.¹ On March 25, 2011, Mr. Lynch e-mailed you a packet of documents the University deemed responsive to your request. Shortly upon receipt of the packet, you specifically inquired as to whether no other documents relating to Chancellor Perlman were being withheld. Mr. Lynch responded to your inquiry on March 28, 2011, as follows:

University records in paper, electronic, or other formats are public records if they are created or received as part of an individual performing their official University duties, and may be subject to public disclosure unless the law provides otherwise. Records "of or belonging to" the University under 84-712.01 are those records "owned" by the University or those records for which the University possess title or an ownership interest. Chancellor Perlman's service as BCS Presidential Oversight Committee Chair is an activity separate from his official University duties and therefore not subject to the public records law of the State of Nebraska.

You subsequently filed your petition with our office. Your petition contains three reasons why the University is precluded from withholding documents belonging to Chancellor Perlman that relate to his service as the Bowl Championship Series ("BCS") Presidential Oversight Committee Chair. First, you assert that because the BCS is not a separate legal entity, Chancellor Perlman could not serve as the BCS Presidential

¹ To be clear, Chancellor Perlman is one of four University chancellors, and serves at the University of Nebraska-Lincoln.

Oversight Committee Chair independently from his position as the chancellor of the University of Nebraska. Additionally, you state that “because the BCS is a joint venture in which the University participates, all BCS-related discussion is, by definition, discussion that pertains to the University’s official business.”

Second, you assert that the scheduling of post-season football matchups is an official university function. And because the University, along with other colleges and universities, have delegated to the BCS the responsibility to schedule post-season football games, it cannot now deny access to public records on the basis that it has delegated its official duties, particularly when the requested records pertain to the terms of that delegation.

Your final argument relates to Chancellor Perlman’s service as the chair of the BCS Presidential Oversight Committee. In this regard, you state that the University’s claim that Chancellor Perlman held the position as BCS Presidential Oversight Committee chair separate from being the chancellor of the University of Nebraska is not true. You state that Mr. Perlman held this position because he was the chancellor at the University of Nebraska. You further state that “the requested records pertain to topics that directly affect University budgets and obligations.” You assert that by participating in “conversations about BCS- and playoff-related topics,” the chancellor helps determine the University’s revenue share “and shape the circumstances under which the University will be bound to participate in college football’s post-season.” You conclude: “Chancellor Perlman cannot shed his University Chancellor ‘hat’ when he engages in discussions that so directly impact the University’s official athletic activities.”

In its response, the University represents that it is not relying on the legal status of the BCS in its denial, and that it is only required to produce records of and belonging to the University, and it has done so. The University also contends that the listing by the BCS of Mr. Perlman’s position as chancellor was done for identification purposes, and was not a qualification to serve as the BCS Presidential Oversight Committee Chair. Further, the University asserts that “Harvey Perlman did not hold his place on the BCS Presidential Oversight Committee as the result of his being Chancellor of UNL; the powers and specific duties of the chancellor are defined in Regents Bylaw 2.8.”

Also, as part of our investigation, we examined the website for the BCS, found at <http://www.bcsfootball.org/>. We note that under the heading “Info,” the governance structure of the BCS is described as follows:

The BCS is managed by the commissioners of the 11 NCAA Football Bowl Subdivision conferences and the director of athletics at the University of Notre Dame. The conferences are Atlantic Coast, Big East, Big Ten, Big 12, Conference USA, Mid-American, Mountain West, Sun Belt, Pacific 10, Southeastern and Western Athletic.

The conference commissioners and the Notre Dame athletics director make decisions regarding all BCS issues, in consultation with an athletics directors advisory group *and subject to the approval of a presidential oversight committee whose members represent all 120 Football Bowl Subdivision programs.* (Emphasis added.)

DISCUSSION

The Nebraska Public Records Statutes generally allow interested persons in Nebraska the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts from those records, and to obtain copies of records in certain circumstances. Under those statutes, every record “of or belonging to” a public body is a public record which individuals may obtain a copy of unless the custodian of the record can point to a specific statute which allows the record to be kept confidential. The burden of showing that a confidentiality statute applies to particular records rests upon the custodian of those records. *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

Specifically, Neb. Rev. Stat. § 84-712.01 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. Data which is a public record in its original form shall remain a public record when maintained in computer files.

Neb. Rev. Stat. § 84-712.01(3) requires that governmental records involving expenditure of public funds shall be liberally construed so “that the citizens of this state shall have the full right to know of and have full access to information on the public finances of the government and the public bodies and entities created to serve them.” See *Evertson v. City of Kimball*, 278 Neb. 1, 9, 767 N.W.2d 751, 759 (2009) (“[Section] 84-712.01(3) requires that courts liberally construe the public records statutes for disclosure when a public body has expended its funds.”).

I.

You first argue that since the BCS is not a discernible legal entity, Chancellor Perlman could not chair the Presidential Oversight Committee separately from his role as chancellor. We disagree. According to the information on the BCS website, the Presidential Oversight Committee is comprised of the presidents and chancellors from the eleven NCAA Football Bowl Subdivision conferences and the University of Notre

Dame. This committee approves decisions made by a subordinate board made up of the conference commissioners and Notre Dame athletic director. The Presidential Oversight Committee represents all 120 members of the Football Bowl Subdivision programs, which we understand include public and private institutions. It appears to us that the BCS does, in fact, possess some structure and purpose, contrary to your assertion that it lacks “a legal personality separate from its participating entities, including the University.” However, it is also clear that the BCS is not a public body, as is the University of Nebraska. And the fact that the University of Nebraska is one of the 120 programs represented by the Presidential Oversight Committee does not mean that all BCS-related discussion pertains to the University’s official business. We are unable to draw that conclusion.

II.

Your second argument relates to the University’s delegation to the BCS of an official University function—scheduling post-season games for the University’s football team. You assert that the University cannot deny you full access to public records because of this delegation and you rely on the Nebraska Supreme Court case *Evertson v. City of Kimball*, *supra*, in support of your argument. In *Evertson*, two citizens sought a copy of a report resulting from an investigation of alleged discrimination by members of the city police department. The mayor of the City of Kimball, Nebraska, commissioned the investigation, and hired an independent investigator from outside of the city to conduct it. Later, the city refused to disclose the report, claiming that the report was verbal, and had not been paid for or requested. The city also claimed that any records relating to the investigation would fall under some of the exceptions to disclosure set out in the Public Records Statutes. The district court disagreed, and ordered the disclosure of a redacted report. *Id.* at 3, 767 N.W.2d at 756-757. The City appealed, asserting *inter alia*, that the district court erred when it determined the requested documents were public records belonging to the city.

The Nebraska Supreme Court agreed with the district court, rejecting the city’s narrow reading of the “of and belonging to” language in § 84-712.01, i.e., “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. Such a reading, the Court noted, “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.” *Id.*

Additionally, the *Evertson* court discussed, for the first time, the application of a functional equivalency test to determine whether records in a private party’s possession should be disclosed:

Specifically, under § 84-712.01, requested materials in a private party's possession are public records if the following requirements are met: (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. There is nothing in the documentation provided to us that indicates that even the first requirement listed above has been met—i.e., that the University entered into a contract with the BCS to perform a University function. To the contrary, as you suggest in your petition, the University, along with the other 119 institutions, have engaged in a joint venture to determine the post-season football schedule. As a result, since we do not find that the BCS is a functional equivalent to a public agency, *Evertson* is not dispositive.

III.

Your final argument relates to Chancellor Perlman's service on the Presidential Oversight Committee, and your assertion that "Chancellor Perlman cannot shed his University Chancellor 'hat' when he engages in discussions that so directly impact the University's official athletic activities." As indicated above, select presidents and chancellors make up the Presidential Oversight Committee, so it is without question that Chancellor Perlman held the position on the committee "precisely because he was University Chancellor." The University's attempts to argue otherwise are unpersuasive.

However, the question is not whether Mr. Perlman served on the committee as the University chancellor, but whether any records relating to his service on the committee are public records *of and belonging to* the University of Nebraska. In Nebraska, in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Swift and Company v. Nebraska Department of Revenue*, 278 Neb. 763, 773 N.W.2d 381 (2009). The plain and ordinary language of § 84-712.01 indicates that "public records" are those records and documents of and belonging to a *public body*. The definition does not appear to provide access records that may be in the possession of a public official acting in a capacity outside of the parameters of his official duties. In this regard, we believe the University's arguments are correct. We cannot reconcile the language in the definition to reach documents belonging to Chancellor Perlman created while fulfilling a leadership role in a private organization separate and apart from the University of Nebraska.

In addition to *Evertson*, which is the only Nebraska case to construe the critical “of and belonging to” language found in § 84-712.01, we find additional guidance in an Iowa case, *City of Dubuque v. Woodward Communications, Inc.*, 420 N.W.2d 450 (1988). In *City of Dubuque*, a private nonprofit racing association appealed a declaratory judgment of the district court, which concluded that the meeting minutes of the racing association's board of directors and executive committee were public records and subject to public examination. The racing association was comprised in part by members of the city council and the city manager or his or her designee. In a definition very similar to that found in Neb. Rev. Stat. § 84-712, Iowa Code § 22.1 defines “public record” to include

all records, documents, tapes or other information, stored or preserved in any medium, *of or belonging to* this state or any county, city, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing.

Id. at 452 (emphasis in original).

In its analysis, the court perceived the issue as whether the meeting minutes belonged to the City under the statutory definition of public records. *Id.* at 453. In this regard, the court stated:

To make this determination, we consider whether the city council members on the DRA board of directors were acting in their official capacity as public servants and whether disclosure of the minutes of the DRA board meetings will facilitate public scrutiny of the conduct of public officers. This decision does not turn on the physical location of the documents in question, rather, the appropriate inquiry is whether the documents are held by the city officials in their official capacity.

Id. The court also noted that “[s]imply because members of a city council serve on the board of directors of a private nonprofit corporation, the affairs of the corporation do not become the affairs of the government.” *Id.* The court also determined that while a nonprofit corporation could become a licensee to operate dog racing tracks, the City of Dubuque could not:

We infer from this provision [Iowa Code § 99D.8] that management of dog racing facilities was not to be an official function of municipal government. The City cannot alter this statutory design and transform a private nonprofit corporation into a governmental body. The City is the owner of the racetrack. The DRA is licensed to conduct dog races on the racetrack and has leased the track from the City.

Furthermore, public examination of DRA board minutes will not facilitate public scrutiny of the conduct of the city council and city officials. *Rather, the realistic effect of disclosure of the minutes will be to provide public scrutiny over the affairs of a private nonprofit corporation. This result is not intended by the Public Records Statute.* Although members of the city council and the city manager may also serve as directors and committee members of the DRA, minutes of the DRA meetings are not documents that belong to the city.

Id. at 453-454 (emphasis added). The court ultimately reversed the judgment of the district court, finding that the meeting minutes of the racing association were “not records or documents *of or belonging to the City.*” *Id.* at 454 (emphasis in original).

In the present case, we assume that Chancellor Perlman acted to approve and ratify decisions made by the managing committee, which ultimately affected 120 postsecondary institutions, including the University of Nebraska. However, neither the BCS nor the committees which make up the BCS are statutory, public bodies of the State of Nebraska. And while the University of Nebraska is *implicated*, we are not persuaded that any records and documents in the possession of Chancellor Perlman which relate to his service on the committee are official University records, or alternatively, records “of and belonging to” the University of Nebraska.

Moreover, the dissemination and examination of any records or documents that Mr. Perlman may have relating to his service on the Presidential Oversight Committee will not serve to scrutinize his duties as University Chancellor. As the University correctly asserts, his service on the Presidential Oversight Committee was not part of his official duties as chancellor of the University of Nebraska-Lincoln. Nor will the dissemination and examination of these records provide scrutiny of the University of Nebraska. Construing *City of Dubuque*, just because Chancellor Perlman served on the Presidential Oversight Committee does not make the affairs of the committee the affairs of the University of Nebraska. Release of Chancellor Perlman’s records will only facilitate public scrutiny of the BCS, which is not a public body, and ultimately not subject to the Nebraska Public Records Statutes.

CONCLUSION

We believe you have made plausible arguments as to why Chancellor Perlman’s records relating to his service as the BCS Presidential Oversight Committee Chairman should be disclosed. Without question, Chancellor Perlman’s appointment to the committee was facilitated by the fact that he was Chancellor of the University of Nebraska-Lincoln. However, on balance we believe that any records relating to Chancellor Perlman’s service on this committee are not records “of or belonging to” the

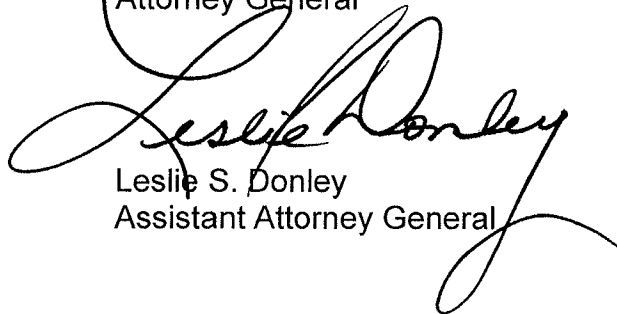
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University of Nebraska, a public body. As a result, we do not believe that the University of Nebraska unlawfully denied you access to public records, and we are closing this file.

If you disagree with our legal analysis set out herein, you may wish to pursue what additional remedies may be available to you under the Nebraska Public Records Statutes.

Sincerely,

JON BRUNING
Attorney General

A handwritten signature in black ink, appearing to read "Leslie S. Donley". The signature is fluid and cursive, with a large initial "L" and "D".

Leslie S. Donley
Assistant Attorney General

cc: William F. Lynch III

49-627-30