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November 6, 2020

Via email at [dlibit@theintercollegiate.com](mailto:dlibit@theintercollegiate.com)

Daniel Libit  
The Intercollegiate  
P.O. Box 250  
Highland Park, IL 60035

RE: *File No. 20-R-135; University of Nebraska; Daniel Libit, The Intercollegiate, Petitioner*

Dear Mr. Libit:

This letter is in response to your petition dated October 10, 2020, and received by this office on October 19, 2020, in which you requested that we review the denial by the University of Nebraska ("University") of your public records request submitted on September 27, 2020. On October 26, the undersigned spoke to University officials about your petition and, at our request, Erin Busch, Director University Records/Associate General Counsel, provided us a copy of your public records request and the University's email denying your request. On November 3, we wrote to you indicating that we had conducted a preliminary investigation of your petition, and it appeared to us that the University had properly responded to your public records request. However, we indicated that our response would be delayed so that we could finalize our decision. We have now completed our review of your petition 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.

### **FACTS**

On September 27, 2020, you emailed Ms. Busch, requesting the following records:

[A]ny agreements entered into by Learfield IMG College's Husker Sports Properties, for any publicity and media rights partnerships related to the University of Nebraska-Lincoln's athletic department, since Jan. 1, 2018. While Husker Sports Properties is a subsidiary of a private company, Learfield IMG, it is standing in the shoes of the University when it makes deals that substantially involve the university.

In support of your request, you included the following excerpt from the Attorney General's public records outline,<sup>1</sup> in which we discuss the Nebraska Supreme Court case *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009):

Section 84-712.01 does not allow a public body to conceal public records by delegating or contracting its duties to a private entity. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009). Under § 84-712.01, 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.

Ms. Busch denied your request on October 2, 2020, indicating as follows:

The records you request are not records "of or belonging" to the University of Nebraska. The records you request are owned by Learfield IMG College ("IMG"), an entity entirely separate from the University of Nebraska. The *Evertson v. City of Kimball* case that you reference is not applicable to the University's contractual arrangement with IMG. The University has not delegated a governmental function to IMG and IMG is not acting as an agent of the University. Instead, the University sold licenses to IMG Learfield for intellectual and other property. Accordingly, the University has no records responsive to your request.

You state in your petition that IMG's Husker Sports Properties is "the mechanism by which the [University] agreed to contract with Learfield IMG College over the marketing and selling of certain of the NU athletic department's media broadcasting, publication, distribution and sponsorship rights." You assert that the University "is given a right" to access and audit records created by Husker Sports Properties. You further assert that the requirements set out in *Evertson* have been clearly met, i.e., the University "contracted with Learfield to carry out the function of marketing and selling the multi-media rights belonging to a public body"; Husker<sup>2</sup> Sports Properties prepared records under this delegation of authority; the University is entitled to Husker Sports Properties' records to monitor its progress; and that "the records I seek inform decisions affecting the public interest—in this case, the finances of a public university and its athletic department."

The University informs us that since 2008, it has been in a contractual relationship with Learfield IMG with respect to the licensing of certain multi-media rights held by the University. There is no agreement between the University and Husker Sports Properties.

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<sup>1</sup> Available at <https://ago.nebraska.gov/public-records>.

<sup>2</sup> We assume you meant *Husker* although your petition references *Buffalo*.

Nor is the University a party to any agreement that Learfield IMG or Husker Sports Properties may enter into with third parties relating to the University's license agreement with Learfield IMG.

## DISCUSSION

We will begin with a brief discussion of *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009)—the case you argue requires the University to produce records belonging to Husker Sports Properties. *Evertson* involved two citizens' efforts to obtain a copy of a written report relating to an investigation of alleged racial profiling by city police officers. The mayor commissioned the investigation, which was conducted by outside investigators. Relying on a verbal report from the investigators, the mayor terminated a police officer's employment. When asked for a written report, 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 none of the statutory exceptions to disclosure alleged by the city applied. *Id.* at 5, 767 N.W.2d at 757.

On appeal, the Nebraska Supreme Court adapted the test referenced above to determine whether a public body is entitled to records in the possession of a private party for purposes of disclosure. Applying the test to the circumstances involving the city and its investigation, the court found that the mayor had delegated his authority to investigate allegations of wrongdoing by city officials to outside investigators. The investigators created records under this delegation of authority, and the mayor used the information in the records in his decision to terminate a city employee. In addition, the city did not claim that the mayor did not have the right to access the records to monitor the investigators' performance. Thus, the court concluded that the investigators' reports were public records under § 84-712.01(1).<sup>3</sup> *Id.* at 12-13, 767 N.W.2d at 761-762.<sup>4</sup>

You assert in your petition that the *Evertson* test requirements have been "clearly met" to compel disclosure. However, we believe the Nebraska Supreme Court case *Frederick v. City of Falls City*, 289 Neb. 864, 857 N.W.2d 569 (2015), is more analogous to the circumstances presented here than *Evertson*. In *Frederick*, the court considered whether a nonprofit corporation formed to encourage economic development in Falls City and the surrounding area was required to produce its records in response to a request made under § 84-712 of the NPRS. The corporation denied the request on the grounds

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<sup>3</sup> Under this provision, "public records" in Nebraska "include all records and documents, regardless of physical form, of or belonging to" governmental entities in the state, "[e]xcept when any other statute expressly provides that particular information or records shall not be made public." Neb. Rev. Stat. § 84-712.01(1) (2014).

<sup>4</sup> However, the court also found that the trial court erred by not finding that the investigatory records exception in Neb. Rev. Stat. § 84-712.05(5) provided a basis to withhold the requested materials.

that it was not a public entity and its records were not public records. The citizen making the request challenged the denial and the trial court ordered, except for a few privileged documents, the disclosure of the requested documents. The corporation appealed.

The *Frederick* court adopted a four-part functional equivalency test to determine whether a private entity, which has an ongoing relationship with a governmental entity, can be considered an agency, branch, or department of such governmental entity within the meaning of § 84-712.01(1), thus requiring disclosure of its records. Under this approach, the court considered (1) whether the private entity performs a governmental function, (2) the level of government funding, (3) the extent of government involvement or regulation, and (4) whether the private entity was created by the government. *Id.* at 874, 857 N.W.2d at 576. The court made clear that the *Evertson* test applied to records generated from “an isolated transaction between a public body and a private entity” and that using the two tests as necessary, depending on whether the private entity’s relationship with the public body is ongoing or limited to a singular transaction, “is consistent with the statutory directive that our public records law be ‘liberally construed’ so that citizens ‘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.’” *Id.* at 874, 857 N.W.2d at 577.

The *Frederick* court indicated that the test should be applied on a case-by-case basis, and that no single factor is dispositive. It ultimately concluded, however, that the corporation was not the functional equivalent of an agency, branch or department of the city despite finding that the city had delegated a governmental function. With respect to this factor, the court stated:

[W]e conclude that promoting economic development is a governmental function. *But it is permissive, not mandatory.* We find no provision of law requiring a city to engage in promotion of economic development, either directly through its own employees or indirectly through an expenditure of public funds to a private entity such as a chamber of commerce or development corporation.

*Id.* at 876, 857 N.W.2d at 577 (emphasis added). Thus, the court found that the corporation’s records were not public records as defined under § 84-712.01(1).

The University represented to you that it has not delegated a governmental function to Learfield IMG, and that Learfield IMG is not acting as an agent of the University. We agree. It seems to us that the marketing and selling of the University’s athletic department’s multi-media rights does not constitute a governmental function of the University. And even if a court were to find otherwise, we find no provision in Nebraska law that requires the University to undertake such licensing and marketing activities. Consequently, since we infer no delegation of a governmental function by the University to Learfield IMG or Husker Sports Properties—the first prong in either test—

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we do not consider those private entities to be the functional equivalent of a unit of the University for purposes of disclosure of their records under the NPRS.

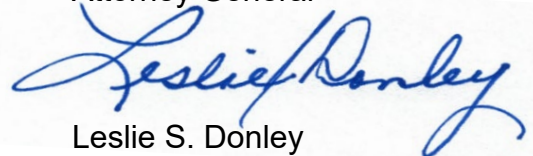
### CONCLUSION

Based on the foregoing, since the University has not delegated a governmental function to either Learfield IMG or Husker Sports Properties, neither *Evertson* nor *Frederick* provides a basis to require that records in the possession of these private entities are public records which must be disclosed. Therefore, we find that you have not been denied access to public records and that the University's response to your public records request was appropriate.

If you disagree with the conclusion reached in this disposition letter, you may wish to discuss these matters 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)

49-2589-29