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June 22, 2022

[REDACTED]
Craig I. Samuelson

RE: *File No. 22-R-128; Bennington Public Schools; Craig I. Samuelson, Petitioner*

Dear Mr. Samuelson:

This letter is in response to your correspondence emailed to our office on May 31, 2022, in which you sought our assistance in obtaining a copy of certain training materials presented to staff of Bennington Public Schools (“BPS”) in March 2022. At our request, you supplemented your request on June 6.¹ Upon receipt of these materials, we forwarded them to BPS legal counsel Derek A. Aldridge, Perry Law Firm, and requested a response. We received Mr. Aldridge’s response on behalf of the district on June 21. We considered your correspondence and BPS’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. 2020, Supp. 2021), amended 2022 Neb. Laws LB 876 and LB 1246. Our findings in this matter are set forth below.

RELEVANT FACTS AND BACKGROUND

On April 22, 2022, you emailed BPS superintendent Dr. Terry Haack requesting, among other things, a copy of a presentation on diversity and inclusion, including any supplemental materials, recently given to BPS professionals.² In an email to you sent May 7, Dr. Haack indicated that “[t]his is one of several trainings the district has organized

¹ As we indicated to you by letter dated June 1, our investigation of your petition began once we received the documentation underlying your public records request. We received your documentation on June 7.

² We note that you also requested a copy of the presentation from the members of the BPS school board, the presenters (Shawntal Mallory and Marti Carrington), and Shannon Thoendel, Ed.D., BPS Assistant Director of Curriculum, Instruction, & Assessment.

and presented to teachers and staff over the past two years on the topics of diversity, equity, and inclusion. The training presentation belongs to the presenters of the training. The school district does not have rights to this material, nor may we share it with the public without permission.”

According to Mr. Aldridge, BPS administration engaged Equity Nerd, LLC in early 2022 “to prepare and present certain diversity, inclusion and equity education to Bennington teaching staff and students.” As set out in the engagement proposal, a pre-recorded student training would first be given to high school students, followed by two live training sessions for faculty and staff. Equity Nerd was solely responsible for preparing the content and format of the sessions.

Sometime in February or March 2022, the parties decided to start the training with the two staff sessions. The first session—“Building Awareness”—was held on March 11, 2022, and consisted of an oral presentation by Ms. Mallory and Ms. Carrington. A PowerPoint presentation was also used by the presenters. With respect to the PowerPoint, Mr. Aldridge states:

The PowerPoint presentation was created by Equity Nerd. Bennington did not create, and was not involved in the creation of, the PowerPoint presentation. The engagement proposal between Bennington and Equity Nerd did not require Equity Nerd to create or prepare a PowerPoint presentation. The engagement proposal between Bennington and Equity Nerd did not require Equity Nerd to use any visual presentation as part of the education sessions. The engagement proposal between Bennington and Equity Nerd does not give Bennington any rights or privileges in any visual presentations created or prepared by Equity Nerd.

The PowerPoint was contained on a laptop owned and used by Equity Nerd. Equity Nerd brought the laptop used to present the PowerPoint; Bennington did not supply the laptop for Equity Nerd’s use. Bennington was not provided a copy of the PowerPoint created and used by Equity Nerd.

Mr. Aldridge informs us that BPS paid \$3,500, or one-half of the total cost for the sessions at the time of engagement. He states that “[a]fter receiving some negative comments from staff, Bennington suspended the education sessions by Equity Nerd. No other education sessions have been presented by Equity Nerd.”

You have asked that this office determine whether Nebraska’s public records law allows you to receive a copy of the requested materials.

DISCUSSION

The basic rule for open public records in Nebraska is found at Neb. Rev. Stat. § 84-712 of the NPRS. That statute provides, in pertinent part:

Except 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.

"Public records" in Nebraska

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) (emphasis added). The purpose of § 84-712 of the NPRS is "to guarantee that public government records are public." Introducer's Statement of Purpose for LB 505, 72nd Nebraska Legislature (1961).

Mr. Aldridge asserts that the requested PowerPoint is not a record "of or belonging to" the district. He calls our attention to the Nebraska Supreme Court case *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009), where the court considered whether records in the possession of a private party were public records 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 Nebraska Supreme Court initially considered whether the NPRS required physical possession of the requested materials:

The City argues 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. But the 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 applied a test, adapted from the Ohio Supreme Court, “to determine whether a public body is entitled to records in the possession of a private party for purposes of disclosure.” *Id.* at 12, 767 N.W.2d at 761. Under the test, the following requirements must be 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. 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). *Id.* at 12-13, 767 N.W.2d at 761-762.³

In the present case, Mr. Aldridge argues that application of the *Evertson* test to the records sought here supports the district’s conclusion that the PowerPoint is not a public record. He asserts that providing the education sessions is not a “governmental function,” and that the education is neither part of the student curriculum nor required under the teacher collective bargaining agreement.⁴ Thus, since no governmental function is

³ 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.

⁴ Mr. Aldridge indicates that BPS administration believed the “sessions would provide a societal benefit.” In this respect, the administration believed that helping students and staff “have a greater

implicated, BPS could not delegate its authority to Equity Nerd. Mr. Aldridge states that “[t]his is clearly evident by the fact that Bennington did not direct or control the form or content of the education sessions by Equity Nerd. Instead, Bennington relied entirely on Equity Nerd, and its principals, to bring their expertise on the matter to the education sessions.” He asserts that BPS “is not entitled to possess the PowerPoint prepared by Equity Nerd.” There was nothing in the engagement proposal requiring Equity Nerd to prepare written materials for the education sessions or which gave BPS the right to access any written materials. As to the last requirement, Mr. Aldridge asserts that BPS has not, and will not, use the PowerPoint “to make any decisions affecting either the school district or the public in general.”

We have carefully considered whether the PowerPoint presentation developed and used by Ms. Mallory and Ms. Carrington during their “Building Awareness” session is a public record of or belonging to BPS. It seems to us that BPS’s engagement with Equity Nerd was governmental in some form since the school district expended funds to pay for half of the training.⁵ However, notwithstanding that fact, we generally agree that the training sessions on diversity, inclusion and equity contemplated here do not constitute a “government function” and that no authority to perform a government function was ever delegated to Equity Nerd by the district. And even if BPS’s engagement with Equity Nerd can be considered a delegation of a government function, BPS was not entitled to possess the materials under subsection (3) of the test. To reiterate, the engagement proposal did not require Equity Nerd to create a PowerPoint or use one during its presentation. The engagement proposal did not give BPS any rights or privileges in any visual or written presentations created by Equity Nerd. The PowerPoint is simply not a record “of or belonging to” BPS, and we therefore decline to order its disclosure.⁶

understanding of important citizenship topics (such as identity understanding, inclusion and equity language choices, cultural awareness, identity/diversity biases, and microaggression) may foster a more cohesive environment for all—both in school and outside of school.”

⁵ See *Aksamit Resource Management LLC v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 122, 907 N.W.2d 301, 307-08 (2018) (“The Legislature intended that courts liberally construe §§ 84-712 to 84-712.03 for disclosure ‘whenever any . . . political subdivision . . . record of receipt . . . or expenditure involving public funds is involved.’ And it does so ‘in order 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 public bodies and entities created to serve them.’”).

⁶ Our conclusion is consistent with previous dispositions where we determined that certain documents prepared by the Big Ten Task Force for Emerging Infectious Diseases and the Big Ten Conference were not public records “of or belonging to” the University of Nebraska. See *File No. 20-R-129; University of Nebraska; Alan Blinder, The New York Times Company, Petitioner* (September 18, 2020) and *File No. 20-R-132; University of Nebraska; Andy Wittry, Petitioner* (October 13, 2020), respectively. Both letters are available at <https://ago.nebraska.gov/disposition-letters>.

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Lastly, Mr. Aldrich asserts that the PowerPoint is protected under the federal Copyright Act. However, in light of the conclusion reached above, it is not necessary to consider BPS's arguments relating to copyright protection of the requested records.

CONCLUSION

Based on the foregoing, we conclude that the requested PowerPoint presentation is not a public record under § 84-712.01(1). Consequently, BPS is not required to make it available to you under the NPRS. Since no further action by this office is necessary, 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 Donley
Assistant Attorney General

C: Derek A. Aldridge (via email only)

49-2971-30