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

15-016

NO. STATE OF NEBRASKA
OFFICIAL
OCT 29 2015
DEPT. OF JUSTICE

DOUGLAS J. PETERSON
ATTORNEY GENERAL

SUBJECT: Status of Omaha Metropolitan Entertainment & Convention Authority as a Public, Private or "Hybrid" Entity

REQUESTED BY: Senator Ernie Chambers
Nebraska State Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
David Bydalek, Chief Deputy Attorney General

You have requested an opinion from this office regarding the status of the Metropolitan Entertainment & Convention Authority ("MECA") as a public, private or "hybrid" entity. Your request letter refers to legislation which you introduced in 2014 pertaining to MECA. In part, L.B. 778 would have required certain entities, including MECA, to comply with state law provisions on open meetings and public records. You state that you intend to introduce legislation pertaining to MECA again in 2016, but have not made reference to any specific legislation. We presume the focus of the 2016 legislation would again be to clarify whether entities such as MECA are subject to the Nebraska Open Meetings Act and Nebraska Public Records Statutes, and we will address your question in that context.

RELEVANT ORDINANCE, STATUTORY PROVISIONS AND GENERAL PROPOSITIONS OF LAW

It is our understanding that MECA was initially registered as a nonprofit public benefit corporation with the Nebraska Secretary of State by two private individuals in 1997. However, in 1999, the Omaha City Council ("City Council") established MECA in the Omaha Municipal Code with the enactment of Ordinance No. 35043, which was subsequently approved by voters in May 2000. Pursuant to Section 4.07, MECA is managed and controlled by a five-member board ("Board") appointed by the City Council or the mayor of Omaha ("Mayor") on a rotating basis, subject to confirmation by the City Council. Board members serve without compensation, but are entitled to reimbursement for reasonable expenses incurred. They may be removed by the City Council for malfeasance in office. Section 4.07(a).

Section 4.07(b) sets out the powers and duties of MECA. It is given express management and control over city public events facilities, which includes "the power to enter into any contracts, [and] have control and management of property, personnel, equipment, facilities and finances." Section 4.07(b)(i) and (ii). Under Section 4.07(b)(iii), the City Council may provide by ordinance additional powers, duties, and administrative and procedural requirements and authorizations for MECA. Section 4.07(c) relates generally to MECA's governance, and provides that MECA shall have no taxing authority or power of eminent domain; may incorporate as a Nebraska nonprofit corporation, and may create committees, subcommittees, etc., as it deems necessary.

Section 4.07(d), (e) and (f) and (g) relate to MECA's fiscal matters and operations. Subsection (d) gives MECA the authority "to charge fees, rentals and other charges for the use of the facilities within its jurisdiction," such charges to be applied to MECA's operating, administration and other necessary expenses, subject to bondholder contracts. Subsection (e) requires MECA to prepare an annual budget and request that the Mayor include in the city's annual budget an amount for MECA's "operating, administration, and other such payments to or for the benefit of [MECA]."

Subsection (f) requires MECA to pay to the city treasurer, who shall serve as MECA's *ex officio* treasurer, "[a]ll income, revenue, receipts, donations, retained earnings and money of [MECA] from whatever source derived . . . ." This money shall not be commingled with any other funds under the treasurer's control, and can only be disbursed upon requisition by designated individuals authorized by the Board. MECA, the city, or an outside entity must conduct an annual audit of MECA's funds and accounts, independent of the general city audit. A copy of the audit shall be submitted to the City Council.

Finally, subsection (g) authorizes the city or an entity on behalf of the city to issue and sell "[g]eneral obligation bonds, redevelopment bonds, lease-purchase bonds, revenue bonds and refunding bonds" or notes, or any combination thereof, "to finance or refinance the acquisition, construction, improving and equipping of such facilities, and public improvements and acquisitions pursuant to a redevelopment plan containing such facilities."[1]

The Open Meetings Act is codified at Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2014) ("Act"). Under those statutes, a "public body" subject to the meetings provisions includes the governing bodies of political subdivisions and state agencies as well as "all independent boards, commissions, bureaus, committees, councils, subunits, or any other bodies, created by the Constitution of Nebraska, statute, or otherwise

---

[1] According to MECA's website at http://www.omahameca.com/About/WhoWeAre.aspx:

The Metropolitan Entertainment & Convention Authority (MECA) is a 501©(3) non-profit organization that builds and manages public event venues in Omaha, Nebraska. The formal operations of MECA commenced on August 25, 2000 with the signing of a 99-year Lease and Development Agreement with the City of Omaha. The cost to build CenturyLink Center Omaha was $291 million, funded through a public-private arrangement. The private sector contributed $75 million and the public sector contributed $216 million. CenturyLink Center Omaha opened in 2003.

pursuant to law" and "instrumentalities exercising essentially public functions." Neb. Rev. Stat. § 84-1409(1)(a). While the term "public body" is not defined within the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS"), § 84-712.01 defines "public records" as records 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."

The purpose of this statute is "to guarantee that public government records are public." Introducer's Statement of Purpose for L.B. 505, 72nd Nebraska Legislature (1961). Under this statute, it was intended that all public records of the state, its counties, and its other political subdivisions should be open to inspection, except where the Legislature has otherwise provided that the record shall be confidential. Judiciary Committee Statement on L.B. 505, 72nd Nebraska Legislature (1961). Thus, public records are broadly defined, and a wide scope of bodies is covered.

With regard to the Nebraska open meetings laws, the Nebraska Supreme Court has held that they are a statutory commitment to openness in government. *Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002); *Steenblock v. Elkhorn Township Board*, 245 Neb. 722, 515 N.W.2d 128 (1994). Their purpose is to ensure that public policy is formulated at open meetings of the bodies to which the law is applicable. *Dossett v. First State Bank, Loomis, NE*, 261 Neb. 959, 627 N.W.2d 131 (2001). In Nebraska, the formation of public policy is public business, which may not be conducted in secret. *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010).

Finally, the open meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public. *Schauer.* The beneficiaries of the openness sought by the Open Meetings Act include citizens, members of the general public, and reporters or other representatives of the news media. *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (Neb. Ct. App. 2007).

ANALYSIS

This office has previously examined the status of MECA as a private or a governmental entity in response to a public records petition in 2001 and an open meetings inquiry in 2010. In the 2001 disposition letter to *The Omaha Weekly* dated December 28, 2001, we concluded that MECA was not a unit of government, but rather a private organization which was not subject to the Nebraska Public Records Statutes. In our disposition letter dated March 11, 2010, we responded to an open meetings inquiry by Common Cause Nebraska concerning MECA. We pointed out that MECA is a Nebraska nonprofit corporation, its Board is appointed by the Mayor and City Council, and that it develops, manages and operates various public facilities in Omaha, including the Qwest Center, now known as the CenturyLink Center. We noted that we had previously concluded that MECA was not subject to the NPRS, and that a similar result

with respect to the Open Meetings Act was "entirely possible." However, we stated that there was no need to engage in an extensive analysis regarding the application of the Act to nonprofit corporations such as MECA because MECA had voluntarily chosen to follow the Open Meetings Act, through its by-laws. It is our understanding that MECA still adheres to this policy.

Both of those disposition letters, however, were issued prior to the Nebraska Supreme Court's recent opinion in *Frederick v. City of Falls City,* 289 Neb. 864, 857 N.W.2d 569 (2015). In *Frederick,* the court discussed whether certain documents in the possession of a nonprofit corporation, the Falls City Economic Development and Growth Enterprise, Inc., or EDGE, were public records for purposes of the Nebraska Public Records Statutes.

In reviewing the relevant facts in *Frederick*, the court noted that EDGE was a mutual benefit corporation incorporated under the Nebraska Nonprofit Corporation Act by eight private individuals for the purpose of encouraging economic development in Falls City and the surrounding area. The EDGE board was governed by a 21-member board of directors, which included the mayor of Falls City and one city council member. The Falls City administrator was an *ex officio* member of the board of directors.

With regard to the finances of EDGE, it received both public and private funding and performed services for Falls City and Richardson County, as well as its private investors. It had an ongoing contractual relationship with Falls City, reflected in part by a memorandum of understanding in which the parties desired "to work together to implement an aggressive, targeted approach to creating a positive image of Falls City and marketing the community as a preferred business location that will generate new wealth and create quality employment opportunities.'" *Id.* at 867, 857 N.W.2d at 572.

The court then noted that in a prior opinion, *Evertson v. City of Kimball,* 278 Neb. 1, 767 N.W.2d 751 (2009), it "recognized that many courts have adopted functional equivalency tests which focus on whether the documents are in the possession of a 'hybrid public/private entity: an entity created by, funded by, and regulated by the public body.' We noted that such tests 'appear appropriate when a private entity performs an ongoing government function.'" *Frederick* at 872, 857 N.W.2d at 575 (quoting *Evertson,* 278 Neb. at 11, 767 N.W.2d at 761).

However, the court in *Evertson* declined to employ a functional equivalency test, as the record at issue was a lone document prepared in the course of an isolated incident. The court instead devised a test which focused on the requested document. In contrast, the requested records in *Frederick consisted* of "multiple documents prepared over a period of time by an entity which had an ongoing relationship with Falls City." *Id.* at 873, 857 N.W.2d at 576. Under these factual circumstances, the court concluded that the functional equivalency test was appropriate to determine whether a private entity which has an ongoing relationship with a governmental entity should be considered an agency, branch, or department of the governmental entity within the meaning of § 84-712.01(1). *Id.* at 874, 857 N.W.2d at 576.

The functional equivalency test, as borrowed from the Supreme Court of Connecticut, considers the following factors:

(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. This test is applied on a case-by-case basis, with no single factor being dispositive.

Id. at 874, 857 N.W.2d at 576 (internal citations omitted).

The court then applied the functional equivalency test to the facts pertinent to EDGE. As for the first prong of the test, the court found that EDGE, in promoting economic development, performed a governmental function. The court did specify that promoting economic development was a permissive, rather than a mandatory, government function, noting that Falls City was not required by statute to engage in the promotion of economic development. The court stressed that "unlike essential governmental functions such as building and maintaining streets and highways and providing for public health and safety, private entities are free to engage in economic development activities without any involvement of public bodies." *Id.* at 878, 857 N.W.2d at 579.

With regard to the second factor, level of government funding, the court found that EDGE received approximately 63 percent of its revenue from public sources. As to the public funding, the court stated:

> In *Dow v. CCCI,* the Maine Supreme Court held that receipt by a private development corporation of at least 60 percent of its annual revenue from a city did not support a conclusion that it was the functional equivalent of a city agency. But in *State v. Beaver Dam Area Development Corp.,* the Wisconsin Supreme Court considered the fact that a development corporation was "almost entirely taxpayer funded" to be a significant factor in its determination that the entity was a "quasi-governmental corporation" subject to state open meetings and public records statutes.

Id. at 876, 857 N.W.2d at 578.

Looking at the third and fourth factors, the extent of government involvement and the creation of the entity, the court pointed out that "the city has representation on EDGE's board of directors, but not control." Id. at 877, 857 N.W.2d at 578. EDGE's employees were not city employees; it maintained separate financial records and did

not occupy city offices. The court further found that EDGE was incorporated by several private individuals, none of whom were employed by Falls City.

After weighing all factors, the *Frederick* court concluded that EDGE was not the functional equivalent of an agency, branch, or department of Falls City and its records are not "public records" as that term is defined in the Nebraska Public Records Statutes. Id. at 878, 857 N.W.2d at 579. While EDGE performed a governmental function, the fact that economic development was not a mandatory governmental function was significant in its ruling. Likewise, the fact that EDGE received 63 percent of its funding from government was, in light of the totality of the circumstances, not enough to render it a government agency. Despite the presence of factors one and two of the functional equivalency test (to at least some extent), the nearly complete absence of factors three and four appeared to be important in the court's analysis.

FUNCTIONAL EQUIVALENCY TEST AS APPLIED TO MECA

Whether a nonprofit corporation which has an ongoing relationship with a state agency or a political subdivision or which performs services for a governmental entity is a public body for purposes of the Nebraska Public Records Statutes involves a case-by-case analysis. This analysis necessarily involves a consideration of the factors enumerated above.

Performance of a governmental function: As noted above, the Omaha City Council has given MECA control over the management and operations of two of Omaha's public events facilities – the CenturyLink Center and T.D. Ameritrade Park. The court in *Frederick* held that the general encouragement of growth and industry (economic development) are public purposes. Public funds may be expended through private entities to achieve these public purposes. A study commissioned by MECA in 2014 revealed that the CenturyLink Center has had a $4.8 billion economic impact to the Omaha economy.[2] As such, MECA's management of city-owned public events facilities has had a substantial impact on Omaha's economic development and, as such, constitutes the performance of a governmental function.

However, at issue is whether the management of city-owned public events facilities constitutes an essential function which governmental entities have a duty or responsibility to perform, as opposed to the simple authority to do so if it chooses. In *Frederick*, the court stressed that EDGE's promotion of economic development was not an essential governmental function, reasoning that "private entities [such as the Chamber of Commerce] are free to engage in economic development activities without any involvement of public bodies."

There are key differences, however, between MECA's operation of Omaha's public events facilities, and the economic development undertaken by EDGE. The public nature of EDGE was much less evident than that of MECA. EDGE was primarily

[2] *See* http://www.omahameca.com/Libraries/MECA_PDFs/Goss_Study_Press_Release_FINAL.sflb.ashx

directed by private interests (only two of the 21 members of the EDGE board were public officials), did not occupy any public buildings in Falls City, and its agreement with Falls City was revocable upon 60 days written notice.

By contrast, we understand that, pursuant to a 99 year agreement, MECA operates Omaha's public events facilities - facilities which have a substantial economic impact on the city.[3] Moreover, the people of Omaha voted to establish the public-private partnership between MECA and the City of Omaha in the Omaha Municipal Code – affirmatively expressing a desire to yield a governmental function to MECA.

The level of government funding: After a city-wide vote, Omaha funded approximately 75% of the cost to build CenturyLink Center ($216 public funds, $75 million private funds). And, as previously noted, a study released in March of 2014 (commissioned by MECA) found that CenturyLink Center Omaha generated $4.8 billion of overall economic impact to the local economy between 2002 and 2013. The study further found that the convention center and arena have contributed $86.4 million in indirect and direct tax collections to the City of Omaha during this same time, including sales tax, parking tax and property taxes paid by new developments near the facility.[4] The governmental function assumed by MECA has a considerable effect on Omaha's economy.

Pursuant to Section 4.07(e) of the Omaha Municipal Code, MECA's operations and administration expenses may be funded by the City of Omaha. MECA is also authorized to use facility fees, rentals, and other charges to pay for operating, administrative and necessary expenses, with certain limitations.

A review of Omaha City budgets over the past several years reveals that MECA has received public funding - $880,000 in 2012, $424,887 in 2013, $1,100,000 in 2014, and a recommended appropriation of $450,000 in 2015.[5]

Extent of government involvement or regulation: We note that MECA is created by city ordinance and that its members are appointed on a rotating basis by the City Council or the Mayor and thereafter confirmed by the City Council. MECA board members are subject to removal by the City Council for malfeasance. Thus, while MECA board members are not public officials nor employees, city officials have direct control over the composition of the board.

In addition to control of MECA board appointments by city officials, other factors reveal a significant amount of governmental involvement in MECA:

---

[3] While the agreement is referenced on MECA's website, we do not have a copy of the agreement.
[4] *See* http://www.omahameca.com/Libraries/MECA_PDFs/Goss_Study_Press_Release_FINAL.sflb.ashx
[5] *See* http://www.cityofomaha.org/finance/images/stories/2015%20Recommended%20Budget.pft and http://www.cityofomaha.org/finance/images/stories/Budgets/budget2013recommended/2013%20Recommended%20Budget.pdf

(1) The powers and duties of MECA are set forth in the Omaha Municipal Code;

(2) The Omaha City Treasurer is ex officio treasurer of MECA and all income, revenue, receipts, etc., are paid to and under the control of the city treasurer;

(3) MECA's funds and accounts must be audited annually, and the audit report must be submitted to the City Council;

(4) MECA's offices are located in the CenturyLink Center – obviously a city-owned facility;

(5) The City Council has expressly reserved the opportunity to enact by ordinance additional powers and duties and administrative and procedural requirements for MECA

The extent of government involvement with respect to MECA is quite different from the circumstances presented in the *Frederick* case. There, the court noted that only two of the 21 voting members of EDGE's board were city officials that Falls City had no control over the composition of the EDGE board, and that EDGE and Falls City maintained separate financial records.

MECA is much more akin to the economic development corporation at issue in *Meri-Weather v. Freedom of Info. Com'n*, 47 Conn. Supp. 113, 778 A.2d 1038 (Conn. Super. 2000) discussed by the court in *Frederick*. The court in *Meri-Weather* held that the economic development corporation at issue in that case appointed a majority of that corporation's board of directors, the executive director of the city agency served as the executive officer of the nonprofit corporation, and the city agency maintained the nonprofit corporation's financial records in the office of the city agency. The corporation was found to be subject to the Connecticut Freedom of Information Act.

Creation of the entity: While MECA was originally created as a private, nonprofit corporation, it was subsequently created in the Omaha Municipal Code with the enactment of Ordinance No. 35043, which was approved by voters in 2000 (*see* Section 4.07, which reads, "There is hereby **created** a Metropolitan Entertainment and Convention Authority..." (emphasis supplied). MECA and the City of Omaha signed a 99-year Lease and Development Agreement in August of 2000. As it now exists, MECA is a "creation" of a city ordinance. Interestingly, in MECA's audited financial statements for 2013 and 2014, MECA is referred to as "a component unit of the City of Omaha."[6]

[6] *See* http://cityclerk.cityofomaha.org/images/stories/agenda/ID%2015_03_31/City%20Clerk/402.pdf

CONCLUSION

We conclude that the Metropolitan Entertainment & Convention Authority is a hybrid public/private entity as it is created by ordinance, though it is also authorized to incorporate as a Nebraska nonprofit corporation. Utilizing the functional equivalency test set forth in *Frederick*, we conclude that MECA should be subject to the Nebraska Public Records Act. All four of the factors set forth in that test are applicable to MECA such that it should be considered an agency, branch, or department of the City of Omaha.

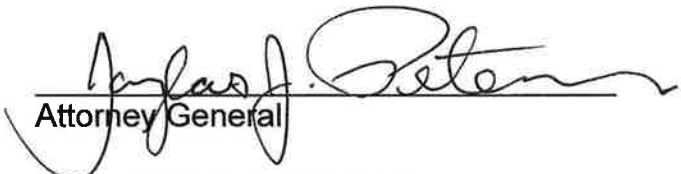
We likewise conclude that MECA is subject to the dictates of the Nebraska Open Meetings Act. MECA, as it now exists, is a creation of an Omaha City Ordinance. It serves the public function of managing and controlling the public events facilities of the City of Omaha.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

David Bydalek
Chief Deputy Attorney General

Approved by:



Attorney General

pc. Patrick J. O'Donnell
Clerk of the Nebraska Legislature

07-993-29