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June 17, 2014

Larry Ball
2025 Pepper Ave.
Lincoln, NE 68502

RE: *File No. 14-R-112; City of Lincoln; Complainant Larry Ball*

Dear Mr. Ball:

This letter is in response to your Public Records Request complaint received by us on April 16, 2014, in which you requested our review of a public record request made by you to the City of Lincoln ("City"), through the City Clerk, for a copy of "the document their contracted manager uses to lease the facilities of the Pinnacle Bank Arena to users such as those who sponsored the Boys State Basketball Tournament, and the NCAA." As is our normal practice with such complaints, we contacted the party against whom the complaint was made in regards to your complaint. We subsequently received a response from Marcee A. Brownlee, Assistant City Attorney for the City of Lincoln. We have now considered your complaint and the City's response under the Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2008, Cum. Supp. 2012, Supp. 2013), and our findings in this matter are set forth below.

FACTS

Our understanding of the facts in this matter is based on your complaint, your Public Records request, and the response from the City.

On approximately March 31, 2014 you visited the office of the Lincoln City Clerk and made a request for documents related to the Haymarket Joint Public Agency and the Pinnacle Bank Arena ("Arena.") On April 2, 2014, you made a written clarification of your request, as you had been able to obtain all but one of the requested documents directly from the City Clerk's website. Your written clarification stated that you had not been able to find a copy of the "arena leasing agreement," which you define as "the contract that is used to lease the premises to various entities such as the NCAA and the Nebraska Scholl [sic] Activities Association." You further state that you are specifically

seeking "a copy of the agreement executed by and between the Arena and the Nebraska School activities association . . .that permitted the Nebraska Boys State Basketball Tournament held at the Pinnacle Bank Arena that terminated on March 15, 2014."

On April 4, 2014, the City responded to your written request. The City advised that "a search of our records would indicate that there is no contract between the City of Lincoln or the Haymarket JPA and any other party regarding" the Boys State Basketball Tournament. The City has contracted with SMG Management to manage the Pinnacle Bank Arena. The City further states that under that Management Agreement, SMG is responsible for booking all events held at the Pinnacle Bank Arena, except for those associated with the University of Nebraska at Lincoln. The City's position is that, because SMG is an independent contractor, and based upon the terms of the Management Agreement, the City "has no right to possession of any contract entered into by SMG." The City concludes that the document you seek is a document of SMG and not the City, and consequently is not a public record under the Nebraska Public Records Statutes.

The City further claims that, even if the document you have requested was a public record subject to disclosure under the Public Records Statutes, significant portions of that document could be withheld by the City under Neb. Rev. Stat. § 84-712.05 (3) as proprietary or commercial information.

ANALYSIS

Right to access the document sought

The Nebraska Public Records Statutes ("NPRS") 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. See, Neb. Rev. Stat. § 84-712.01 (1).

The question presented by your Public Records request, and the City's denial, is whether the document you seek is "of or belonging to" the City and therefore subject to the NPRS, or whether it is a record of SMG and not subject to those statutes. The City is not required to be a party to the contract you seek in order for the contract to be "of or belonging to" the City. Neb. Rev. Stat. § 84-712.01 (1) also does not require a public body to have actual possession of a record that has been requested. It 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." *Evertson v. City of Kimball*, 278

Neb. 1, 9, 767 N.W.2d 751, 759 (2009). A public body cannot circumvent the NPRS by claiming the records sought are in the possession of a third party.

The NPRS do not define "of or belonging to," but the Nebraska Supreme Court has weighed in on the subject and provided a four-part test to determine if a record in the possession of a third party is a public record subject to disclosure.

> [U]nder § 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.

Evertson, 278 Neb. 1, 12, 767 N.W.2d 751, 761.

Delegation of Authority

The first part of the test set forth in *Evertson* is whether the public body, here the City, through a delegation of its authority to perform a government function, contracted with a private party, SMG, to carry out the government function. While the ownership and management of an event facility may not be a typical governmental function, such as providing police and fire services would be, the City has entered into the "arena business" through its ownership of the Pinnacle Bank Arena. Therefore, management of the Arena is a governmental function the City has undertaken. It has delegated that management to SMG to carry out the day to day operation of the Arena. See, Management Agreement dated June 7, 2012, Sections 4.1 and 4.3 (The City owns the facility for the benefit of the citizens of the City; SMG is engaged to manage and operate the facility per the terms of the Management Agreement.)

The City also argues, in the alternative, that no governmental function has been delegated to SMG to allow for the booking of events, because the City has no authority of its own to book events at the Arena. However, the Management Agreement vests the authority to book events in SMG, and that authority is granted by the City. If the City had no authority to grant, it could call into question the entire Management Agreement. Additionally, the City was not required to enter into an agreement with SMG to manage the Arena. It could have chosen to undertake the management itself. Following the expiration or termination of the Management Agreement with SMG, it could choose to do so again. Management Agreement, 26.3. Without the authority to book events, the City would be unable to effectively manage the Arena. By its ownership of the Pinnacle

Bank Arena, the City is vested with the authority to negotiate contracts concerning the arena facilities, including booking contracts. Consequently, we reject this argument.

We believe that the first part of the *Evertson* test has been met.

Preparation of records

The second part of the test is whether the private party, SMG, prepared the records under the public body's delegation of authority. The City argues it did not. We disagree. SMG entered into the agreement with the NSAA for the basketball tournament to be held at the Pinnacle Bank Arena under the terms of the Management Agreement it has with the City. But for the Management Agreement, SMG would not have entered into a contract with the NSAA. The Management Agreement allows SMG to enter into such agreements, without needing City approval on each agreement. See, Management Agreement 7.1(b)(ii)(SMG is to book and schedule all events "tailored to the specific needs of the City and the Arena including significant involvement of the City at critical decision points.") Appropriate arena events, including concerts, conventions, shows and other programs and activities, are to be coordinated with the City. Management Agreement 7.1(b). Therefore, we believe the second prong of the *Evertson* test has been met.

Monitoring

The third part of the *Evertson* test is whether the public body was entitled to possess the materials to monitor the private party's performance. The City argues it is not so entitled and claims it has no right to access the document you seek. The City makes a distinction between "records that document the performance of the contractor" in carrying out the governmental function and "records of the contractor that reflect the manner or means of the performance." *Evertson* makes no such distinction.

The City's position is that the booking contracts between SMG and an event sponsor or performer do not document the performance of a governmental function. It distinguishes between a booking contract and accounting records relating to the arena operations. The City argues that the accounting records would be subject to the NPRS. But, it argues that a booking contract, or contracts for personnel, security, landscape management, etc. are related to the "manner and means" of the performance and should not be subject to the NPRS.

In support of its position, the City points to the "Independent Contractor" provision of the Management Agreement, which states:

> 46. Independent Contractor. The City is interested only in the results produced by this Agreement. SMG has sole and exclusive charge and control of the manner and means of performance. SMG shall perform as an independent

> contractor and it is expressly understood and agreed that SMG is not an employee of the City and is not entitled to any benefits to which City employees are entitled, including, but not limited to, overtime, retirement benefits, workmen's compensation benefits, sick leave or and [sic] injury leave.

We do not read this provision as prohibiting the City from gaining access to any records, including contracts booking the arena. Nor do we read the similar Section 14.5:

> The parties agree that each of them is acting on its own behalf and not as an employee, joint venture or partner of the other. Each party is interested only in the results obtained from this agreement and each party shall be in exclusive charge and control of its own performance according to its own means and methods. Nothing in this Agreement shall be interpreted as creating a partnership, joint venture ore relationship of principal and agent between the parties

as prohibiting the City from accessing any documents.

You point to Section 7.1(b)(i) in support of your argument that the record you seek is subject to the NPRS. That section states:

> (i) Planning. SMG shall provide a professional Arena Event management planning and control system tailored to the routine handling of the Arena Event management requirements for each principal type of Arena Event at the Arena. This system shall have the capability to produce hard copy, electronic or other reports in sufficient detail, subject to City approval, to provide accountability and proper record-keeping, including detailed reports at the City's request and in such form as the City may reasonably require upon termination or expiration of this Agreement.

The City states that this section of the agreement requires the information requested to be provided to the City only at the termination of the contract with SMG. However, this provision also requires SMG to provide the requested information at the "City's request," which we interpret to mean at any time during the pendency of the Management Agreement. However, we are not sure this provision applies specifically to the document you seek. It appears more to refer to data compiled as to ticketing, security, staffing, and other functions, for each event held at the Arena.

Further, the City argues that the Management Agreement does not "confer upon the City the right to possession, nor does the City demand any right to possess any material that evidence manner or means of performance." However, the Management Agreement demonstrates that the City remains involved in the operation of the Arena, including approval of events to be held at the Arena, despite the delegation of the day to day management to SMG. The following provisions demonstrate this:

4.1 The City owns and holds the Facilities for the benefit of the citizens of the City of Lincoln.

4.4. The City desires to engage SMG to manage and operate the Facilities and SMG desires to accept such engagement on the terms and conditions set forth in this Agreement.

6.1(h) Revenues. . . . .Revenues collected by SMG and deposited in the SMG Operating Fund will be held in trust for the City and used in the manner hereinafter provided.

7.1(b)(i) Planning. See quoted language, p.5, above. The City may request detailed reports from SMG.

7.1(b)(ii). Booking and Promotions. SMG shall, subject to [UNL use], provide for all booking and scheduling of Events at the Arena tailored to the specific needs of the City and the Arena including significant involvement of the City at critical decision points.

7.1(b)(v) Advisory Committee[1]. SMG shall cooperate and provide information as may be reasonably requested by the Advisory Committee in its advisory function to the City and the City's Contract Administrator as it relates to the successful operation of events at the Arena. This shall include a written report and attendance by the corporate officials at quarterly Advisory Board meetings.

13. Powers Reserved to the City.

13.1 The City shall have, and hereby reserves the right of approval over the matters provided herein. The City's right of approval shall include the following matters:

(a) The kind, quality and prices of events and concessions as suggested by SMG from time to time; . . .

(g) Arena Events to be promoted or co-promoted as recommended by SMG from time to time. . .

13.4 This reservation expressly limits SMG's authorities to those granted in this agreement and those necessarily implied thereby, and in no event shall implicit authority control over the wishes of the City in any manner.

14.3 SMG has limited authority to act as the representative of the Arena in carrying out its obligations under this Agreement, but has no authority to bind the City, unless authorized by the City in writing.

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[1] Defined as "the Pinnacle Bank Arena Advisory Committee as established by Resolution of the City Council of the City of Lincoln." Management Agreement 3.3.

> 14.4 All deposits made to the funds or accounts which may be established under the Agreement are the property of the City. . . .
>
> 24.3 The City shall have unlimited access to all accounting records and supporting documentation of SMG relating to the Facilities during the term of this Agreement and for a period of one (1) year thereafter. Such right to access shall be exercised in a reasonable manner.
>
> 26 Termination Provisions.
>
> 26.4 SMG agrees to and does hereby transfer to the City all ownership rights to all financial records, contracts and any reports, studies, statistics or other information (collectively "SMG Records") prepared or produced under the terms of this Agreement. SMG agrees that upon termination or expiration of this Agreement to turn over the SMG Records in a prompt and coordinated fashion.

We cannot agree with the City's assertion that the Management Agreement does not entitle the City to possess the document you seek. Reading the Management Agreement as a whole, it appears to us that the City maintains involvement in the Arena, including the right to be involved in the choice of events held at the Arena. We do believe that the City is "entitled to possess the materials to monitor the private party's performance" as required by *Evertson*.

It is true that "public records laws should not permit scrutiny of all a private party's records simply because it contracts with a government entity to provide services." *Evertson* at 11, 767 N.W.2d at 761. The City argues that the document you seek is the type of document the court had in mind when making this statement. However, we believe that this applies not to records directly related to the operation and management of the Arena facility, but to ancillary or general operating records of SMG. For example, a member of the public would not be able to gain access, through a public records request to the City of Lincoln, to SMG's own corporate financial records or to agreements SMG has with other entities to manage other facilities. Those would clearly be the records of SMG and not related to the operation and management of the City's facility. We do not believe this applies to records directly related to the Pinnacle Bank Arena and its operations.

Public Interest

Finally, *Evertson* requires that "the records are used to make a decision affecting public interest." Neb. Rev. Stat. § 84-712.01(3) requires liberal construction erring on the side of disclosure of documents whenever an expenditure of public funds is involved. The Pinnacle Bank Arena was built with public funds. The deposits made of funds earned from events held at the arena are the property of the City, making them public funds. Consequently, the booking of an event at the arena is in the public

interest, as the success of the Arena, and its financial stability, are in the public interest. We believe booking contracts to be documents which meet this forth prong of *Evertson.*

Conclusion

We believe each of the four parts of the *Evertson* test have been met in determining whether the record you seek is "of or belonging to" the City of Lincoln. We believe that the contract between SMG and the NSAA, booking the arena for the Nebraska State Boys Basketball Tournament, is a public record subject to disclosure under the NPRS.

Applicability of Neb. Rev. Stat. § 84-712.05(3)

Although the Nebraska Public Records Statutes provide for access to public documents, they are not absolute. The NPRS also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). 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). Section 84-712.05 is comprised of eighteen categories of documents which may be kept confidential from the public at the discretion of the agency involved. In the present case, the City has stated that if the document was subject to disclosure under the NPRS (which we believe it to be), then significant portions of that document would be subject to being withheld under the provisions of Neb. Rev. Stat. § 84-712.05(3). We agree.

Neb. Rev. Stat. § 84-712.05(3) provides "Trade secrets, academic and scientific research work which is in progress and unpublished, and other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose" may be withheld from public disclosure by the custodian of the record. While we believe the contract you seek is subject to the NPRS, and must be disclosed by the City, we also believe that substantial portions of that contract may be redacted by the City prior to its disclosure. The hosting of the various state high school tournaments is a highly competitive process, with various cities and event facilities vying to host the tournaments. Portions of the contract with the event facility may provide a competitive advantage to another facility when the contract is again "up for bid" if it were released to the public. Consequently, while the City must provide you with this document, it may redact any portions which may provide an advantage to the competitors of the Pinnacle Bank Arena and the City in hosting this, or any other, tournament.

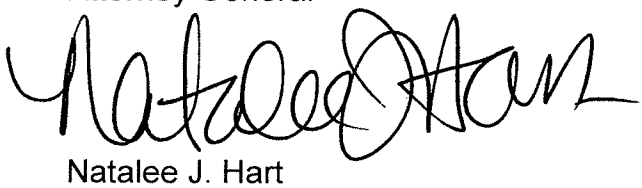
CONCLUSION

For the reasons stated above, we believe that you have been improperly denied access to public records. We trust that City of Lincoln will provide you with the record

you seek without delay, subject to the provisions of Neb. Rev. Stat. § 84-712.05(3), thus, no further action will be taken by this office with respect to this complaint. If you disagree with our analysis under the Public Records Statutes set out above, you may wish to review the applicable statutes and determine what additional remedies, if any, are available to you under those statutes.

Sincerely,

JON BRUNING
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Marcee A. Brownlee

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