STATE OF NEBRASKA

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February 26, 2010

Mr. Fran Chadwick
601 S. 6th
Nebraska City, NE 68410

Re: *File No. 10-R-111; City Clerk of Nebraska City; Chadwick.*

Dear Mr. Chadwick:

This letter is in response to your complaint form dated February 10, 2010, which we received on February 11, 2010. In your complaint, you raised issues regarding a denial of access to records belonging to the Wildwood Golf Course, and as a result, we considered your complaint as a petition for access to records under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Supp. 2009). Our response to your petition is set out below.

FACTS

Our understanding of the facts in this matter is based upon your complaint and the materials you provided to us with it.

The Wildwood Golf Course is a publically owned golf course in Nebraska City. Apparently, you submitted a public records request to the City Clerk-Treasurer for the City of Nebraska City in which you requested "a current and accurate list of the season pass holders of Wildwood Golf Couarse (sic) and the season pass holders that are renting cart shed space." Mr. Ehlers, the City Clerk-Treasurer, responded to your records request and indicated that he would not provide you with the records which you seek. In doing so, he stated:

> I will not be able to provide you with the requested information based upon my interpretation of the Nebraska Public Records Statute 84-712. The customer lists you are requesting are confidential information.

The denial by Mr. Ehlers precipitated your complaint to this office.

ANALYSIS

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 therefrom, and to obtain copies of records in certain circumstances. However, while the Nebraska Public Records Statutes do provide for access to public documents, they are not absolute, and they also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). For example, § 84-712.05 sets out a number of categories of documents which may be kept confidential from the public at the discretion of the agency involved, and one such category is set out at § 84-712.05 (10):

> With respect to public utilities and except as provided in sections 43-512.06 and 70-101, personally identified private citizen account payment information, credit information on others supplied in confidence, and customer lists;

You have requested a current and accurate list of the season pass holders for Wildwood Golf Course and a list of those individuals who are also renting cart shed space at the course. It appears to us that the season pass holders of the golf course could be fairly characterized as the "customers" of the golf course. Consequently, you have essentially requested a "customer list" from the golf course, and we must determine if a golf course is a "public utility" within the meaning of § 84-712.05 (10).

We have considered the issue of whether a public golf course is a public utility under the Public Records Statutes on two previous occasions. In that regard, we will quote extensively from our disposition letter in File No. 99-R-103, dated May 11, 1999. That file involved access to the records of the Monument Shadows Golf Course in Gering, Nebraska. In File No. 99-R-103, we stated:

> In the present case, the documents at issue in your records request would reveal the names of those persons who purchased season passes to the Monument Shadows Golf Course. Since those persons are "customers" of the golf course and of the City, it appears to us that you have, in essence, requested a customer list from the City. Section 84-712.05 (9), by its express terms, is limited to public utilities, and allows the customer lists of public

utilities to be kept confidential. As a result, we must determine if a golf course is a public utility under § 84-712.05 (9).

The phrase "public utility" is not defined in the Public Records Statutes or in the statutes which provide general definitions for use throughout all the Nebraska Statutes. As a result, it becomes necessary to look elsewhere for the meaning of that phrase.

Some authorities have held directly that golf links or golf courses are "public utilities." *Capen v. City of Portland*, 112 Or. 14, 228 P. 105 (1924); 35 A.L.R. 589 (1925); 10 EUGENE MCQUILLIN, THOMAS EVANS & JUDITH O'GALLAGHER, THE LAW OF MUNICIPAL CORPORATIONS § 28.12 (3rd ed. 1999). As stated in the McQuillin treatise, '[g]olf links constitute a "public utility" which the city may purchase by a bond issue to furnish means of public recreation.' 10 MCQUILLIN at 28.

In addition, the United States Court of Appeals for the Fifth Circuit considered the meaning of the phrase "public utility" in *United States v. Pinson*, 331 F.2d 759 (5th Cir. 1964). In that case, the court stated:

> ... "public utilities" is a phrase of varied meanings. It is true that it commonly refers to corporations or individuals engaged in the business of supplying the public generally with commodities or services which are of public consequence and need and which the public has the right to demand. But the phrase is also often used in a more restricted sense to denote the physical facilities themselves which have been dedicated by their owners to the service of the public.

Id. at 761. The Fifth Circuit then went on to note that various courts have held airports, bridges, parking lots, golf links, switch tracks, telephone lines and toll roads and bridges to be public utilities. Significantly, the Nebraska Supreme Court has held that a municipal aviation field is both a "public service property" and a "public utility." *State ex rel. City of Lincoln v. Johnson*, 117 Neb. 301, 220 N.W. 273 (1928).

> Based upon the authorities above, it appears to us that the phrase "public utilities" in § 84-712.05 (9) should be read to include golf courses along with obvious utilities such as water systems or power systems. . . .

Disposition Letter in File No. 99-R-103 at 3-4 (May 11, 1999).

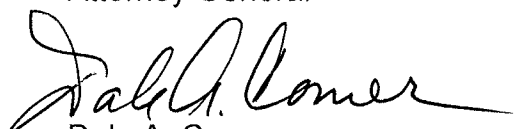
For the reasons set out in our disposition letter for File No. 99-R-103, we believe that the Wildwood Golf Course, as a publicly owned golf course, is a "utility" of the City of Nebraska City. Consequently, the city may choose to keep the customer lists of that utility, including lists of the season pass holders and lists of the season pass holders who are also renting cart shed space, confidential under § 84-712.05 (10). On that basis, we do not believe that you were improperly denied access to public records by the City Clerk-Treasurer, and we are closing this file.

We will suggest to Mr. Ehlers, through a copy of this letter, that a denial letter under § 84-712.04 must include "citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial [of access to public records]." For that reason, his denial letter in this instance should have contained a reference to § 84.712.05 (10) as well as a reference to § 84-712. We will expect him to comply with that statute in the future.

If you disagree with our legal analysis set out herein, you may wish to consult with your private attorney to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

JON BRUNING
Attorney General



Dale A. Comer
Assistant Attorney General

cc. Arnold M. Ehlers
City Clerk-Treasurer

05-176-20