



STATE OF NEBRASKA  
**Office of the Attorney General**

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July 13, 2021

Via email at [dave.lopez@huschblackwell.com](mailto:dave.lopez@huschblackwell.com)  
David A. Lopez, Attorney  
Husch Blackwell  
13330 California Street, Suite 200  
Omaha, NE 68154

RE: *File No. 21-R-120; City of Omaha; David A. Lopez, Petitioner*

Dear Mr. Lopez:

This letter is in response to your public records petition officially received by this office on June 28, 2021. You are challenging the partial denial of a public records request you submitted to the City of Omaha ("City") on June 7, 2021, relating to an application for tax increment financing ("TIF") submitted by Warhorse Gaming Omaha, LLC ("Warhorse"). Upon receipt of your petition, we contacted Deputy City Attorney Bernard J. in den Bosch, and advised him of the opportunity to respond to your petition. We received Mr. in den Bosch's response on behalf of the City on July 2. We have considered your petition and the City'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). Our findings in this matter are set out below.

### RELEVANT FACTS

On June 7, 2021, you emailed your request for public records to the Omaha City Clerk<sup>1</sup> seeking the following:

[A]ll materials submitted to the City by "WARHORSE CASINO-OMAHA" from January 1, 2021, to the present in connection with WARHORSE CASINO's application for Tax Increment Financing for a project located at 6303 Q Street. . . .

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<sup>1</sup> It appears that you initially dealt with City Planner Don Seten regarding your request and, on June 8, Mr. Seten requested that you submit any additional request via the City's public records portal. In his response to us, Mr. in den Bosch noted the "initial confusion" regarding your request, including your reluctance to utilize the portal. In any event, the City responded to your request in a timely manner.

David A. Lopez  
July 13, 2021  
Page 2

This request includes, but is not limited to, all materials submitted in support of the applicant's contention that the project would not be economically feasible without the use of TIF.

Mr. in den Bosch responded to your request on June 11. You indicate the response included "several emails, and Parts I through III of the underlying TIF application." However, the City withheld certain records under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(3), as follows:

From Part II of the TIF Application – Confidential Section – 1. Commitment letter from Great Western Bank; 2. Horsemen's Park Lease Agreement between Horsemen's Benevolent and Protective Association and WarHorse Gaming Omaha, LLC; 3. Operating Agreement, WARHORSE GAMING OMAHA, LLC; 4. Income Statement, WarHorse Gaming Omaha, Year end December 31, 2020; and 5. Detailed Construction Budget.

From Part III of the TIF Application – Section F. Reports & Studies – 1. Feasibility Study for Proposed Warhorse Casino, dated February 5, 2021 by Marquette Advisors.

Mr. in den Bosch stated that all of the records withheld under the exception "are records that have been provided by the TIF applicant and contain proprietary or commercial information which if released to the public would give an advantage to business competitors."

Following receipt of the City's June 11 response, you contacted the City and requested "any reasonably segregable public portion" of the records at issue pursuant to Neb. Rev. Stat. § 84-712.06. Mr. in den Bosch subsequently responded on June 17, indicating that the first five items (i.e., 1. commitment letter (one page); 2. lease agreement (eighteen pages); 3. operating agreement (thirty pages); 4. income statement (one page); and 5. construction budget (three pages)) were not reasonably segregable. With respect to the feasibility study, Mr. in den Bosch indicated that he reviewed the study "and redacted that information that is proprietary or commercial which if released would give an advantage to a business competitor." A redacted copy was enclosed with his response. In addition, Mr. in den Bosch disagreed with your description that the withheld records were expansive, indicating that the produced "TIF application . . . contains substantial information about the project." He further stated that "the City requests very specific information in support of its process," some of which would give a competitor an advantage if allowed to review it.

## **YOUR PETITION**

By way of background, you note the recently approved ballot initiatives which legalized "all forms of games of chance" at casinos located at licensed racetracks in

Nebraska. You indicate that one particular casino operator, Ho-Chunk, Inc., “was a major financial supporter of the gaming initiatives,” and that during its campaign it touted “the massive amount of revenue that would be generated by the new Nebraska gaming facilities . . . .” You further indicate that it “came as a surprise to many” when Ho-Chunk, Inc., through its subsidiary Warhorse, sought \$17.5 million in TIF for its proposed casino development in Omaha. You indicate that you scrutinized the City Planning Department’s analysis, especially the City’s economic feasibility analysis, to determine whether the application met the statutory criteria in Neb. Rev. Stat. § 18-2116(1)(i)-(iii). Concluding that the City’s analysis was insufficient, and noting through other publicly available records that Warhorse’s TIF application “would include several materials that would assist in evaluating the accuracy of the City’s conclusion that this project truly would not go forward without public financial support,” you submitted your public records request to the City.

You state that the City has asserted that the redacted and withheld “records contain information that is ‘proprietary or commercial which if released would give an advantage to a business competitor.’” You argue that regardless of whether this assertion is true, the City failed to acknowledge the second part of the exception, i.e., that the release of the records would “serve no public purpose.” In this regard, you cite to *Aksamit Resource Management LLC v. Neb. Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018) [*“Aksamit”*], “where, like here, the public entity was resting its proprietary/commercial information assertion only on the first prong” of the exception.

You further state:

[T]he public purpose in allowing review and scrutiny of a TIF applicant’s purported justification for public financial support is clear. This is especially so here, where significant portions of the withheld records relate to a *mandatory* statutory element for TIF approval, namely that a project must be economically *infeasible* without public support. To deny the public the ability to assess *all* aspects of an applicant’s economic feasibility showing would be to gut key provisions of both the TIF statutes and the public records statutes at issue here. This is particularly true given the explicit statutory preference for public disclosure where public finances are at stake. Neb. Rev. Stat. § 84-712.01(3). Accordingly, there is an incontrovertible public purpose in allowing for public review of *all* submissions made in support of a TIF application.

Section 84-712.05(3) provides no basis for the City’s withholding of the records at issue. The City has identified no other basis for denying the underlying public records request. The City should accordingly be required to comply with the request. (Emphasis in original.)

## THE CITY'S RESPONSE

As an initial matter, Mr. in den Bosch observed that while some of the information in your "Background" section may be relevant in determining whether a statutory exception applies to the records at issue, much of it does not. He states that "the history relative to how gambling was approved in the State, any opposition to it, and any statements that may have been made for or against it in campaign advertisements, are absolutely irrelevant in determining what documents are entitled to be withheld relative to a public records request." He further states that those comments "bear[ ] no relationship as to the appropriateness of applying Nebraska Redevelopment Law to any given site."

With respect to the records withheld, Mr. in den Bosch states that while the City did not cite the entire exemption in its July 11 response, "it is clear that [the] City bears the burden of establishing that any documents that are withheld fit within the statutory exemption," including the element of "no public purpose." While acknowledging the *Aksamit* court's construction of the exemption, he cautioned that this language should not be read "so broadly as to effectively eliminate the exemption." To the extent the language is construed to mean that any document wanted by a member of a public serves a public purpose, "then the exemption means nothing." "Public purpose," he states, "should not be intermixed with curiosity." Mr. in den Bosch also asserts that

[t]his particular exemption was intended to protect the records of businesses who make application to, collaborate with, make bids to, or need permits from governmental entities and have to provide information to government entities so that governmental entities may consider their entitlement to permits, benefits, or to contract with the government. In fact, in this instance, the City stated to applicants that the information at issue would be maintained confidentially and that has been the City practice.

Mr. in den Bosch states that the matter pending before the Omaha City Council is a "Resolution to approve a redevelopment project plan—a conceptual item and not an agreement with WarHorse." He states that "[i]t is clear that the approval of a redevelopment plan has nothing to do with the entity requesting [TIF], but rather requires an analysis of whether development of the site meets the factors laid out in NEB. REV. STAT. § 18-2113." Mr. in den Bosch further informs us that the document the City Council is considering (enclosed with his response and linked in your petition), contains a description of the redevelopment project plan from the City Planning Director and a comprehensive financial examination by the City Planning Department and recommendation to the City Council.

The City's response also contained an affidavit from Lance Morgan, President and CEO of Ho-Chunk, Inc., a corporate subsidiary of the Winnebago Tribe of Nebraska. Mr. Morgan addressed the five withheld documents and redacted feasibility study, in pertinent part, as follows:

Item 1

On May 7, 2021, as part of the financing package for the Project, the Warhorse development team obtained a commitment letter from Great Western Bank providing that it had reviewed the terms of the proposed TIF and that it would be willing to provide financing for the TIF. The terms of this letter are specific to this particular project and a long-standing relationship with Great Western Bank. The information contained with the letter contains proposed financing rates, which are proprietary to the relationship between Warhorse and Great Western Bank and if released would give an advantage to Warhorse's competitors. . . . Affidavit of Lance Morgan ("Morgan Affidavit") at ¶ 4.

Item 2

On April 12, 2021, Warhorse and Horsemen's Benevolent and Protective Association ("Horseman's") entered into a Lease Agreement ("Lease Agreement") for the property commonly known as Horsemen's Park. The sole purpose of submitting the Lease Agreement was to establish Warhorse's authority to proceed with certain applications to the City. The Lease Agreement contains information that is confidential, business related and proprietary to Warhorse and Horseman's. Turning over the Lease would benefit Warhorse's competitors by informing them of rent structures, rates, and other key business elements. . . . Morgan Affidavit at ¶ 5.

Item 3

An Operating Agreement for Warhorse dated February 9, 2021 ("Operating Agreement") sets forth certain key business elements and financial and business decision structures. The Operating Agreement sets forth any voting rights and obligations of members and the management of Warhorse. The information within the Operating Agreement is not readily available to the public. Knowledge of the Warhorse structure, voting rights, and member rights, responsibilities and obligations would benefit its competitors. . . . Morgan Affidavit at ¶ 6.

Item 4

An income statement for the Warhorse entity ("Income Statement") was prepared for the application. The Income Statement included financial information and details that are confidential to Warhorse and if released would give an advantage to Warhorse competitors. The details within the Income Statement are solely beneficial to Warhorse and to its competitors. . . . Morgan Affidavit at ¶ 7.

Item 5

A detailed construction budget for the Project ("Detailed Construction Budget") was prepared and included financial information and details that are confidential to Warhorse and the project budget. If released, the information would give an advantage to Warhorse's competitors. The details within the Detailed Construction Budget are solely beneficial to Warhorse and to its competitors as it would be [sic] provide the competitors with the negotiated construction rates and other related fees. . . . Morgan Affidavit at ¶ 8.

Redacted Feasibility Study

Marquette Advisors prepared on behalf of Warhorse a Feasibility Study dated February 5, 2021 ("Feasibility Study") . . . . The Feasibility Study was obtained by Warhorse through the investment of significant, time, effort and expense and the information contained within the Feasibility Study if released would provide a significant competitive advantage in business. A Feasibility Study is often used to evaluate the potential strengths and weaknesses of a project. The details within the Feasibility Study would be solely beneficial to Warhorse and its competitors and not the public. . . . Morgan Affidavit at ¶ 9.

In each instance, Mr. Morgan represents that the document has no public purpose since it does "not impact the health, safety and welfare of the public."

Mr. Morgan further represents that while the casino market is not yet established in Omaha, ". . . Warhorse has a number of competitors in the Omaha area who are interested in or are entering the casino market, including Elite Casino Resorts, LLC ("Elite") . . . ." Mr. Morgan states that Elite was selected over Warhorse to build a casino in Grand Island, and that the CEO of Elite, Dan Kehl, has informed him that you represent Elite. In this regard, Mr. Morgan states:

The release of the requested information would function as a direct handout of confidential, proprietary business information to Warhorse's competitors. The Withheld Portions include WarHorse's internal analysis of the viability of the project and business decisions, and risks analysis related to the Project. Release of the Withheld Portions would give these competitors an advantage by providing proprietary or commercial information regarding Warhorse, the casino market in Omaha, and Warhorse's business considerations and decisions.

Mr. Morgan further states that items 1-5 "are entirely related to Warhorse's internal business operations," and that the only one to benefit from release of the documents, beside Warhorse, would be a Warhorse competitor. He states that the business information in those documents "would not assist the public in assessing the Application or the feasibility of the Project without TIF, and serves no public purpose." Similarly, the

redacted information in the feasibility study “relate[s] solely to business considerations regarding Warhorse’s business operations and business choices.” The redactions “contain no information that would promote any interest of the public, and serve no public interest.”<sup>2</sup>

In conclusion, Mr. in den Bosch states:

We would submit to you that the rules of proper statutory construction require the Attorney General to reject the construction of NEB. REV. STAT. § 84-712.05(3) offered by Mr. Lopez. The City has met its burden of establishing that the withheld records are within the exemption. It cannot be presumed that the legislature intended that this exemption meant nothing. The requested construction of this provision seems to assert that every document would have some “public purpose.” If this statutory construction were adopted, you would have the nonsensical result of eliminating a carefully crafted exemption drafted by the legislature. The legislature clearly was attempting to provide protection to those private companies that provide information to governmental bodies so that they did not have their businesses damaged because they desired to work within a governmental framework or seek appropriate permits, contracts, etc. from any governmental body.

## DISCUSSION

Under Neb. Rev. Stat. § 84-712(1) (2014), access to public records in Nebraska is guaranteed “[e]xcept as otherwise expressly provided by statute . . . .” “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). Thus, there is no absolute right to access public records in those instances where records are exempt from disclosure by statute. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 788, 943 N.W.2d 231, 240 (2020); *Aksamit*, 299 Neb. at 123, 907 N.W.2d at 308.

Section 84-712.05 of the NPRS contains twenty-three categories of public records that may be withheld at the discretion of the records custodian “unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties . . . .” Neb. Rev. Stat. § 84-712.05 (Cum. Supp. 2020). The City is relying on the exception in § 84-712.05(3) as its basis to withhold the documents listed above and the redacted information in the feasibility study, specifically

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<sup>2</sup> It is our understanding that you received a copy of the City’s response, including the Morgan Affidavit, and have not attempted to refute any of the representations made by Mr. Morgan.

that portion of the exception pertaining to “proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose.”

We will begin our analysis with a brief summary of *Aksamit*. In *Aksamit*, the Nebraska Public Power District (“NPPD”) withheld generation unit-specific cost and revenue information in response to public records requests submitted by two limited liability companies (and potential competitors of the district) under the proprietary or commercial information exception in § 84-712.05(3). The district court found that the information sought was in fact proprietary or commercial to NPPD, and that if it were disclosed, it would give an advantage to NPPD’s competitors. The district court further concluded that disclosure would “result in disadvantage to its ratepayers by denying them ‘the benefits of a successful and profitable operation and conduct of the business of the district.’ [Neb. Rev. Stat.] § 70-655(1) [Cum. Supp. 2016)]. Such a result would serve no public purpose.” *Id.* at 121, 907 N.W.2d at 307.

On appeal, the Nebraska Supreme Court noted that NPPD focused on the confidentiality of the information and the competitive harm it would suffer in the event responsive records were disclosed. The court acknowledged that “[t]here is no real dispute that *Aksamit* seeks to compete with NPPD.” *Id.* at 119, 907 N.W.2d at 306. However, since the exception’s components “give advantage to business competitors” and “serve no public purpose” are connected by the conjunction “and,” the court found that “both requirements must be met for the exception to become operative.” *Id.* at 124, 907 N.W.2d at 309.

With respect to the “public purpose” to be served, the court stated:

“A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants.” When we consider the meaning of the words “public purpose” in § 84-712.05(3), liberal public disclosure of the records of public entities is an important factor. The testimonies of Goss and the former NPPD employee articulated public purposes of the information well within political and economic realms; indeed, one can scarcely escape the intense public debate regarding the merits of fossil fuels versus renewable fuels.

*Id.* at 124-125, 907 N.W.2d at 309. The court concluded that while NPPD established that releasing the requested information would give advantage to its competitors, it failed to establish by clear and convincing evidence that disclosing the information would serve no public purpose. Consequently, NPPD was not entitled to withhold the information under § 84-712.05(3).

We believe that a significant difference exists between the records sought in *Aksamit* and the records at issue here. In *Aksamit*, requesters sought detailed cost and revenue information for each of NPPD’s generation units. In its analysis, the court noted

the public policy necessitating a liberal construction of §§ 84-712 to 84-712.03 when *fiscal records* of a public entity are involved.<sup>3</sup> The court also noted that there was nothing in the statutes that would operate to deny the public access to public power districts' books and records and that the Legislature had not, to date, "exclude[d] a public power district's competitive information from public scrutiny . . . ." *Id.* at 127, 907 N.W.2d at 310. In contrast, the records at issue here are financial and business records of a *private company* submitted to the City with respect to an application for a redevelopment project under the Community Development Law. They are not the fiscal records of a governmental body which, by statute, require a more liberal construction as to their disclosure. Representations from Mr. Morgan describe in detail the proprietary nature of each document, and the competitive advantage that would be gained by their release. Mr. Morgan also identified a known competitor (Elite), which could gain a competitive advantage from the release of the records. And we note again that, in this instance, the City told applicants that the information at issue would be kept confidential, and the City has done so.

While the "crux" of the appeal in *Aksamit* was the meaning of the "and serve no public purpose" clause, determining what constitutes a "public purpose" for purposes of the exception remains unclear. In the present case, you assert that the public has the right to see the withheld records "so that the public may engage in meaningful and informed scrutiny of the TIF application—and engage with their elected officials . . . ." However, Mr. in den Bosch argues that construing § 84-712.05(3) in such a way to require the public "to have access to any information submitted to the City to confirm that the City is analyzing, reviewing, and awarding everything to its individual standards" would render the exemption "meaningless since everything could have a public purpose." We agree. We are also not convinced that a *public* purpose is served by providing you access to the withheld records and information based on Mr. Morgan's representations that you represent Elite, a Warhorse competitor.

"To give effect to all parts of a statute, an appellate court will attempt to reconcile different provisions so they are consistent, harmonious, and sensible, and will avoid rejecting as superfluous or meaningless any word, clause, or sentence." *Yagodinski. v. Sutton*, 309 Neb. 179, 193, 959 N.W.2d 541, 551 (2021). In construing a statute, "[a] court must attempt to give effect to all parts of a statute, and if it can be avoided no word, clause or sentence will be rejected as superfluous or meaningless." *Newman v. Thomas*, 264 Neb. 801, 808, 652 N.W.2d 565, 571 (2002). "As an aid to statutory interpretation, appellate courts must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose rather than a construction which would

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<sup>3</sup> Section 84-712.01(3) states that "[s]ections 84-712 to 84-712.03 shall be liberally construed whenever any state, county, or political subdivision fiscal records, audit, warrant, voucher, invoice, purchase order, requisition, payroll, check, receipt, or other record of receipt, cash, or expenditure involving public funds is involved 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 government and the public bodies and entities created to serve them."

defeat it.” *Id.* at 808, 652 N.W.2d at 571. With these legal principles in mind, this office is unwilling to construe the “and serve no public purpose” clause so broadly as to swallow the exception clearly authorized in § 84-712.05(3) to protect the proprietary information of private parties submitted to governmental entities. We also believe that if we were to direct the release of such proprietary materials, it would have a chilling effect on businesses’ dealings with governmental entities relating to services, contracts, permits and economic development. Consequently, based on our review of all of the materials provided to this office, we believe that the City has shown, by clear and convincing evidence, that the records at issue may be withheld under § 84-712.05(3).

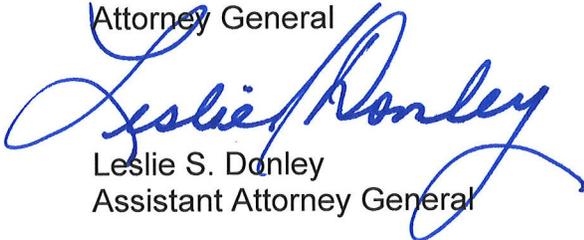
Finally, although Neb. Rev. Stat. § 84-712.03 creates enforcement responsibilities for this office, there is no statutory mechanism for an *in camera* review of the records by the Attorney General. Under § 84-712.03(2), that procedure is left for the courts. Consequently, we will rely on representations from Mr. Morgan and Mr. in den Bosch that the records fall within the exception in § 84-712.05(3) and are, in fact, proprietary and/or commercial information which if released would give an advantage to competitors and serve no public purpose. And, as it relates to City officials, “[i]n the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed.” *Wolf v. Grubbs*, 17 Neb. App. 292, 310, 759 N.W.2d 499, 517 (Neb. Ct. App. 2009).

### CONCLUSION

For the reasons discussed above, we conclude that the City of Omaha has met its burden and may continue to withhold the records and redacted information under § 84-712.05(3). Since no further action by this office is necessary, we are closing this file. If you disagree with the conclusion reached in this disposition letter, you are free to pursue the other legal remedies available to you under Neb. Rev. Stat. § 84-712.03 of the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General



Leslie S. Donley  
Assistant Attorney General

c: Bernard J. in den Bosch (via email)