

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

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March 9, 2016

VIA EMAIL

Jack Gould  
Issues Chair  
Common Cause Nebraska

RE: *File No. 16-R-110; Metropolitan Entertainment & Convention Authority;  
Jack Gould, Common Cause, Petitioner*

Dear Mr. Gould:

We are writing in response to your email correspondence received by this office on February 23, 2016, in which you challenge the denial of your public records request by the Metropolitan Entertainment & Convention Authority ("MECA"). When we receive petitions of this nature, our normal practice is to contact the entity involved and advise it of the opportunity to provide a response to this office. In the present case, we contacted MECA legal counsel, Robert L. Freeman, of the Fraser Stryker law firm, and advised him accordingly. On March 4, 2016, we received a response to your petition from Roger A. Dixon, MECA President/CEO. On March 8, 2016, the undersigned requested and received from Mr. Dixon the documents referenced in his response.<sup>1</sup> Our review was conducted in accordance with the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS"). Our findings in this matter are set forth below.

**RELEVANT FACTS**

Our understanding of the facts in this matter is based solely on your correspondence and the response and documentation we received from Mr. Dixon.

On February 16, 2016, you emailed a request for public records to Mr. Dixon, with a copy to MECA Chair Dana Bradford, Director of Communications Kristi Andersen, and Attorney General Peterson. Your request stated, in pertinent part:

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<sup>1</sup> Specifically, the "Amended & Restated Development Agreement" and an "Agreement and Lease Regarding Omaha Convention Center/Arena" between the MECA and the City of Omaha.

It is our understanding that MECA is in full compliance with Nebraska's Open Records Laws. Accordingly, Common Cause is requesting a list of all those individuals and organizations that currently own or lease MECA suites. Please include the amount paid for each suite or the rate at which the suites are leased.

Mr. Dixon responded to your request on February 19, 2016. He stated initially that while "MECA is a private, non-profit corporation organized under the Nebraska Nonprofit Corporation Act," he indicated that MECA follows the NPRS regardless of whether it is legally required to do so. Mr. Dixon denied you access to the requested records based on the exception to disclosure set out in Neb. Rev. Stat. § 84-712.05(3) of the NPRS pertaining to proprietary or commercial information. He explained that "[u]nlike traditional governmental organizations, MECA is in a highly competitive business," and that MECA staff works diligently to earn repeat business from its sponsor and premium seating clients with respect to various meetings, conventions, sporting events, and concerts. Mr. Dixon stated that just in the Omaha/Lincoln market area, "there are at least five other Venues (Arenas and Stadiums) competing for 'suite' business" and that disclosing the requested records "would put MECA at a competitive disadvantage." In addition, Mr. Dixon states that many of the private individuals and organizations who rent suites at the CenturyLink Center or TD Ameritrade Park Omaha have requested confidentiality.

Mr. Dixon supplemented the basis for the denial in his response to this office. In this regard, Mr. Dixon indicates that premium seating revenue is one of the most important revenue sources in the industry, with 2015 sales of suite and club seating totaling \$9,500,000 or 23% of MECA's total revenue. He states that in MECA's trade area, Memorial Stadium, Pinnacle Bank Arena, Ralston Arena, and Baxter Arena are direct competitors for premium seating revenue. In addition, facilities in Des Moines, Kansas City and Sioux Falls offer suites to some of the same companies as MECA. With respect to any advantage competitors would realize from the disclosure of the requested records, Mr. Dixon states:

Disclosing suite-holder names and lease terms would put MECA at a competitive disadvantage when soliciting new or repeat premium seating business as its competitors would be able to specifically identify MECA's current suite-holders and offer pricing and competing terms based on that information.

Mr. Dixon further asserts that MECA would be competitively disadvantaged by the disclosure of the requested information because many of MECA's lessees of premium seating "have requested that their names and lease terms *not be disclosed*." (Emphasis in original.) Mr. Dixon argues that if this confidentiality cannot be maintained, certain premium seating lessees "would likely choose to reallocate their entertainment budgets to seating, events, or venues that can accommodate this level of confidentiality."

Mr. Dixon states in conclusion that the requested suite holder information involves both proprietary and commercial information, that specific competitors would gain a competitive advantage if the information were disclosed, and that disclosure of the information would serve no public purpose.

In your petition to our office, you state generally that you “believe MECA’s denial of [your] request runs counter to the AG’s opinion from October 29 number 15016.”<sup>2</sup> However, we are unclear as to the basis for your claim, since MECA indicated to you in its denial letter that it follows the “Public Records Act,” and fashioned a response in accordance with those statutes. Consequently, our review below will be limited to whether the exception claimed by MECA to withhold the requested suite holder information was appropriate under the facts and circumstances presented.

### DISCUSSION

The Nebraska Public Records Statutes generally allow Nebraska citizens and other interested persons 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. The NPRS are not absolute, however, and 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 statutory exception applies to disclosure of 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).

Neb. Rev. Stat. § 84-712.05 contains eighteen categories of documents which may be kept confidential from the public at the discretion of the public body involved. In the present case, MECA has cited to the exception in Neb. Rev. Stat. § 84-712.05(3) as its basis to withhold the requested records. That subsection provides, in pertinent part:

The following records, unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties, may be withheld from the public by the lawful custodian of the records:

\* \* \*

(3) 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* . . . .

(Emphasis added.)

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<sup>2</sup> In Op. Att’y Gen. No. 15016 (October 29, 2015), the Attorney General concluded that MECA was a hybrid public/private entity subject to both the Nebraska Public Records Statutes and the Open Meetings Act. *Id.* at 9.

We are aware of no Nebraska cases which discuss the proprietary or commercial information exception provided in § 84-712.05(3). However, we find guidance in a recent opinion in which the Attorney General addressed whether certain contracts entered into by the Nebraska State Fair could be lawfully withheld from disclosure on the State Contracts Database under the same exception at issue here. In Op. Att’y Gen. No. 16003 (February 16, 2016), we reaffirmed the standards previously set out in Op. Att’y Gen. No. 92068 (May 7, 1992), an opinion written at the request of the Nebraska Department of Revenue. In that situation, the department sought our guidance as to whether the exception applied to certain financial records provided to the State Tax Commissioner for purposes of property tax valuations. While we ultimately concluded that the department, and not this office, must determine whether to withhold such records, we fashioned the following standards to assist the department in analyzing the applicability of the exception to the financial records at issue:

- (a) Section 84-712.05(3) does not impose any requirement of "substantial" competitive injury or advantage to make the exception from disclosure available;
- (b) A bare assertion by the provider of commercial information that such information is confidential is insufficient to justify nondisclosure; and
- (c) Nondisclosure must be based upon a showing that a specified competitor may gain a demonstrated advantage by disclosure rather than a mere assertion that some unknown business competitor may gain some unspecified advantage.

Op. Att’y Gen. No. 16003 at 3-4. While we were unable to definitively address whether the State Fair contracts fell within the exception, due to the lack of specific information concerning those contracts, we concluded that any governmental entity that wished to withhold information pursuant to the exception in § 84-712.05(3) is required to engage in an analysis consistent with the standards set out above. *Id.* at 6.

We have carefully considered the information provided to us by MECA in the context of the standards set out above. We believe that this information provides more than a bare assertion that the records which you seek contain proprietary or commercial information. Mr. Dixon has indicated to us that premium seating is commercially lucrative—accounting for 23% of the MECA’s total revenue in 2015. He has specified four direct competitors, as well as three regional competitors, which might gain an advantage from disclosure of the information at issue. It seems to us that, in this commercially competitive environment, MECA’s competitors would gain a demonstrated advantage by the disclosure of MECA’s premium seating lessees and the terms of those leases. Moreover, Mr. Dixon has represented to this office that express audit provisions set out in the “Agreement and Lease Regarding Omaha Convention Center/Arena” provide “appropriate public oversight without requiring MECA to disclose sales and

revenue information that would place MECA at a competitive disadvantage.” Weighing all of these factors together, it is not unreasonable to conclude that “the interests served by nondisclosure outweigh any public purpose served by disclosure.” Op. Att’y Gen. No. 92068 at 4. Consequently, we believe that MECA may rely on the exception in § 84-712.05(3) to withhold the requested suite holder information.

### CONCLUSION

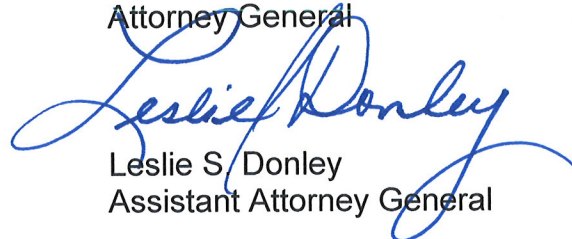
In the present case, MECA noted, both in its denial letter to you and in its response to this office, that it is not a traditional governmental organization, but rather a private nonprofit created for purposes of operating the City of Omaha’s public event venues. We acknowledge that MECA is unlike any other governmental entity we have encountered in this context. However, we believe that MECA has endeavored in good faith to operate under the provisions of the Nebraska Public Records Statutes with respect to your request for information. And in this disposition, we have held MECA to the same standards as any other governmental entity seeking to withhold records under the exceptions in § 84-712.05.

Therefore, for the reasons explained above, we conclude that MECA has met its burden with respect to the application of this exception, and that the requested suite holder information belonging to MECA may be lawfully withheld under Neb. Rev. Stat. § 84-712.05(3). Since we conclude that MECA did not unlawfully deny your records request, no further action by this office is warranted. Accordingly, we are closing this file.

If you disagree with the analysis and the conclusion we have set out above, you may wish to consider what additional remedies may be available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General



Leslie S. Donley  
Assistant Attorney General

c: Roger A. Dixon (via email)  
Robert L. Freeman (via email)