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October 29, 2012

Riley M. Johnson
Managing Editor
Daily Nebraskan
1400 R Street
Lincoln, NE 68588-0448

RE: *File No. 12-R-138; University of Nebraska-Lincoln; Petitioner Riley Johnson,* Daily Nebraskan

Dear Mr. Johnson:

This letter is in response to your correspondence received by us on October 12, 2012, in which you seek an "advisory opinion" as to a public records request made by you to the University of Nebraska Lincoln ("UNL" or "University"). We have construed your request to be a Public Records Petition under the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. § 84-712 through 84-712.09 (Reissue 2008, Cum. Supp. 2010, Supp. 2011). Pursuant to our normal procedure, we asked the public body complained about to respond to your complaint. We forwarded your Petition to William F. Lynch, III, the Director of the University Records Management Division on October 18, 2012. We received a response from Mr. Lynch on October 23, 2012.

FACTS

Our understanding of the facts in this case is based on your public records request of October 5, the October 11 response from UNL through Mr. Lynch, the subsequent e-mail correspondence between you and Mr. Lynch thereafter, your Public Records Petition, and the response of UNL to that Petition. You made a request on or about October 5, 2012 to UNL through its procurement office, which was forwarded to Records Management, for "access to and a copy of all bid proposals submitted for the development of the University Health Center on or before October 5, 2012." Your request was denied on October 11, 2012 by Mr. Lynch, as "not subject to the public records laws of the State of Nebraska" until such time as the preferred vendor is chosen

and a contract is signed. Mr. Lynch referred you to the UNL "Public Records Request Guide for Procurement Documents" as support for his determination. That document states "[u]ntil a notice of intent to award is issued, a purchase order, or contract is awarded, the University may treat all bid and proposal submissions and other records as confidential." The Guide does not provide citation to a statute which supports this policy. The first issue, therefore, is whether bid proposals submitted to UNL are public records within the meaning of the NPRS.

The second issue is based upon the response of UNL to your Petition. Therein, the University appears to abandon the premise that the records you seek are not public records, and instead cites to Neb. Rev. Stat. § 84-712.05(3) as reason to withhold the bid submissions as trade secrets or proprietary or commercial information. Consequently, if we determine that the records you seek are public records, the question then becomes whether the response of UNL to your pubic record request was adequate under the NPRS, and whether those records may be withheld under Neb. Rev. Stat. § 84-712.05(3).

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 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. 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).

Specifically, Neb. Rev. Stat. § 84-712.01 defines "public records" as:

> all records and documents, regardless of physical form, 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. Data which is a public record in its original form shall remain a public record when maintained in computer files.

Neb. Rev. Stat. § 84-712.01(3) requires that governmental records involving expenditure of public funds shall be liberally construed so "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." *See Evertson v. City of Kimball*, 278 Neb. 1, 9, 767 N.W.2d 751, 759 (2009) ("[Section] 84-712.01(3) requires that courts liberally construe the public records statutes for

disclosure when a public body has expended its funds.").

The October 11, 2012 responses via letter and e-mail from UNL to your public record request indicate that the position of the University at that time was that the records you seek are not public records subject to the provisions of the NPRS until such time as a bidder is chosen and a contract signed. The University cites only to its "Public Records Request Guide for Procurement Documents" as substantiating this. However, the documents you seek are in the possession of the University, having been submitted by the bidders in early October. The NPRS provide that documents of a public body are public records, unless a specific statute allows those records to be kept confidential. We requested that in its response to your Petition that the University provide us with the statute or statutes which allow it to accept sealed bids and maintain the confidentiality of those bids until the contract is awarded. The University did not provide us with any such statutory reference. It has cited only to its internal policies, which, without sufficient statutory basis, cannot override the provisions of the NPRS.

Consequently, we believe the records you have requested are "public records" under the Nebraska Public Records Statutes. Therefore, we must next determine if the response provided to you by UNL was adequate and whether the University may withhold these documents under the provisions of the NPRS.

In his letter of October 23, 2012 to this office in response to your Petition, Mr. Lynch states that UNL treats "all bid and proposal submissions and other related records as confidential" until such time as a successful bidder is announced. He cites to Neb. Rev. Stat. § 84-712.05(3) along with UNL policies and the Invitation to Bid as support for this position. He no longer appears to be advancing the position that the records you seek are "not subject to the public records laws of the State of Nebraska," as stated in his October 11, 2012 letter to you.

As an initial matter, the response given to you by UNL on October 11, 2012 did not comply with the requirements of the NPRS. As the University's position is now that Neb. Rev. Stat. § 84-712.05(3) allows it to withhold the bid proposals you have requested, UNL should have supplied you with a denial letter complying with Neb. Rev. Stat. §84-712.04 (2008).

(1) Any person denied any rights granted by sections 84-712 to 84-712.03 shall receive in written form from the public body which denied the request for records at least the following information:

(a) A description of the contents of the records withheld and a statement of the specific reasons for the denial, correlating specific portions of the records to specific reasons for the denial, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial;

(b) The name of the public official or employee responsible for the decision to deny the request; and
(c) Notification to the requester of any administrative or judicial right of review under section 84-712.03.

Mr. Lynch's October 11, 2012 letter does not provide a description of the records withheld, the citation to Neb. Rev. Stat. § 84-712.05(3), or any of the other information required by statute, and does not comply with the NPRS. However, as discussed below, Mr. Lynch will have the opportunity to cure this omission.

As the University is now asserting Neb. Rev. Stat. § 84-712.05(3) as a basis to withhold the bid or bids it received, we must determine if it is appropriate to utilize this subsection in this situation. We will note that the University's citation to its internal policies and the invitation to bid have no impact on whether the documents at issue may be withheld under the NPRS. Those policies are irrelevant to our analysis, as the University has not supplied us with a statutory basis for the implementation of a policy that withholds records that may otherwise be subject to the NPRS.

Neb. Rev. Stat. § 84-712.05(3) allows a public body, at its discretion, to withhold from disclosure "[t]rade 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." We are not aware of any Nebraska cases which discuss the precise parameters of § 84-712.05(3). However, we have discussed that exemption from disclosure in two previous opinions of this office. Op. Att'y Gen. No. 97033 (June 4, 1997); Op. Att'y Gen. No. 92068 (May 7, 1992). Those opinions set out several factors which, in our view, control whether the exemption in § 84-712.05(3) is properly asserted:

-- § 84-712.05(3) does not impose any requirement of "substantial" competitive injury or advantage to make the exception from disclosure available,

-- a bare assertion by the provider of commercial information that such information is confidential is insufficient to justify nondisclosure,

-- 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,

-- the interests served by nondisclosure of the records must outweigh any public purpose served by disclosure.

Based upon the factors set out in our earlier opinions, we find it highly unlikely that the bid documents at issue in this instance constitute commercial or proprietary

information in their entirety. For example, standard form provisions such as language pertaining to the term of the proposed contract at issue would hardly provide a business advantage to competing bidders for the contract. On the other hand, certain types of information typically contained in bid documents could well constitute commercial or proprietary information to the extent that they might allow competitors to ascertain an individual bidder's pricing procedures, assumptions, costs and so forth.

In the present circumstances, we will ask the University to review the bid documents at issue in connection with your request. If there are portions of those documents which constitute commercial or proprietary information under the standards articulated in our previous opinions, i.e., specified competing bidders could gain a specific and demonstrated advantage from disclosure of the information at issue, then those portions of the bid documents may be redacted. The other portions of the bid documents should be provided to you. And, if the University decides to redact portions of the bid documents based upon § 84-712.05(3), then it should provide you with a denial letter which contains the information required in § 84.712.04.

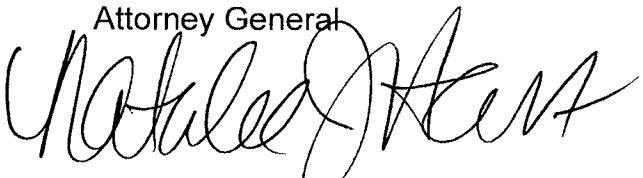
CONCLUSION

For the reasons stated above, we believe the University is required to disclose certain portions of the bid or bids it has received. We have provided guidelines herein for production of the requested documents. We trust that the University will undertake this in good faith, 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 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: William Lynch, III

02-355-30