

STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

DOUGLAS J. PETERSON
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

May 27, 2015

Via email and regular U.S. Mail
Tracy Overstreet
Grand Island Independent
422 West First Street
P.O. Box 1208
Grand Island, NE 68802-1208

RE: *File No. 15-R-122; City of Grand Island; Tracy Overstreet, Grand Island Independent, Petitioner*

Dear Ms. Overstreet:

This letter is in response to your petition which we received on May 12, 2015, in which you requested our review of the denial of certain records by the City of Grand Island ("City"). Specifically at issue is a contract between the City and PST Services, Inc. ("PST"), relating to the provision of EMS and fire department billing services. As is our normal practice with such requests, we contacted the public body named in the petition. In this case, we contacted City Attorney Robert J. Sivick and requested a response to your petition, which we received on May 26, 2015. We have now completed our analysis and have fully considered your petition for access to records as well as the City's response. We considered your petition under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS"), and our findings are set forth below.

RELEVANT FACTS

Our understanding of the facts in these matters is based on your petition and the information contained in the City's response.

On May 4, 2015, you emailed a request for public records to Mr. Sivick. Specifically, you requested the following:

This is a formal request to have a copy of the McKesson (PST) ambulance billing contract that was approved by the Grand Island City Council.

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Should the contract, or its attachments, contain the "trade secret" billing formula as was mentioned during the April 28, 2015 council meeting, please strike that section with a notation and release the remainder of the contract.

Mr. Sivick responded to your request by letter dated May 8, 2015. Mr. Sivick indicated that the requested contract was being withheld under the exception in § 84-712.05(3) of the NPRS pertaining to "[t]rade secrets, academic and scientific research work which is in progress and unpublished, and other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose[.]"

In addition, Mr. Sivick indicated that as the City's purchasing agent,¹ and acting in accordance with the purpose of the procurement provisions of the City Code,² his office "strives to negotiate contracts for goods and services in the best interests of the City's taxpayers." He further states that

[a]t times that entails negotiating terms not subject to public disclosure as they fall under the exceptions set forth in Neb. Rev. Stat. § 84-712.05(3) as "trade secrets" or "proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose." The billing rate previously disclosed fell under those exceptions as does the PST contract itself. The reasons for such nondisclosure is contractors almost always provide goods and services to customers at different terms and prices due to a variety of factors.

Mr. Sivick asserts that the exceptions in the NPRS give public bodies the same economic advantages enjoyed by private entities in negotiating and contracting for the procurement of goods and services, which specifically results in lower costs to taxpayers. Mr. Sivick further asserts that "[r]efusing to negotiate or contract for such nondisclosure ultimately harms the public and taxpayers as it drives up the cost of goods and services." And disclosing the information gives an advantage to a City contractor's competitors. Mr. Sivick states that "such disclosure harms the City's reputation and erodes confidence in it as a reliable and reputable customer. This in turn results in contractors refusing to do business with the City or only at a much higher cost." Finally, Mr. Sivick asserts that as the City Attorney, he has an obligation not to

¹ Pursuant to Grand Island City Code § 27-5, the City Attorney shall perform the duties of purchasing agent whenever the position is vacant.

² "The purpose of this chapter is to provide for the fair and equitable treatment of all persons involved in public purchasing by the City to maximize the purchasing value of public funds in procurement, and to provide safeguards for maintaining a procurement system of quality and integrity." Grand Island City Code, § 27-1.

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expose the City, its citizens and taxpayers to civil liability, and that disclosing the requested contract "would likely constitute breach of contract and would be violation [sic] of my duties as an attorney."

You subsequently filed your petition with our office challenging the City's denial of the contract. You state you are concerned that if one vendor is able to keep the contract from the public, then other vendors may attempt to do the same. You also pointed out that during the city council's discussion of the contract at its meeting on April 28, 2015, one city council member opened his packet containing the contract. You state that this action "alone . . . would make the document a public record since it was opened and referenced to during a public meeting."

In his response to this office, Mr. Sivick indicates that

[t]he PST contract contains that company's detailed proprietary operational methods and procedures for carrying out the City's ambulance billing in a manner that will maximize efficiency and financial returns while maintaining compliance with applicable laws and regulations. The contract also contains the information disclosed by Mr. Ferguson, namely the percentage of net revenue PST would retain as compensation for its services.

Mr. Sivick iterated that it was the City's position that the contract fell within the exception in § 84-712.05(3). Mr. Sivick declined to address our specific request to show how a specified competitor would gain a demonstrated advantage through the disclosure of the contract. In this regard, Mr. Sivick did advise that a couple of days after your request, New Life Billing Systems LLC ("New Life"), a direct competitor of PST, submitted a public records request for the same information you had requested.³ He asserts that "the purpose of its request was to obtain information to gain a competitive advantage in the medical billing industry." Mr. Sivick further asserts that any public interest relating to the disclosure of the contract is outweighed by protecting PST from competitive harm, and to allow the City to negotiate the best possible terms and price.

With respect to the argument that a city council member disclosed the contract during the April 28, 2015, city council meeting, Mr. Sivick calls our attention to the Nebraska Supreme Court case *State ex rel. Nebraska Health Care Association v. Dept.*

³ Mr. Sivick provided us a copy of New Life's public records request. It appears that New Life sought records relating to all of the vendors who participated in the City's procurement process for ambulance billing services, and specifically requested bid proposals, evaluation materials and score sheets, pricing information, and a copy of the contract between the City and PST. The City denied access to all of these materials under § 84-712.05(3).

of Health and Human Services Finance and Support, 255 Neb. 784, 587 N.W.2d 100 (1998). In *Nebraska Health Care Association*, the court held, *inter alia*, that "[d]isclosure, within the meaning of this statute [§ 84-712.05], refers to the exposure of documents to public view . . ." *Id.* at 794, 587 N.W.2d at 107.

DISCUSSION

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 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).

As you know, while 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). Section 84-712.05 of the NPRS 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 claimed the exception set out in subsection (3) as its basis for denying you access to the PST contract. 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:

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

In Op. Att'y Gen. No. 92068 (May 7, 1992), the Attorney General discussed withholding records involving the "proprietary or commercial information" exception. The Attorney General concluded that (a) § 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

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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. Our office reaffirmed those requirements for assertion of the proprietary and commercial information exception to disclosure in Op. Att'y Gen. No. 97033 (June 8, 1997).

The City has not provided us enough information to determine whether any portion of the contract at issue is a trade secret or constitutes proprietary or commercial information. Mr. Sivick refused our request to show how a specified competitor would gain a demonstrated advantage by disclosure of the contract. Moreover, Mr. Sivick's argument that New Life's public record request shows how a direct competitor was seeking a competitive edge is unpersuasive. Our experience in this regard indicates that unsuccessful bidders often request documents relating to the procurement process to find out where they fell short. In any event, we do not believe this particular information is responsive to our inquiry or satisfies the requirements of the standards set out in Op. Att'y Gen. No. 92068.

Consequently, we will rely on Mr. Sivick's response given during the April 28, 2015, city council meeting with respect to a question from City Council member Nickerson as to whether the fee was "secret":

If a vendor or a contractor or a bidder, however you want to characterize these companies, inform us that a particular part of their pricing structure is a trade secret we tend to defer to that. Under 84-712.05 subparagraph 3 as public records that are not open to the public or not public records it includes "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." We consider and City staff considers this pricing formula to be proprietary or commercial information which if released would give advantage to this company's business competitors either in a way that the competitor would know how their pricing is or how they are calculating it and could use that to their advantage.

The other thing I want to impress upon the Council is the reason why we respect these requests from bidders and contractors is if we release this information, we can if we want to but we are not required to do so, we stick to that. The reason why we do not release this information is it would make it very difficult for us to attract prospective bidders on various things that the City wishes to do business and it is best that we get as many

people interested in doing business with the City as possible and one way to do that is to respect their trade secrets. I understand this may rub some people the wrong way but there is a reason for it and it is permitted under Nebraska's public records laws.

It is unclear to us how the "pricing formula" referenced by Mr. Sivick above, which could be properly withheld under § 84-712.05(3), expanded to include the entire contract. It seems to us every contract contains boilerplate provisions which do not constitute proprietary or commercial information or trade secrets.⁴ We have seen nothing to support the City's position that the entire PST contract is a trade secret or proprietary or commercial information that would allow the City to withhold it in its entirety from public disclosure.

With respect to the purported "disclosure" of the contract during the city council meeting, we believe that *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) is dispositive. In *Nebraska Health Care Association* [NHCA], the court considered whether certain records generated by the Department of Health and Human Services [DHHS] in the course of its audits of nursing homes were "investigatory records," which could be withheld by the agency under § 84-712.05(5). NHCA argued that since DHHS had sent the records at issue to the individual nursing homes from which it was seeking information, the records were "disclosed by a public entity pursuant to its duties" and no longer subject to the exception. *Id.* at 794, 587 N.W.2d at 107 (quoting § 84-712.05). The court disagreed, relying on definitions of "disclose" to support a finding that "[d]isclosure, within the meaning of this statute, refers to the exposure of documents to public view and not simply to the transmission of a document to the subject to any agency's investigation." *Id.* The court concluded "that records have been 'disclosed' within the meaning of § 84-712.05 are only those records that a public body has, in its official capacity, already made available to the general public." *Id.* at 795, 587 N.W.2d at 108. Since the records in NHCA had only been sent to the audited nursing homes, no disclosure to the general public had occurred. In the present case, the fact that Mr. Nickerson opened a packet containing the contract during the meeting does not mean that the contract was disclosed to the general public. Consequently, we find no merit to this argument.

Finally, we note that Neb. Rev. Stat. § 84-712.03 requires the Attorney General to determine whether the petitioner has been denied access to public records, or whether the public body is otherwise not in compliance with the NPRS. We do not pick

⁴ In this regard, provisions may include, but are not limited to, the contract term; termination; disclaimer/limitation of liability; assignment/amendments/succession/waivers; notice; force majeure; compliance with statutes and regulations; and conflicts of law.

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sides while making these determinations. However, Mr. Sivick asserts that our role is adversarial to the City, among other things, and as such he is "unable and unwilling to open [his] file on this matter to assist [us] in [our] decision as confidentiality is not assured." To do so, he asserts, would bring harm to the City through a breach of contract claim.

This response suggests to us that the contract at issue contains some kind of confidentiality clause or, alternatively, the City has entered into some type of confidentiality agreement with PST. It is unclear to us whether this clause/agreement applies to the proprietary or commercial information contained in the contract or the contract as a whole. We assume, however, based on the response we received, that the City has agreed not to disclose any terms of the contract. To the extent any confidentiality provision applies to trade secrets or other proprietary or commercial information, we believe such provision is enforceable. However, to the extent any confidentiality provision applies to the contract as a whole, such a provision is void and unenforceable and contrary to the public policy established by the Nebraska Public Records Statutes.

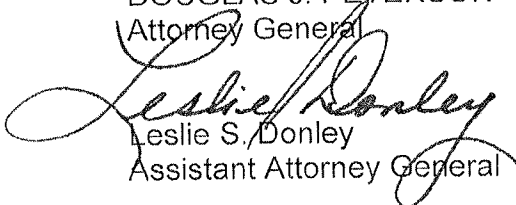
CONCLUSION

We believe that while discrete portions of the PST contract may be withheld under Neb. Rev. Stat. § 84-712.05(3), we do not believe the entire contract may be lawfully withheld under this provision. As a result, we will direct the City Attorney, by sending him a copy of this disposition letter, to produce the requested contract to you at his earliest possible convenience, but in no event later than June 3, 2015. The City may make appropriate redactions with respect to the pricing formula.

If you disagree with the analysis we have set out above, you may wish to contact your private attorney to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Robert J. Sivick
City Attorney