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January 29, 2021

Via email at [REDACTED]
Nathan S. Williams
1920 N. Clarmar
Fremont, NE 68025

RE: *File No. 21-R-102; City of Fremont; Nathan Williams, Petitioner*

Dear Mr. Williams:

This letter is in response to your petition dated January 14, 2021, in which you requested this office investigate an alleged violation by the City of Fremont ("City") of the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020). On January 19, 2021, we contacted Molly Miller of Adams and Sullivan, PC, LLO, attorney for the City, and advised her of the opportunity to provide this office a response to the petition. We received a response from Ms. Miller, on behalf of the City, on January 22, 2021. We have fully considered your petition and the City's response in accordance with the NPRS. Our findings in this matter are set forth below.

FACTS

Our understanding of the facts in this matter is based upon your petition, the documentation you provided this office, and the response we received from the City.

On January 11, 2021, you made a public records request to the City. Specifically, you sought the following records: (1) "the number of times that unit number 16 and 23 for S2 Rolloffs went across the scale at the Transfer station in Fremont Ne for either the [purpose] of dumping or being classified for the years 2018 and 2019," and (2) "a list of the trucks that were permitted to operate in the city of Fremont for the years 2018 and 2019. Specifically, units 16 and 23 and when they were added to operate during those years." You indicated in your request that you were not "interested in the tonnage, expense or other vehicles." On January 12, 2021, the City sent you a letter denying your request. The City stated it was denying your request due to the information being,

“competitive or proprietary information which would give an advantage to business competitors’ if disclosed.” In your petition to our office, you state that, “[t]rucks have to be permitted and I am asking if the two trucks in question were permitted, and if so, what time periods they were permitted during the time period that I requested.” In its response to our office, the City states that because you did not ask for general information, and specifically asked for information relating to two vehicles, the exception provided by § 84-712.05(3) applies, which allows for the withholding of “commercial information which if released would give advantage to business competitors and serve no public purpose.” Further, the City stated that, “the appearance of seeking the information for a commercial competitive advantage is apparent and providing such information on two specific trucks from one company does not provide the public purpose promoted by the statute.”

DISCUSSION

Neb. Rev. Stat. § 84-712 (2014) sets out the basic rule for access to public records in Nebraska. That statute provides, in pertinent part:

Except as otherwise expressly provided by statute, all citizens of this state and all other persons interested in the examination of the public records as defined in section 84-712.01 are hereby fully empowered and authorized to (a) examine such records, and make memoranda, copies using their own copying or photocopying equipment in accordance with subsection (2) of this section, and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business and (b) except if federal copyright law otherwise provides, obtain copies of public records in accordance with subsection (3) of this section during the hours the respective offices may be kept open for the ordinary transaction of business.

(Emphasis added.) “Public records” are defined as follows:

Except when any other statute expressly provides that particular information or records shall not be made public, public records shall include 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(1) (2014) (emphasis added). Thus, in those instances where records requested under the NPRS are exempt from disclosure by statute, there is no right of access.

Although the NPRS 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). Neb. Rev. Stat. § 84-712.05 of the NPRS is comprised of twenty-three categories of records that may be kept confidential from the public at the discretion of the agency involved. 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).

The City asserts the exception in subsection (3) of § 84-712.05 as its basis to withhold the 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.

Previous opinions by our office discuss the burden that must be met in order to withhold records under § 84-712.05(3). In Op. Att’y Gen. No. 92068 (May 7, 1992), the Nebraska Department of Revenue 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. We indicated that the exceptions set out in § 84-712.05 merely allow the custodian of public records to withhold records, but do not require it, and that the Department of Revenue must determine, as a matter of policy, whether to elect to withhold records that fall within any of the exceptions. We concluded that even if the department determined that the submitted information fell within the exception in § 84-712.05(3), it was under no obligation to decline any request to produce those records. We further distinguished records which could be withheld under the exceptions in § 84-712.05 from those records “which fall within specific statutory exceptions to public disclosure which mandate confidentiality.” *Id.* at 2.

While we 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.

Id. at 4.

In Op. Att’y Gen. No. 16003 (February 16, 2016), we once again affirmed the standards set out in our prior opinions. *Id.* at 3-4. While we were unable to definitively address whether the contracts at issue in that opinion fell within the exception, due to the lack of specific information provided to us, 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.

Recently, the Nebraska Supreme Court in *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018), construed the exception in 84-712.05(3). The court stated that in order to assert the exception, a public body must demonstrate that the records, if released, would give an advantage to competitors. The Court emphasized that even if a public body demonstrates that the records would give an advantage to competitors, it must also show that releasing the records *would serve no public purpose*. “The law as framed required [NPPD] to provide both elements.” *Id.* at 127, 907 N.W.2d at 310.

You have requested information regarding two trucks owned and operated by the company S2 Rolloffs, LLC. While your original request to the City asks for, “a list of the trucks that were permitted to operate in the city of Fremont for the years 2018 and 2019,” it then goes on to state, “[s]pecifically units 16 and 23 and when they were added to operate during those years.” Your petition also states that you were specifically looking for information on two trucks. However, on its face, it does not appear that the requested information is proprietary or commercial in nature.

The City asserts that since you requested information “specific as to two vehicles associated with one company,” and not general information, the commercial competitive advantage sought is apparent. This argument is not compelling and, based on our opinions, is insufficient to justify nondisclosure. Withholding records under § 84-712.05(3) must be based upon a showing that a specified competitor may gain a demonstrated advantage by the disclosure. See Op. Att’y Gen. No. 92068 (May 7, 1992). The City has not attempted to make such a showing. Consequently, we will allow the City to provide us the information consistent with our opinions and *Aksamit* at its earliest possible

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convenience, but in no event later than February 10, 2021. Once we receive the City's information, we will then make a determination as to whether the City's application of the exception is appropriate.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

s/Laura A. Nigro
Laura A. Nigro
Assistant Attorney General

cc: Molly Miller (via email only)

35-136-29