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March 10, 2017

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RE: *File No. 17-R-111; Nebraska Department of Administrative Services; DSM USA Insurance Company, Inc., Petitioner*

Dear Mr. Pepper:

We are writing in response to the Petition for Determination by Attorney General ("Petition") received by this office on February 23, 2017, in which you challenge the denial of a public records request submitted to the Nebraska Department of Administrative Services ("DAS") on behalf of DSM USA Insurance Company, Inc. ("DSM USA"). 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 DAS Director Byron L. Diamond, and advised him accordingly. On March 3, 2017, we received a copy of correspondence provided to the State Procurement Manager, Brenda Pape, by attorney Thomas J. Kenny, of Kutak Rock, LLC, prepared in response to your Petition. DAS also provided this office the complete bid response of the company whose records are at issue, MCNA Insurance Company ("MCNA"). Our review was conducted in accordance with the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2016) ("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 Petition, the response and documentation we received from Mr. Kenny, and the information provided to this office by DAS counsel. The undersigned has also reviewed the timeline and documents located on the DAS State Purchasing's website at <http://das.nebraska.gov/materiel/purchasing/5427/5427.html>.

This matter arises in the context of a formal bid process to obtain a qualified contractor to manage the Medicaid Dental Benefit Program. [Request for Proposal for Contractual Services # 5427 Z1 (“RFP”).] DSM USA and MCNA each submitted a proposal in response to the RFP. After the scoring process, on December 7, 2016, DAS issued a notice of intent to award the contract to DSM USA. On December 20, 2016, MCNA protested the award notice.

On January 27, 2017, you submitted a public records request on behalf of DSM USA to DAS State Purchasing, seeking access to the following records:

Documents reflecting communication between DAS and MCNA Insurance Company including any records provided to MCNA; the unredacted RFP response from MCNA; and documents reflecting scoring notes or results from the RFP.

Ms. Pape responded to the request on February 2, 2017. Her correspondence indicates that certain records responsive to your request were enclosed and that MCNA’s bid response could be found on the State Purchasing website. With respect to redacted materials, Ms. Pape indicates that “[i]n accordance with Neb. Rev. Stat. § 84-712.05(3), certain materials are marked proprietary.” Ms. Pape’s denial letter listed 73 items from MCNA’s bid proposal which MCNA had determined to be proprietary and confidential and not subject to disclosure.¹ While Ms. Pape did not expressly state that the requested records were being withheld pursuant to § 84-712.05(3), she did advise you of the right to administrative or judicial review in the event her decision to withhold the information was “in error.” Petition, Exhibit 4 at 3.

By letter dated February 23, 2017, Bo Botelho, DAS Chief Operations Officer, concluded that “DSM USA Insurance Company, Inc.’s bid was non-responsive and thus they are disqualified from consideration of the aforementioned contract award.”² MCNA Response, Exhibit A. DAS subsequently awarded the contract to MCNA. It is our understanding that you, on behalf of DSM, have or will be filing a protest to contest the award notice to MCNA.

¹ These items included a combination of attachments and select pages from the bid response, e.g., “5. Attachment B-6, Performance Bond Letter” and “47. Response, Section 40, pages 214-215.”

² Mr. Kenny suggests that we should consider the Petition moot since the protest has been decided, and because the basis for the decision bears no relationship to the records at issue. Under Neb. Rev. Stat. § 84-712.03, our review is limited to determining (1) whether a record may be withheld from public inspection or (2) whether the public body that is the custodian of such record has otherwise failed to comply with the provisions of the NPRS. The underlying reason for any public records request is not relevant to this office in determining whether a public body is in compliance with the NPRS, and we do not consider it in our analysis. See *State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993) (Neb. Rev. Stat. § 84-712 applies equally to all persons without regard to the purpose for which the information is sought). It is immaterial to our analysis that DSM USA sought the records to defend itself against a bid protest.

DSM'S PETITION

In the Petition, you state that the documents at issue include the following:

- (1) Attachment B-7, Certificate of Insurance
- (2) Attachment 3-1, Compliance Program
- (3) Attachment 22-1, Grievances & Appeals Flowchart
- (4) Attachment 24-2, Network Development Plan
- (5) Attachment 50-1, Prior Authorization Flowchart, and
- (6) all redacted responses in MCNA's RFP response except Response, Section B, which involves financial statements.

You assert that the records at issue do not constitute proprietary information within the meaning of § 84-712.05(3), and that, as a matter of public policy, DAS should be required to disclose the requested information. You also assert that “even if portions of the marked documents and responses contained proprietary information, it defies credibility that all of the redacted information in MCNA's proposal is actually proprietary.” Petition at 4 (emphasis in original). You “respectfully submit[] that DAS's overbroad use of the exception to disclosure of public records is a violation of the statute and Nebraska's public policy. See Neb. Rev. Stat. § 84-712.01(3).” *Id.*

In addition, you cite to two previous disposition letters issued by this office in which the applicability of the exception in § 84-712.05(3) was at issue. With respect to File No. 14-R-121 (August 15, 2014), you assert the public body involved, i.e., Metropolitan Community College, “wrongly withheld basic information from bids submitted in response to a competitive bid process.” Petition at 5. Based on the facts presented, we concluded that “it [was] highly unlikely that the bid documents at issue in this instance constitute commercial or proprietary information in their entirety. *Id.*, citing File No. 14-R-121 at 3. In File No. 15-R-134 (August 25, 2015), you note that in ordering the Department of Economic Development to disclose certain records, this office “gave additional consideration to the fact that the withheld records pertained to the expenditure of public funds.” Petition at 5. In that regard, we concluded that the department had ignored the public policy mandated in § 84-712.01(3)—which requires a liberal construction of §§ 84-712 to 84-712.03 as it relates to public funds.

You cite to “certificates of insurance, grievance flowcharts, appeals flowcharts and authorization flowcharts” as examples of records that are not confidential or proprietary, and which would be “necessarily disclosed” in the event MCNA was awarded the contract. *Id.* at 5-6. You also point out that since bids are submitted simultaneously, there is no “demonstrated advantage” in releasing nonproprietary information once the bids are submitted. You argue that “if there is to be an open and fair bidding process, including a protest/grievance process, then a full disclosure of non-confidential information is essential.” Petition at 6. You state that on “multiple occasions” MCNA has relied on other states' proprietary and trade secret exceptions “to submit overly redacted proposals in an

attempt to circumventing [*sic*] the state's open bidding process." Petition at 7. In doing so, you argue, "MCNA prevents equal access to information for all bidders." *Id.* You cite to litigation in Florida³ and other states where the extent of MCNA's redaction of its bid proposal was called into question under that state's public records law. Finally, you argue that there is no need for DAS to go back to MCNA to further support its redactions, since this process was mandated at the time the responses were submitted. Rather, you ask the Attorney General to identify the redacted information which does not qualify as proprietary and order its disclosure.

MCNA'S RESPONSE

Mr. Kenny argues, *inter alia*, that DSM USA mischaracterized the dispositions letters noted above. In this regard, he states that in File No. 14-R-121, the Attorney General, "contrary to [DSM USA's]⁴ assertion," did not order MCC to disclose the contents of two bid proposals which had been marked proprietary in their entirety. Rather, the Attorney General requested that MCC work with the bidders to determine what portions of the bid responses were, in fact, subject to the exception. MCNA Response at 5. Mr. Kenny further distinguishes our disposition in File No. 15-R-134 by noting that the records at issue there involved delinquent loans made by the department itself; the records did not involve proprietary or commercial information from a bidder or private company. *Id.* at 6.

In addition, Mr. Kenny states that

[b]ased on [DSM USA's] conduct in Nebraska, Arkansas and other states, MCNA believes that [DSM USA] seeks MCNA's proprietary information to gain a competitive advantage in future bid solicitations, whether in Nebraska or other states. Contrary to [DSM USA's] assertion in the Petition that "there is no demonstrated advantage" from disclosing the information, Petition at 6, MCNA's concerns are well-grounded and based on [DSM USA's] demonstrated conduct in Nebraska and other states. As described in MCNA's protest letter, dated December 20, 2016, [DSM USA's] bid contained blatant copies of materials that had been developed by MCNA. These included "Tooth Fairy Tips" that were word-for-word copies of existing MCNA materials and a crossword puzzle with the exact shape and clues as previously developed by MCNA, among other things

Id. at 7 (footnote omitted).

³ In *MCNA Dental Plans v. Florida Healthy Kids Corp.*, Case No. 2016 CA 1012 (Fla Cir. Ct. 2016), the court ordered MCNA to disclose redacted portions of its bid proposal to a competing bidder which the court found did not constitute trade secrets.

⁴ We note for the record that the MCNA Response refers to the Petitioner as "DentaQuest," which we have changed to DSM USA in quoted text.

Mr. Kenny informs us that DSM USA pursued a similar strategy in Arkansas by using the public records law to obtain MCNA's redacted proposal materials. Following its review, the state concluded that five pages, out of a total of 444, should be made available. MCNA agreed and released these pages. Mr. Kenney indicates that MCNA would be willing to release those same pages found in its Nebraska proposal.⁵ MCNA Response at 8.

Mr. Kenny further represents that MCNA's redactions were "specifically designed" to protect MCNA-developed methodology, technology, and software, among other things. *Id.* at 9. This information, he asserts, distinguishes one bidder from another, and without the ability to redact certain proprietary information, all bidders would submit essentially the same proposal. Mr. Kenny states that under these circumstances evaluating bids and "discerning meaningful distinctions between them [would be] much more difficult." *Id.* He states that "Nebraska's interests are best served by allowing bidders to protect their trade secrets and confidential competitive information in the manner MCNA has done here." *Id.*

Finally, Mr. Kenny advises that issues pertaining to MCNA's redactions were litigated in the State of Idaho in a case captioned *Blue Cross of Idaho Care Plus v. Idaho Department of Administration et al.* Here, Blue Cross of Idaho Care Plus sued MCNA under the Idaho Freedom of Information Act challenging whether information redacted by MCNA in its bid proposal constituted "trade secrets." Upon review, the Idaho court found that some of the information was properly redacted and ordered the disclosure of other information. Mr. Kenny states that MCNA used guidance from the Idaho court to make redactions in the bid proposal at issue here, even though the standard for trade secret is "potentially stricter than both the Nebraska and federal standards." *Id.* He argues that if the information was deemed a "trade secret" in Idaho, its release here would "certainly 'result in competitive harm to' MCNA" *Id.*

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).

⁵ The corresponding pages in the Nebraska proposal are 37, 85, part of page 68 and 69.

Neb. Rev. Stat. § 84-712.05 (Cum. Supp. 2016) sets out twenty categories of records which may be kept confidential from the public at the discretion of the agency involved so long as those records have not been “publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties” In the present case, DAS is relying on the exception to disclosure in § 84-712.05(3), which allows it to withhold, at its discretion, the following 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*

(Emphasis added.)

We are unaware of any Nebraska Supreme Court or Court of Appeals cases in which the exception in § 84-712.05(3) is discussed. However, three district courts have recently considered the applicability of the proprietary or commercial information exception in mandamus cases involving public utilities. In *State of Nebraska ex rel. Aksamit Resource Management, LLC, et al., v. Nebraska Public Power District*, Case No. CI16-254 (Platte County Dist. Ct.), relators sought records from the Nebraska Public Power District (“NPPD”) relating to costs and revenue associated with electricity generation. NPPD denied access to the requested records pursuant to § 84-712.05(3). The court found that the statute required NPPD to show “(1) the existence of proprietary or commercial information which if released would give advantage to business competitors, and (2) [that] the release of which information would serve no public purpose.” Memorandum Opinion and Order at 6 (February 28, 2017). The court found that the evidence at trial demonstrated that the relators were in direct competition with NPPD, and that NPPD treated the requested information as confidential and did not disclose it publicly. The court further found that given the highly competitive markets in which NPPD operates, “access to NPPD’s commercially sensitive generation unit-specific cost and revenue information would provide a competitive advantage to other . . . market participants.” *Id.* at 7. With respect to the public purpose element of the exception, the court stated that

it would be highly unlikely that in enacting § 84-712.05(3), the Legislature intended to allow record custodians to withhold proprietary or commercial information that would give advantage to business competitors, only to render the exemption meaningless by also requiring anything that could conceivably be labeled a “public purpose” for release to nullify the exemption. Here, release of NPPD’s proprietary . . . information would give advantage to its competitors, including the relators. There is merit to NPPD’s argument that creating an unlevel field for competition is not a public purpose.

Id. at 8. Consequently, the court concluded that NPPD could rely on § 84-712.05(3) to withhold the requested information. *Id.* at 9.⁶

In addition to the limited guidance provided by these district court cases, we continue to look to previous opinions of this office where we determined whether the exception in § 84-712.05(3) applied in the circumstances presented. 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.

In Op. Att'y Gen. No. 97033 (June 9, 1997), we addressed, *inter alia*, whether certain data generated by an HMO under contract with the Department of Health and

⁶ In two other mandamus cases filed by the same relators in Douglas and Lancaster Counties against Omaha Public Power District and the Municipal Energy Agency of Nebraska, respectively, the courts have overruled relators' motions for summary judgment seeking disclosure of the requested records. See *State of Nebraska ex rel. Aksamit Resource Management, LLC, et al., v. Omaha Public Power District*, Case No. CI16-4661 (Douglas County Dist. Ct.); *State of Nebraska ex rel. Aksamit Resource Management, LLC, et al., v. Municipal Energy Agency of Nebraska*, Case No. CI16-1947 (Lancaster County Dist. Ct.). The Douglas County matter is stayed pending resolution of relators' appeal of the Platte County District Court order.

Human Services (“DHHS”), and contained in records belonging to DHHS, fell within the proprietary or commercial information exception. We reaffirmed the standards set out in Op. Att’y Gen. No. 92068, and indicated that in our enforcement capacity under Neb. Rev. Stat. § 84-712.03, we have required governmental bodies relying on § 84-712.05(3) to withhold records to name specific competitors who might gain advantage and the nature of the advantage which would result from disclosure of the withheld records. We have also required governmental bodies under these circumstances to provide to the public “[a]ny reasonably segregable public portion of a record . . . upon request after deletion of the portions which may be withheld.” Neb. Rev. Stat. § 84-712.06 (2014).

However, in response to the question as to whether the records at issue fell within the proprietary and commercial information exception, we stated, in pertinent part:

[I]t is apparent that we have insufficient information from you at this juncture to determine if any records belonging to the Department as a result of the [HMO] contract are subject to the proprietary or commercial information exemption from disclosure set out in § 84-712.05(3). To make that determination with respect to particular records, we would need the names of specific competitors of [the HMO] which could gain competitive advantage from access to the records at issue, and we would need some description of the nature of the commercial advantage which would could [sic] be gained from that access.

Id. at 5.

Finally, 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.

With those standards in mind, and with regard to the recent district court orders which addressed the application of the exception, we have attempted to balance the arguments made by the parties as to whether disclosure in the present case is warranted. On balance, we believe that MCNA has made the better argument supporting nondisclosure. We believe that this information provides more than a bare assertion that the records sought by DSM USA contain proprietary or commercial information. MCNA has identified several competitors, including “[DSM USA], Liberty Dental, Scion Dental, Centene (d/b/a Envolve), United Healthcare, Delta Dental, Dentegra, Advantage Dental, Guardian, MetLife, Aetna, Avesis, Humana, DeCare, and Blue Cross.” MCNA Response, Exhibit E at 1. MCNA has represented to us that it has, and will in the future, suffer a competitive disadvantage if it were required to disclose its proprietary information to its

competitors. MCNA has submitted sufficient information to meet the enumerated standards and to support application of the exception.

We have also considered the public purpose to be served by the release of the redacted materials. In this regard, we have considered not only the impact of this contract, but the other multimillion dollar contracts to which the State of Nebraska is a party. Bidders seeking to enter into a contract with the state who are required to release proprietary information may choose not to bid or, alternatively, may choose to withhold certain information in their proposals. In either case, competition would likely suffer. It seems to us then that the public purpose is best served by giving DAS the best possible means to contract on behalf of the State of Nebraska, which should include transparency to protect citizens as well as the ability for private companies to protect their proprietary information. 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 DAS may rely on the exception in § 84-712.05(3) to withhold the requested information in MCNA's bid response.

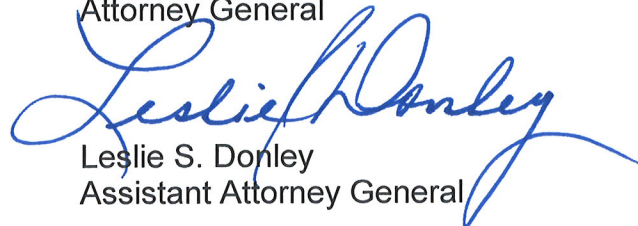
CONCLUSION

For the reasons explained above, we conclude that DAS, in conjunction with MCNA, has met its burden with respect to the application of this exception, and that the requested information found in the MCNA bid proposal may be lawfully withheld under Neb. Rev. Stat. § 84-712.05(3). Since we conclude that DAS 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,

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