



STATE OF NEBRASKA
Office of the Attorney General

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April 5, 2017

Via email at [REDACTED]
And Regular U.S. Mail
Scott Rupp
[REDACTED]

RE: *File No.17-R-114; City of Grand Island; Scott Rupp, Petitioner*

Dear Mr. Rupp:

This letter is in response to your email correspondence received by this office on March 20, 2017,¹ in which you sought our assistance in obtaining certain records from the City of Grand Island ("City") pertaining to its agreement with the Central Nebraska Humane Society ("CNHS"). 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 the Grand Island City Attorney, Jerom E. Janulewicz, and requested that he provide us specific information in the context of standards previously enumerated by this office to determine the applicability of the exception relied on by the City to withhold certain financial records of CNHS. On March 29, 2017, we received Mr. Janulewicz's response. We have construed your correspondence to be a petition for review under Neb. Rev. Stat. § 84-712.03 of 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 and the response we received from Mr. Janulewicz. The undersigned also reviewed the contracts between the City and CNHS found on the City's website at the following URLs:

¹ For the record, the statutory timeframe in which to make a determination on the merits of your petition began to run on March 21 when we received a copy of the public records request you submitted to the City.

<http://www.grand-island.com/Home/ShowDocument?id=7061>
<http://www.grand-island.com/Home/ShowDocument?id=16409>
<https://agendamangement.blob.core.windows.net/agenda-1000-public/meeting/695/20081014-G24.pdf>

According to documentation received, it appears that on March 2, 2017, you emailed the City's public information officer "requesting an opportunity to inspect or obtain copies of public records pertaining to the Animal Control contract with the Central Nebraska Humane Society, including but not limited to the annual audit/financial review." The PIO acknowledged receipt of your request and advised that the City's Legal Department would be contacting you. On March 9, 2017,² you emailed Mr. Janulewicz, seeking the status of your request. Mr. Janulewicz responded to you later that day, advising that the contracts you had requested could be found on the City's website, and providing you with the URLs to access those documents. With respect to the financial audits you had requested, Mr. Janulewicz stated that on March 7, the CNHS had provided him objections to the disclosure of the financial audit reports. Mr. Janulewicz advised that he was in the process of reviewing the records and the objections to determine whether the reports were public records and, if so, whether all or any part of the reports could be withheld. Mr. Janulewicz further advised that he expected to complete his review and provide a response to you by the close of business on March 13.

The City's Denial Letter

You indicate that you received Mr. Janulewicz's letter on March 18. In his letter, Mr. Janulewicz enclosed copies of the City's request for proposal for animal control services and the proposal submitted by CNHS in response. However, as to the audit reports of the CNHS, the City denied you access to those records under the exception set out in Neb. Rev. Stat. § 84-712.05(3) (Cum. Supp. 2016) ("[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"). Mr. Janulewicz indicated that CNHS informed him that its audit reports "contain financial information concerning services provided to the City as well as private operations and fundraising of Central Nebraska Humane Society, includes its trade secrets and other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose." He further indicated that CNHS objected to releasing its audit reports except for specific sections directly relating to the compensation received from the City of Grand Island, as follows:

² While it is apparent from the record that Mr. Janulewicz was working to fulfill your public records request, his initial response to you was due March 8 under the provisions of Neb. Rev. Stat. § 84-712. We will remind Mr. Janulewicz to keep this statutory deadline in mind, as well as the provisions relating to delays, when responding to any request brought pursuant to § 84-712.

- Unrestricted Net Assets, Public Support and Revenue, Animal Control-Grand Island
- Unrestricted Net Assets, Public Support and Revenue, Pet Licenses
- Expenditures, License Costs and Reimbursements
- Organization and Nature of Activities

Based on CNHS's representations regarding disclosure, and his review of the reports at issue, Mr. Janulewicz determined those portions of the reports that may be withheld under § 84-712.05(3). Those particular records were identified and set out in the City's denial letter.

Your Petition

You subsequently filed your petition with our office. You assert that "[t]he documents that were withheld must be disclosed under the Nebraska Public Records Law § 84-712 et seq. because the basis for denial, Neb. Reb. Stat. § 84-712.05(3) does not apply to the requested records." You provided us no further information as to why you believed the exception did not apply to the records at issue.

The City's Response to the Nebraska Department of Justice

Mr. Janulewicz advises that there are two separate and related functions to CNHS's operations: (1) animal control services³ it provides to the City under an express contract with the City, and (2) animal shelter and adoption activities. The animal shelter and adoption activities are not financed with City funds, but receive funding through adoption fees, grants, public donations, and other public fundraising efforts. Mr. Janulewicz states that CNHS's annual audits are conducted on the entity as a whole; the animal control functions are not separate from the society's other functions. However, the income and expenses pertaining to the contract with the City are separately stated from that of the other income and expenses of CNHS.

In response to our specific request to provide information as to a specific competitor(s) of CNHS which may gain an advantage as a result of the disclosure of the withheld records, and the nature of the advantage, Mr. Janulewicz informs us that you are a former employee of CNHS, that you have previously worked in animal shelters and have sought employment at other local animal shelters. CNHS has expressed its concern that you, working individually or in conjunction with another agency or entity, "would utilize financial information in the audit reports to compete against CNHS for contracts and donations." Another concern is that this information could be further disclosed by you to a person or entity who would (1) compete against CNHS in obtaining future contracts with the City or Hall County for animal control services, (2) compete with CNHS with respect

³ These services include "responding to calls such as dogs running at large, dog and animal bites, and public safety assists, which are police, sheriff, and other public safety agency requests for assistance in seizing abused or neglected animals and animals in possession of persons arrested and jailed."

to adoption services provided to the community, and (3) could draw away the donations currently received by CNHS.

Mr. Janulewicz concludes as follows:

The danger is as described in the comment to the Restatement (First) of Tort § 757: "One who has a trade secret may be harmed merely by the disclosure of his secret to others as well as by the use of his secret in competition with him. A mere disclosure enhances the possibilities of adverse use. . . . The rule stated in this Section protects the interest in a trade secret against both disclosure and adverse use."

In consideration of the above, it was determined that objections to disclosure stated by CNHS were valid objections and a basis existed under § 84-712.05(3) for withholding portions of the audit reports from public disclosure. Mr. Rupp was provided with copies of the CNHS audit reports for the years requested, including the auditor's opinions and audit report notes, with redaction of the financial data stated therein except: the revenue received from City, revenue received from the sale of pet licenses, and pet license costs and reimbursements.

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 (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, the City 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.⁴ However, 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) application of the exception does not require a showing of "substantial" competitive injury or advantage; (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. Our office reaffirmed those requirements to assert the proprietary and commercial information exception to disclosure in Op. Att'y Gen. No. 97033 (June 8, 1997) and Op. Att'y Gen. No. 16-003 (February 16, 2016).

In the present case, we have considered the City's correspondence (the March 13, 2017 denial letter and the March 28, 2017 response to us) in the context of the standards set out above. The information contained in the denial letter, especially the detailed breakdown of the audit reports, appears to us to satisfy the requirements contemplated in subsections (a) and (b). Mr. Janulewicz's response with respect to subsection (c) further satisfies the requirements. In this regard, Mr. Janulewicz and CNHS has identified you—someone who has worked for CNHS and continues to work in this field—as a known competitor. CNHS has expressed concern that if its financial information were made

⁴ 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. C116-254 (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 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. Memorandum Opinion and Order at 6-7 (February 28, 2017). 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. Consequently, the court concluded that NPPD could rely on § 84-712.05(3) to withhold the requested information. *Id.* at 9.

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. C116-4661 (Douglas County Dist. Ct.); *State of Nebraska ex rel. Aksamit Resource Management, LLC, et al., v. Municipal Energy Agency of Nebraska*, Case No. C116-1947 (Lancaster County Dist. Ct.). The Douglas County matter is stayed pending resolution of relators' appeal of the Platte County District Court order.

publically available, you and other individuals and entities could potentially use this information to gain an advantage in competitive bidding, in the provision of adoption services and in soliciting donations. Consequently, we believe that the City and CNHS have provided 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 CNHS's financial information to you. Mr. Janulewicz has represented to us that the City has provided you CNHS's financial information as it relates to its contract with the City. Without question, the NPRS mandates access to the financial records of the City, and any other governmental entity.⁵ However, here the financial information being withheld does not specifically relate to the City's contract, but rather implicates other functions and activities of CNHS, like fundraising. Since we are unable to articulate any *public* purpose that would be served by disclosure of this particular information, we believe the City may rely on the exception in § 84-712.05(3) to withhold the requested financial information.

CONCLUSION

For the reasons explained above, we conclude that City of Grand Island has met its burden with respect to the application of this exception, and that the requested financial information in the CNHS's audit reports not pertaining to the contract with the City may be lawfully withheld under Neb. Rev. Stat. § 84-712.05(3). Since we conclude that the City did not unlawfully deny your records request, no further action by this office is warranted. Accordingly, we are closing this file.

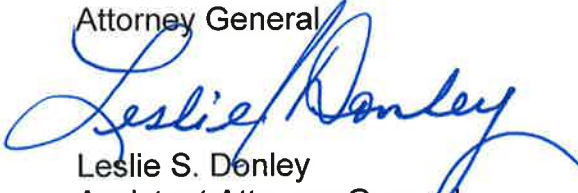
⁵ Section 84-712.01(3) of the NPRS provides that "[s]ections 84-712 to 84-712.03 shall be liberally construed whenever any state, county, or political subdivision fiscal records, audit, warrant, voucher, invoice, purchase order, requisition, payroll, check, receipt, or other record of receipt, cash, or expenditure involving public funds is involved in order 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."

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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: Jerom E. Janulewicz
49-1758-29