



STATE OF NEBRASKA  
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August 21, 2020

Via email at [DVDrew@drewlawfirm.net](mailto:DVDrew@drewlawfirm.net)  
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RE: *File No. 20-R-121; Omaha Public Power District; David V. Drew, Petitioner*

Dear Mr. Drew:

This letter is in response to your petition received by this office on July 27, 2020, in which you requested that this office determine whether certain bid information submitted to the Omaha Public Power District ("OPPD") relating to the decommissioning of the Fort Calhoun nuclear power plant ("Fort Calhoun Station") may be withheld under Neb. Rev. Stat. § 84-712.05(3) (Supp. 2019). In accordance with our normal practice, we forwarded a copy of your petition to OPPD general counsel, Stephen M. Bruckner, and requested a response to the issues raised in your petition. On August 6, we received a response to your petition from Mr. Bruckner and Katherine A. McNamara, of the Fraser Stryker law firm. On August 11, we wrote to you indicating that we had conducted a preliminary investigation of your petition, and it appeared to us that OPPD had properly responded to your public records request. However, we indicated that our response would be delayed so that we could finalize our decision. Late in the afternoon on August 20, 2020, you emailed us a letter further clarifying your petition, and on August 21, Mr. Bruckner provided us a response to your letter. We have now fully considered your petition and OPPD's response in accordance with the provisions of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018, Supp. 2019) ("NPRS"). Our findings and conclusion in this matter are set forth below.

#### **RELEVANT FACTS**

On July 13, 2020, your law firm mailed a public records request to OPPD seeking the following documents:

1. All bids or proposals for Scopes 4 and 5 of Fort Calhoun Station Site Civil Work received by OPPD or Energy Solutions from March 1, 2020 to present.
2. All Contraction [*sic*] H&S Qualification Forms received by OPPD or Energy Solutions from bidders on Scopes 4 and 5 of Fort Calhoun Station Site Civil Work received by OPPD from March 1, 2020 to present.

On July 21, OPPD provided you responsive documents but redacted the amount of the submitted bids. You indicate that OPPD's basis for the redaction "is that the amount of the bids are confidential and/or proprietary information to OPPD that may give an advantage to OPPD's business competitors."

In support of your petition, you assert that "[u]nder Neb. Rev. Stat. § 84-712.01, the [NPRS] shall be liberally construed when the fiscal records of a public body are involved so that citizens shall have full access to information on public finances of government." You also note that under Neb. Rev. Stat. § 70-639 (2018), OPPD is required to award the contract to the responsible bidder who submits the lowest and best bid, and you state that the purpose for your request is to determine whether OPPD complied with its statutory duty.<sup>1</sup> You contend that ". . . OPPD's redaction of the amount of the bids obviously prevents taxpayers from determining whether the bid was actually let to the lowest bidder."

In addition, you challenge OPPD's reliance on Neb. Rev. Stat. § 84-712.05(3) and Neb. Rev. Stat. § 70-673, which allows certain proprietary, commercial, and competitive information to be withheld when disclosure of such information could give an advantage to OPPD's business competitors. You state that the information sought here is the amount of construction bids to tear down a power plant, and not "the costs of producing and selling energy, revenue, or annual output" records sought in *Aksamit Resource Management LLC v. Neb. Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018)—a decision which led to the enactment of § 70-673. You further assert that "[n]o competitive advantage could be given to a competing energy company by learning the amount of the successful and unsuccessful bids for the decommissioning project."

Your August 20, 2020, letter asks us to consider that at the time you filed your petition, the contract had already been awarded. Therefore, the bidding information could only be used to determine the amounts of the successful/unsuccessful bids. You assert that "since the bid has been let, releasing the public records with the bid information

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<sup>1</sup> This office does not consider the reason or purpose for a records request when making our determination under § 84-712.03(1)(b). "The public records statutes apply 'equally to all persons without regard to the purpose for which the information is sought.' As a general rule, citizens are not required to explain why they seek public information." *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 801, 943 N.W.2d 231, 247 (2020).

unredacted would not provide a competitive advantage and OPPD should therefore be required to provide it.”

In its response, OPPD counsel informs us that in November 2018, the OPPD Board of Directors approved management’s recommendation to conduct the decommissioning of Fort Calhoun Station with contractor support, and directed management to negotiate and enter into a decommissioning contract with a qualified contractor. Following a bid process, in April 2019 OPPD executed such contract with EnergySolutions, LLC (“Energy Solutions”). The decommissioning contract contains express provisions prohibiting disclosure of “Confidential Information,” defined in pertinent part as “any information obtained by Contractor in carrying out the Work . . . .” OPPD Response at 3.

The OPPD Response included the Affidavit of Wakely W. Wescott, the Subcontract Manager for Energy Solutions. Mr. Wescott avers that

[t]he work performed by Energy Solutions with respect to the dismantling of nuclear power plants is unique, complex, (given the nature of the disposal of radioactive material), and highly competitive, due to the limited number of contractors that provide decommissioning services, let alone the limited number of entities possessing the requisite expertise in the decommissioning of nuclear power plants. For example, there are only two main competitors of Energy Solutions in the area of nuclear decommissioning services, NorthStar and Comprehensive Decommissioning International, LLC (CDI).

Wescott Aff. ¶ 7. As a result of this competitive environment, all contracts, subcontracts, and other documentation, e.g., requests for proposals and bid responses, are considered by Energy Solutions to be proprietary and confidential. Wescott Aff. ¶ 8. Mr. Wescott further avers that “[i]nformation received by potential vendors of Energy Solutions, including pricing or other sensitive information, if publically disclosed, could be used by competitors in a competitive bid situation and could improve a competitor’s position in the solicitation of a contract for similar services, or provide a competitor with an advantage over Energy Solutions.” Wescott Aff. ¶ 9.

Mr. Wescott states that pursuant to the decommissioning contract, Energy Solutions contracts with outside vendors to perform some of the decommissioning work as necessary. In March 2020, Energy Solutions circulated the request for proposal at issue here, which included “a confidential and proprietary Scope of Work as well as a proposed Subcontract . . . .” Wescott Aff. ¶ 10. He states that “[t]he FCS Site Civil Work RFP protects disclosure of confidential and proprietary information sent from, or received by, Energy Solutions.” Wescott Aff. ¶ 11.

Mr. Wescott states that Energy Solutions received and evaluated the proposals from three vendors, despite the fact that two of the vendors (i.e., Lueder Construction and KRW Construction, Inc.) failed to submit complete proposals. He states that the evaluation team “rated each potential subcontractor and determined an overall score for each area evaluated. CA Murren [& Sons, Company Mid-Atlantic, LLC] scored the highest out of the potential contractors.” Wescott Aff. ¶ 14. Mr. Wescott further represents:

Based on my experience reviewing proposal submissions, the disclosure of pricing, technical approach and other elements of a proposal can be harmful to a bidder. Competitors are capable of reverse engineering those items from a proposal to construct pricing build-ups (e.g., fee, overhead and other highly proprietary information). Lueder and KRW are similarly situated competitors doing business in a narrow geographic marketplace.

Wescott Aff. ¶ 16.

OPPD counsel assert that the redacted information was properly withheld under the NPRS. The information constitutes “confidential and proprietary vendor pricing information,” the disclosure of which would (1) prevent OPPD, through its contractor, from obtaining reasonable pricing; (2) discourage bidders from providing their best offers in response to a RFP; and (3) increase costs that will ultimately impact OPPD’s customer-owners. OPPD Response at 2. Disclosure and use of the information by a competitor in a competitive bid process would (1) reduce that competitor’s expenditure of resources and time necessary to prepare its bid and (2) improve that competitor’s position in the solicitation of a contract for similar services, resulting in a competitive advantage over Energy Solutions. Disclosure of the information would also provide an unfair advantage to Energy Solutions’ clients or potential clients negotiating for decommissioning services.

As noted above, OPPD and Energy Solutions are contractually bound to keep certain information confidential. Similar provisions exist between Energy Solutions and the three bidders. OPPD counsel represent that “Energy Solutions would not have negotiated this subcontract (or any subcontract) without such protection, and the bidders would not have offered the specific pricing information and other terms sought by the RFP without the same assurance of confidentiality . . . .” OPPD Response at 4-5.

Finally, OPPD counsel asks us to consider the decision in *Burlington Northern Railroad Co. v. Omaha Pub. Power Dist.*, 703 F. Supp. 826 (D. Neb. 1988); *aff’d Burlington Northern Railroad Co. v. Omaha Pub. Power Dist.*, 888 F.2d 1228 (8th Cir. 1989) [*“Burlington Northern”*]. This case involved access to a coal hauling contract entered into by Burlington Northern and OPPD. The contract contained a confidentiality clause that required OPPD to notify the railroad in the event disclosure of the contract was sought. Nebraska Public Power District (“NPPD”) subsequently requested the contract, and OPPD notified the railroad pursuant to the contract. Burlington Northern

filed suit, seeking a judgment declaring that OPPD could not publicly disclose the contract and injunctive relief.

Following an *in camera* review, the district court ultimately determined that OPPD could withhold the contract under § 84-712.05(3) as a trade secret. In this regard, the court stated:

The confidential pricing information—here confidential rate setting—obviously gives Burlington Northern an advantage over competitors who do not know or use it. The formula in the contract for escalation of the base contract rate for coal transportation was developed by Burlington Northern as a competitive device to attract utility customers to enter into a contract with Burlington Northern in preference to other carriers. Considerable effort and expense accompanied that development.

\* \* \*

Burlington Northern has gone to considerable lengths to keep the information secret. It has not disclosed the information to persons not directly involved in developing information for formulating this or other similar contracts; it negotiated the contract with a strict confidentiality requirement in it; [and] it instituted and vigorously prosecuted this action against NPPD and OPPD in an effort to obtain a ruling that the contract was not to be disclosed.

*Burlington Northern*, 703 F. Supp. at 831-832.

## DISCUSSION

The NPRS 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. However, the NPRS are not absolute. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). Neb. Rev. Stat. 84-712(1) (2014) expressly provides that the right to examine or obtain copies of public records exists “[e]xcept as otherwise provided by statute.” The definition of “public records” in Neb. Rev. Stat. § 84-712.01(1) (2014) sets out an exception from that definition “when any other statute expressly provides that particular information or records shall not be made public . . . .” Thus, in those instances where records requested under the NPRS are excepted from disclosure by statute, there is no right of access. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *Aksamit*, 299 Neb. at 123, 907 N.W.2d at 308; *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).

In the present case, OPPD is relying on two exceptions in Neb. Rev. Stat. § 84-712.05(3) and Neb. Rev. Stat. § 70-673 as its basis to redact the pricing information. Section 84-712.05 sets out a number of categories of records that may be withheld at the discretion of the records custodian “unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties . . . .” Subsection (3) specifically pertains 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 . . . .” Section 70-673 provides, in pertinent part:

(1) Notwithstanding any other provision of law, the public power industry as defined in section 70-601 and the Nebraska Power Review Board may withhold competitive or proprietary information which would give an advantage to business competitors. Competitive information is information which a reasonable person, knowledgeable of the electric utility industry, could conclude gives an advantage to business competitors.

Neb. Rev. Stat. § 70-673 (2018).

We have carefully considered the extent to which these three provisions apply to the redacted information. As noted in your petition, § 70-673 was the legislative response to *Aksamit Resource Management LLC v. Neb. Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018). In *Aksamit*, two limited liability companies submitted twenty-two public records requests to NPPD. While NPPD provided records responsive to the vast majority of the requests, NPPD withheld records relating to three of the requests under the proprietary or commercial exception in § 84-712.05(3).<sup>2</sup> The district court found that the information sought was in fact proprietary or commercial to NPPD, and that if it were disclosed, it would give an advantage to NPPD’s competitors. The court further concluded that disclosure would “result in disadvantage to its ratepayers by denying them ‘the benefits of a successful and profitable operation and conduct of the business of the district.’ . . . Such a result would serve no public purpose.” *Id.* at 121, 907 N.W.2d at 307.

On appeal, the Nebraska Supreme Court noted that “[t]here is no real dispute that *Aksamit* seeks to compete with NPPD.” *Id.* at 119, 907 N.W.2d at 306. However, since the exception’s components “give advantage to business competitors” and “serve no public purpose” were connected by the conjunction “and,” “both requirements must be met for the exception to become operative.” *Id.* at 124, 907 N.W.2d at 309. The court found while NPPD established that releasing the requested information would give advantage to its competitors, it failed to establish by clear and convincing evidence that

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<sup>2</sup> The records at issue included “actual expenditures and revenues by cost and profit centers for each year from 2008 through 2015”; “a six-year rate outlook by cost and profit centers” beginning January 1, 2013; and “annual generation output and revenue for each [NPPD] generation resource, owned or cont[r]acted from 2008 through 2015.” 299 Neb. at 117, 907 N.W.2d at 305 (brackets in original).

disclosing the information would serve no public purpose. *Id.* at 127, 907 N.W.2d at 310. Consequently, NPPD was not entitled to withhold the information under § 84-712.05(3).

In Nebraska, “[s]tatutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.” *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 123, 907 N.W.2d 301, 308 (2018); *Farmers Cooperative v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017). “In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.” *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 793, 943 N.W.2d 231, 243 (2020). The plain language of § 70-673(1) allows the “public power industry,”<sup>3</sup> and the Nebraska Power Review Board, to withhold “competitive or proprietary information which would give an advantage to *business* competitors.” (Emphasis added.) In this context, “business” may be defined as “[a] commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain.”<sup>4</sup> We fail to see how bid amounts in proposals relating to decommissioning services at the Fort Calhoun Station would give an advantage to OPPD’s *business* competitors, unless those competitors were also decommissioning nuclear power plants and were competing for decommissioning services. That does not appear to be the case here. Consequently, we conclude that § 70-673 does not provide a basis to redact the information under these circumstances.

However, we do find that the trade secret exception discussed in *Burlington Northern* does provide a basis to redact the pricing information. In *Burlington Northern*, the district court analyzed the terms of the requested contract under the definition of trade secret found in the Restatement of Torts, § 757,<sup>5</sup> which included the following features:

(1) [T]hat the trade secret may consist of a “formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not

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<sup>3</sup> This term includes “public power districts, public power and irrigation districts, municipalities, registered groups of municipalities, electric cooperatives, electric membership associations, joint entities formed under the Interlocal Cooperation Act, joint public agencies formed under the Joint Public Agency Act, agencies formed under the Municipal Cooperative Financing Act, and any other governmental entities providing electric service.” Neb. Rev. Stat. § 70-601(8) (2018).

<sup>4</sup> BLACK’S LAW DICTIONARY (11<sup>th</sup> ed. 2019), business.

<sup>5</sup> The court noted that the Nebraska Trade Secrets Act, Neb. Rev. Stat. § 87-501 *et seq.*, with an effective of July 9, 1988, had no application to the case before it where the triggering event—OPPD’s receipt of the NPPD letter requesting the contract—occurred on December 28, 1987. With respect to the definition employed, the court stated: “. . . I am persuaded that such a definition would be the one adopted by the Supreme Court of Nebraska if it were to interpret the statute under consideration here.” *Burlington Northern*, 703 F. Supp. at 831.

know or use it;" (2) that the trade secret must be "for continuous use in the operation of the business;" (3) that it may "relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates, or other concessions in a price list or catalog, or a list of specialized customers, or a method of bookkeeping or other office management;" (4) that the trade secret must be secret and not generally known to the public or the industry; and (5) that the factors to be considered in determining whether a trade secret exists relate to the efforts of the owner to keep the information secret and its competitive value if disclosed. See Restatement of Torts, § 757, comment b.

*Burlington Northern*, 703 F. Supp. at 831. The court also noted decisions from the Tenth and Third Circuits, holding that confidential pricing data constitutes a trade secret. *Id.* at 831 (citing *Black, Sivalls & Bryson, Inc. v. Keystone Steel Fabrication, Inc.*, 584 F.2d 946, 952 (10th Cir. 1978) ("Confidential data regarding operating and pricing policies can also qualify as trade secrets"), and *SI Handling Systems, Inc. v. Heisley*, 753 F.2d 1244, 1260 (3rd Cir. 1985) ("[A] wide array of confidential data relating to materials, labor, overhead, and profit margin not readily obtainable by others in the industry qualifies as a trade secret.")).

In the present case, OPPD has established that the redacted pricing information is a trade secret. Mr. Wescott represents that the work done by Energy Solutions with respect to the decommissioning of nuclear power plants, which involves the disposal of radioactive material, is unique and complex. There are a limited number of contractors that can perform decommissioning services, and an even more limited number that possess the expertise to decommission nuclear power plants. As a result, Energy Solutions considers documentation such as contracts, subcontracts, request for proposals and bid proposals received in response to requests to be confidential and proprietary. OPPD has also established the advantages to be gained by the competitors, clients and potential clients of Energy Solutions, and the impact it would have on OPPD customer-owners, if the pricing information is disclosed. Competitors of bidders responding to requests for proposals would also gain an advantage if pricing information submitted by the individual bidders is disclosed. The redacted amounts were received by Energy Solutions, and evaluated by the evaluation team. That information has not been made available to the public or anyone in the industry. Moreover, OPPD and Energy Solutions have taken concerted steps, by including confidentiality provisions in the decommissioning contract and the FCS Site Civil Work RFP, to keep the information secret. Based on the foregoing, and with particular reliance on the Wescott affidavit, we conclude that OPPD may continue to redact the information you seek.

Finally, since we have concluded that the trade secrets exception allows OPPD to redact the pricing information, it is not necessary for us to determine whether the other exception in § 84-712.05(3) relating to proprietary or commercial information also applies.



David V. Drew  
August 21, 2020  
Page 9

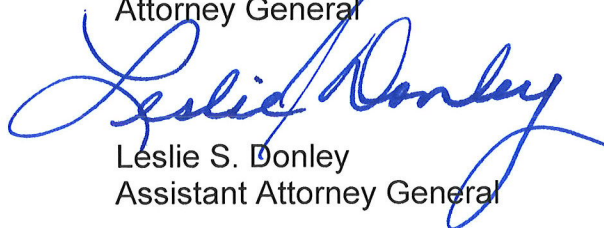
## CONCLUSION

Based on the foregoing, we conclude that OPPD has sustained its burden by demonstrating that the trade secrets exception set out in Neb. Rev. Stat. § 84-712.05(3)) applies to the redacted information. Since we do not believe that OPPD violated the NPRS by redacting the pricing information, no further review by this office is necessary and we are closing this file.

If you disagree with the conclusion reached above, you may wish to review the other remedies available to you under Neb. Rev. Stat. § 84-712.03.

Sincerely,

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