

STATE OF NEBRASKA
Office of the Attorney General

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June 30, 2015

Jason Braun
Research Analyst
Trust Builders Inc.
AskTrak.com
PO Box 1088
Dallas, OR 97338

RE: *File No. 15-R-128; Nebraska Public Employees Retirement System;
Petitioner Jason Braun, AskTrak*

Dear Mr. Braun:

This letter is in response to your correspondence received by us on June 15, 2015, in which you requested our review of a response to a public records request made by you to the Nebraska Public Employees Retirement System ("NPERS"). We consider your letter to be a petition for access to records under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014). As is our normal practice with such requests, we contacted the party against whom the complaint was made. In this case, we spoke to Orron Hill, Legal Counsel for NPERS. We have now considered your complaint and our findings are set forth below.

FACTS

Our understanding of the facts in this case is based on your public records request addressed to NPERS on June 3, 2015, the response provided by NPERS on June 4, 2015, and the follow-up response provided by Mr. Hill on June 18, 2015.

As an initial matter, you made your request under the Federal Freedom of Information Act. The Freedom of Information Act, or FOIA, is a federal law, codified at 5 USC § 552, which generally provides that any person has the right to request access to *federal* agency records and information. You are seeking information from NPERS, an agency of the State of Nebraska. FOIA does not apply to state agencies. The Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 ("NPRS"), govern access to records of and belonging to NPERS. Consequently, our analysis will be related only to the NPRS and not to FOIA.

You made a request on June 3, 2015 for “the formula and factors used to determine a monthly annuity for any option a Cash Balance participant may elect.” NPERS responded on June 4, 2015 as follows:

NPERS will not be able to release its actuary factors or annuity calculations to AskTrak. NPERS does consider this information to be a trade secret that is confidential as explained under FOIA, Exemption 4. Likewise, Neb. Rev. Statute 84-712.05(3) protects our agency’s confidential information from such release.

Mr. Hill sent you a follow-up email on June 18, 2015 in which he provided you web links for the information as to the statutory formula and factors used by NPERS and its actuaries in calculating the annuity benefits under the several cash balance plans administered by NPERS. Mr. Hill also stated that NPERS has no other documents responsive to your request. NPERS has indicated to this office that they are provided with a computer program by their contracted actuary into the code of which a complex calculation formulated by the actuary is programmed. That computer program then calculates the precise cash balance annuity benefit for plan members.

ANALYSIS

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. See Neb. Rev. Stat. § 84-712.01(1).

The basic rule for open public records in Nebraska is found at Neb. Rev. Stat. § 84-712 (2014). That statute provides:

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.

"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). Neb. Rev. Stat. § 84-712 does not require a public agency to review documents and create abstracts or other lists, to answer questions or to create documents which do not otherwise exist. Op. Att'y Gen. No. 94092 (November 22, 1994); Op. Att'y Gen. No. 94035 (May 11, 1994); Op. Att'y Gen. No. 87104 (October 27, 1987). This means the requestor is entitled only to make a request for specific documents or records, and the custodian is required only to provide documents or records responsive to the records request, if they exist. The requestor is not entitled to ask, and the custodian is not required to answer, any questions in the request. The custodian is also not required to create documents that do not exist, or to interpret a public records request to determine what records are being requested.

In the present case, you have requested that NPERS provide you with the "formula and factors used to determine a monthly annuity for any option a Cash Balance participant may elect." Mr. Hill provided you with links to the employee handbooks found on the NPERS website which explain how the monthly annuities are calculated for the various cash balance plans offered by the State of Nebraska. To the extent that your request seeks the formulas devised by the actuaries who contract with NPERS to calculate benefits, those formulas are components of the computer programs provided by the actuary to NPERS. This office has taken a consistent position that those components are not "records or documents" of or belonging to NPERS as that term is contemplated in Neb. Rev. Stat. § 84-712. The fact that the actuary's computer program is provided to NPERS does not make the underlying source code/computer programming available to members of the public as public records.

Even if the portion of the computer program you seek was a public record, we believe NPERS can withhold the formula and factors provided by its actuaries under the NPRS. 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 public records, and to obtain copies of public records in certain circumstances. Even though the NPRS do provide for access to public documents, they are not absolute, and they also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). Section Neb. Rev. Stat. § 84-712.05

(2014) is comprised of eighteen categories of documents which may be kept confidential from the public at the discretion of the public body involved.

Neb. Rev. Stat. 84-712.05 provides, in relevant 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

The actuary's formulas and the computer program developed around those formulas are part of a proprietary computer system for which NPERS contracts for use. The formulas and factors are commercial and proprietary information that belong to the actuary with which NPERS contracts. Competing actuaries would gain a specific business advantage should the formulas and factors used by one actuary be released to any other actuary, competitor, or member of the public. We believe it is reasonable that, if the source code was considered a public record under the NPRS, NPERS could withhold the "formulas and factors" requested by you under the NPRS.

We will note that the initial response of NPERS on June 4 to your request for records did not fully comply with the provisions of the NPRS. Neb. Rev. Stat. § 84-712.04 (2014) governs denials of public records requests and provides:

(1) Any person denied any rights granted by sections 84-712 to 84-712.03 shall receive in written form from the public body which denied the request for records at least the following information:

(a) A description of the contents of the records withheld and a statement of the specific reasons for the denial, correlating specific portions of the records to specific reasons for the denial, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial;

(b) The name of the public official or employee responsible for the decision to deny the request; and

(c) Notification to the requester of any administrative or judicial right of review under section 84-712.03.

NPERS' June 4 email to you did not contain portions of the required information under this statute. The agency has since revised its response to you. We will simply remind the agency, through a copy of this letter, that if it denies access to records under the

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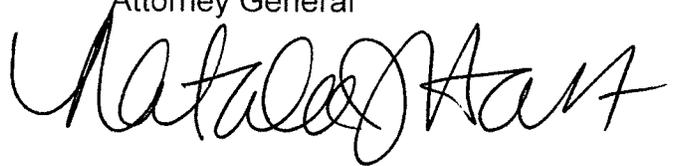
NPRS, that denial letter must fully comply with the requirements found in Neb. Rev. Stat. § 84-712.04.

CONCLUSION

For the reasons stated above, we do not believe you have been improperly denied access to public records. If you disagree with our analysis under the Public Records Statutes set out above, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under those statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

A handwritten signature in black ink, appearing to read "Natalee J. Hart". The signature is fluid and cursive, with the first name "Natalee" being more prominent than the last name "Hart".

Natalee J. Hart
Assistant Attorney General

cc: Orron Hill

02-510-29