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August 25, 2015

Deena Winter
Nebraska Watchdog
2019 Lake St.
Lincoln, NE 68502

RE: *File No.15-R-134; Department of Economic Development; Deena Winter, Petitioner*

Dear Ms. Winter:

This letter is in response to your petition which we received on August 10, 2015, in which you requested our review of the denial of certain records by the Nebraska Department of Economic Development ("Department"). We have completed our analysis and have fully considered your petition for access to records under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS"). Our findings in this matter are set forth below.

RELEVANT FACTS

According to your petition, beginning June 8, 2015, and culminating with your final clarified request emailed to Department counsel on July 10, 2015, you sought public records relating to "delinquent" or "defaulted" loans made by the Department. Your specific request was as follows:

> To clarify, I'm seeking records of all delinquent loans made by the state Department of Economic Development in the history of its economic development programs. I'm seeking the number of delinquent loans (15, for example) and any additional information about them the department has, such as the name of the company, amount of the loan, date it was approved and then became delinquent, etc.

By letter dated July 14, 2015, Department Director Brenda Hicks-Sorensen denied your request. Ms. Hicks-Sorensen informed you that the Department did have

records responsive to your request involving one company and two loans currently in "default status."[1] However, she indicated that those records were being withheld under the exceptions in § 84-712.05(3) and (5) of the NPRS, relating to "proprietary or commercial information" and "investigatory records," respectively.[2] Ms. Hicks-Sorensen further asserted that the requested records should also be "withheld in the interest of public policy." In this regard, Ms. Hicks-Sorensen stated:

> From a public policy standpoint, disclosure of the *Loan Records* at this point in time is likely to impact the ability of the Department to continue to engage in negotiations and discussions with the business entity, and may frustrate the Department's ability to further facilitate and encourage the business to cure the default situation. It is in the best interest of the Department and State of Nebraska to have use of all available tools to facilitate and encourage repayment of these loans.

You subsequently filed your petition with our office challenging the Department's denial of the requested records. You question the applicability of § 84-712.05(3) to the present case, in that the Department failed to show how a specified competitor would gain a demonstrated advantage through the disclosure of the requested records, a standard mandated by previous opinions of this office. You also point out that the Department cannot show that releasing the requested records—which relate to the

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[1] The responsive records identified by Ms. Hicks-Sorensen include an Excel spreadsheet containing information on the two loans, i.e., the loan number, date of loan, loan amount, loan status, and borrower contact information. (The Department referred to this information as the "*Loan Records*".)

[2] Those specific exceptions provide, 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.
> * * *
> (5) Records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, when the records constitute a part of the examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training, except that this subdivision shall not apply to records so developed or received relating to the presence of and amount or concentration of alcohol or drugs in any body fluid of any person . . . .

Neb. Rev. Stat. § 84-712.05(3) and (5) (2014).

expenditure of public funds—would not serve any public purpose. You also challenge the Department's reliance on the investigatory records exception in § 84-712.05(5) as another basis to withhold the requested records. Finally, you point out that § 84-712.01(3) provides that the NPRS shall be liberally construed when the expenditure of public funds is at issue.

DISCUSSION

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. 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).

We have carefully considered the arguments in your petition, along with the Department's denial, and believe the Department has not met its burden to establish that either statutory exception applies. With respect to § 84-712.05(3), the Department's denial letter contains language that this office has explicitly stated is *insufficient* to assert the exception—i.e., a mere assertion that some unknown business competitor may gain some unspecified advantage by the release of the requested records.[3] Moreover, the Department's assertion that disclosure of the requested records, "at a point in time where a company can still remedy such default, would serve no public purpose," and its further assertion that the records should be withheld "in the interest of public policy," ignores the clear public policy mandated in § 84-712.01(3) of the NPRS, which provides:

> Sections 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

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[3] 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) § 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. Our office reaffirmed those requirements for assertion of the proprietary and commercial information exception to disclosure in Op. Att'y Gen. No. 97033 (June 8, 1997).

> 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.

(Emphasis supplied.)

The other exception relied on by the Department—§ 84-712.05(5)—is likewise inapposite. As an initial matter, we have reviewed the statutes pertaining to the Department,[4] and we do not accept the idea that the Nebraska Department of Economic Development is a "public bod[y] charged with duties of investigation or examination of persons, institutions, or businesses." But even if we did, the assertion that the Department's duty of examination "relates to the Department assessing and determining the ability of such businesses to repay loans" is specious at best. It seems to us that the Department's "assessment" in this regard relates to the Department's administration of its loan programs, nothing more. In addition, there is nothing to support the idea that the records being withheld here, i.e., a spreadsheet consisting of a borrower's contact information, loan number(s), loan date(s), loan amount(s), etc., were compiled as part of any Department "investigation."

CONCLUSION

We conclude that any records pertaining to delinquent loans made by the Nebraska Department of Economic Development cannot be withheld under either statutory exception in § 84-712.05 set out in the Department's denial letter. Moreover, there is no "public policy" exception in the NPRS that would allow the Department to withhold the requested records. Consequently, in the absence of any statutory exception which would allow the Department to keep the records confidential, and with the requirement that provisions of the NPRS must be liberally construed when the records at issue pertain to the expenditure of public funds, we will direct the Department, by sending a copy of this letter to Ms. Hicks-Sorensen, to provide you a

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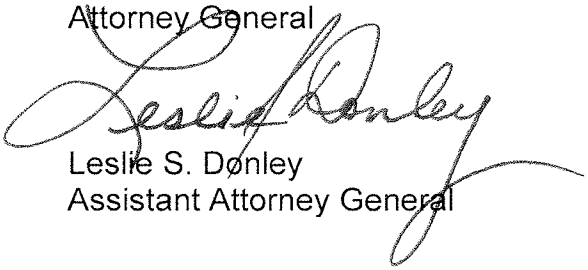
[4] Neb. Rev. Stat. §§ 81-1201.01 to 81-12,167 (2014, Supp. 2015).

copy of the identified spreadsheet, and any other responsive records, at its earliest opportunity.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Brenda Hicks-Sorensen

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