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May 25, 2016

Donald D. Olson
318 County Road 29
Valparaiso, NE 68065

RE: *File No. 16-R-120; Lower Platte South NRD; Don Olson, Petitioner*

Dear Mr. Olson:

We are writing in response to your letter received by this office on April 19, 2016, in which you challenge the denial of your public records request by the Lower Platte South Natural Resources District ("District"). 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 District's legal counsel, Steven G. Seglin, of the Crosby Guenzel law firm, and advised him accordingly. On April 21, 2016 we received a response to your petition from Steven G. Seglin. On May 5, 2016 we contacted both you and Mr. Seglin requesting additional information for our review. Our review was conducted in accordance with 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

Our understanding of the facts in this matter is based solely on your correspondence and telephone response as well as the information we received from Mr. Seglin.

At a District meeting sometime before April 5, 2016 you spoke with Glenn D. Johnson, General Manager of the Lower Platte South Natural Resources District about public records containing chemigation information. Mr. Johnson indicated he would turn your request over to the District's attorney. On April 5, 2016 Steven G. Seglin of the Crosby Guenzel law firm replied to you on behalf of the District.

The District's response characterized your request as one, "for each irrigator holding a chemigation permit for the District, a list of all chemicals used, nitrogen and phosphate in particular, and the amounts that are being applied to the land." Mr. Seglin

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indicated that the District does possess records which contain the information you seek in the form of applications from irrigators holding chemigation permits. Mr. Seglin then asserted the District denied the request per Neb. Rev. Stat. § 84-712.05(3) because the information you seek is proprietary and commercial, and if released would give advantage to business competitors and serve no public purpose. Mr. Seglin indicated Glenn D. Johnson was responsible for the denial.

On April 21, 2016, Mr. Seglin responded to this office's request for information regarding the District's denial of your request. Mr. Seglin indicated that the purpose of the Nebraska Chemigation Act ("Act") was to protect ground water and the natural resource district's role is to inspect and approve chemigation systems to ensure that safety equipment has been properly installed and operated so ground water is not contaminated. Mr. Seglin noted that each application is tied to the specific land identified, and includes the types of chemicals and amounts of those chemicals applied to that land. Mr. Seglin included a blank chemigation application form. He further stated that nowhere in the Act is the permit holder alerted that the information he or she provides in the application may be released to the public, and disclosure of the records would serve no public purpose.

On May 9, 2016, Mr. Seglin provided additional information at the request of this office. Mr. Seglin further asserted that farming is a competitive activity. Mr. Seglin states that "Farmers are looking for a competitive edge by selecting the right seed/crop varieties and utilizing best management practices such as the timing and application of the most effective fertilizers and herbicides to increase productivity." He indicated that if information used to obtain a Chemigation Permit is subject to disclosure, non chemigation permit holders can obtain a competitive advantage since the amount and type of fertilizer that someone without a permit uses is not subject to disclosure.

Mr. Seglin did indicate that some of the information you requested is compiled in the aggregate in an annual report, which the District would be willing to provide.

DISCUSSION

The basic rule for open public records in Nebraska is found at Neb. Rev. Stat. § 84-712 of the Nebraska Public Records Statutes. That statute provides, in pertinent part:

> *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.

Neb. Rev. Stat. § 84-712(1) (2014) (emphasis added). Under the NPRS, every record "of or belonging to" a public body is a public record which individuals may access or obtain a copy of unless the custodian of the record can point to a specific statute which allows the record to be kept confidential. Neb. Rev. Stat. § 84-712.01(1). The public body has the burden to show that a public record falls within an exemption to the general disclosure requirement. *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 contains eighteen categories of documents which may be kept confidential from the public at the discretion of the public body involved. Here, the District raises two possible exceptions to disclosure. The District explicitly claims the exception in Neb. Rev. Stat. § 84-712.05(3) as its basis to withhold the requested records. Subsection (3) provides, 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.*

(Emphasis added).

No Nebraska court decisions appear to discuss the proprietary or commercial information exception provided in § 84-712.05(3). However, two Attorney General Opinions, Op. Att'y Gen. No. 16003 (February 16, 2016) and Op. Att'y Gen. No. 92068 (May 7, 1992), fashioned and affirmed the following standards to assist the public entity in analyzing the applicability of the exception to the 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.

Op. Att'y Gen. No. 16003 at 3-4. We concluded that the public body, not this office, must determine whether to withhold such records. However, if the public body wishes to

withhold information pursuant to the exception in § 84-712.05(3), it is required to engage in an analysis consistent with the standards set out above. *Id.* at 6.

We have carefully considered the information provided to us by the District in the context of the standards set out above. We believe that the District's information provides more than a bare assertion that the records you seek contain propriety or commercial information. The District's response describes the competitive nature of agricultural production. In that environment, the District asserts, providing information regarding the types and amounts of fertilizers and chemicals a chemigation applicant intends to use could give a specific advantage to those who do not chemigate. This is because those who do not chemigate may use fertilizers, herbicides or other chemicals, but do not have to disclose that information, while a person who wishes to use a chemigation system must do so.

Mr. Seglin notes that applicants for chemigation are not informed that the required application, which is to ensure ground water safety during the chemigation process, could be subject to disclosure. While not informing an applicant that a record may be subject to disclosure is not determinative, this fact is relevant to support the competitive nature of the agricultural environment. A farmer may choose not to use the chemigation process if the farmer knows that the farmer's own unique mix of and amounts of fertilizers may be disclosed to nearby agricultural competitors. The District does provide a specific assertion of a demonstrated advantage.

Mr. Seglin then states that no public purpose could be served by disclosure of the records. We disagree. The public purpose of protecting groundwater is the very point of the Act which requires the application at issue here. But that public purpose is one the District is specifically charged with monitoring. So no additional public purpose appears to be served by disclosure of these records.

Weighing all of these factors together, it is not unreasonable to conclude that "the interest served by nondisclosure outweigh any public purpose served by disclosure." Op. Att'y Gen. No. 92068 at 4. Consequently we believe that the District may rely on the exception in § 84-712.05(5) to withhold the requested chemigation information.

CONCLUSION

Therefore, for the reasons explained above, we conclude that the District has met its burden with respect to the application of this exception to disclosure of the public records you seek, and that the requested chemigation information belonging to the District may be lawfully withheld under Neb. Rev. Stat. § 84-712.05(3). However, to the extent the District possesses records which contain some of the information you seek and which records do not fall within the proprietary and commercial records exception, the District should provide that information to you at its earliest convenience. We trust the District will undertake this in good faith, thus, no further action will be taken by this office with respect to this complaint at this time. 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,

DOUGLAS J. PETERSON
Attorney General

Marna Munn
Assistant Attorney General

cc: Steven G. Seglin

46-009-29