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STATE OF NEBRASKA
OFFICIAL
MAY 7 1992
DEPT. OF JUSTICE

DATE: April 27, 1992

SUBJECT: Confidentiality Under the Public Records Act of Information Filed with the State Tax Commissioner by Public Service Entities for Property Tax Valuation Purposes.

REQUESTED BY: M. Berri Balka, State Tax Commissioner
Nebraska Department of Revenue

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion as to whether information provided to the State Tax Commissioner by public service entities for property tax valuation purposes pursuant to Neb.Rev.Stat. § 77-801 (Reissue 1990) are public records which must be disclosed under the Nebraska Public Records Act, Neb.Rev.Stat. §§ 84-712 to 84-719.09 (Reissue 1987 and Supp. 1991) [the "PRA"]. A public service entity taxpayer has submitted a request for a declaratory ruling from the Department, asserting that "financial and operational information required to be submitted by [the taxpayer] is proprietary commercial information which if released would give advantage to business competitors and would serve no public purpose." The taxpayer seeks a declaration "that the proprietary commercial and financial information of taxpayers which is required to be submitted pursuant to Neb.Rev.Stat. § 77-801 (Reissue 1990), and which is not otherwise a matter of public record, shall be kept confidential and not disclosed to the public by employees of the Department of Revenue." The taxpayer's request thus seeks a declaration that such information will not be disclosed pursuant to the exception contained in Neb.Rev.Stat. § 84-712.05(3) (Reissue 1987) for "proprietary or commercial information which if released

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would give advantage to business competitors and serve no public purpose; . . . ."

The basic rule for open public records in Nebraska is found at Neb.Rev.Stat. § 84-712 (Reissue 1987). 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 . . . are hereby fully empowered . . . to examine the same, and to make memoranda . . . therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business.

Neb.Rev.Stat. § 84-712.01 (Reissue 1987) defines public records for purposes of the public records statutes. Under that section, except where other statutes expressly provide that a record shall not be made public, public records are "all records and documents, regardless of physical form," of or belonging to the state and its various political subdivisions, departments, boards, and commissions. Given the broad definition of public records contained in this section, it is apparent that the information submitted to the Tax Commissioner pursuant to § 77-801 would fall within the definition of "public records" in § 84-712.01.

The public records statutes are not absolute, however, and they provide for exceptions to disclosure of public records by express and special provisions. Orr v. Knowles, 215 Neb. 49, 337 N.W.2d 699 (1983). Neb.Rev.Stat. § 84-712.05 (Reissue 1987) describes records which may be withheld from the public by their lawful custodian unless disclosed in open court, in an open administrative proceeding, in an open meeting, or pursuant to the duties of the public body. The exceptions in § 84-712.05 simply permit nondisclosure; they do not require confidentiality for those categories of records. Burlington Northern R.R. Co. v. Omaha Public Power Dist., 703 F.Supp. 826 (D. Neb. 1988), aff'd 888 F.2d 1228 (8th Cir. 1989).

As the provisions for nondisclosure under § 84-712.05 merely permit the lawful custodian of public records to refuse disclosure, as opposed to mandating nondisclosure, the Department must determine whether, as a matter of policy, it will elect to refuse disclosure of records which may fall within any of the exceptions under § 84-712.05.[1] Thus, even if the information referred to by

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[1] This would not, of course, be true of records in the Department's possession which fall within specific statutory exceptions to public disclosure which mandate confidentiality. See e.g., Neb.Rev.Stat. § 77-2711(7) (Reissue 1990) (information in the

the taxpayer were determined to fall within the exception for proprietary or commercial information under § 84-712.05(3), the Department would be under no obligation to decline any request for disclosure of records provided under § 77-801 which would fit within this exception. The determination of whether information which qualifies for the exception will be disclosed upon request from the public must be made by the Department and not this office. We will, however, attempt to provide guidance as to the scope of the exception permitting nondisclosure of "proprietary or commercial information" in § 84-712.05(3) in order to assist the Department in determining whether this exception may be applicable to any specific information supplied by the taxpayer (or by other public service entities) pursuant to § 77-801.

Among the materials exempted from the disclosure requirements of the public records statutes are those falling within the exception for

> [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.

Neb.Rev.Stat. § 84-712.05(3) (Reissue 1987) (Emphasis added).

While the Nebraska courts have not had occasion to interpret the scope of the exception for proprietary or commercial information under the PRA, the federal courts have, on several occasions, construed the provisions of Exemption 4 of the federal Freedom of Information Act ["FOIA"] (codified at 5 U.S.C. § 552(b)(4)), which excludes from the FOIA's public information provisions "trade secrets and commercial information obtained from a person and privileged or confidential." The test employed in determining whether commercial or financial information falls within the exemption under the FOIA is whether disclosure would impair the government's ability to obtain necessary information, or whether disclosure would cause substantial harm to the competitive position of the person from whom the information was obtained. See, e.g., National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D. C. Cir. 1974).

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possession of the Tax Commissioner pertaining to sales and use tax records, reports, and returns); Neb.Rev.Stat. § 77-27,119(6) (Reissue 1990) (income tax report and return information in the possession of the Tax Commissioner). No specific statutory exception of this nature is provided for records submitted by public service entities pursuant to § 77-801.

The exemption for "commercial" information under the FOIA, however, is obviously different from the exception provided for "proprietary or commercial information" under § 84-712.05(3) of the PRA. The language of § 84-712.05(3) does not support the conclusion that "substantial" competitive injury or harm to the provider of information must be demonstrated before nondisclosure is appropriate. Rather, § 84-712.05(3) speaks in terms of whether proprietary or commercial information would, if disclosed, give "advantage to business competitors and serve no public purpose." In construing similar language, the Texas Attorney General has ruled unsustainable an agency's claim of exemption based on the mere assertion that an unknown competitor might gain some unspecified competitive advantage by disclosure of information. Instead, the agency must establish that a specific competitor will gain a demonstrated advantage if disclosure is made. Tex. Op. Att'y. Gen. ORD-124 (1976).

Moreover, the Maryland Attorney General, in construing the exception for commercial or financial information under the Maryland public records statutes, has ruled that the submitter's bare assertion that commercial information is confidential is insufficient to justify withholding records. The information qualifies for exemption only if it is customarily regarded as confidential in the industry, and if the interests served by nondisclosure outweigh the public interest in disclosure. 63 Op. Md. Att'y Gen. 78-55 (1978).

Section 84-712.05(3), by its plain terms, does not impose any requirement of "substantial" competitive injury or advantage for proprietary or commercial information to fall within the scope of the exception. Accordingly, we conclude that such a requirement is not applicable under our PRA, even though such a standard has been applied under the federal FOIA. In addition, we agree with the Maryland Attorney General's determination that the provider's bare assertion that commercial information is confidential or qualifies for nondisclosure is insufficient and that records should not be withheld, unless, at a minimum, the information would give advantage to business competitors and if the interests served by nondisclosure outweigh any public purpose served by disclosure. Finally, we also concur with the Texas Attorney General's conclusion that the mere assertion by an agency that some unknown business competitor may gain some unspecified advantage by disclosure of information does not provide an adequate basis for nondisclosure. Rather, a finding that a specified competitor (or competitors) may gain a demonstrated advantage by disclosure is required to invoke the exception under § 84-712.05(3).

In sum, based on our discussion of the meaning of the language excepting from the requirement of public disclosure "proprietary or commercial information" under § 84-712.05(3), the Department should, in response to the declaratory ruling sought by the taxpayer in question, initially determine whether any or all of the information submitted by the taxpayer as required by § 77-801 qualifies for this exception to the PRA. This would include, of course, consideration of whether the information submitted constitutes commercial or proprietary information, the disclosure of which would give advantage to business competitors, as well as consideration of whether disclosure would serve no public purpose. After making this determination, the Department must then decide whether it desires, as a matter of policy, to declare that access to any such information falling within the exception in § 84-712.05(3) will be refused if requested, as the provision for nondisclosure of such information is permissive, not mandatory.

Very truly yours,

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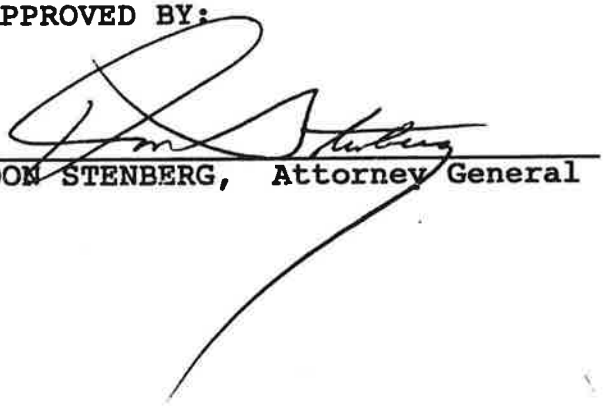
APPROVED BY:



DON STENBERG, Attorney General