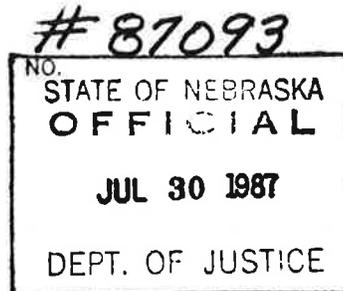


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509



ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: July 28, 1987

SUBJECT: Public Disclosure of Information Submitted by
Taxpayers Qualifying for Tax Incentives Under LB
775.

REQUESTED BY: Donald S. Leuenberger
State Tax Commissioner

WRITTEN BY: Robert M. Spire, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion on two questions pertaining to the disclosure of information obtained in connection with agreements entered into under the provisions of LB 775, the Employment and Investment Growth Act. Initially, you ask whether you are permitted to release to the public the identities of taxpayers who have entered into agreements under the Act, prior to the time your report is presented to the Legislature under the requirements contained in §10 of LB 775. Your second question concerns whether you are permitted to release to the public copies of written agreements entered into between yourself and particular taxpayers under the terms of §4 of the Act.

The right of access to, and inspection of, public records exists at common law. The right to inspect public records may be declared by statute, and, in such cases, the right to access is governed by the terms established by the legislative body pursuant to statute. 76 C.J.S. Records §35 (1952); News and Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984). See In re Midland Publishing Co., Inc., 420 Mich. 148, 362 N.W.2d 580 (1984). Generally, any document which may properly be considered a public record is subject to disclosure, and, where access is sought pursuant to statute, the terms of the statute determine the records subject to disclosure. 76 C.J.S. Records §36 (1952).

In Nebraska, public access to records of government bodies is governed by the provisions of the Public Records Act, codified at Neb.Rev.Stat. §§84-712 to 84-712.09 (Reissue 1981 and Cum. Supp. 1986). Section 84-712 provides:

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James H. Spears
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John R. Thompson
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Linda L. Willard

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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 examine the same, and to make memoranda and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business. (Emphasis added).

The phrase "public records" is defined broadly in §84-712.01, which provides, in pertinent part:

(1) Except where 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. (Emphasis added).

An examination of the Nebraska statutory scheme authorizing access to public records reveals that such records are broadly defined, and evinces an intent to require public bodies to allow access to all records and documents unless a specific statutory exception has been provided to preclude public access to particular information or records.

With this background in mind, we will attempt to respond to your particular questions. Your first question concerns whether you are permitted to release to the public the names of taxpayers who have entered into agreements under the Act prior to the time you have reported to the Legislature as required under §10 of LB 775. We do not believe any language in LB 775 would preclude you from disclosing the identity of taxpayers who have entered into agreements, nor are we aware of any other statute which would exclude such information from public disclosure. In this regard, we note that, while §4(2) of LB 775 does provide that the application and supporting documentation filed by a taxpayer is confidential, this section further provides this confidentiality does not, among other matters, extend to disclosure of the name of the taxpayer. As the identity of the taxpayer is expressly not considered confidential under this provision, it seems logical to conclude nothing would prohibit disclosure of the taxpayer's identity subsequent to the time an agreement is executed under the terms of the Act. While the identities of taxpayers entering into agreements are to be included in the report to the Legislature required under §10, there is no

language in the Act which would indicate an intent to preclude disclosure of such information prior to the time this report is submitted.

Your second question concerns whether you may, upon request, release to the public copies of written agreements entered into between yourself and particular taxpayers under the Act. In order for a taxpayer to qualify for the various tax incentives under LB 775, a taxpayer is required to file an application for an agreement with the Tax Commissioner which includes the following:

(a) A written statement describing the plan of employment and investment for a qualified business in this state;

(b) Sufficient documents, plans, and specifications as required by the Tax Commissioner to support the plan;

(c) If more than one location within the state is involved, sufficient documentation to show that the employment and investment at different locations are interdependent parts of the plan;

(d) A nonrefundable application fee of five hundred dollars.

LB 775 §4(2).

Section 4(2) of LB 775 further provides: "The application and all supporting information shall be confidential except for the name of the taxpayer, the location of the project, and the amounts of increased employment and investment."

Following submission of the application, you are required to determine if the application will be approved. After approval, you are to enter into a written agreement with the taxpayer. Section 4(4) of LB 775 provides that in the agreement

. . . The taxpayer shall agree to complete the project, and the Tax Commissioner on behalf of the State of Nebraska, shall designate the approved plans of the taxpayer as a project and, in consideration of the taxpayer's agreement, agree to allow the taxpayer to use the incentives contained in the Employment and Investment Growth Act.

This subsection further provides: "The application, and all supporting documentation, to the extent approved, shall be considered a part of the agreement." The question which arises, then, is whether the language in §4(2), providing "The application and all supporting information shall be confidential", manifests a legislative intent to prohibit disclosure of such

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information after an agreement is entered into under the provisions of §4(4) of the Act.

In Kellogg co. v. Herrington, 216 Neb. 138, 144, 343 N.W.2d 326, 330 (1984), the Nebraska Supreme Court set forth the following rules of statutory construction:

"A statute is not to be read as if open to construction as a matter of course." County of Douglas v. Board of Regents, 210 Neb. 573, 577, 316 N.W.2d 62, 65 (1982). "Where words of a statute are plain and unambiguous, no interpretation is necessary to ascertain their meaning, and in the absence of anything to indicate to the contrary, words will be given their ordinary meaning." Hill v. City of Lincoln, 213 Neb. 517, 521, 330 N.W.2d 471, 474 (1983). Moreover, "[i]t is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of the court to read anything plain, direct, and unambiguous out of a statute." Gaughen v. Sloup, 197 Neb. 762, 765, 250 N.W.2d 915, 917 (1977). In the construction of a statute which is clear and unambiguous, courts cannot supply missing language, and it is not within the court's power to read into a statute meaning which the clear language does not warrant. See, Omaha Public Schools v. Hall, 211 Neb. 618, 319 N.W.2d 730 (1982).

Applying these principles to the interpretation of LB 775, it appears the Legislature has specifically mandated that all applications and supporting information submitted under the Act shall, except for certain specified information, be confidential. As a general rule, the use of the word "shall" in a statute is considered to be indicative of a mandatory intent. Moyer v. Douglas and Lomason Co., 212 Neb. 680, 325 N.W.2d 648 (1982). Section 4(4) contains no qualifying language indicating a contrary intent regarding the character of this material after the signing of an agreement under the terms of the Act. Thus, the plain language of the statute reveals a legislative intent to provide for the confidentiality of this particular information. Therefore, we conclude these specific materials are not available as public records as having been expressly excepted by statute from disclosure within the meaning of §§84-712 and 84-712.01.

In reaching this conclusion, however, we do not mean to suggest that the entire written agreement referred to in §4(4) is exempted from disclosure to the public. The agreement would, by nature, fall within the broad definition of "public record" contained in §84-712.01(1), and, as there is no language which specifically excepts the agreement from disclosure, we believe

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any agreement you may enter into under this section should be considered available for public inspection upon request. Consistent with our previous conclusion, however, public access to any such agreement cannot include access to those matters specifically excepted from disclosure as confidential information under this section of the Act, consisting of the application and any supporting information. To the extent that disclosure of the portion of the agreement other than the items specifically excepted would not violate the confidentiality of these materials, we conclude that access to such non-confidential matters within the agreement should be provided upon public request.

In addition, we note that, even if the Legislature had not specifically provided for the application and supporting information supplied by taxpayers under LB 775 to be confidential, it is possible that other statutory exceptions to public disclosure of certain records would also preclude public access to certain information provided under the Act. See, e.g., Neb.Rev.Stat. §84-712.05(3) (Cum. Supp. 1986) (proprietary or commercial information which if released would give advantage to business competitors); Neb.Rev.Stat. §77-2711(7) (Reissue 1986) (information in possession of Tax Commissioner pertaining to sales and use tax records, reports, and returns); Neb.Rev.Stat. §27-27,119(6) (Reissue 1986) (income tax report and return information in the possession of the Tax Commissioner). Indeed, a recognition of such confidentiality concerns may have influenced the Legislature in specifically providing for the confidentiality of certain specific information supplied by taxpayers under LB 775.

In reaching our decision, we are mindful of the strong public policy, recognized by many courts, favoring a liberal right of access to and inspection of public documents and records. Warden v. Byrne, 102 Ill. App. 3d 50, 430 N.E.2d 126 (1981); Stivahtis v. Juras, 13 Or. App. 497, 511 P.2d 421 (1973). See, Matter of Estate of Hearst, 67 Cal. App. 3d 777, 136 Cal. Rptr. 821 (1977); Denver Publishing Co. v. Dreyfus, 520 P.2d 104 (Colo. 1974). The Nebraska Supreme Court, while not having spoken as to the construction of the provisions of the Public Records Act, has, in the context of construing the Nebraska Public Meetings Laws, recognized that these statutes constitute a "commitment to open government", and are to be "broadly interpreted and liberally construed to obtain the objective of openness in favor of the public." Grein v. Board of Education, 216 Neb. 158, 164-65, 343 N.W.2d 718, 723 (1984). Clearly, the policy objective of providing open access to the business of government should apply with equal force concerning the availability of records of public business. As one court has noted, however, numerous considerations exist with respect to the propriety of permitting full access to all public records:

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In a democratic society where the government is responsive to the people, it is important that a citizen have access to matters relating to the public's business. . . .

The people's right to know, however, must be balanced by the practical necessities of governing. Public officials must be able to gather a maximum of information and discharge their official duties without infringing on rights of privacy. Certain information possessed by government is often supplied by individuals and enterprises that have no strict legal obligation to report but do so on a voluntary basis, with the understanding the information will be treated as confidential. Therefore, it is important to consider whether disclosure would constitute an invasion of privacy; whether there could be prejudice to private rights or give an unfair competitive advantage; whether it would prevent responsible business people from serving the public; whether it would discourage frankness; and whether it could cut off sources of information upon which a government relies.

People ex rel. Better Broadcasting Council, Inc. v. Keane, 17 Ill. App. 3d 1090, __, 309 N.E.2d 362, 364 (1974).

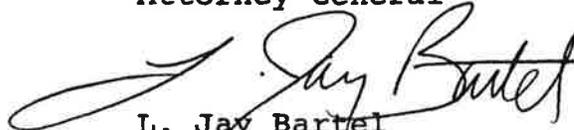
In summary, it is our conclusion that you are not prohibited from releasing to the public the names of taxpayers who have entered into agreements under LB 775 prior to the time you report to the Legislature under the requirements in §10 of the Act. In addition, it is our opinion that you may, upon request, disclose any written agreement entered into under the Act; provided, however, that any such disclosure does not include the application or any supporting information supplied by the taxpayer declared to be confidential under the terms of §4 of the Act.

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The Legislature has, in our view, expressly required that his particular information be treated as confidential, and, therefore, unavailable for disclosure as a public record.

Sincerely,

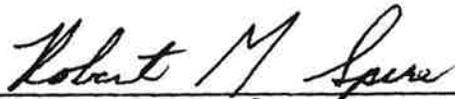
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Attorney General