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16-003
NO.
STATE OF NEBRASKA
OFFICIAL
FEB 16 2016
DEPT. OF JUSTICE

SUBJECT: Whether Certain Nebraska State Fair Contracts Are Exempt from the Disclosure Requirements Under the Taxpayer Transparency Act, as Amended by LB 851?

REQUESTED BY: Senator John McCollister
Nebraska State Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
Leslie S. Donley, Assistant Attorney General

In your opinion request letter, you indicate that you have introduced LB 851, which would amend the Taxpayer Transparency Act, Neb. Rev. Stat. §§ 84-602, 84-602.01-602.02 (2014, Supp. 2015) ("Act"). Specifically, LB 851 would require any "quasi government agency," defined as a "state entity" in section 2 of the bill, to provide financial information to the State Treasurer for inclusion on the state's transparency website.[1] Your bill also requires quasi government agencies to provide copies of their contracts to the Department of Administrative Services ("DAS") for posting on its website.[2]

You state that the Nebraska State Fair, as "a quasi-public agency," is covered under the provisions of LB 851. The State Fair Board has conveyed to you its general support of your proposed legislation, but has concerns that disclosing its midway contract and contracts for "national acts," "would reveal proprietary and commercial information that would be damaging to the operations of the State Fair and hence detrimental to the

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1 See http://www.statespending.nebraska.gov/.
2 See https://statecontracts.nebraska.gov/, referred to as the "Nebraska State Contracts Database."

public purpose of having a top quality State Fair."[3] You indicate in your letter that some members of the Legislature may seek to exclude the State Fair contracts from the disclosure requirements of the Act. However, you question whether express exemption is necessary in light of current statutory language, retained by LB 851, which states:

> Nothing in this section requires the disclosure of information which is considered confidential under state or federal law or is not a public record under section 84-712.05.

Neb. Rev. Stat. § 84-602.02; LB 851, section 3, page 8, ll. 5-7. You also refer us to the exception to disclosure set out in Neb. Rev. Stat. § 84-712.05(3) of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 to 84-712.09 (2014) ("NPRS"), relating to proprietary and commercial information.

Your specific question to us is as follows:

> Considering these provisions of existing law, would the State Fair contracts described in the email be records which may be withheld from the public as proprietary and commercial information which would give advantage to business competitors and hence be exempt from the requirements of LB 851?

DISCUSSION

The NPRS generally allow Nebraska citizens and other interested persons 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. Although the NPRS provide for access to public documents, they are not absolute. The NPRS also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). Section § 84-712.05 of the NPRS is comprised of eighteen categories of records which may be kept confidential from the public at the discretion of the custodian of the public records. 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).

You have specifically inquired as to the exception set out in subsection (3), which 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

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[3] Your opinion request includes an email from Joseph McDermott, Executive Director of the Nebraska State Fair, addressed to you and State Treasurer Stenberg, dated January 4, 2016, in which Mr. McDermott set outs his specific concerns with respect to the disclosure of the above referenced contracts.

> 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; . . . .

Neb. Rev. Stat. § 84-712.05(3) (2014) (emphasis added).

We are aware of no Nebraska cases which discuss the proprietary or commercial information exception provided in § 84-712.05(3). However, in Op. Att'y Gen. No. 92068 (May 7, 1992), we addressed whether certain information provided to the State Tax Commissioner by public service entities for property tax valuation purposes was a public record which must be disclosed under the NPRS. The opinion request was precipitated by a taxpayer's request for a declaratory ruling from the Nebraska Department of Revenue, in which it asserted "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.'" *Id.* at 1. The taxpayer sought a declaration that the information was not otherwise a matter of public record, and would be kept confidential and not disclosed to the public by department employees. *Id.*

We indicated that the exceptions set out in § 84-712.05 merely allow the custodian of public records to withhold records, but do not require it, and that the Department of Revenue must determine, as a matter of policy, whether to elect to withhold records that fall within any of the exceptions. We concluded that even if the department determined that the submitted information fell within the exception in § 84-712.05(3), it was under no obligation to decline any request to produce those records. We further distinguished records which could be withheld under the exceptions in § 84-712.05 from those records "which fall within specific statutory exceptions to public disclosure which mandate confidentiality." *Id.* at 2.

We concluded that the department, and not this office, must make the decision whether to disclose records which fell within the exception. However, we fashioned the following standards to assist the department in assessing whether the exception applied to the information supplied by the taxpayer:

> (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.

Id. at 4.

In Op. Att'y Gen. No. 97033 (June 9, 1997), we addressed, *inter alia,* whether certain data generated by an HMO under contract with the Department of Health and Human Services ("DHHS"), and contained in records belonging to DHHS, fell within the proprietary or commercial information exception. We reaffirmed the standards set out in Op. Att'y Gen. No. 92068, and indicated that in our enforcement capacity under Neb. Rev. Stat. § 84-712.03, we have required governmental bodies which rely on § 84-712.05(3) to withhold records to name specific competitors who might gain advantage and the nature of the advantage which would result from disclosure of the withheld records. We have also required governmental bodies under these circumstances to provide to the public "[a]ny reasonably segregable public portion of a record . . . upon request after deletion of the portions which may be withheld." Neb. Rev. Stat. § 84-712.06 (2014).

However, in response to the question as to whether the records at issue fell within the proprietary and commercial information exception, we stated:

> [I]t is apparent that we have insufficient information from you at this juncture to determine if any records belonging to the Department as a result of the [HMO] contract are subject to the proprietary or commercial information exemption from disclosure set out in § 84-712.05(3). To make that determination with respect to particular records, we would need the names of specific competitors of [the HMO] which could gain competitive advantage from access to the records at issue, and we would need some description of the nature of the commercial advantage which would could [*sic*] be gained from that access. Should you wish to provide us with such information regarding particular records from the [HMO] contract, we will provide you with our views as to whether and to what extent § 84-712.05(3) allows those records to be kept confidential.

Id. at 5.

In the present instance, we believe that it is more likely than not that the contracts referenced by Mr. McDermott contain proprietary or commercial information which may be lawfully withheld or redacted under the exception in § 84-712.05(3). However, we have insufficient information to make a determination as to whether particular information within such contracts fall within the exception. Any decision to withhold and/or redact any contract based on the proprietary or commercial information exception must be made by the entity required under the Act to provide a copy of the contract to the DAS database.

In making this determination, our prior opinions provide guidance and the standards to be met to justify reliance on the exception.

Finally, we would make the following observations about two current provisions of § 84-602.02. First, we note that § 84-602.02(5) states, in part, that "[n]othing in this section requires the disclosure of information which is . . . not a public record under section 84-712.05." As already noted above, § 84-712.05 describes records which may be withheld from the public by their governmental custodian unless disclosed in open court, in an open administrative proceeding, an open meeting, or pursuant to the duties of the public body. However, the records that may be withheld are still public records. *Burlington Northern Railroad Company v. Omaha Public Power District*, 703 F. Supp. 826 (D. Neb. 1988); *aff'd*, 888 F.2d 1228 (8th Cir. 1989).

Second, § 84-602.02(3)(b) provides, in pertinent part, that

> (b) The following shall be redacted or withheld from any contract before such contract is included in a data base pursuant to subdivision (3)(a) of this section:
>
> * * *
>
> (iii) Any information which may be withheld from the public under section 84-712.05; . . . .

We question the incongruity of requiring the redaction or withholding of any contract premised on a statute which is permissive in nature. As stated by the court in *Burlington Northern*:

> Nothing suggests that these statutory provisions are intended to set any standard for prohibiting disclosure. Section 49-802, Nebraska Revised Statutes, passed in 1947, declares:
>
> > "Unless such construction would be inconsistent with a manifest intent of the Legislature, rules for construction of the statutes of Nebraska hereafter shall be as follows:
> >
> > (1) When the word may appears, permissive or discretionary action is presumed. When the word shall appears, mandatory or ministerial action is presumed."
>
> The manifest intent of the Legislature would not be violated if the word "may" in § 84-712.05 were interpreted to give the public entity, here OPPD, discretion to withhold from the public specific records. There is no indication that "may" means "shall" in this statute.

703 F. Supp. at 829-830.

CONCLUSION

In conclusion, LB 851 keeps in place current provisions in the Act that would allow the Nebraska State Fair to withhold or redact any contract which contains proprietary or commercial information, the disclosure of which would give advantage to business competitors and serve no public purpose. The determination as to whether withholding and/or redaction is appropriate is left to the discretion of the State Fair staff. However, it is incumbent on the part of the Nebraska State Fair, as well as any other "state entity" that wishes to withhold information pursuant to Neb. Rev. Stat. § 84-712.05(3), to engage in an analysis consistent with the standards set out in the Attorney General opinions referenced above.

Sincerely,

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Leslie S. Donley
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Approved by:

Attorney General

pc. Patrick J. O'Donnell
Clerk of the Nebraska Legislature

49-1523-29