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April 13, 2016

Rob Nickeson
8209 S. 17th Street
Lincoln, NE 68512

RE: *File No. 16-R-116; Nebraska Department of Roads; Rob Nickeson, Petitioner*

Dear Mr. Nickeson:

We are writing in response to your email correspondence received by this office on March 29, 2016, in which you requested our assistance in obtaining certain public records belonging to the Nebraska Department of Roads ("Department"). As is our normal practice with such requests, we contacted the public body named in your correspondence. In this particular case, we discussed your public records request with Department legal counsel, Jeff Schroeder and Jennifer Huxoll. We have now considered your email, which we have construed to be a petition for access to records under Neb. Rev. Stat. § 84-712.03 of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS"), as well as the Department's response to your petition. 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 the information provided to us by Department counsel.

On March 28, 2016, you emailed a public records request to Department Communications Manager Jeni Lautenschlager. In your request, you stated the following:

> I was notified last week that I was not selected for a position with the Nebraska Department of Roads. I request appropriately redacted copies of all documents associated with that interview and hiring process. Additionally I request appropriately redacted copies of any file or communication (paper or electronic) that relates to or references me for a period covering the last five years.

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Ms. Lautenschlager responded to your request the following day. She indicated that no public records or documents responsive to your request could be provided to you, and that "the criteria information is proprietary and disclosure is not permitted under the Act where its release could provide an unfair advantage to a competitor applying for employment." She further advised you of your right to appeal under § 84-712.03.

You subsequently filed your petition with this office. You assert that "[a]ll of the information should have been made available with limited redaction." You further assert that while the exception claimed by the Department to withhold the requested records may apply to the interview questions, you should not have received a blanket denial. You have requested that this "office step in and enforce the law."

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.) However, access to public records under the NPRS is not absolute.[1] 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. 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).

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[1] *See Orr v. Knowles*, 215 Neb. 49, 54-55, 337 N.W.2d 699, 703 (1983) (in construing § 84-712 [and § 24-311], the court determined that "[w]hile both these statutes state that judicial proceedings and records are matters of public interest, neither statute is absolute. Both provide that exceptions may be created by express and special provisions.").

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 Department relies on 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.)

In a recent opinion, the Attorney General addressed whether certain contracts entered into by the Nebraska State Fair could be lawfully withheld from disclosure under the proprietary or commercial exception set out in § 84-712.05(3). In Op. Att'y Gen. No. 16003 (February 16, 2016), we reaffirmed the standards which had been discussed and developed in a previous opinion to assist a governmental body to determine whether the exception applied to certain financial records.[2] Those standards include the following:

> (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 3-4. While we were unable to definitively address whether the State Fair contracts fell within the exception, due to the lack of specific information, we concluded that any governmental entity that wished to withhold information pursuant to the exception in § 84-712.05(3) is required to engage in an analysis consistent with the standards set out above. *Id.* at 6.

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[2] *See* Op. Att'y Gen. No. 92068 (May 7, 1992); Op. Att'y Gen. No. 97033 (June 9, 1997).

In the present case, we have considered the reasons advanced by Department counsel to support the application of the claimed exception in conjunction with the standards referenced above. The Department represents that it wants to be able to effectively compete in the job market to hire the best engineering candidates, with the idea that the best people will make the best decisions for the Department and the State of Nebraska. It represents that it is continually competing with other employers—county, city and federal entities, as well as private firms, e.g., HDR, Benesch and others, to hire qualified engineers. In addition to the number of competitors, the Department asserts that certain employers maintain a competitive edge over it due to the amount of compensation they can offer qualified candidates. Under these circumstances, the Department believes that disclosing its lists of candidates who have applied for positions with the Department, the interview questions, scoring matrix, screening tools, and other internal records delineating the interview and hiring process, would give these competitors a demonstrated advantage. It further asserts that disclosing such information would serve no public purpose, but would merely assist other employers looking to hire (or hire away) qualified candidates. In the present case, the Department has provided us specified competitors, e.g., Lancaster County, HDR, Benesch, etc., and has specified the nature of the advantage gained by these competitors in the event documentation relating to the Department's interview and hiring process was disclosed. Upon review, it appears that the Department has met its burden with respect to the application of this exception. Consequently, the Department may rely on the exception in § 84-712.05(3) to withhold the requested information.

However, we agree with you that the Department should not have applied the exception in § 84-712.05(3) as a basis to withhold all of the records at issue here. In this regard, we note that § 84-712.05(15) (2014) expressly provides that public bodies may withhold job application materials (defined in the exception as "employment applications, resumes, reference letters, and school transcripts") for applicants for public positions *except* for finalists. Subsection (15) defines a "finalist" as "any applicant (i) who reaches the final pool of applicants, numbering four or more, from which the successful applicant is to be selected, (ii) who is an original applicant when the final pool of applicants numbers less than four, or (iii) who is an original applicant and there are four or fewer original applicants . . . ." "In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Swift and Company v. Nebraska Department of Revenue*, 278 Neb. 763, 773 N.W.2d 381 (2009). The plain language of the exception allows the Department to withhold job application materials for a public position only as it relates to *nonfinalists*. However, finalists' employment applications, resumes, reference letters and school transcripts must be made available under the general disclosure requirement set out in § 84-712. While § 84-712.05(3) provides a basis to withhold the bulk of materials relating to the Department's interview and hiring process, we believe that the exception to the exception in § 84-712.05(15) requires the disclosure of these other materials. Consequently, we will direct the Department, by sending copy of this disposition letter to Mr. Schroeder, to

produce any job application materials for finalists which may be responsive to your request. We would ask the Department to provide you this information at its earliest opportunity, but in no event later than ten business days from the date of this letter.

CONCLUSION

For the reasons explained above, we conclude that any records of or belonging to the Nebraska Department of Roads relating to its interview and hiring process may be withheld under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(3). We further conclude that the Department must produce to you the job application materials for any finalists for the position at issue. Since we have determined that the exception claimed by the Department to withhold the requested records was, in part, appropriate, we do not believe the Department's handling of your request constituted a violation of the NPRS. As a result, since no further action by this office is warranted, 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

Leslie S. Donley
Assistant Attorney General

c: Jeff Schroeder

49-1559-29