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May 27, 2021

Via email at suzette.rasmussen@freemanlovell.com
Suzette Rasmussen
Freeman Lovell, PLLC
9980 South 300 West, Suite 200
Sandy, Utah 84070

RE: *File No. 21-R-112; Department of Health and Human Services; Suzette Rasmussen, Petitioner*

Dear Ms. Rasmussen:

This letter is in response to your petition dated and received by this office on April 29, 2021, in which you requested that we review the partial denial by the Department of Health and Human Services ("DHHS") of your public records request submitted to DHHS on April 20, 2021. On May 14, 2021, we indicated to you that our response in this matter would be delayed to allow DHHS legal counsel, Erik Fern, to provide a response to this office. We received Mr. Fern's response, which included correspondence from David L. Mortensen, Stoel Rives LLP, on behalf of NOMI Health, Inc. ("NOMI"), on May 20, 2021. We considered your petition and the responses we received from Mr. Fern and Mr. Mortensen, in accordance with the provisions of the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020). Our findings in this matter are set forth below.

RELEVANT FACTS

Your petition involves a series of public records requests submitted to DHHS beginning on April 9, 2021. Your initial request sought

[r]ecords (emails, text messages, memos, reports, contracts) between NE HHS officials (including but not limited to CEO Dannette Smith) and State of Utah Department of Administrative Services/Procurement officials (former Executive Director Tani Pack Downing, Division of Purchasing and General Services/Procurement Director Christopher (Chris) Hughes, Asst. Director

Christopher (Chris) [Jennings] regarding or related to TestNebraska, COVID-19 testing, NOMI Health, Co-Diagnostics, Qualtrics, and DOMO from December 31, 2019 - January 2021.

On April 12, 2021, you submitted the following request to DHHS:

. . . I hereby request the following records:

A log of all records requests made discussing or regarding the Test Nebraska contract and/or vendor selection, Qualtrics, NOMI Health, DOMO, Dave Elkington, Mark Newman, Ryan Smith, Josh James, their consultants, lobbyists, executives, or staff, and the state of Nebraska Governor's Office, DHHS, OCIO, and/or DAS. (This log request means any public records requests submitted by and the responses to.)

Responsive records were provided to you on April 20, 2021. Later that day, you made five additional requests relating to the records you received, including two items that form the basis for your petition, i.e.,

1. Binder 1_Part 3 pages 41-43 have been redacted. Please provide the exemptions for those redactions.
3. Several emails discuss the validity of tests (validation of studies for TestNebraska). I am requesting all reports and/or emails discussing, related to, or regarding any reports on the process and actual validation studies for the COVID-19 diagnostic tests (Test Nebraska).

We understand you discussed your requests with Mr. Fern on April 22, and verbally requested an unredacted version of the report referenced in No. 3 above at that time. Mr. Fern followed up that discussion by sending you two separate emails later that day. With respect to Request No. 1, Mr. Fern indicated that his office provided you “an unaltered copy of each request and the agency’s response to the request without further redaction.” He also indicated that the citations for the redactions could be found in the agency’s response to the original requester. Mr. Fern informed you that “[n]o further agency action will be taken in this regard.”

With respect to Request No. 3—involving a document from NOMI entitled “Validation of the Logix Smart™ Coronavirus Disease 2019 (COVID-19) Kit”—Mr. Fern stated:

[A]ttached is the NE Validation Report provided by Nomi Health. The agency must respectfully deny the request for an unredacted copy. The following has been redacted: (1) proprietary and trade secret information claimed by Nomi Health pursuant to Neb. Rev. Stat. § 84-712.05(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”).

Your Petition

You indicate that your “petition concerns only those records that contain several pages of redacted material” found in the requests set out above. You state that the report at issue concerns “the validation and accuracy of the tests that the state purchased for use to save lives by combatting the spread of the disease.” Thus, you argue that such information should be a public record. You further state that “it is unreasonable to maintain any secrecy regarding whether or not these tests were in fact accurate and effective merely because the vendor asserts that the information is a ‘trade secret.’”

You point out that under § 84-712.05(3), a records custodian may withhold public records classified as trade secrets if their release would give advantage to business competitors and serve no public purpose, citing *Aksamit Resource Management LLC v. Neb. Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018) [*Aksamit*], and prior opinions of this office.¹ You also state that Neb. Rev. Stat. § 84-712.01(3) requires courts to liberally construe the NPRS when expenditure of public funds is at issue. You claim “the state has expended millions of federal dollars to pay for these test kits. The citizens of this state and nation have a right to know if those funds were well spent by reviewing the validation and accuracy of the tests.” In conclusion, you state:

These records serve a very important public purpose—to understand how the government is promoting public health and the general welfare of all the inhabitants during a pandemic. Additionally, these records pertain to the expenditure of taxpayer funds, serving another very important purpose—to have full access on the public finances of the government.

NOMI’s Response

According to Mr. Mortensen, in order to perform under the contract with the state to provide COVID-19 testing, “NOMI was required to set up and contract with certain laboratories, establish testing procedures and identify and purchase materials and equipment to complete the necessary testing.” He states that NOMI evaluated numerous materials, solutions, products and equipment to identify those that were the most effective and cost-effective. Mr. Mortensen states that “[a]s a result of its extensive research and testing, NOMI was able to establish and contract with laboratories that used the materials and equipment NOMI identified and followed the procedures it established to fulfill its contracts with Nebraska.”

¹ Op. Att’y Gen. No. 92068 (May 7, 1992); Op. Att’y Gen. No. 97033 (June 8, 1997); and Op. Att’y Gen. No. 16-003 (February 16, 2016).

Mr. Mortensen claims that disclosing the full report “would give an advantage to NOMI’s competitors.” NOMI expended “substantial resources” to conduct the research and testing described above. If the full report is released, NOMI’s competitors could establish competitive laboratories using NOMI’s trade secret and other proprietary and commercial information “without incurring the costs and expending the resources necessary to duplicate NOMI’s extensive testing and research.” Mr. Mortensen further represents that NOMI has made reasonable efforts to maintain the secrecy of this information by limiting its access and requiring nondisclosure requirements in contracts with employees and other parties.

With respect to the public purpose to be served by the release of this information, Mr. Mortensen asserts that you have already received, in records produced by DHHS, “documents demonstrating the efficacy and accuracy of NOMI’s testing.” Moreover, the redacted report itself discloses such information, i.e.:

Accuracy was verified by testing 30 positives and 46 negative COVID-19 patient samples

Of the 30 positive samples . . . 30 were detected positive” This gives a positive percent agreement of 100% and a negative percent agreement of 100%.

See redacted report at 1. Lastly, Mr. Mortensen asserts that

[w]hile the public may have some interest in knowing the accuracy of NOMI’s testing, it has no interest in knowing the specific materials, solutions and/or equipment NOMI uses in setting up its laboratories and completing its testing. In fact, it is highly unlikely that the public would know or even recognize the identity of the various materials, solutions or equipment used by Nomi. But NOMI’s competitors would know and would benefit from this information.

DISCUSSION

The basic rule for access to public records is set out in Neb. Rev. Stat. § 84-712(1) (2014). That provision states:

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.

“Public records” in Nebraska “include all records and documents, regardless of physical form, of or belonging to” governmental entities in the state, “[e]xcept when any other statute expressly provides that particular information or records shall not be made public.” Neb. Rev. Stat. § 84-712.01(1) (2014). Thus, there is no absolute right to access public records in those instances where records are exempt from disclosure by statute. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 788, 943 N.W.2d 231, 240 (2020); *Aksamit*, 299 Neb. at 123, 907 N.W.2d at 308.

Request No. 1—Binder 1 Part 3 pages 41-43

In the course of our review, we found nothing that indicates that you submitted a written request for these particular records. You requested “[a] log of all records requests made discussing or regarding the Test Nebraska contract and/or vendor selection,” which you defined as “any public records requests submitted by and the responses to.” DHHS provided you responsive records. You subsequently requested the *exemptions for the redactions*, which Mr. Fern provided to you.² Consequently, since you did not request the records at issue, no further response from this office relating to this item is necessary.

Request No. 3—Unredacted Report

DHHS is relying on the trade secrets exception in Neb. Rev. Stat. § 84-712.05(3) (Cum. Supp. 2020) as its basis to withhold the redacted information in the report. While not defined in the NPRS, “trade secret” is defined in the Nebraska Trade Secrets Act³ as

information, including, but not limited to, a drawing, formula, pattern, compilation, program, device, method, technique, code, or process that:

(a) Derives independent economic value, actual or potential, from not being known to, and not being ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Neb. Rev. Stat. § 87-502(4) (2014). The purpose of the Act is “to protect commercially valuable information which is purposefully kept a secret by a business.” Introducer’s

² See Mr. Fern’s email sent April 22, 2021, at 7:24 a.m.: “The citations you seek are included in the agency’s original response to Ms. Costello in Binder1_Part 1, pp. 9-15, in particular, Neb. Rev. Stat. § 71-503.01(1), the Health Information Portability and Accountability Act (HIPAA), 42 U.S.C. 1230d-6, et seq., 45 C.F.R. § 164.502(a), and 45 C.F.R. § 164.514(b)(2).”

³ Neb. Rev. Stat. §§ 87-501 to 87-507 (2014).

Statement of Intent to LB 309, 90th Neb. Leg., 1st Sess. (1987).

We have considered your argument that § 84-712.01(3) mandates disclosure of the redacted information because the “records pertain to the expenditure of taxpayer funds.” We disagree. The redacted information pertains to the validation and efficacy of a COVID-19 test kit. It is not a “fiscal record[], audit, warrant, voucher, invoice, purchase order, requisition, payroll, check, receipt, or other record of receipt, cash, or expenditure involving public funds” Thus, the statute does not apply to the information requested.

Overall, we believe that DHHS/NOMI have sufficiently established that the redacted information contained in the report constitutes a trade secret. NOMI expended significant resources in testing and research to determine the most effective and cost-effective means of performing the testing required under the contract. The release of such information would give an advantage to NOMI’s competitors who could establish laboratories using NOMI’s trade secrets without having to incur the costs NOMI expended for testing and research. It also appears that NOMI has taken steps to protect the secrecy of this information by limiting access and negotiating nondisclosure requirements in agreements.


Finally, we have considered your argument that the public purpose would be served by releasing information concerning the validation and accuracy of the testing program purchased by the state. We recognize that “promotion of the public health” is one of the objectives listed in the definition of “public purpose” set out in *Aksamit*. However, “[t]he clause ‘which if released would give advantage to business competitors and serve no public purpose’ does not modify trade secrets. If trade secrets are in a document, the document may be withheld.” *Burlington Northern Railroad Co. v. Omaha Pub. Power Dist.*, 703 F. Supp. 826, 831 (D. Neb. 1988); *aff’d Burlington Northern Railroad Co. v. Omaha Pub. Power Dist.*, 888 F.2d 1228 (8th Cir. 1989). Since we have concluded that the redacted information in the report is a trade secret, no further analysis is necessary.

CONCLUSION

We conclude that DHHS has sustained its burden by demonstrating that the trade secrets exception in § 84-712.05(3) applies to the redacted information in the "Validation of the Logix Smart™ Coronavirus Disease 2019 (COVID-19) Kit" report. Consequently, we plan no further action regarding this file. If you disagree with our conclusion, you may wish to review the other remedies available to you under Neb. Rev. Stat. § 84-712.03.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

A handwritten signature in blue ink that reads "Leslie S. Donley". The signature is fluid and cursive, with the first name being the most prominent.

Leslie S. Donley
Assistant Attorney General

c: Erik Fern (via email only)
David L. Mortensen (via email only)