



STATE OF NEBRASKA  
**Office of the Attorney General**

2115 STATE CAPITOL BUILDING  
LINCOLN, NE 68509-8920  
(402) 471-2682  
TDD (402) 471-2682  
FAX (402) 471-3297 or (402) 471-4725

**JON BRUNING**  
ATTORNEY GENERAL

**NATALEE J. HART**  
ASSISTANT ATTORNEY GENERAL

August 15, 2014

Troy Hendrickson, Esq.  
333 N. Dobson Rd., Suite 18  
Chandler, AZ 85224

RE: *File No. 14-R-121; Metropolitan Community College; Petitioner Troy Hendrickson*

Dear Mr. Hendrickson:

This letter is in response to your correspondence received by us on July 31, 2014, in which you make a Public Records Petition under the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. § 84-712 through 84-712.09 (Reissue 2008, Cum. Supp. 2012, Supp. 2013) against Metropolitan Community College. Pursuant to our normal procedure, we asked the public body complained about to respond to your complaint. We forwarded your Petition to James R. Thibodeau, General Counsel of Metropolitan Community College ("MCC"). We subsequently received a response from Mr. Thibodeau and our conclusions are set forth below.

### **FACTS**

Our understanding of the facts in this case is based on your public records request addressed to MCC dated April 2, 2014; the April 14, 2014 response from MCC through Mr. Thibodeau; your renewed request to MCC dated June 5, 2014; the response thereto of June 24, 2014; your Public Records Petition; and the response of MCC to that Petition.

You made a request on or about April 2, 2014 to MCC, addressed to the "Custodian of Records," which was forwarded to Mr. Thibodeau, for "copies of all bids received in response to the 2013-2014 Wide Area Network RFP, the bid evaluation matrix completed when the bids were received, and any other documentation supporting the vendor selection."

Mr. Thibodeau responded on April 14, 2014, denying access to the public records sought, for the reason that MCC was currently negotiating its agreement with one of the bidders and releasing the bids at that time would have placed MCC at a competitive disadvantage. It also advised that once the purchase was complete, MCC could choose to withhold portions of the bid documents sought by you under Neb. Rev. Stat § 84-712.05(3), which allows the custodian of records to withhold "proprietary or commercial information" in certain circumstances.

On June 5, 2014, you renewed your public records request for all bids related to the Wide Area Network RFP, as you assumed the bidding process had, by then, been completed. Mr. Thibodeau again responded on June 24, 2014. At that time, he provided some of the documents you requested and withheld others under Neb. Rev. Stat § 84-712.05(3). He provided you a list of what was withheld from each vendor's bid. As to four of the bids (COX Business, Great Plains Communications, Nebraska Colocation Centers, and Pinpoint Broadband), one of more pages were withheld, primarily related to costs and price sheets. As to one bid (Unite), the entire bid was provided to you. In two circumstances (Level 3 and Windstream), the bidder designated their entire bid as commercial or proprietary.

You complain that MCC allowed the bidders themselves to designate which portions of their bids were proprietary. This resulted in some information withheld as to certain bidders, but disclosed as to others. Ultimately, your complaint is that MCC has not appropriately applied Neb. Rev. Stat. § 84-712.05(3) as to all bidders.

Initially, you made your request under the Federal Freedom of Information Act ("FOIA") and "Nebraska Revised Statute 87-142." The Freedom of Information Act, or FOIA, is a federal law, codified at 5 USC § 552, which generally provides that any person has the right to request access to *federal* agency records and information. You are seeking information from Metropolitan Community College, a publicly-supported community college located in Omaha, Nebraska. In this particular context, FOIA does not apply and the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 ("NPRS"), govern access to records of and belonging MCC. Consequently, our analysis will be related only to the NPRS and not to FOIA.

## **ANALYSIS**

The Nebraska Public Records Statutes generally allow interested persons in Nebraska 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 Nebraska Public Records Statutes 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). The burden of showing that a confidentiality statute applies to 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). Section 84-712.05 is comprised of eighteen categories of documents which may be kept confidential from the public at the discretion of the agency involved.

Neb. Rev. Stat. § 84-712.05(3) provides one such category of documents that may be withheld. This statute states "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" may be withheld from public disclosure by the custodian of the record.

As MCC is asserting Neb. Rev. Stat. § 84-712.05(3) as a basis to withhold portions, or the totality, of the bids it received, we must determine if it is appropriate to utilize this subsection in this situation, and the extent to which it may be utilized. We are not aware of any Nebraska cases which discuss the precise parameters of § 84-712.05(3). However, we have discussed this statutory provision in two previous opinions of this office. Op. Att'y Gen. No. 97033 (June 4, 1997); Op. Att'y Gen. No. 92068 (May 7, 1992). Those opinions set out several factors which, in our view, control whether the exemption in § 84-712.05(3) is properly asserted:

- § 84-712.05(3) does not impose any requirement of "substantial" competitive injury or advantage to make the exception from disclosure available,
- a bare assertion by the provider of commercial information that such information is confidential is insufficient to justify nondisclosure,
- 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,
- the interests served by nondisclosure of the records must outweigh any public purpose served by disclosure.

Based upon the factors set out in our earlier opinions, we find it highly unlikely that the bid documents at issue in this instance constitute commercial or proprietary information in their entirety. For example, standard form provisions such as language pertaining to the term of the proposed contract at issue would hardly provide a business advantage to competing bidders for the contract. On the other hand, certain types of information typically contained in bid documents could well constitute commercial or proprietary information to the extent that they might allow competitors to ascertain an individual bidder's pricing procedures, assumptions, costs and so forth.

Based upon the information we have been provided, in particular, the description of the documents withheld by MCC in its June 24, 2014 letter to you, we believe that some of the documents have been properly withheld. The redaction of pages, or sections, from the bids of COX Business, Great Plains Communications, Nebraska Colocation Centers, and Pinpoint Broadband appear to fit squarely within the provisions of Neb. Rev. Stat. § 84-712.05(3). The portions withheld from those bids by MCC primarily include pricing documents, which, if released, would by definition provide an advantage to a competitive bidder. However, the designation by Level 3 and Windstream that each of their bids is, in its entirety, proprietary, is suspect. Presumably, those bids contain standard form language found in the COX, Great Plains, and other bids where portions were provided to you. It is unlikely that the entire bid of these two companies constitutes commercial or proprietary information to the extent that it may allow a competitor to ascertain a distinct, specified advantage.

While it is not a violation of the NPRS for MCC to have allowed the bidders an opportunity to designate which portions of their bids were proprietary, MCC does have the ultimate responsibility under the NPRS to ensure that it complies with the NPRS in providing documents under a public records request. This includes reviewing a bidder's designation of commercial or proprietary information to ensure that the public body is withholding documents consistently across bids and ensuring that documents designated as "proprietary" by the bidder are, in fact, proprietary.

As to the bids from Level 3 and Windstream, we believe you may have been denied access to public records. At this juncture, we will ask MCC, through a copy of this letter, to go back to these two bidders and work with them to determine what, in fact, is commercial or proprietary under the NPRS. A blanket assertion that the entire bid is proprietary is not adequate. If there are portions of those documents which actually constitute commercial or proprietary information under the standards articulated in our previous opinions, i.e., specified competing bidders could gain a specific and demonstrated advantage from disclosure of the information at issue, then those portions of the bid documents may be redacted.

## **CONCLUSION**

For the reasons stated above, we believe MCC may be required to disclose certain portions of the bids it has received from Level 3 and Windstream. We have provided guidelines herein for determining whether production of any portion of the requested documents is required. We trust that MCC will undertake this in good faith. However, we will leave our file open while providing MCC an opportunity to work with the bidders at issue and provide you with any documents you may be entitled to under the NPRS.

If you disagree with our analysis under the Public Records Statutes set out above, you may wish to determine what additional remedies, if any, are available to you under those statutes.

Troy Hendrickson  
August 15, 2014  
Page 5

Sincerely,

JON BRUNING  
Attorney General

A handwritten signature in black ink, appearing to read "Natalee J. Hart". The signature is fluid and cursive, with the first name being the most prominent.

Natalee J. Hart  
Assistant Attorney General

cc: James R. Thibodeau

02-432-30