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October 6, 2015

Dave Conklin
Developmental Technologies, LLC
6404 Manatee Ave W, Suite N
Bradenton, FL 34209

RE: *File No.15-R-141; University of Nebraska; Petitioner Dave Conklin*

Dear Mr. Conklin:

This letter is in response to your petition received by us on September 21, 2015, in which you requested our review of the denial of certain public records by the University of Nebraska-Lincoln. As is our normal practice with such requests, we contacted the party against whom the complaint was made. In this case, we contacted Erin E. Busch, Director University Records/Associate General Counsel, and requested a response to your petition, which we received on September 28, 2015. We also received a submission opposing your petition from John Mueller, attorney for Valmont Industries, Inc. We have now completed our analysis and have fully considered your petition for access to records as well as the responses from the University and Valmont Industries. We have conducted our review in the context of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2014) ("NPRS"). Our findings in this matter are set forth below.

FACTS

Our understanding of the facts in this matter is based on your petition and the information contained in the responses of the University and Valmont Industries.

According to the petition, on July 29, 2015, you submitted the following request to the University of Nebraska-Lincoln:

Any and all documents and communications, from January 1, 2009 to the present, involving or relating to Root Demand Irrigation™ (sometimes referred to as "RDI™"), including its subsurface irrigation tubing, including RDI's 73B40 product and its subsurface irrigation methods providing plant-driven irrigation utilizing the natural process of root exudation, including

Dave Conklin
October 6, 2015
Page 2

without limitation all documents, communications, studies and reports involving (i) Dr. Derrel Martin's project to follow the performance of RDI's 73B40 product in commercial fields, and/or (ii) Jacob LaRue (RDI's Director of Research and Development).

By email sent to you on August 20, 2015, Ms. Busch partially denied the request. The University attached a redacted research agreement between the Board of Regents of the University of Nebraska, on behalf of the University of Nebraska-Lincoln, and Valmont Industries. This agreement was signed on or about June 16, 2014 by Jeanne Wicks on behalf of the University, Jacob L. LaRue on behalf of Valmont Industries, and Dr. Derrel L. Martin as the Principal Investigator supervising the research to be performed at the University. Ms. Busch specifically denied access to the redacted portions of this agreement, which consisted of three attachments to the contract, including the Statement of Work, the Ancillary Confidentiality Agreement, and the Budget, based on the exception set out in 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"). Ms. Busch also withheld "other responsive documents" under this portion of the NPRS, but did not indicate what "other responsive documents" the University has in its possession.

On September 15, 2015, you contacted Ms. Busch and objected to the withholding of documents pursuant to your public records request. You stated that the documents you have requested do not fall within the confines of Neb. Rev. Stat. § 84-712.05(3) for a number of reasons. First, you believe that the research work being performed by the University for which you seek records is not unpublished, as Mr. LaRue of Valmont Industries filed for a patent application in February 2014 for the Root Demand Irrigation system which you contend outlines the entirety of the system at issue. Additionally, you state that other universities have disclosed information regarding their research and that a website has been established which you believe fully discloses the Root Demand Irrigation system. You also object to the University utilizing the "proprietary or other commercial information" exception to disclosure as the University has not made 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, as this office has previously determined must be shown by the public body invoking this exception. See Op. Att'y Gen. No. 92068 (April 27, 1992). Finally, you take issue with the redaction of the entirety of the three attachments to the agreement Ms. Busch provided. You state there is no way for you to know if this information was properly redacted.

Ms. Busch responded on September 17, 2015 stating "[t]he documents in the University's possession contain unpublished research and/or other proprietary or

Dave Conklin
October 6, 2015
Page 3

commercial information which if released would give advantage to business competitors and serve no public purpose. The University stands on its denial.”

You subsequently filed your petition with our office. In support of your petition, you state, “the redacted information is overly broad with no explanation of the basis for each redaction.” You believe it to be “highly unlikely that the entire list of documents redacted would ‘contain unpublished research and/or other proprietary or commercial information which if released would give advantage to business competitors.’”

The University and Valmont Industries provided responses to this office to your petition on September 28, 2015. Ms. Busch’s response explains that Dr. Derrel Martin, a professor at the University, is in the midst of his research project on the Root Demand Irrigation system and that Dr. Martin has not made any publications or presentations regarding this project. Ms. Busch states that “[t]he documents in the University’s possession that are responsive to the public records request are solely related to Dr. Martin’s research project and include emails, interim reports, underlying research data, pictures, and other research items, all of which are unpublished.” Ms. Busch reiterates the University’s position that the documents sought by you “fall squarely within the unpublished research exception” to the NPRS. Additionally, Ms. Busch points to the agreement between the University and Valmont Industries, which requires confidentiality of “the research project, underlying data, results, etc. unless the University receives the written approval of Valmont Industries,” which it has not received with respect to your public records request. In support of withholding records under Neb. Rev. Stat. § 84-712.05(3), trade secrets and other proprietary and commercial information, Ms. Busch states “[d]isclosure of details of the project would result in competitors in the irrigation industry gaining a competitive advantage. Researchers at other universities would also gain a competitive advantage because Dr. Martin’s unpublished research would be disclosed.”

Ms. Busch provided us a copy of the redacted agreement between the University and Valmont Industries. It is a “research agreement” for research to be supervised by Dr. Martin beginning May 1, 2014 through April 30, 2016. The scope and the extent of the research has been redacted. The parties entered into a confidentiality agreement, for “mutual confidentiality” which has also been fully redacted. The parties appear to be in agreement that the research being conducted under this agreement concerns Root Demand Irrigation system performance.

Valmont Industries has also provided a response to this office to your petition, via its legal counsel, John Mueller, supporting the denial by the University of your public records request. Mr. Mueller specifically addresses your position that the information you seek should be released by the University because Mr. LaRue has filed a patent application, that a website provides information concerning the Root Demand Irrigation

system, and other universities have provided information concerning their similar research. However, Mr. Mueller states, "none of the materials or [the] website cited reference, much less describe, any ongoing research performed by UNL or Dr. Martin for or on behalf of Valmont or [Root Demand Irrigation]." Mr. Mueller also states, in support of withholding the documents you seek under Neb. Rev. Stat. § 84-712.05(3), that while the Root Demand Irrigation product is currently being marketed, "the scientific research being performed by UNL has not been completed or published. Moreover, the actual nature of the ongoing scientific research being conducted is not in the public domain." As to the trade secret and other proprietary and commercial information exception, Mr. Mueller states that "revealing more of the contract [between UNL and Valmont Industries] would provide [Mr. Conklin's company] DTL, as well as Valmont's competitors in the subsurface irrigation industry, with the knowledge as to the nature and specific types of research that would be necessary with respect to developing a competitive system/product." Mr. Mueller also points us to ongoing litigation between your company, DTL, and Valmont Industries and DuPont regarding the Root Demand Irrigation system. Mr. Mueller summarizes the claims of DTL as "Valmont and DuPont purportedly misappropriated DTL's trade secrets in developing RDI and that DTL is a competitor of Valmont and DuPont in the irrigation marketplace." Mr. Mueller believes you are attempting to "evade the discovery process in the Federal Court Action (and the Confidentiality Agreement signed by all parties) or to shift to the public sphere information that has been the result of substantial research and investment by Valmont that DTL would try to use to develop a competitive product/system or sell to one of Valmont's competitors."

DISCUSSION

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. Under those statutes, every record "of or belonging to" a public body is a public record which individuals may 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 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).

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). In the present case, the University relies on Neb. Rev. Stat. § 84-712.05(3) to withhold the requested records. That specific exception 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

Neb. Rev. Stat. § 84-712.05(3).

Academic and Scientific Research Exception

The first portion of Neb. Rev. Stat. § 84-712.05(3) upon which the University relies to withhold the requested records is the “academic and scientific research work which is in progress and unpublished” exception. This office has previously determined whether certain records belonging to the University of Nebraska- Lincoln and the University of Nebraska Medical Center [UNMC] could be lawfully withheld under § 84-712.05(3). In two of those dispositions concerning UNMC, we determined that certain records, directly and indirectly related to the nonhuman primate research being conducted at UNMC, could be lawfully withheld. We used the same analysis when determining whether necropsy/mortality reports prepared by University personnel could be withheld by the University of Nebraska-Lincoln’s Institute of Agriculture and Natural Resources. We will quote from one of our prior dispositions at length below, since the analysis remains relevant to the present case:

We are unaware of any Nebraska cases that discuss the research exclusion set out above. However, we find guidance in an Indiana case cited by the UNMC, *Robinson v. Indiana University, et al.*, 659 N.E.2d 153 (1995). In *Robinson*, the Indiana Court of Appeals was asked to determine whether completed IACUC records, which were submitted to two university committees for review, and any references to research projects appearing in the meeting minutes of those committees, were exempt from disclosure under the Indiana Public Records Act. *Id.* at 155.

In its analysis, the court discussed a factually similar case from North Carolina, *S.E.T.A. UNC-CH, Inc. v. Huffines*, 101 N.C.App. 292, 399 S.E.2d 340 (1991). In *S.E.T.A. UNC-CH*, a student organization sought access to various IACUC records, but the committee chair refused to provide the records for particular experiments. The North Carolina Court

of Appeals held that the records must be disclosed, but required redaction of information that could be patented or would lead to the identification of researchers and staff. *Id.* at 156. In distinguishing the *S.E.T.A.* case from its own, the *Robinson* court stated:

There is a critical distinction between the present case and *S.E.T.A.* which dictates against following North Carolina's precedent: North Carolina's Public Records Act does not contain a concerning research exception. Indiana's inclusion of the concerning research exception, in addition to a trade secret exception, see IC 5-14-3-4(a)(4), indicates the legislature's intent to extend nondisclosure to a larger number of records. Some records may not be of a proprietary nature so as to constitute a trade secret, but may be of a scientific or experimental nature so as to concern research. The latter category of documents would fall into the concerning research exception, and, thus, would not be subject to disclosure.

Id. at 156-57. The *Robinson* court concluded its analysis by stating:

We agree with the trial court's determination that the information sought by the research applications was "information concerning research conducted by [or] under the auspices of Indiana University." . . . The application seeks information about the researcher, the nature of the proposed or ongoing research project, and procedures to be employed throughout the project. **The sole subject matter of the application is a research project and related personnel and procedures. Even in the narrowest sense, the information sought by the application concerns research. As such, it was not subject to disclosure under the Public Records Act.**

Id. at 158. [Emphasis added.]

In our prior dispositions, we also discussed the legislative history of the exception and concluded that, like Indiana, the Nebraska Legislature intended to extend nondisclosure to a larger number of records when it enacted an exemption which included three distinct components: (1) trade secrets, (2) research and (3) other proprietary or commercial information. During debate, the Legislature added the words "academic and scientific" to qualify "research" "in order to identify those things that the *University* might be working on, those research and studies that might be going forward that truly are not in the interest of the public to have them disclosed." Floor Debate on

LB 86, 86th Neb. Leg. 1st Sess. 5214 (May 11, 1979) (Statement of Sen. Murphy) (emphasis added). It also seemed to us that the Nebraska Legislature recognized that while some records may not be of a proprietary nature to constitute a trade secret, certain research conducted at the University was deemed as important to warrant an exception from disclosure.

The University and Valmont Industries represent to us that the redacted portions of the contract provided to you, and other documents maintained by the University contain unpublished information material to ongoing academic and scientific research. As Dr. Martin's research, per the terms of the contract, is only partially completed, we have no reason to dispute the University's position in this regard. Consequently, we believe that the University's denial of your request for the documents you seek on the basis of the statutory research exemption was appropriate under the circumstances here.

Trade Secrets, Commercial or Proprietary Information

The University has also relied on the remaining portion of Neb. Rev. Stat. § 84-712.05(3), "[t]rade secrets . . . and other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose," to withhold the documents you seek. As we believe that the University may withhold the documents under the academic and scientific research exception, as explained above, we will not analyze in detail whether it may also withhold the records under this exception. For completeness, we will briefly discuss this exception.

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 (April 27, 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.

The University's denial letter, and its response to this office, do not meet the burden of proof for establishing that a specified competitor may gain a demonstrated advantage by disclosing the documents you seek. However, when considering the University's letter to this office, along with the supporting letter from Valmont Industries, which has partnered with the University in the research project at issue, we believe the burden has been met. Valmont has stated that your company, DTL, stands to gain an advantage from the release of the records you seek, as it would allow DTL to develop a competing product to sell to Valmont's competitors. Court documents from the ongoing litigation between DTL and Valmont Industries and DuPont,¹ including DTL's Motion to Quash² filed June 26, 2015, show that DTL itself has alleged that Valmont Industries is a direct competitor of DTL. We believe the totality of the evidence provided by the University and Valmont Industries shows that the University properly claimed the documents you seek can be withheld under Neb. Rev. Stat. § 84-712.05(3), trade secrets and other commercial and proprietary information.

The University's Denial Letter

While you have not taken issue with the form of the University's response, we will take this opportunity to remind the University of two important requirements imposed upon every public body by the NPRS. First, the NPRS require a public body to respond to each public records request within four business days from the receipt of the written request. Neb. Rev. Stat. § 84-712(4) (2014). Your public records request was sent to the University on July 29, 2015. The University did not respond in any fashion until August 20, 2015. While it would have been reasonable for the University to require more time than four business days to search for all records in its possession, redact those provided, and provide an accounting of those records not provided, it does not appear that the University provided you with a written delay letter within the requisite four business days. No explanation has been given for the University's delay. We will remind the University, through a copy of this letter to Ms. Busch, that it must comply with the four business day requirement as to all public records requests.

Additionally, we do not believe that the University has complied in full with the requirements of the NPRS when records are denied. While we have found that the University may withhold records that are otherwise responsive to your public records

¹ *Developmental Technologies, LLC v. Valmont Industries, Inc. and E.I. DuPont de Nemours and Company*, 8:14-cv-02796 (M.D. FL).

² *Id.* Plaintiffs' (sic) *Corrected Motion to Quash pursuant to Rule 45(d) or, Alternatively, Motion for Protective Order Pursuant to Rule 26(c)*, Document 54, p. 16.

request, it still must provide a description of all records withheld. Neb. Rev. Stat. § 84-712.04 (2014) governs denials of public records requests and provides:

(1) Any person denied any rights granted by sections 84-712 to 84-712.03 shall receive in written form from the public body which denied the request for records at least the following information:

(a) A description of the contents of the records withheld and a statement of the specific reasons for the denial, correlating specific portions of the records to specific reasons for the denial, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial;

(b) The name of the public official or employee responsible for the decision to deny the request; and

(c) Notification to the requester of any administrative or judicial right of review under section 84-712.03.

(2) Each public body shall maintain a file of all letters of denial of requests for records. This file shall be made available to any person on request.

The University's denial letter does not comply with Neb. Rev. Stat. § 84-712.04(1)(a). The public body is required in their response to include information in a denial letter as to the description of the contents of the records withheld. We do not see any such description in the University's August 20, 2015 e-mail to you which only references "other responsive documents." The University's response to this office included the required description of the records withheld, as Ms. Busch referenced "emails, interim reports, underlying research data, pictures, and other research items, all of which are unpublished" in her argument as to why the documents withheld fall within the academic and scientific research exception to the NPRS. That same description should have been provided to you in the August 20 denial letter. We will remind the University that all denial letters must contain a description of all records withheld.

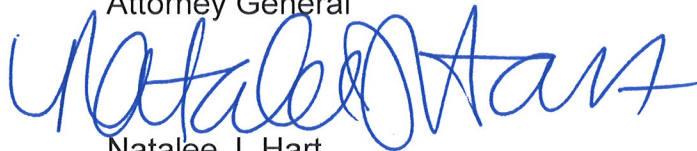
Dave Conklin
October 6, 2015
Page 10

CONCLUSION

For the reasons set out above, we believe that the requested records belonging to the University of Nebraska may be properly withheld under Neb. Rev. Stat § 84-712.05(3). Consequently, we do not believe you have been improperly denied access to public records. If you disagree with our legal analysis set out herein, you may wish to consult with your private attorney to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Erin E. Busch

02-533-29