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June 8, 2016

Via email and regular U.S. Mail

Abraham S. Cho
Hearst Corporation
Office of General Counsel
300 West 57th Street
New York, NY 10019

RE: *File No. 16-R-126; Omaha Public Power District; David Earl, KETV,
Petitioner*

Dear Mr. Cho:

This letter is in response to your petition filed under Neb. Rev. Stat. § 84-712.03 of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS"), on behalf of David Earl, a reporter at KETV, which we received on May 24, 2016. In your petition, you seek our review of the denial of certain records by the Omaha Public Power District ("OPPD"). As is our normal practice with such requests, we contacted the public body named in the petition. In this case, we contacted Kimberly Tracy, OPPD Corporate Secretary, and requested a response to your petition. On June 6, 2016, the undersigned spoke with attorney Stephen M. Bruckner, of the Fraser Stryker law firm, about OPPD's response, and later that day we received OPPD's written response to your petition. We have now completed our analysis and have fully considered your petition for access to records as well as OPPD's response, and our findings are set forth below.

Before we begin, we note that your petition references the recent announcement by OPPD "that it would recommend decommissioning of the Fort Calhoun nuclear power station, citing unspecified 'economic analysis,' and 'market conditions'" You state that the circumstances surrounding this announcement "are a matter of significant public concern" and you point out the "massive expenditures" made since 2011 to repair and operate the facility. Please note that the underlying reason for any public records request is not relevant to this office in determining whether a public body is in compliance with the NPRS, and we do not consider it in our analysis. *See State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993) (Neb. Rev. Stat. § 84-712 of the Public Records Statutes does not require any showing by a person requesting access to public records of the reason for his or her review of those records).

RELEVANT FACTS

Our understanding of the facts in these matters is based solely on your petition and the information contained in OPPD's response.

On May 9, 2016, Mr. Earl submitted a request for public records to OPPD. The request sought the following records:

1. A copy of the 20-year agreement between the Omaha Public Power District and Exelon Corp. to operate the Fort Calhoun Nuclear Station.
2. The monthly invoices paid by OPPD to Exelon Corp. for services under the contract beginning from the date of the contract's execution.
3. Any letters or memos from the OPPD Executive Team to any representatives of the Exelon Corp. dating back to April 1, 2016.

On May 11, 2016, Ms. Tracy responded to Mr. Earl's request. With respect to item number 1, the response indicated the existence of three agreements between OPPD and Exelon Generation Company, LLC ("Exelon"): (1) An "Operating Services Agreement," with an effective date of August 17, 2012, which "specifies the terms and conditions under which Exelon manages day-to-day operations at Fort Calhoun Station, including the compensation to Exelon for those services"; a "Licensing Agreement," same effective date, which "licenses OPPD's use at Fort Calhoun Exelon's proprietary Nuclear Management Model"; and an "Advisory Services Agreement," entered into by the parties on January 25, 2012, which "relat[ed] to services in connection with the restart and recovery efforts at Fort Calhoun Station."¹ Ms. Tracy denied Mr. Earl's request for the agreements based on confidentiality provisions contained within the Operating Services Agreement and the Licensing Agreement and the exception to disclosure in Neb. Rev. Stat. § 84-712.05(3) relating to trade secrets, proprietary or commercial information. With respect to the other items in the request, Ms. Tracy produced redacted invoices with her May 11 response, and on May 16, subsequently produced an April 12, 2016 letter from Exelon to OPPD.

YOUR PETITION

Your petition seeks our review of the denial of the request for OPPD's agreements with Exelon. You have also asked that we "direct OPPD to confirm that the single communication provided on May 16 is, in fact, the only communication in its possession

¹ According to Ms. Tracy, the Advisory Services Agreement was terminated under the terms of the Operating Services Agreement effective August 26, 2012, and any remaining work under that particular agreement was incorporated into the Operating Services Agreement.

that is responsive to that portion of the Request.” Please note that we did not request that OPPD confirm the veracity of its production in response to item number 3. In this regard, we assume that OPPD officials acted in good faith when it produced the April 12 letter, and you have indicated no reason or provided any evidence which would compel us to look behind OPPD’s response.²

You assert initially that OPPD’s reasoning that a “confidentiality designation” within the agreements at issue supports nondisclosure “is erroneous as a matter of law.” You state that

[t]he mere insertion of a confidentiality provision added to a contract that is otherwise a public record does not itself exempt the records from disclosure and from public review. Indeed, if the existence of a confidentiality clause in a public record were sufficient to justify the withholding of the entire document from public disclosure, this would swallow the rule and presumption of public access reflected in Nebraska’s public records law.

You assert that the Nebraska Legislature clearly had the policy of openness of public records set out in § 84-712 in mind when it enacted legislation pertaining to confidentiality provisions in settlement agreements involving certain public entities or officials. See Neb. Rev. Stat. § 84-713 (2014). You conclude that “the insertion of a confidentiality provision alone in an operating agreement between a public electric utility . . . and a private contractor cannot exempt the entire set of agreements from disclosure.”

You also challenge OPPD’s reliance on the trade secrets exception, without “any explanation or analysis of *why* the exemption applies.” (Your emphasis.) Assuming *arguendo* that the exception does apply, you assert that § 84-712.06³ of the NPRS compels production of the agreements with any information falling within the parameters of the exception (i.e., “[t]rade secrets . . . and other proprietary or commercial information which if released would give advantage to business competitors . . .”) redacted as necessary. You argue that “the entirety of all three agreements cannot reasonably be withheld on the basis that every part of the contracts would reveal such trade secrets.”

² In *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009), there was no evidence in the record which established that a county board had published notice of its meetings anywhere. The Court of Appeals held that in the absence of contrary evidence, it may be presumed that public officers faithfully performed their official duties. *Id.* In addition, absent evidence showing misconduct or disregard for the law, the regularity of official acts is also presumed. *Id.* In *Wolf*, the court also indicated that the plaintiffs had the burden at all times to show that it was more probable that notices of meetings were not posted than probable that they were.

³ This section provides that “[a]ny reasonably segregable public portion of a record shall be provided to the public as a public record upon request after deletion of the portions which may be withheld.”

As such, you believe that OPPD's withholding these agreements in their entirety violates §§ 84-712, 84-712.06, "and the spirit of the public records law."

OPPD'S RESPONSE

In OPPD's response, Mr. Bruckner confirms that the Operating Services Agreement and the Licensing Agreement were withheld on the basis of confidentiality provisions contained in those agreements, and the exception to disclosure set out in Neb. Rev. Stat. § 84-712.05(3). However, Mr. Bruckner notes that OPPD has published summaries of parts of those agreements, with the concurrence of Exelon. Those publications were provided to this office, and included excerpted pages from an OPPD bond "Official Statement," plus a letter dated September 10, 2012 to the U.S. Nuclear Regulatory Commission from then-OPPD president Gary Gates.

Further, in response to a request from this office, Mr. Bruckner addressed, using the standards⁴ set out in Op. Att'y Gen. Nos. 92068 (May 7, 1992), 97033 (June 9, 1997) and 16003 (February 16, 2016), the application of § 84-712.05(3) to the agreements at issue. Mr. Bruckner indicates that in the United States, Exelon's known competitor includes Entergy (which operates a nuclear facility in Nebraska for the Nebraska Public Power District). Internationally, Exelon competes with companies including Engie, EdF, KHNP, Rosatom, and various Chinese nuclear operators. He indicates that when OPPD considered engaging a private operator for the Fort Calhoun facility, OPPD also "evaluated Entergy and other companies providing similar services in the United States."

Mr. Bruckner further represents that Exelon considers the agreements, in their entirety, to be trade secrets. In support of this assertion, Mr. Bruckner makes the following representations (paraphrased in part):

- The agreements reflect a pattern and compilation of terms that Exelon offers to nuclear operators and owners with which it has commenced negotiations as an enticement to enter into a contract with Exelon.

⁴ As enumerated in the opinions:

(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.

- Those terms directly impact Exelon's ability to attract and engage potential customers.
- The agreements and exhibits detail the services provided, the approach and goals used to address the client's specific issues, the expertise and positions needed to meet the goals, and the rates and pricing for the various levels and category of services to be provided.
- Exelon continuously uses its pricing and pricing structure in its business dealings, and disclosure of this information, beyond what has been publicly disclosed, would provide an unfair advantage to its competitors or to clients or potential clients with whom Exelon is negotiating.
- The agreements contain a specific number of personnel assigned to meet OPPD's needs and the roles fulfilled by those persons. The role, expertise, and number of individuals is a direct product of Exelon's experience and expertise.
- Other provisions in the agreements, involving responsibilities of the owner and Exelon, indemnity, risk of loss, and similar provisions, outline the risks and liabilities Exelon is willing to assume and include additional considerations that give Exelon an advantage over less experienced competitors.
- Disclosure of the agreements would allow other businesses to enter the industry with the benefit of and full understanding of Exelon's risk profile.
- All sections of the agreements are inter-related and together form the pattern and compilation of terms which constitute a trade secret and proprietary information. The completeness and relationship of the provisions detail the agreements' value, which, taken as a whole, constitute a trade secret and proprietary information to Exelon.
- The agreements are assets used continuously in the operation of Exelon's business, including multiple competitive bid negotiations domestically and internationally. In light of the highly competitive field of nuclear operating and advisory services, where there are many competitors internationally but only a handful domestically,

small nuances and offerings can mean the difference between a new client and a lost business or profit opportunity, in the view of Exelon.

- Requiring disclosure of the agreements would give existing and potential clients access to the pricing negotiated with another party, and provide Exelon's expertise and experience to competitors, such as those identified above.
- The agreements' inherent independent economic value lies in their ability to attract and engage clients both domestically and internationally and, because it is a cornerstone in Exelon's success in this industry, Exelon considers the agreements a priceless trade secret that requires the highest levels of protection for Exelon.

Mr. Bruckner further states that Exelon has expended significant resources and money to hone the terms in the agreements. The information in the agreements contain the service model which Exelon uses in competitive bidding. If disclosed, competitors would gain an advantage because their time and resources in responding to other bids would be reduced, not to mention the competitive edge gained by knowing the substance of a competitor's bid response. Exelon also limits disclosure of the agreements at issue to only critical personnel, "as well as customers and those individuals who have entered into an acceptable non-disclosure agreement." Mr. Bruckner asserts that Exelon would not have negotiated the agreements with OPPD without a strict confidentiality provision, and states that Exelon would not have offered the pricing and terms which were subsequently negotiated between the parties without the confidentiality protection.

Finally, Mr. Bruckner asks this office to consider the decision in *Burlington Northern Railroad Co. v. Omaha Public Power District*, 703 F. Supp. 826 (D. Neb. 1988), *aff'd*, 888 F.2d 1228 (8th Cir. 1989). In *Burlington Northern*, the Nebraska Public Power District sought from OPPD a copy of a commercial coal hauling contract entered into between OPPD and the railroad, which OPPD declined to produce. Burlington Northern filed suit against both districts seeking, *inter alia*, a declaration that the contract constituted a trade secret under the NPRS. In analyzing the terms of the contract at issue, the court noted:

The confidential pricing information—here confidential rate setting—obviously gives Burlington Northern an advantage over competitors who do not know or use it. The formula in the contract for escalation of the base contract rate for coal transportation was developed by Burlington Northern as a competitive device to attract utility customers to enter into a contract with Burlington Northern in preference to other carriers. . . . [I] conclude that the formula in the contract is "for continuous use in the operation of the business." It is true that the formula is not freshly exercised daily nor

regularly, but the result of it is and, like most accumulations of information, its makeup changes year-to-year if not month-to-month or day-to-day, as new experience is compiled. That information is not generally known to the public or to the industry.

* * *

Burlington Northern has gone to considerable lengths to keep the information secret. It has not disclosed the information to persons not directly involved in developing information for formulating this or other similar contracts; it negotiated the contract with a strict confidentiality requirement in it; it instituted and vigorously prosecuted this action against NPPD and OPPD in an effort to obtain a ruling that the contract was not to be disclosed.

Id. at 831-832. The court concluded that the contract, as a whole, was a trade secret which could be withheld by OPPD. The U.S. Court of Appeals for the Eighth Circuit affirmed the decision of the trial court. Mr. Bruckner states that both OPPD and Exelon assert that *Burlington Northern* directly applies to their position that § 84-712.05(3) provides a basis to withhold the requested agreements.

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.

(Emphasis added.) "Public records" are defined as follows:

Except when any other statute expressly provides that particular information or records shall not be made public, public records shall include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-

supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form shall remain a public record when maintained in computer files.

Neb. Rev. Stat. § 84-712.01(1) (2014) (emphasis added).

Section 84-712 expressly provides that the right to examine or obtain copies of public records exists “[e]xcept as otherwise provided by statute.” The definition of “public records” in § 84-712.01(1) provides an exception from that definition “when any other statute expressly provides that particular information or records shall not be made public” Thus, in those instances where records requested under the NPRS are excepted from disclosure by statute, there is no right of access. 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).

We have carefully considered the arguments made by both parties as to whether the agreements at issue may be properly withheld. As indicated in portions of §§ 84-712 and 84-712.01 set out above, exceptions to disclosure are based on *statutes*, not contractual provisions. Thus, we do not believe that a contract clause can abrogate the explicit public policy for openness set out in the Nebraska Public Records Statutes. Accordingly, the confidentiality clauses contained in the agreements at issue here do not, standing alone, provide a basis to withhold records in response to a request made under § 84-712.

We are persuaded, however, by the information provided by OPPD which addresses the application of the trade secret, proprietary or commercial information exception in the context of the standards set out above. We believe this information provides more than a “bare assertion” that the agreements contain trade secrets, and proprietary or commercial information. Mr. Bruckner has specified both U.S. and international competitors who would gain an advantage from the release of Exelon’s agreement terms. This disposition letter has set out, in great detail, the advantage competitors would gain by the release of these terms—with its noted impact on the services provided to OPPD, the pricing structure, risk exposure, competitive bidding, etc. Since we believe that OPPD has met its burden with respect to application of the exception, it may appropriately rely on § 84-712.05(3) to withhold the requested agreements. Finally, while there may be some question as to whether the agreements may be withheld in their entirety, *Burlington Northern* supports OPPD’s position to do so.

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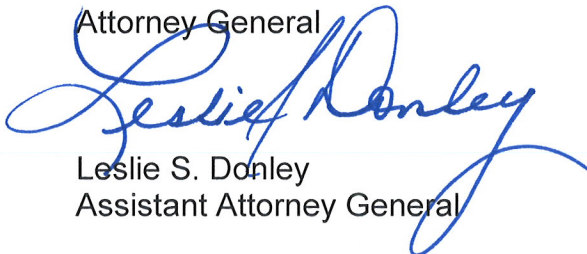
CONCLUSION

In sum, while we do not believe that a confidentiality clause alone provides a basis to withhold a public record in a request brought under § 84-712, we conclude that the agreements between OPPD and Exelon—i.e., the Operating Services Agreement and the Licensing Agreement—may be withheld under the exception to disclosure in Neb. Rev. Stat. § 84-712.05(3).

If you disagree with the analysis we have set out above, you are free to pursue the remedy available to you under § 84-712.03(1)(a) (2014) of the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Stephen M. Bruckner

49-1597-29