



### **Public Power Generation Records Not Protected**

A recent Nebraska Supreme Court decision on the disclosure of public power records to potential competitors has been the focus of debate in the Legislature. Shortly after the case was decided in February, the Legislature's Natural Resources Committee held a special hearing on an amendment to LB822 that would provide that the public power industry would not be required to disclose proprietary or commercial information which would give advantage to business competitors. This concept was made a part of the committee amendment to LB1008, which was adopted. At the time of this writing, the bill awaits further debate on Final Reading. This article outlines the case.

When a competitor asked for cost and revenue data from the Nebraska Public Power District (NPPD) for each of its generation units, the Nebraska Supreme Court found that it was not proprietary information protected by public records laws. In *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114 (2018), the court found that in order for NPPD to withhold its proprietary or commercial information, it had to show that the information would give advantage to business competitors and serve no public purpose. Because NPPD was unable to demonstrate by clear and convincing evidence that the information would serve no public purpose, the Supreme Court reversed a district court order and released the information. The court suggested that a legislative change would be necessary to balance and reconcile the public purpose embodied in the public records statutes and the public power statutes.

At trial, Aksamit focused on the public purpose that would be served by the disclosure of information. An economist studying public power presented research showing that the trajectory of public power prices in Nebraska was larger than the national average and was unsustainable. However, he concluded that it was very difficult to judge whether NPPD, which makes payments in lieu of taxes but pays no property or income taxes, was being run efficiently without looking at the cost and revenue information broken down by generation units.

NPPD's arguments focused on the confidentiality of the information in the industry and the competitive harm it could suffer if it had to disclose records to competitors. The district court found that the generation-unit specific cost was proprietary or commercial information that would give an advantage to competitors and that it should be exempt from disclosure under Neb. Rev. Stat. §84-712.05(3). Aksamit appealed.

The Supreme Court narrowly construed the public records statutes, focusing on the strong public policy for disclosure of public records. Section 84-712.05(3) sets forth an exemption for 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." The court concluded that NPPD is not a typical governmental body, because its proprietary nature is different from a governmental capacity.

The court noted that the Legislature did not include directions regarding public access to public records in statutes governing public power districts except generally keeping books and records open for inspection and disclosing certain contracts. If the Legislature had included references to excluding a public power district's competitive information from disclosure, the decision would have reached a different conclusion.

The full text of the case is available [here](#) at 299 Neb 114/S-17-333.

LB1008 is available [here](#).

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