

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

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May 29, 2018

Via email at [REDACTED]  
David Moll

RE: *File No. 18-R-119; Village of Greenwood; David Moll, Petitioner*

Dear Mr. Moll:

This letter is in response to your complaint received by this office on May 2, 2018, in which you sought our assistance in obtaining certain public records from the Village of Greenwood ("Village"). We construed your complaint to be a petition for review under § 84-712.03 of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2016) ("NPRS"). Upon receipt of your petition, we wrote to you requesting a copy of your original public records request and all other correspondence between you and the Village associated with your request, which we received on May 14.<sup>1</sup> We subsequently contacted the Village's attorney, David J.A. Barga, and advised him of the opportunity to provide this office a response to the petition. On May 21, 2018, we received Mr. Barga's response. The undersigned also spoke to Mary Avery, Special Audits and Finance Manager, Auditor of Public Accounts, about this matter on May 24. We have now had the opportunity to consider your petition and the Village's response in accordance with the provisions of the NPRS. Our findings in this matter are set forth below.

### RELEVANT FACTS

Our understanding of the facts in this matter is based upon your petition, the documentation you provided this office, and the information we received from Mr. Barga and Ms. Avery.

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<sup>1</sup> Our investigation of any petition submitted to this office under § 84-712.03 (2014) begins once we receive documentation sufficient to investigate the petition, i.e., the public records request, a copy of the response from the public body, if any; and any other documentation associated with the request, denial and/or noncompliance by the public body of the NPRS.

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On April 11, 2018, you emailed a request for public records to Mr. Bargen, the members of the Village board and the Village clerk. Your specific request was as follows:<sup>2</sup>

I am requesting all correspondence between the Village of Greenwood and the Nebraska Auditor of Public Accounts (state auditor) regarding the financial irregularities I had noted to you in December – which is the same as the complaint I filed in October with the state auditors office. This list will include, at a minimum, the following:

1. All correspondence from the state auditor.
2. All correspondence from the village council to the state auditor in response.
3. All correspondence from the village legal counsel if responding to the auditor representing the council.
4. All correspondence to and from the audit firm of HBE or any other audit firm, company or individual that has been asked to help, or been assigned, to Greenwood to assist in the financial issues.

The Village clerk responded to you on April 19,<sup>3</sup> providing you 70 pages of email responsive to your request. On April 22, you emailed the Village officials again, challenging the timeliness of the clerk's response and acknowledging receipt of "numerous emails." However, you indicated that

the correspondence to and from the State Auditors office were not included. Nor was any correspondence included from the villages legal counsel to the State Auditors office representing the village.

These documents are due to me immediately, or a letter from your legal counsel detailing state statutes on why these documents are not public information, or a statement that there has been no correspondence.

The Village clerk responded to you by email the following day, indicating that "[t]o the best of my knowledge you have received all corresponding emails pertaining to this matter." (Our emphasis.)

Notwithstanding the Village clerk's statement that all responsive records had been provided to you, you submitted a petition with our office. You state that "[i]t has always

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<sup>2</sup> Please note that quoted material has been reproduced as written.

<sup>3</sup> Neb. Rev. Stat. § 84-712(4) (2014) requires the custodian of records to respond to a written request for public records no more than *four business days* after actual receipt of the request. Receipt of a request on April 11, taking into account that the Village office is closed on Tuesdays, would require a response from the Village no later than April 18. We will remind the Village clerk to carefully review § 84-712 to ensure full compliance of the statutory timeframes in the future.

been the State Auditors procedure to send a letter” to the Village requesting comment when any complaint against it is filed. You indicate that since you sent the State Auditor documentation showing deficiencies in the Village’s balance sheets, you “can not believe the Auditors office did not correspond with the Clerk, or the Council, or the Legal Counsel—nor can I believe the Auditors office did not demand a response. These are the copies the clerk, council and legal counsel have refused to disclose.” Your petition concludes as follows:

Therefore, I am filing a complaint against the village clerk, village council and especially the village’s legal counsel (because he knows the law and it is his job to advise the council on matters such as this) for not providing me all documents I have asked for - and specifically, the correspondence to and from the State Auditors office and the village. This entire financial problem, as well as all the correspondence to and from the state Auditor has been hidden from the public — I am asking these public documents be provided to me immediately as the Nebraska statutes requires.

#### **THE VILLAGE’S RESPONSE**

Mr. Barga initially informs us that as the Village’s legal counsel, he is not the custodian of Village records, does not control Village records, and is not an appropriate recipient of requests made under the NPRS. In addition, to the extent you seek to file a complaint against him as the Village’s legal counsel, Mr. Barga points out that under Neb. Rev. Stat. § 84-712.03, the Attorney General is required “to determine whether a record may be withheld from public inspection or whether the public body that is custodian of such record has otherwise failed to comply with [the NPRS] . . . .” (Emphasis added.) Mr. Barga states that he is not a member of the public body, and that his response to this office is made on behalf of the Village “as administered by its Board of Trustees and Village Clerk.”

Mr. Barga further informs us that upon receipt of your April 11 request, the Village clerk compiled, to the best of her knowledge, the records responsive to your request that were in the possession of the Village and emailed those records to you. He indicates that your various complaints and requests were received at a time when the Village is in a state of transition with its board chairperson and clerk, and that “the Village has endeavored to respond in good faith in a timely manner.” With respect to your allegations that the Village refused to provide you correspondence between legal counsel and the State Auditor, Mr. Barga confirms that “[t]here has been no correspondence between the Village’s legal counsel and the State Auditor, or any other auditor, on this matter or any other matter regarding the Village . . . .”<sup>4</sup>

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<sup>4</sup> In addition, Mr. Barga indicates that the Village clerk re-checked for any additional records responsive to your request and has identified two letters, dated May 2 and 7, 2018, which the Village received *after* your request and the Village’s production of records on April 19. You may obtain copies of those letters upon submission of a written request to the Village pursuant to § 84-712.



**DISCUSSION**

As an initial matter, we agree with Mr. Bargaen's assertions that he is not an appropriate recipient of a public records request since he is neither a member of a public body nor the custodian of Village records. He also cannot be the subject of a petition brought under § 84-712.03. As a result, we considered your petition only as applied to the Village board of trustees and the Village clerk.

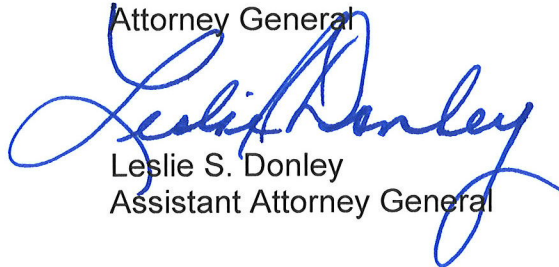
To support your allegations that certain correspondence exists between Village officials and the State Auditor, and that the Village refused to produce it, you assert that it has always been the State Auditor's procedure to send a letter to the Village when a complaint is filed. Further, you state that you "can not believe" that the Auditor did not correspond with the Village clerk, board and attorney and "did not demand a response" to the complaint. However, according to Ms. Avery, written correspondence to a public body upon receipt of a complaint is not automatic. Generally, the Auditor's office will start an internal investigation to see if the complaint warrants further action by her office. Contact with a public body is not always made by written correspondence, and may be made by other means, e.g., telephone or a personal visit. Ms. Avery confirmed to the undersigned that the only written correspondence between her office and the Village is the May 2, 2018 letter referenced above.

**CONCLUSION**

Since you received all records of or belonging to the Village of Greenwood relating to your April 11 records request, you have not been denied access to public records. As a result, no further action by this office is necessary and we are closing this file. If you disagree with our analysis, you may wish to discuss this matter with your private attorney to determine what, if any, additional remedies might be available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General



Leslie S. Donley  
Assistant Attorney General

c: David J.A. Bargaen (via email)  
Mary Avery (via email)