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Office of the Attorney General

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DOUGLAS J. PETERSON
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LESLIE S. DONLEY
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September 26, 2019

Via email at [REDACTED]
Sandra Koll

RE: *File No. 19-R-123; Saline County Planning and Zoning Board; Sandra Koll, Petitioner*

Dear Ms. Koll:

This letter is in response to the correspondence you submitted to our office on September 6¹ and 16, 2019, in which you sought the assistance of the Attorney General in obtaining certain public records from the Saline County Planning and Zoning Board ("Board"). We considered your correspondence to be a petition for review under § 84-712.03(1)(b) of the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018) ("NPRS"). We forwarded your petition to the Saline County Attorney, Tad Eickman, and requested that he provide this office a status of your pending public records requests. We subsequently spoke to Mr. Eickman about your petition on September 19, 2019, and received his written response on behalf of the Board on September 25. We have now fully considered your petition and the Board'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 solely on your petition and the information we received from Mr. Eickman.

Your petition involves three separate requests for public records, which we have summarized below:

1. Tower Documents. On July 12, 2019, you emailed Lyle Weber, Saline County Zoning Administrator, requesting "a digital copy of all the conditional use permits [CUP]

¹ The fifteen days in which to respond to your petition began to run on September 11, the date you clarified what particular records had not yet been provided to you by the Board.

and building permits [BP] for the MET Towers[.]” It appears that you sent emails to Mr. Weber on July 19, 26, and 31 to check on the status of your request. On August 20 and 26 and September 5, Mr. Weber provided you some of the requested documents. However, you indicate that certain permits have not been provided to date.

2. Meeting Minutes. By email sent September 5, 2019, you requested that Mr. Weber provide you “the minutes from when the 14 MET towers were approved as far as CUP’s from planning and zoning.” You indicate that you verbally requested these documents in June, July and August, but your September 5, 2019 email is the first written request for the minutes. It is our understanding that you have not received these records.

3. “Wind Contract.” On August 21, 2019, you emailed Mr. Weber and Mr. Eickman requesting a copy of the “wind contract” purportedly discussed during a Board meeting on August 20. In an August 30 email, Mr. Eickman explained to you that the document at issue was a “‘De-Commissioning’ agreement draft” and that, according to Mr. Weber, you should already have a copy of the agreement. Mr. Eickman further stated that “[h]opefully you have been provided with the documents you have requested from Lyle as of this date. Please let me know if you have not.” You indicate that you disagreed with the county’s characterization of this document, and emailed Mr. Eickman and Mr. Weber on September 3 to tell them “they [were] wrong.”

THE BOARD’S RESPONSE

With respect to your three requests, Mr. Eickman informs us as follows:

1. Mr. Weber does not have the CUP or BP for the items listed under numbers 1 and 2 in the spreadsheet you provided this office. Apparently, the former zoning administrator failed to retain copies for those particular towers. His office also does not have BP documents for the items in numbers 3-5, because Mr. Weber had just started his tenure as administrator and did not realize that he should keep copies.

2. Meeting minutes for the Board meetings conducted on August 16, 2016; December 20, 2016; January 16, 2018; June 19, 2018; November 20, 2018; and June 18, 2019, were provided to the undersigned. It is our understanding that Mr. Eickman’s office will email these documents to you as soon as possible if it has not already done so.

3. Mr. Weber does not have the “wind contract” you requested. He indicates that Board members discussed “the depth of concrete to be poured for the turbines” during the August 20, 2019, Board meeting, but is unaware of any discussion taking place regarding a “contract.” Mr. Weber further indicates that at the September 17, 2019 Board meeting, you discussed the “wind contract” with two Board members, and believes that they were able to provide a satisfactory explanation to you on this issue.

DISCUSSION

The NPRS govern access to and obtaining copies of public records in Nebraska. Generally, those statutes allow interested persons 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 § 84-712(4), interested persons seeking access to or copies of a particular public record initiate that process by providing a written request to the custodian of that record for such access or copies. In connection with our enforcement authority under the NPRS, we have consistently taken the position that those statutes do not require public agencies to answer questions or to create records which do not otherwise exist. Instead, those statutes focus on providing access to and copies of specific records.

Since it appears that the Board has provided you all of the records it has that are responsive to your requests, we believe this matter has been resolved, and there is no need for further action by this office. However, we will take this opportunity to discuss the shortcomings displayed in the handling of your requests. Under Neb. Rev. Stat. § 84-712(4) (2014), requests for public records must be submitted in writing. The public body which is the custodian of the records then has four business days after actual receipt of the request to respond to the requester in some fashion as provided in the statute. Those responses include: (1) providing access to, or copies of, the records at issue; (2) denying access to the requested records, and providing the statutory basis to do so, along with the information required in Neb. Rev. Stat. § 84-712.04; or (3) delaying production of any public records because of “the significant difficulty or the extensiveness of the request.” The written explanation of delay must include the earliest practicable date for fulfilling the records request, an estimate of the expected cost of any copies, and an opportunity for the requester to modify or prioritize the items within the request.

In the present case, the Board’s responses to your written requests were not made in a timely fashion. For example, you emailed your request for the tower documents to Mr. Weber on Friday, July 12, at 2:00 p.m. Applying the statutory criteria in § 84-712(4), Mr. Weber was required to respond to you no later than four business days after July 12—i.e., July 18. The written response could have been either emailed anytime on July 18 or postmarked July 18. However, there is no indication in the documentation provided to this office that there was any written communication between the parties relating to this request until Mr. Weber emailed some of the requested documents to you on August 20.

However, we note from reviewing the various correspondence that Mr. Weber appears to have been actively searching for the requested records during the time frames stated above. In this regard, we do not get a sense that Mr. Weber was ignoring your requests or intended to deny you access to any responsive records possessed by the Board. Accordingly, we will remind Mr. Weber that, in the future, he is required under the NPRS to respond to a written public records request within four business days of actual receipt.

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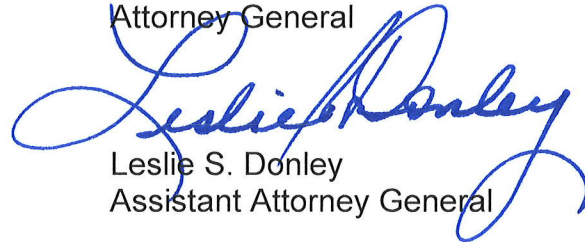
Finally, we are concerned that past and present officials working in the Planning and Zoning Department did not recognize the importance of making copies of substantive Board documents and seem generally unaware of their legal duties to retain copies in accordance with published retention schedules. However, this office does not enforce the Records Management Act,² and we have no supervisory authority over administrative matters involving local political subdivisions. Nevertheless, the undersigned suggested to Mr. Eickman that Mr. Weber may want to consider contacting the tower entities involved and attempt to obtain copies of any substantive documents currently missing.

CONCLUSION

Since the Board (and Mr. Eickman's office) has or will be providing you all of the records responsive to your request, we conclude that you have not been denied access to public records. On that basis, we are closing this file. If you disagree with our analysis under the Nebraska Public Records Statutes set out above, you may wish to consult with your private attorney to determine what additional remedies, if any, may be available to you under those statutes.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Tad Eickman (via email)

49-2273-29

² Neb. Rev. Stat. §§ 84-1201 to 84-1227 (2014, Cum. Supp. 2018).