STATE OF NEBRASKA

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December 21, 2010

Michael Van Buskirk
1627 N. 132nd Avenue Circle
Omaha, NE 68154

RE: *File No. 10-R-144; Northwest Rural Public Power District; Michael Van Buskirk, Petitioner*

Dear Mr. Van Buskirk:

This letter is in response to your correspondence dated December 6, 2010, hand delivered to this office on that date, and your e-mail sent to the undersigned on December 8, 2010, in which you have requested our assistance in obtaining certain public records belonging to the Northwest Rural Public Power District (the "District"). As is our normal practice with such requests, we contacted the party against whom the complaint was made. In this case we contacted Rolland Skinner, District Manager, and requested a response. On December 14, 2010, we received a preliminary response from Terry Curtiss, Curtiss, Moravec, & Curtiss, who responded on behalf of the District. On December 17, 2010, we received a final response from Mr. Curtiss. We have now considered your correspondence, which we have construed to be petitions for access to records under Neb. Rev. Stat. § 84-712.03 (the "Petitions"), and the responses from Mr. Curtiss under the Nebraska Public Record Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010) ("NPRS"). Our findings in this matter are set forth below.

At the outset, we would like to reiterate that, pursuant to Neb. Rev. Stat. § 84-712.03, this office has general enforcement authority over the Nebraska Public Records Statutes. We also have general enforcement authority over the Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2008, Cum. Supp. 2010), concurrent with the local county attorney. However, our authority does not extend to general supervision of local political subdivisions, like the District, nor do we police the actions taken by these public bodies during the course of open meetings. We would

also like to make it clear that we saw no specific allegations relating to violations by the District of the Open Meetings Act in any of your correspondence. This response pertains solely to the Petitions brought under the NPRS.

FACTS

Our understanding of the facts in this case is based upon your Petitions and the attached materials, and Mr. Curtiss' written responses. We also discussed this matter briefly with Mr. Curtiss by telephone on December 15, 2010.

It appears from the documentation provided to us that your initial written request for public records was made on November 22, 2010. In your e-mail, you stated:

> I would like to make a public information request for the total dollar amount of attorney fee's the Northwest Rural Public Power District has incurred since the beginning of the lawsuit with Tri State.

Mr. Curtiss responded to you by letter dated November 29, 2010. Mr. Curtiss indicated that "a complete copy of the monthly financials prepared for each monthly Board meeting will be sent to you under separate mailing from Northwest as soon as possible." However, he indicated that because you had not been seated on the District board yet, you were not entitled to receive the confidentiality agreements relating to the pending litigation.[1] Mr. Curtiss also stated "that the statutes regarding public information do not require providing copies, but that such are available for review at the principal office of the District." Additionally, Mr. Curtiss provided you copies of the "publicly available documents from the court file," which included the complaint and various other pleadings.

Your second written public records request was made on December 5, 2010. You stated:

> I would like to make a second written public information request for copies of all NRPPD governing documents including the charter and/or bylaws for the District. . . .
>
> Also, may I have a copy of the district confidentiality agreement pertaining to the TriState matter that all current board members have signed to be sure I have had adequate time to review it.

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[1] This litigation is captioned *Chimney Rock Public Power District, et al. v. Tri-State Generation and Transmission Association, Inc., et al.*, Case No. CV-09-5008 (United States District Court for the District of Nebraska) [the "Lawsuit"].

The following day, December 6, you submitted your first petition to this office. Your petition included all of the documents which you had previously received relating to your request for the total amount of legal fees incurred in the Lawsuit. You also alleged that you had received no follow up communication regarding your request for "governing documents, i.e., District Bylaws and the copy of the confidentiality agreement." It appears from the documentation that Mr. Curtiss responded to you by e-mail on December 7. He informed you that the District bylaws would be sent to you by Mr. Skinner, but reiterated that copies of the confidentiality agreement and co-representation agreement would not be provided to you until you are a seated member of the District board. He also advised you that a policy manual, including other new board member orientation information, would be provided to you as soon as available. The next day, December 8, you filed your second petition with our office, in which you assert, *inter alia*, that you were denied access to the confidentiality agreement.

In his letters dated December 14 and 17, 2010, Mr. Curtiss provided us general background on the pending Lawsuit, and the District's rationale in withholding the confidentiality agreements. He represents to us that once you are seated on the District board, you will have access to those documents. His December 17 letter included copies of the agreements at issue. Mr. Curtiss also represents to us that you have received "monthly board financial summaries" through November 10. Finally, Mr. Curtiss advises us that the District has taken the position that Neb. Rev. Stat. § 70-622 (2009) controls how the District disseminates public information.

DISCUSSION

We will begin by discussing the basic parameters of the Nebraska Public Records Statutes. Generally speaking, these statutes 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 public records, and to obtain copies of public records in certain circumstances. Even though the Nebraska Public Records Statutes do provide for access to public documents, they are not absolute, and they also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). Section 84-712.05 is comprised of eighteen categories of documents which may be kept confidential from the public at the discretion of the agency involved

With respect to your requests for the total amount of legal fees incurred in the Lawsuit, and your requests for the governing documents of the NRPPD Board, we understand that you have now received documents responsive to your requests. However, your requests for the confidentiality agreement(s) pertaining to the Lawsuit remain outstanding. In that regard, Mr. Curtiss has asserted to us that the

confidentiality agreement(s) are attorney-client privileged communications and attorney work product. As such, the documents would fall within the parameters of Neb. Rev. Stat. § 84-712.05, specifically subsection (4), which provides in relevant 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:
>
> *(4) Records which represent the work product of an attorney and the public body involved which are related to preparation for litigation, labor negotiations, or claims made by or against the public body or which are confidential communications as defined in section 27-503;*

(Emphasis added.) We have reviewed the agreements, and believe that Mr. Curtiss could make a colorable argument before a court that the documents are in fact privileged, and may be withheld from public disclosure at the discretion of the District in accordance with the statute. As a result, we believe that the District may continue to withhold the confidentiality agreement(s) until that time you become an official member of the Board, which appears to be sometime on or around January 27, 2011. We understand that you will receive those documents at that time.

Finally, we would like to address Mr. Curtiss' assertions that Neb. Rev. Stat. § 70-622 controls the District's dissemination of public records. Section 70-622 provides:

> The board of directors shall cause to be kept accurate minutes of their meetings and accurate records and books of account, conforming to approved methods of bookkeeping, clearly setting out and reflecting the entire operation, management and business of the district. Said books and records shall be kept at the principal place of business of the district or at such other regularly maintained place or places of business of the district as shall be designated by the board of directors, with due regard to the convenience of the district and its customers in the several localities or divisions served or from which the information is thus gathered or obtained. Said books and records shall at reasonable business hours be open to public inspection.

We believe that § 70-622 merely informs that the records of the District are to be made public. The statute does not, however, abrogate the NPRS. The basic rule for open public records is found at Neb. Rev. Stat. § 84-712, which requires that

> [e]xcept 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 the same, 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.

Neb. Rev. Stat. § 84-712(1) (2008). We have identified no statute which would exclude the District from the reach of § 84-712. Consequently, we would strongly advise that the District amend its current public records policy to comport with the provisions of §§ 84-712 through 84-712.09.

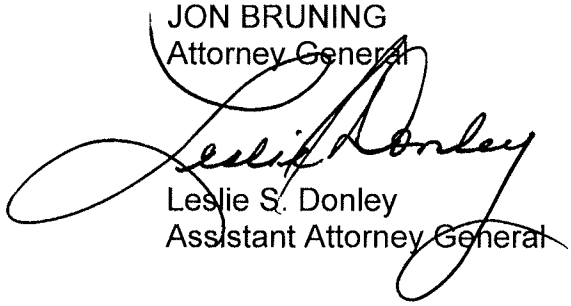
CONCLUSION

We believe that the District may continue to keep confidential those agreement(s) entered into by the District under the current Lawsuit. Our conclusion in this regard is based on the exception set out in under § 84-712.05(4), relating to attorney-client privileged communication and the work product doctrine. We further believe that the District must begin to comply immediately with the Nebraska Public Records Statutes when responding to citizens' requests for public records. Finally, since the District did not unlawfully deny your records requests, we believe that no further action by this office is warranted. Accordingly, we are closing this records file.

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 your under the Nebraska Public Records Statutes.

Sincerely,

JON BRUNING
Attorney General



Leslie S. Donley
Assistant Attorney General

cc: Terry Curtiss

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