STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

JON BRUNING
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

November 17, 2011

Monte Bowman
7631 Park Drive
P.O. Box 27321
Ralston, NE 68127

RE: *File No. 11-R-137; Douglas County Assessor; Monte Bowman, Petitioner*

Dear Mr. Bowman:

We are writing in response to your e-mail submitted through the Attorney General Website/Constituent Complaint form on August 12, 2011, in which you alleged violations of the "Nebraska Freedom of Information Statutes" and due process violations by the Douglas County Assessor's Office. On October 18, 2011, you followed up your complaint with an e-mail to our constituent services director, Liz Eberle. We subsequently contacted the public body involved and requested a response to your complaint. On November 4, 2011, we received a written response from Douglas County Chief Deputy Assessor Mike Goodwillie. We also spoke to Mr. Goodwillie about your complaint on October 24 and November 3, 2011. On November 7, 2011, this office contacted you to obtain a copy of the affidavit referenced in your complaint, which we received the following day. We have now considered your complaint, the supporting documentation, and Mr. Goodwillie's response to your complaint under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010, Supp. 2011), and our findings in this matter are set forth below.

Before we begin, we must point out to you that the Attorney General has express enforcement authority over the Nebraska Public Records Statutes ("NPRS"). Under Neb. Rev. Stat. § 84-712.03, we must 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 such sections." We do not, however, have general enforcement authority over entities of local government, like the Douglas County Board of Equalization ("BOE") or the Douglas County Assessor's Office. Consequently, issues relating to the process used by the BOE to protest property valuations or what records are necessary to file a protest fall outside of our purview. We also have no basis to

render an opinion on the merits of the protests mentioned in your complaint or determine whether you or your clients were denied due process. Our focus must be placed solely on whether you were denied access to public records or, alternatively, whether the Douglas County Assessor's Office otherwise failed to comply with the Nebraska Public Records Statutes.

RELEVANT FACTS

Our understanding of the facts in this case is based on your petition, the affidavit of your assistant Tina Mach, along with Mr. Goodwillie's response. We also viewed the portion of the Douglas County Board of Equalization meeting conducted on August 2, 2011, the link to which you provided to Ms. Eberle.

According to Ms. Mach's affidavit, sometime during the first week of June, you "prepared a list of properties [you] would need PROPERTY RECORD CARDS[1] for." The list was given to "Marlene" at the Miracle Hills location. On some unspecified date after this, Marlene called and said the paperwork was ready to be picked up. Ms. Mach states that she was given the PROPERTY PROFILE for two businesses. Sometime during the second week of June, you accompanied Ms. Mach back to the Miracle Hills office and requested the rest of the information in the file, i.e., worksheets, cost approach, comparables, etc. Ms. Mach states that these documents "were made available at the end of the second week of June." Beginning the third week of June, Ms. Mach states that she "dropped off the second list that had about 17 requests for FULL PROPERTY RECORD FILE." However, she was given only the PROPERTY PROFILE. She states that you both had to go back to the Assessor's Office sometime during this week, at which time you made the request again explaining your time constraints. Ms. Mach states that she called every day into the fourth week, and picked up the records on the afternoon of June 27.

According to Mr. Goodwillie, his staff indicated that the request was presented either June 20 or June 21, and that the records were produced on June 27, 2011. He stated that depending on how you count time, the production of records by his office was either timely, or one or two days late. He also states that "[o]ur staff did indicate, verbally, that the records would not be ready right away. Under the public records statutes, if we were unable to provide the records within four business days, our response to that effect should have been in writing." He represents to us that the last ten days of June are an extremely busy time for staff, given the number of protests and homestead exemption applications filed with his office. He offers this as a reason, not as an excuse. Mr. Goodwillie asserts, however, that despite all of the circumstances surrounding the filing of protests, that you were not prevented from filing your protests

---

[1] Terms appearing in uppercase letters in your documentation are reproduced identically in this disposition letter.

or "denied due process in any meaningful way." He concludes:

> We do acknowledge that our process could have been better. Our staff should have advised Mr. Bowman or his staff, in writing, rather than verbally, that the records may not be produced within the four business day window provided for by the Public Records Act. This office is re-examining its practices with respect to receipt of public records requests to ensure compliance with the Nebraska Public Records Act.

DISCUSSION

The basic rule in Nebraska for access to public records is set out in Neb. Rev. Stat. § 84-712 (2008). That statute provides, in relevant 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 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.

The Nebraska Public Records Statutes are not absolute, and do allow public bodies to withhold public records through express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). And while the Act provides for access to and copies of public records, it does not require public officials to answer questions, or to create records which do not otherwise exist.

Additionally, Neb. Rev. Stat. § 84-712(4) sets out the procedure to be followed when requesting public records. That subsection provides:

> Upon receipt of a written request for access to or copies of a public record, the custodian of such record shall provide to the requester as soon as is practicable and without delay, but not more than four business days after actual receipt of the request, either (a) access to or, if copying equipment is reasonably available, copies of the public record, (b) if there is a legal basis for denial of access or copies, a written denial of the request together with the information specified in section 84-712.04, or (c) if the entire request cannot with reasonable good faith efforts be fulfilled within

> four business days after actual receipt of the request due to the significant difficulty or the extensiveness of the request, a written explanation, including the earliest practicable date for fulfilling the 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.

We note that you did not provide us with the actual written requests for public records which you submitted to the Assessor's Office, nor did you provide us with the exact dates as to when you submitted your requests and picked up the documents. We also note that the terminology used in requesting documents from the Assessor's Office may have resulted, at least in part, in the delay in production. In that regard, under Title 350, *Nebraska Administrative Code*, Chapter 10, § 001.10 (effective date 3/15/09), "property record file" is defined as

> a file that contains the property record card, worksheets, supplemental data, and transfer information. All portions of the property record file shall be interrelated through codes and references, which shall be recorded on a property record card. This may be in the form of an electronic file that can be printed on demand.

Under Title 350 NAC, Chapter 10, § 001.11 (effective date 3/15/09), a "property record card" is defined as

> a master record located on the front of or cover of the property record file and shall serve as a reference to and inventory of all portions of the property record file. It shall contain a summary of the general data relevant to the parcel it represents. This may be in the form of an electronic file that can be printed on demand.

With these regulatory definitions in mind, we carefully reviewed your documentation. In your initial e-mail complaint to this office, you stated that "Douglas County has always had the PROPERTY RECORD FILE available as ONE REQUEST." Yet in your follow-up e-mail to Ms. Eberle, you wrote that your previous complaint "concerned production of *Property Record Cards* for 16 clients, 21 parcels." (Emphasis added.) You also wrote that "[n]ormally with the Property Record Card being all inclusive you had plenty of time to read the file . . . ." In your e-mail to the Douglas County Board of Commissioners, dated July 31, 2011, you wrote: "Attached is an Affidavit showing what occurred in the month of June in an attempt to acquire property record files." However, according to the affidavit, Ms. Mach went to the Assessor's Office the first week of June with a list of properties you "would need PROPERTY RECORD CARDS for." Further, in your written statement to the Douglas County Board of Equalization, you state that "Miz [sic] Tina Mach, an administrative assistant for AIVRAS made the first request for the PROPERTY RECORD FILE the first week of June 2011."

Obviously, a property record file and a property record card are two very different things. Yet the two terms are used interchangeably throughout. If in fact "property record cards" were requested by a member of your staff instead of the "property record file" or the "contents of the property record file," according to the definitions set out above, this would explain why you did not receive the records you sought. Furthermore, the fact that the Assessor's Office may have changed its policy with respect to obtaining individual records in a property record file does not implicate the NPRS, so long as the Assessor's Office produced the public records to the requester in accordance with the statutes.

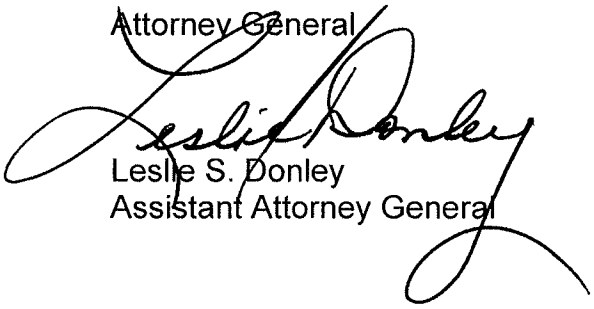
Which brings us to the ultimate issue—whether the Assessor's Office violated the NPRS when it produced the requested records on June 27, 2011. As indicated above, § 84-712(4) requires a public body, upon receipt of a written request for public records, to respond in writing to the requester no later than four business days after actual receipt. This office has consistently stated that the day of receipt of the request is not counted as one of the four business days. To illustrate, if a public records request is received by a public body on a Monday, a response to the requester must be postmarked no later than Friday's date to be timely (assuming there are no holidays during the week). In the present case, your assistant stated that "[b]eginning the third week of June" (June 20?), she dropped off the second list of properties. Mr. Goodwillie tells us that staff believes the request came in either June 20 or June 21. Both parties agree that the records were made available on June 27. Using June 20 as the date of receipt, the Assessor's Office was one day late, and violated § 84-712. If June 21 is used, the production of records was timely. In any event, Mr. Goodwillie represents to us that the process could have been better, and has assured us that his office will review its practices to ensure compliance with the Nebraska Public Records Statutes in the future.

When we receive petitions under § 84-712.03, our focus is to ensure that citizens have not been improperly denied public records. We investigate these petitions on a case-by-case basis. Since you have received the records at issue, we see no reason to continue our investigation, and we are closing the file. If you disagree with the analysis we have set out above, you may wish to contact your private attorney to determine what

additional remedies, if any, are available to you under the Nebraska Public Records Law.

Sincerely,

JON BRUNING
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Mike Goodwillie

49-694-30