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Office of the Attorney General

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DOUGLAS J. PETERSON
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

May 9, 2022

Via email at [REDACTED]
F. Gregory Hayden, Ph.D.
Professor of Economics

RE: *File No. 22-R-120; Lincoln Electric System; F. Gregory Hayden, Ph.D.,
Petitioner*

Dear Dr. Hayden:

This letter is in response to your public records petition emailed to our office on April 21, 2022, and received on April 22, in which you sought our assistance in obtaining certain records and information belonging to the Lincoln Electric System (“LES”). In accordance with our normal practice, we contacted the public body involved and requested a response. In this case, we contacted LES Vice-President and General Counsel Shelley Sahling-Zart, who provided us a response to your petition on April 29, 2022. We considered your petition and the LES response in accordance with the provisions of the Nebraska Public Records Statutes (“NPRS”), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020, Supp. 2021). Our findings in this matter are set out below.

RELEVANT FACTS

This matter involves your requests for emission data and information from LES dating back to September 2021. Following a telephone conversation between your research assistant and Scott Benson, LES Manager, Resource & Transmission Planning, Mr. Benson provided the assistant “LES aggregate CO2 emissions data spanning 2011–2020” on October 11, 2011. You made no further response as to this data until February 7, 2022, at which time you requested “the (a) calculation methodology, (b) methods, and (c) the data found for green-house gas emissions for Lincoln Electric System for the years 2011-2021.” Mr. Benson followed up on February 16, indicating that this information had been previously provided to your research assistant. He stated that “[b]ased on our discussion the other day, I believe this should be everything you need, but don’t hesitate to reach out if you have any questions.” You responded on February 20, acknowledging

that you had the data previously provided, but “need[ed] to know . . . how that data were derived.” You specifically requested the following:

- (1) The equations used to calculate the annual green-house gas emissions for every LES facility for every year from 2011 through 2021,
- (2) An explanation about how the data were collected and derived to use as entries for the elements in the equations in order to calculate the annual green-house gas emissions for every LES facility, and
- (3) The results generated from entering the data in the equations for every LES facility.

By email on February 21, Mr. Benson provided an explanation of the calculation methodology and a link to the U.S. Environmental Protection Agency’s (“EPA”) Air Markets Program Data. On March 2, you renewed your request for the three items listed above, modified as follows:

- (1) The equations used to calculate the annual greenhouse-gas emissions for all kinds of greenhouse-gas emissions for each and every individual LES generating facility for every year from 2011 through 2021;
- (2) An explanation about how the data were collected and derived to use as entries for the elements in the equations used to calculate the annual greenhouse-gas emissions for all kinds of greenhouse-gas emissions for each and every individual LES generating facility for every year from 2011 through 2021; and
- (3) The results generated from entering the data [in 2) above] in the equations [in 1) above]] for all kinds of greenhouse-gas emissions for each and every individual LES generating facility for every year from 2011 through 2021.

Mr. Benson called you on March 11 to discuss your request. No timelines were discussed nor did you express urgency for a response. On March 18, you submitted a formal public records request to Mr. Benson for the information requested on March 2. Mr. Benson responded on March 22, providing information and links believed to be responsive to your request.

YOUR PETITION

You state in your petition that while “Mr. Benson sent material,” it is inconsistent with your request. In your analysis of Mr. Benson’s March 22 email, you indicate that he failed to provide you the specific equations used by LES in its calculations. You assert that references to the federal regulations containing equations is insufficient since there are multiple different equations and “a long list of fuels from combustion fuel source types,

various data definitions, and so forth” You further assert that the reports cited by Mr. Benson, which were meant to “help identify the equations used and how the related data was collected/derived,” were not helpful to you because they did not contain “the actual equations, data, and application of data utilized by LES.” You claim that for each of the facilities reported, “[t]he information presented . . . does not contain the equations, data, and/or calculations of the data in the equations for the greenhouse-gas emissions” You have requested that we order Mr. Benson to provide you the requested information “for the list of facilities of which LES claims ownership on page 29 of LES’s prospectus for a Series 2020B Bonds offer, dated September 23, 2020 (see Exhibit 13).”

LES’S RESPONSE

Ms. Sahling-Zart informs us that “LES is required to comply with numerous federal environmental regulations.” The requirements at issue include the EPA’s Continuous Emission Monitoring and Mandatory Greenhouse Gas (GHG) Reporting requirements applicable to owners and operators of facilities that directly emit GHG. The requirements are codified in federal regulations.¹ LES’s reporting is certified, under penalty of law, by LES’s designated representative. The EPA subsequently verifies the submittals. Ms. Sahling-Zart also informs us that LES provided data to you for only those facilities for which it has reporting requirements.²

Ms. Sahling-Zart indicates that it is LES’s position that the NPRS do not apply to your request, and that LES has attempted to be responsive to your request and provide responsive records nonetheless. She states that “Dr. Hayden is simply not requesting public records for which LES is the custodian or which are subject to Neb. Rev. Stat. § 84-712 et seq.” In addressing the three items in your request, Ms. Sahling-Zart states that equations promulgated at the federal level do not meet the statutory definition of “public record” found in Neb. Rev. Stat. § 84-712.01(1). She states that LES is neither the author nor the custodian of EPA equations, but is required to use the equations to fulfill its emission reporting responsibilities to the EPA. She states that “LES utilizes these equations through EPA-compliant reporting tools and software.”

In similar fashion, LES is not required to provide explanations about records or the information provided. With respect to the “results” requested in item three, Ms. Sahling-Zart indicates that LES provided you reports existing in the EPA’s Air Market Program Data and Facility Level Information on Greenhouse Gases Tool (Flight) tools. While LES could have denied your request for equations and explanations since those items did not constitute public records of or belonging to LES, Mr. Benson responded to your request,

¹ 40 CFR Part 75 and 40 CFR Part 98, respectively.

² Those facilities include J Street, Rokeby, and Terry Bundy Generating Station. With respect to the J Street facility, Mr. Benson informed you that since 2013, the facility was no longer required to comply with the 40 CFR Part 98 regulations, but LES nonetheless continued to calculate the CO₂ emissions and the 2013–2020 results were provided to you.

providing you links to the federal regulations and noting specifically an equation utilized by LES, i.e., Equation G-4. She further contends that your repeated assertions that the *information* provided was insufficient supports LES's position that you were not requesting *public records*. Ms. Sahling-Zart states that, contrary to your assertions, the direct links to the U.S. EPA's FLIGHT set out in Mr. Benson's March 22 email did identify the equations used by LES. In this respect, she states:

For example, if you click on the "Rokeby" link provided in Mr. Benson's March 22, 2022, email, you get to the screen noted in [your] Exhibit 10. On that home screen, if you click on the button labeled "View reported data" you would see a more detailed report which I have included in Attachment 1.³ I have manually highlighted where it clearly indicates the equations used in reporting the data for each applicable fuel as well as the inputs for the equations. If you click on the "Data Year" at the top-left of the home screen, you can view this information for each available reporting year. Again, explanations of the various equations are included in the related EPA regulations, which Mr. Benson also provided links to.

Ms. Sahling-Zart states that Mr. Benson has been diligent in trying to respond to the items in your request as he and LES understand them. Moreover, Mr. Benson has responded to you despite LES's position that you are requesting information that does not constitute public records and have requested explanations where none are required under the NPRS.

DISCUSSION

In Nebraska, the basic rule for open public records is found at Neb. Rev. Stat. § 84-712 (2014) of the NPRS. That statute provides, in pertinent part, 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 such records, 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 purpose of § 84-712 is "to guarantee that public government records are public." Introducer's Statement of Purpose for LB 505, 72nd Nebraska Legislature (1961). Neb.

³ A copy of LES's Attachment 1 is enclosed with this letter.

Rev. Stat. § 84-712.01(1) (2014) defines public records as “all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form shall remain a public record when maintained in computer files.”

Under the NPRS, every record “of or belonging to” a public body is a public record which individuals may obtain a copy of unless the custodian of the record can point to a specific statute which allows the record to be kept confidential. This office has consistently taken the position that the NPRS do not require a public agency to review documents and create abstracts or other lists, to answer questions or to create documents which do not otherwise exist. Op. Att’y Gen. No. 94092 (November 22, 1994); Op. Att’y Gen. No. 94035 (May 11, 1994); Op. Att’y Gen. No. 87104 (October 27, 1987).

We have carefully reviewed the items in your request with the information/links provided in the March 22 email. It appears to us that LES provided you responsive information, including the equations sought under item number one. LES has no further obligation, under a public records request made pursuant to § 84-712, to provide you “[a]n explanation about how the data were collected and derived to use as entries for the elements in the equations used to calculate the . . . emissions.” The NPRS give you the right to access public records. It does not require public bodies to explain the records to you. Your suggestions that Mr. Benson is being evasive and is refusing to provide you certain information is not supported when considering the amount of information contained in the March 22, 2022 email alone.

Under Neb. Rev. Stat. § 84-712.03(1)(b), the Attorney General is required to determine whether a record may be withheld from public inspection or whether the public body has otherwise failed to comply with the NPRS.⁴ Ms. Sahling-Zart has represented to the undersigned that LES provided you all of the documentation it considered to be responsive to the items in your request. Upon careful consideration of all of the materials presented by the parties, there is no basis to conclude that you have been denied access to public records or that LES is otherwise in noncompliance with the law.

⁴ This office is also required to determine whether the fees charged by a public body for producing public records are appropriate under § 84-712.

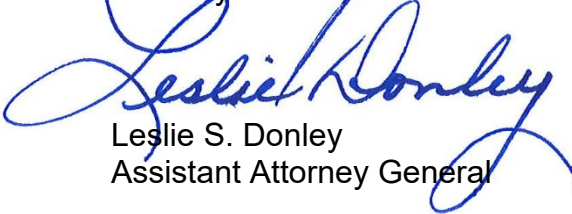
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CONCLUSION

For the reasons discussed above, we do not believe that LES violated the provisions of the NPRS relating to your public records request, and we will issue no order requiring further production of records by Mr. Benson. Since there is no basis for further action on this matter, 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 additional remedies, if any, are available to you under the NPRS.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

Enclosure

c: Shelley Sahling-Zart (via email only)

49-2936-30