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August 21, 2014

David J. Bender
808 Canyon Crest Dr.
Irving, TX 75063-4669

RE: *File No.14-R-120; Cass County Assessor; David J. Bender, Petitioner*

Dear Mr. Bender:

This letter is in response to your petition received by us on July 24, 2014, in which you requested our review of the denial of certain public records by the Cass County Assessor. As is our normal practice with such requests, we contacted the party against whom the complaint was made. In this case, we contacted the Cass County Assessor, Allen J. Sutcliffe, and requested a response to your petition, which we received on August 6, 2014. On August 8, 2014, we wrote to you indicating that while it appeared from our preliminary review that Mr. Sutcliffe's office was in compliance with the Nebraska Public Records Statutes, we indicated that our response would be delayed so that we could further analyze the issues. We have now completed our analysis and have fully considered your petition for access to records as well as Mr. Sutcliffe's response. We also took into consideration your correspondence received by the undersigned on August 18, 2014. We conducted our review under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Supp. 2013) ("NPRS"). Our findings in this matter are set forth below.

FACTS

Our understanding of the facts in this matter is based on your petition and the information contained in Mr. Sutcliffe's response.

According to your petition, on June 26, 2014, you emailed Mr. Sutcliffe and requested information "to determine the statistical basis and validation of the information he is using to assess valuation for property taxes." In this regard, you state that Mr.

Sutcliffe uses information published by the University of Nebraska for cash rents.[1] You indicate that Mr. Sutcliffe "flatly refused" to provide you the requested information. You followed up your email with a certified letter dated June 30, 2014, which was received by the Assessor on July 3, 2014, in which you requested "an opportunity to obtain copies of public records that describe the statistics underlying the cash rent values as part of the land valuation process in Cass County's appraisal process for 2014." Your request was made under the NPRS. Your letter contained seven questions detailing the information sought. For example, question number 6 stated:

> How was the difference between those using a share (revenue split) or other basis for payment evaluated or equated relative to those using the cash rent approach in applying the methodology used to arrive at the cash rent value used in the valuation process?

You indicate that Mr. Sutcliffe did not respond to your letter. You have asked for our assistance to require Mr. Sutcliffe to respond, produce the requested information and/or any other information that would "substantiat[e] his office's valuation methodology."

Mr. Sutcliffe states that between June 11 and June 26, 2014, you and he engaged in an ongoing "conversation," which included thirteen emails from you. Mr. Sutcliffe indicates that during this time he responded seven times and provided you with several documents and references for additional information, including the above referenced Real Estate Report. Mr. Sutcliffe indicates that during this discussion, you requested more detail about the Real Estate Report, and that he directed you to its author, Bruce Johnson.[2] He states that apparently Mr. Johnson did not respond to your inquiries. Mr. Sutcliffe admits that he offered to contact the University and request the data you sought, but has not had time to do so. Mr. Sutcliffe states that "[w]hen pressed for the data I stated I didn't need the data as the report has been published for 25 years and I accepted it as is and there is no other source for income based appraisal of farm real estate (agricultural land)." He indicates that you then asked again for the detailed information in your letter dated June 30, 2014. Mr. Sutcliffe represents to us that he "always made it clear to Mr. Bender that I was not in possession of the information and it was only available from Mr. Johnson." Mr. Sutcliffe suggests that you pursue your request for information with the University of Nebraska because he does not have the information you seek.

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[1] It is our understanding that this information is published in the University of Nebraska, Department of Agricultural Economics, "Nebraska Farm Real Estate Market Highlights 2013-2014," by Jim Jansen and Roger Wilson, June 2014, Report No. 194 (hereinafter, the "Real Estate Report").

[2] According to page ii of the Real Estate Report, Dr. Bruce Johnson retired sometime in 2013. We note that the names and contact information for the current authors also appears on page ii.

DISCUSSION

The Nebraska Public Records Statutes generally 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 records, and to obtain copies of records in certain circumstances. Under those statutes, 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. However, 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.[3]

Under the Nebraska Public Records Statutes, "public records" are defined as follows:

> Except when any other statute expressly provides that particular information or records shall not be made public, public records shall include 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.

Neb. Rev. Stat. § 84-712.01 (2008) (emphasis added). This office has previously stated that the key question with respect to access to particular records is whether those records are records "of" or "belonging to" an agency. Op. Att'y Gen. No. 97033 (June 8, 1997).

In the present case, you have attempted to obtain underlying statistical data relating to the University of Nebraska's Real Estate Report from the Cass County Assessor. You have alleged that Mr. Sutcliffe "flatly refused" to provide you this information. However, it appears to us that Mr. Sutcliffe represented to you on at least three occasions that his office did not have the data to provide to you. For example, at one juncture, Mr. Sutcliffe referred you to the report's previous author, Dr. Johnson, for assistance. Another time, he offered to contact the University to get some answers. Finally, in an email to you on June 26, Mr. Sutcliffe stated that he couldn't provide the University's data. We fail to see how Mr. Sutcliffe's actions in this regard constitute a flat refusal to produce records. Moreover, there is nothing to suggest that even if Mr. Sutcliffe had the information, he would not have provided it to you, as he did with other spreadsheets and reports.

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[3] *See* Op. Att'y Gen. No. 94092 (November 22, 1994); Op. Att'y Gen. No. 94035 (May 11, 1994); and Op. Att'y Gen. No. 87104 (October 27, 1987).

In any event, any underlying statistical data relating to the Real Estate Report would be records of and belonging to the University of Nebraska, not the Cass County Assessor. Mr. Sutcliffe's duties under the NPRS require him to provide you access to the records of and belonging to his office, not the University. He is not obligated to answer questions or create documents that do not otherwise exist. Submitting a public records request for the information does not alter this fact.

However, Mr. Sutcliffe did have an obligation to respond to your June 30, 2014, public records request in a timely fashion, if only to advise you again that his office did not have any responsive records. Consequently, we will suggest to Mr. Sutcliffe that, in the future, a timely response must follow any request for public records. Further, the Assessor's response must fully comport with the requirements set out in Neb. Rev. Stat. § 84-712(4). And, in the event access to particular records is denied, that the Assessor include all of the components set out in Neb. Rev. Stat. § 84-712.04 in its denial letter.

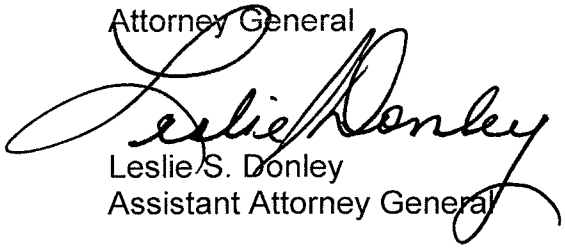
CONCLUSION

We conclude that the information that you seek is likely to be found in records of and belonging to the University of Nebraska, not the Cass County Assessor. As a result, we believe that the Cass County Assessor did not unlawfully deny you access to public records. Since no further action by this office is warranted, we are closing this records file.

If you disagree with our legal analysis set out herein, you may wish to pursue what additional remedies may be available to you under the Nebraska Public Records Statutes.

Sincerely,

JON BRUNING
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Allen J. Sutcliffe

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