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

DOUGLAS J. PETERSON
ATTORNEY GENERAL

MARNA MUNN
ASSISTANT ATTORNEY GENERAL

May 31, 2016

Jerry Schumacher
P.O. Box 667
Chadron, NE 69337

RE: *File No. 16-R-124; City of Chadron, Chadron Joint Airport Zoning Board; Jerry Schumacher, Petitioner*

Dear Mr. Schumacher:

We are writing in response to your petition sent to the Attorney General on May 13, 2016, in which you requested our assistance in obtaining certain public records belonging to the Chadron Joint Airport Zoning Board and the City of Chadron ("City of Chadron") requested under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014). As is our normal practice with such requests, we contacted the party against whom the complaint was made. In this case, we sent a letter regarding this matter to the City Clerk for the City of Chadron on May 19, 2016. We received a response from Mr. Terrance O. Waite, of the law firm Waite, McWha & Heng, on behalf of the City of Chadron. We have now completed our analysis under the Nebraska Public Records Statutes and have fully considered your petition for access to records as well as the City of Chadron's response. Our findings are set forth below.

Before we begin, we note that your petition contains supporting information and explanation which appear to address a wide range of issues. This disposition will focus on the pertinent information for consideration of this public records petition regarding your assertions that City of Chadron improperly denied you access to the April 22, 2016 meeting minutes and the March 22, 2106 video of the Joint Airport Zoning Board meeting.

RELEVANT FACTS

Our understanding of the facts in this matter is based on your public records request, your petition which includes two letters to Donna Rust, Chadron City Clerk, and the responses you received from Ms. Rust and from City Manager, Wayne Anderson, and the written response the City of Chadron's legal counsel provided to our office regarding

Printed wth soy ink on recycled paper

this matter. On April 22, 2016, you mailed Ms. Rust a public records request for several records relating to meetings of the Joint Airport Zoning Board ("JAZB") and the Chadron City Council. On April 28, 2016, Ms. Rust provided to you all but one of the requested records. Ms. Rust explained that she did not include the April 12, 2016 JAZB minutes because the board had not yet met to approve those minutes. She did indicate that she would provide those minutes after they were approved by the board. On April 30, 2016, you sent another letter to Ms. Rust recounting your original request and acknowledging her response. You also raised several questions about the March 22, 2016 video recording. You indicated that upon watching the video purporting to be of the March 22, 2016 meeting, it became clear to you the recording was not of the March 22, 2016 meeting. You then asked Ms. Rust to provide you with the video record of the March 22, 2016 Chadron Joint Airport Zoning Board meeting. On May 5, 2016, Wayne Anderson, Chadron City Manager, provided a written response to your April 30, 2016 letter. Mr. Anderson indicated that the video you initially received was mistakenly labeled and that the only Joint Airport Zoning Board Meeting that has been recorded by the City staff to date is the meeting of February 25, 2016.

As indicated above, we contacted the City of Chadron on May 19, 2016 via letter with respect to your petition. Terrance O. Waite of law firm Waite, McWha & Heng, responded on behalf of the City of Chadron. In his response, Mr. Waite indicated that the City of Chadron states that no recording was made of the board meeting of March 22, and that the minutes of April 12 meeting are in draft form only and are subject to change by the board.

DISCUSSION

The Nebraska Public Records Statutes ("NPRS") are found at Neb. Rev. Stat. §§ 84-712 through 84-712.09. Generally speaking, the NPRS 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. 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.

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(1) (2014).

March 22, 2016 Video Recording

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. Neb. Rev. Stat. 84-712; 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). This means the requestor is entitled only to make a request for specific documents or records, and the custodian is required only to provide documents or records responsive to the records request, if they exist. The requestor is not entitled to ask, and the custodian is not required to answer, any questions raised in the request.

In this case, you were provided a video recording purporting to be the video record of the March 22, 2016 JAZB meeting. When you pointed out that it was not a video of the March 22, 2016 meeting, the City Manager indicated to you that the label on the video initially provided to you was incorrect. Mr. Anderson acknowledged the video is the recording of the February 25, 2016 Joint Airport Zoning Board meeting and that is the only video record the City has made of any JAZB meeting. Legal counsel for the City of Chadron has also represented to us that no recording was made of the March 22, 2016 meeting. In the "absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed." *Wolfe v. Grubbs*, 17 Neb. App. 292, 310, 759 N.W.2d 499 (Neb. Ct. App. 2009). Given the representations made by the City Manager and the City of Chadron legal counsel, we must assume that public officials acted in good faith, and that they have no records in response to this public records request.

April 12, 2016 Meeting Minutes

Section 84-712.04 of the NPRS provides that if a member of the public is denied access to a public record, he or she should receive the following information from the public body:

1. A description of the contents of the records withheld and a statement of the specific reasons for the denial including citations to particular statutes and subsections relied upon as authority for the denial correlated to specific portions of the records at issue.
2. The name of the public employee or official who made the decision to deny the request.
3. Notification to the requester of any administrative or judicial right of review under § 84-712.03

Under § 84-1413 of the Open Meetings Act, Neb. Rev. Stat §§ 84-1407 to 84-1414 (2014, Supp. 2015), the minutes of all meetings are public records, open to public inspection. "Minutes shall be written . . . and available for inspection within ten working days or prior to the next convened meeting, whichever occurs earlier . . . ."

In this case, the meeting was held April 12, 2016. Your initial request is dated April 22, 2016. The Clerk did not invoke the ten-business day timeframe referenced in the Open Meetings Act to deny you the records. Instead she indicated, as did Mr. Waite's response to our request, that the minutes were in draft form and would not be available until approved by the Board. Neither response provides a citation to any authority under which the records could be withheld on that, or any other, basis. Because the records are public, and because the City of Chadron's response makes clear the minutes had been drafted at the time of your request, the City of Chadron should have provided you the minutes upon your initial request. Withholding meeting minutes on the basis that they have not yet been approved by the board does not fall within the specified exceptions to disclosure found in the NPRS. Both the NPRS and the Open Meetings Act require disclosure of the meeting minutes. Consequently, we will direct the City of Chadron, by sending a copy of this disposition letter to their legal counsel, Mr. Waite, to produce the April 12, 2016 meeting minutes if the City has not already done so. We would ask the City of Chadron to provide you this information immediately.

CONCLUSION

For the reasons explained above, we conclude that given the representations of the public officials regarding the video you seek, there is no action for our office to take on that matter. We further conclude that the City of Chadron must produce to you the April 12, 2016 Joint Airport Zoning Board Meeting Minutes at its earliest convenience. Since we see no basis for further action by this office, we are closing this file. If you disagree with our analysis under the Public Records Statutes set out above, you may wish to determine what additional remedies, if any, are available to you under the Nebraska Public Records Statutes.

Finally, we note that your public records petition contained additional information which might suggest issues of concern more properly considered under the Open Meetings Act. If you believe there are issues to address in that regard, you may file a complaint under the Open Meetings Act with our office. In the event you wish to pursue such a complaint, please provide us as much detailed information as possible about your concerns for consideration by this office.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

Marna Munn
Assistant Attorney General

cc: Terrance O. Waite, Esq.

46-010-29