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

NATALEE J. HART
ASSISTANT ATTORNEY GENERAL

April 18, 2016

Kenneth Main
Tom Kennedy
Milan Moore
Box 395
Sutherland, NE 69165

RE: *File Nos. 16-R-112 and 16-M-113; Village of Sutherland; Ken Main et al., Petitioners*

Dear Mr. Main, Mr. Kennedy and Mr. Moore:

This letter is in response to your petition which we received on March 15, 2016 in which you requested our review of the response of the Village of Sutherland to a public record request made by Mr. Main in May 2015. You also made allegations against the Village under the Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2014, Cum. Supp. 2015) ("OMA"). As is our normal practice with such requests, we contacted the public body against whom the complaints were made. In this case, we contacted Rory Roundtree, attorney for the Village of Sutherland, and requested a response to your petition. On or about March 30, 2016, we wrote to you and indicated that we did not believe you had been improperly denied access to public records, but that your request required further analysis. We received a response from the Village to your complaints on April 5, 2016. Following this, we received an additional complaint from you on April 14, 2016; we did not provide this complaint to the Village for response, as we did not feel it necessary in order for us to respond. We have now completed our analysis under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014) ("NPRS") and have fully considered your petition for access to records as well as the Village's response. We have also considered your Open Meetings Act allegations under the OMA. Our findings are set forth below.

As an initial matter, large portions of your complaint concern the letting and acceptance of bids, Village purchases such as garage doors, annexation by the Village, and the legal guidance of the Village Attorney. This office has no general supervisory authority over governmental subdivisions in Nebraska, including the Village of Sutherland. We have enforcement duties related to the Nebraska Open Meetings Act and the NPRS, but do not have authority over Village policies or the implementation thereof, Village

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purchases, or the work done by the Village Attorney or any other Village official. As such, we will not discuss these portions of your complaint.

FACTS

Our understanding of the facts in this matter is based on your complaints, your voluminous supporting materials, and the information contained in the Village's responses to your public record request and to your NPRS petition and your OMA complaint.

Petition under the NPRS

As to your public records request, we are unclear as to the precise series of events. However, what we understand from your petition is that you made a verbal request for records from the Village sometime in early May 2015, perhaps at a Village Board meeting. The Village requested that you make your request in writing. That request was made on May 18, 2015[1] and requested the following information:

(1) "Electrical billing information" for the Midwest Renewable Energy Ethanol Plant and Village payments received from NPPD for the years 2000, 2001, 2012-2013, and 2014;
(2) County TIF tax settlement records pertaining to the Village and the Midwest Renewable Energy Ethanol Plant for the years 2008-2013, inclusive; and
(3) All written correspondence and financial settlement records between the Village and Midwest Renewable Ethanol Plant pertaining to back taxes owed for the years 2008-2013, inclusive.

The Village responded on May 27, 2015. In its response, the Village indicated that the entity to which your request should have been made was the "Village of Sutherland Community Redevelopment Authority," rather than to the Village itself. However, the Village treated your request as if it had been made to the Sutherland "Community Redevelopment Authority."[2] The Village responded as follows:

> As to request No. 1, the Village has a duty and will provide information related [to] payments received by the Village pursuant to the Ethanol

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[1] You did not provide us a copy of your written public records request dated May 18, 2015. Without a copy of the actual request, we had to rely on your summary materials to indicate what records you requested.

[2] You comment in your petition that "it's all the same," however, a request for records must be made to the custodian of the records. If the custodian of the records is the Community Redevelopment Authority, requests must be made to that entity; the Village of Sutherland is under no obligation to provide records for which it is not the custodian.

> Plan TIF for the years 2000-2001, 2012-2013, and 2014. Please be mindful that pursuant to Neb. Rev. Stat. [§ 84-712(3)(e)][3] the Village CRA is not required to "produce or generate any public record in a new or different from or format modified from that of the original public record."
>
> As to request No. 2, first, I suggest that this inquiry is misplaced and should be directed to Lincoln County, as they are the appropriate entity responsible for the maintenance for the requested County records. The Village has a duty to provide any records that the Village may have that are responsive to your request.
>
> As to request No. 3, "all written correspondence and financial settlement records between the Village and Midwest Renewable Ethanol Plant pertaining to back taxes owed..." such request is denied in part on the basis of attorney-client privilege and attorney work product pursuant to Neb. Rev. Stat. 84-712.05. The Village CRA has a duty to provide to you a copy of the adopted letter approved by the Village CRA.

It appears that responsive to your first request, NPPD billing information, a letter from NPPD to the Village of Sutherland dated May 27, 2015 listing energy billing for the Midwest Renewable Energy Ethanol Plant for 2002 to 2015 was enclosed.

You have subsequently filed your petition under the NPRS, alleging that the Village has violated the NPRS by not providing you NPPD billing information for the Midwest Renewable Energy Ethanol Plant for 2000-2001, not providing records relating to your request for County TIF records, and withholding correspondence under your third request. The Village has responded to your NPRS petition by stating that the Village responded to your public records request in good faith and denies that it improperly denied you access to any records.

Open Meetings Act complaint

You have also made allegations that the Village has not complied with the OMA. While many of your allegations do not invoke the provisions of the OMA, we have identified one portion of your March 15, 2016 complaint which does. You complain that a vote was taken on November 18, 2015 to approve an expenditure to purchase a used road grader, without a proper agenda item. The Village denies any Open Meetings Act improprieties.

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[3] The Village references "84-712(c)," however there is no such section and the statutory language quoted is found in Neb. Rev. Stat. § 84-712(3)(e).

On April 14, 2016 we received an additional complaint from you as to the OMA. You allege that the Village "never published" minutes of two meetings held in June 2014 and August 2013. While both of these allegations concern meetings which are outside the statute of limitations found in Neb. Rev. Stat. § 84-1414 (1), we will address them herein.

DISCUSSION

NPRS Petition

The NPRS 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. The burden of showing that a statutory exception applies to disclosure of particular records rests upon the custodian of those records. *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

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). 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 in the request. The custodian is also not required to interpret a public records request to determine what records are being requested.

Neb Rev. Stat. § 84-712 (4) specifies that

> [u]pon 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, an estimate of the expected cost of the copies and 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. The requester shall have ten business days to review the estimated costs, including any special service charge, and request the custodian to fulfill the original request, negotiate with the custodian to narrow or simplify the request, or withdraw the request. If the requester does not respond to the custodian within ten business days, the custodian shall not proceed to fulfill the request. The four business days shall be computed by excluding the day the request is received, after which the designated period of time begins to run. Business day does not include a Saturday, a Sunday, or a day during which the offices of the custodian of the public records are closed.

The Village was under no obligation to respond to your initial verbal request for records, and only became responsible to respond once your written request for records was received. Both you and the Village reference that your request for records was dated May 18, 2015. The Village does not indicate that it received your request on a date other than May 18, 2015. Consequently, the Village was required to respond to your public records request in one of the ways found in Neb. Rev. Stat. § 84-712(4) within four business days, or no later than May 22, 2015. It responded on May 27, which was not within the four business days required by the NPRS. The Village states that "[a]ny non-response, or delay, was due to either the amount of time required to obtain the requested information or a lack of clarity as to what was being sought." However, neither of these reasons is a valid justification for failing to meet the four business day deadline. The NPRS provides a public body with a method for informing the requestor of any delay in providing the responsive records or that clarification is needed; that notification must be provided within four business days. The Village failed to meet the requirement under the NPRS to respond to your written public records request within four business days. We will remind the Village that all future responses to requests for public records must be provided within the timeframe set forth in the NPRS.

Request for NPPD billing information

Your first request was for "electrical billing information" from NPPD as to the Midwest Renewable Energy Ethanol Plant. The Village stated that it would provide you with the information you requested. However, your request included the years 2000-2001, which does not appear to have been provided. The billing records given to you were provided by NPPD to the Village, which then gave you a copy. As the records sought are billing records from NPPD, the appropriate custodian of the records may be NPPD, rather than the Village.[4] However, the Village stated in its May 27, 2015 letter that it "has a duty and will provide information related [to] payment received by the Village" under your request. If the Village maintains this information, it should provide it to you, as it indicated that it would. Given the age of the information sought, it is possible that such billing records no longer exist. If this is the case, and the Village does not have the records requested for this, or any other reason, it must explain to you under the provisions of Neb. Rev. Stat. §§ 84-712(4) and 84-712.03 why the records cannot be provided. As we trust the Village to undertake this in good faith and provide further information to you regarding the 2000-2001 electrical billing records, we will take no further action as to this portion of your complaint.

Request for TIF tax settlement records

Your second request was for "[c]ounty TIF tax settlement records pertaining to the Village and Midwest Renewable Energy Ethanol Plant" for 2008-2013, inclusive. The Village responded by advising you that Lincoln County is the custodian of the records you seek and that your request should be directed to the county, rather than the Village. We agree. Records related to county TIF records are "of or belonging to" the county. Your request should be directed to the appropriate county official for access to these records.

Your petition indicates that the Village "won't tell [you]" what happened to the TIF funds. As noted above, the Village is not required to answer questions made under the guise of a public record request. There is no violation of the NPRS with respect to this portion of your complaint.

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[4] The NPRS require that records "of or belonging to" a public body be disclosed, unless they fall within certain categories of documents found in Neb. Rev. Stat. 84-712.05, which in the discretion of the public body may be withheld. Only the custodian of documents is obligated under the NPRS to provide access to documents. The phrase "of or belonging to" is to be construed liberally; any documents a public body is entitled to possess falls within this definition. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

Request for correspondence

Your third request was for written correspondence between the Village and Midwest Renewable Energy relating to back taxes owed. The Village responded by stating that the CRA "has a duty to provide you a copy of the adopted letter approved by the Village CRA" and, as to the remainder, invoked the attorney client and work product privileges, citing Neb. Rev. Stat. § 84-712.05.

Neb. Rev. Stat. § 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. In particular, as relevant here, § 84-712.05(4) provides:

> 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.

The Village has withheld the documents you requested as records which are a confidential communication as defined in section 27-503. Neb. Rev. Stat. § 27-503 (2008) codifies the "attorney-client privilege" and sets forth the following:

> (1) As used in this rule:
>
> > (a) A client is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him;
> >
> > (b) A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation;
> >
> > ***
> >
> > (d) A communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

> (2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (a) between himself or his representative and his lawyer or his lawyer's representative, or (b) between his lawyer and the lawyer's representative, or (c) by him or his lawyer to a lawyer representing another in a matter of common interest, or (d) between representatives of the client or between the client and a representative of the client, or (e) between lawyers representing the client.
>
> (3) The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

The relationship between the Village of Sutherland and its attorney fits squarely in the definition of lawyer and client, and an opinion from the attorney to the client may be held in confidence. The client in this case is the Village of Sutherland itself, and not its citizens, as you suggest. The payment of an attorney through the funds of a public body does not create an attorney-client relationship between individual citizens and the attorney. That relationship is between the Village and its attorney. The attorney-client relationship also continues should a particular attorney no longer serve as Village Attorney; dissolution of the attorney-client relationship does not terminate the continued existence of the privilege between attorney and client or the protection of any attorney work product. The Village has claimed the attorney-client and attorney work product privileges on the documents you seek concerning financial settlements and back taxes owed by Midwest Renewable Energy. As Midwest Renewable Energy is not the client of the Village attorney, and is an outside third party, we fail to see how the attorney-client privilege and the work product privilege apply to these documents. We do not believe the Village properly invoked the provisions of Neb. Rev. Stat. § 84-712.05(4) in withholding these documents. Unless the Village can properly withhold these documents under another provision of the NPRS, we believe it must provide you copies of the correspondence you have requested. Additionally, your April 14, 2016 complaint alleges that you never received a copy of the "adopted letter" as the Village stated it would provide you. We would instruct the Village to supply this to you when it provides you the other documents related to this request. As we trust the Village to undertake this in good faith, we will take no further action on this portion of your complaint.

Additionally, while you have not taken issue with the form of the Village's response, we will take this opportunity to remind the Village of an important requirement imposed upon every public body by the NPRS when a public records request is denied. When a public body denies a request for records, it must provide a description of all records withheld. Neb. Rev. Stat. § 84-712.04 (2014) governs denials of public records requests and provides:

> (1) Any person denied any rights granted by sections 84-712 to 84-712.03 shall receive in written form from the public body which denied the request for records at least the following information:
>
> > (a) A description of the contents of the records withheld and a statement of the specific reasons for the denial, correlating specific portions of the records to specific reasons for the denial, including citations to the particular statute and subsection thereof expressly providing the exception under section 84-712.01 relied on as authority for the denial;
> >
> > (b) The name of the public official or employee responsible for the decision to deny the request; and
> >
> > (c) Notification to the requester of any administrative or judicial right of review under section 84-712.03.
>
> (2) Each public body shall maintain a file of all letters of denial of requests for records. This file shall be made available to any person on request.

The Village's denial of your third request does not comply with Neb. Rev. Stat. § 84-712.04(1)(a). The public body is required in its response to include information in a denial letter as to the description of the contents of the records withheld. We do not see any such description in the Village's May 27, 2015 letter to you. Nor does the Village provide a specific section of Neb. Rev. Stat. § 84-712.05 upon which it relied in withholding records, or the name of the person responsible for the denial and the notification of your right to review. We will remind the Village that all denial letters must comply fully with Neb. Rev. Stat. § 84-712.04.

Open Meetings Act Complaints

Your first Open Meetings Act complaint is that the Village voted to purchase a road grader at its November 18, 2015 meeting without a proper agenda item indicating that this topic would be discussed and voted upon. However, the agenda of this meeting, as provided by you, clearly indicates an agenda item under "Other New Business" of "Grader

Purchase." Your notes on this agenda state that there was "no mention anywhere [in] past year of repairs or purchase needed." Whether the Village previously discussed the repair, or disrepair, of its road grader in past open meetings is immaterial as to whether it took a proper vote on the purchase of the grader on November 18, 2015. We conclude that the item was properly on the agenda for this meeting. The minutes indicate that the Village Board of Trustees discussed and voted on this agenda item during this meeting. While your complaint contains allegations that the Village did not vote to advertise for bids for the road grader during an open meeting, the issue of whether bids should have been taken and evaluated for this purchase is outside our purview. We find no violation of the Open Meetings Act related to this portion of your complaint.

Finally, your April 14, 2016 letter states that the Village did not publish minutes from two meetings, one on June 11, 2014 and the other on6 August 28, 2013. The statute of limitations relating to OMA allegations is, at most, one year. See Neb. Rev. Stat. § 84-1414(1). Both of these meetings are outside the statute of limitations. However, there is no basis for your OMA complaint related to the "publication" of minutes. A public body is not required by the OMA to publish its minutes. It is required only to prepare and have its minutes "available" within ten working days. The Village is also allowed an additional ten working days if the employee responsible for writing the minutes is absent due to a serious illness or emergency. Neb. Rev. Stat. § 84-1413(5). The Village is not in violation of the OMA for not publishing the minutes from these two meetings.

CONCLUSION

For the reasons stated above, we believe the Village of Sutherland has not violated the Open Meetings Act, but has improperly denied access to certain records requested by you. We will direct the Village, through a copy of this letter to the Village Attorney, to provide you with the records we believe to have been improperly withheld, as described herein, at its earliest convenience. We trust the Village will undertake this in good faith, thus, no further action will be taken by this office with respect to this complaint at this time. Accordingly, we are closing this 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 Statutes and the Open Meetings Act.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

Natalee J. Hart
Assistant Attorney General

cc: Rory J. Roundtree

02-623-29