



STATE OF NEBRASKA
Office of the Attorney General

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MIKE HILGERS
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October 28, 2024

Via email to [REDACTED]

Erin E. Busch

Baird Holm
[REDACTED]

RE: *Public Records Matter Involving Knox County Officials*
File No. 20241196

Dear Ms. Busch:

This letter is in response to the public records petition you filed with this office on October 11, 2024. You have requested our assistance with respect to a public records request you submitted to various Knox County officials on August 2, 2024. We forwarded your petition to Knox County Attorney John Thomas and Special Knox County Attorney David D. Begley¹ on October 16, 2024, and requested a response. The responses we received from Mr. Thomas and Mr. Begley are summarized below. We considered your petition under the provisions of the Nebraska Public Records Statutes (NPRS), Neb. Rev. Stat. §§ 84-712 to 84-712.09 (2014, Cum. Supp. 2022), amended 2024 Neb. Laws LB 43 and LB 1204. Our conclusions are set out below.

RELEVANT FACTS

On August 2, you submitted a public records request to Mr. Thomas, the Knox County Clerk, Joann Fischer, and members of the Knox County Board of Supervisors (Board) and the Knox County Planning Commission (Commission). You requested the following records for the time frame January 1, 2023 to the present:

¹ Mr. Begley was hired by the Knox County Board to represent county officials in *North Fork Wind, LLC et al. v. Knox County, Nebraska et al.*, 4:24CV03150 (D. Neb.). Your firm filed the lawsuit on behalf of the plaintiff, North Fork Wind, LLC, on August 23, 2024.

1. Any and all documents and records related to the Knox County Board of Supervisors' consideration and adoption of revisions to wind energy zoning regulations, including but not limited to the Knox County Zoning Resolution adopted November 15, 2023, and the amendments adopted at the July 24, 2024 Board of Supervisors Meeting.
2. Any and all documents and records related to the proposed revisions to wind energy zoning regulations considered by the Knox County Planning Commission, including but not limited to the agenda and minutes for any meeting when such proposed revisions were considered, including but not limited to the Knox County Zoning Resolution adopted November 15, 2023, and the amendments considered at the May 14, 2024, and June 11, 2024 Planning Commission Meetings.
3. Any and all written correspondence, including letters, emails, and text messages, sent to or from any member of the Knox County Board of Supervisors, member of the Knox County Planning Commission, or staff of Knox County regarding proposed changes to wind energy zoning regulations or the Knox County Board of Supervisors' consideration and adoption of revisions to wind energy zoning regulations.
4. Any and all documents, records, and correspondence including letters, emails, and text messages, sent to or from any member of the Knox County Board of Supervisors, member of the Knox County Planning Commission, or staff of Knox County regarding wind energy zoning regulations, the Knox County Zoning Resolution adopted November 15, 2023, the July 24, 2024 Board of Supervisors Meeting, or the amendments considered at the May 14, 2024, and June 11, 2024 Planning Commission Meetings, including but not limited to the agenda and a copy of the minutes from such meetings.

Mr. Thomas mailed you three thumb drives of responsive records on or about August 16 and September 13. You indicate that you did not receive the second production until after you had written to Mr. Thomas on September 17, requesting

clarification regarding whether a search had been conducted for text messages responsive to the public records request and a repeated request for Knox County to provide any text messages responsive to the request. I also asked Knox County for confirmation for all identified individuals who did not provide text messages responsive to the request, that a search was conducted and no responsive text messages found.

Your September 17 letter also requested that Mr. Thomas provide a supplemental response in compliance with Neb. Rev. Stat. § 84-712.04.

By letter dated September 23, 2024, Mr. Thomas deferred the matter to Mr. Begley as counsel for Knox County in the *North Fork Wind* litigation, asserting that your letter “may be considered a discovery request.” Petition at 3. In a letter dated September 24, 2024, Mr. Begley concurred with Mr. Thomas’ assertion and asked you to agree to hold the matter in abeyance until the time that discovery could proceed in the litigation.

You have requested this office to issue a disposition letter directing Knox County to (1) “search for and produce any other public records, including but not limited to text messages or emails within personal email accounts, that are responsive to the request and to identify any individuals whose text messages and emails were searched, but no responsive text messages or emails found” and (2) “issue a response that complies with Neb. Rev. Stat. § 84-712.04.”

THE COUNTY’S RESPONSES

Mr. Thomas responded by letter dated October 17, 2024, stating that you and your firm were “using information requests as substitute for discovery” in the *North Fork Wind* litigation. On October 23, we sent Mr. Thomas another letter, explaining that

absent a specific exception,² a public body is not exempt from complying with the public records law when there is pending litigation involving the parties. There is certainly no such authority in Nebraska. Moreover, the Nebraska Supreme Court has indicated that “[t]he public records statutes apply ‘equally to all persons without regard to the purpose for which the information is sought.’ As a general rule, citizens are not required to explain why they seek public information.” *BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 801, 943 N.W.2d 231, 247 (2020). Thus, the pending litigation provides no basis for noncompliance with the Nebraska Public Records Statutes (NPRS), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2022), amended 2024 Neb. Laws LB 43 and LB 1204.

Accordingly, we asked Mr. Thomas to “confirm whether responsive records were withheld.” And in the event records were withheld, he was to provide you the information required in Neb. Rev. Stat. § 84-712.04(1), i.e.:

- (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;

² See, e.g., MICH. COMP. LAWS ANN. § 15.243(1)(v) (West 2023) (Public bodies may exempt from disclosure “[r]ecords or information relating to a civil action in which the requesting party and the public body are parties.”).

- (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.

We requested Mr. Thomas to provide you this information, with a copy to this office, no later than the close of business on October 25, 2024. Our letter also pointed out a statement he made in an August 3, 2024, email to Baird Holm legal assistant T. Smith that “I do have at least two attorney client letters that may be privileged.” On October 25, we received an email from Mr. Thomas’ legal assistant, on behalf of Mr. Thomas, “confirm[ing] that all texts were sent on previous thumb drives.” Earlier today, we wrote again to Mr. Thomas inquiring whether he provided you a response that complied with § 84-712.04. He indicated that “we actually fully complied prior to [your submitting the petition] so there is nothing more to produce or to respond to.”

Mr. Begley contacted the undersigned by telephone on October 22 to discuss your petition. He agreed to contact members of the Board and Commission to obtain written assurances that all responsive records were produced, including text messages. Mr. Begley forwarded the emails he received to the undersigned on October 22, 24 and 25. As of today’s date, all members responded except Keith Nielsen³ and Doug DeShazer. We understand that Mr. Begley does not represent Board member Mackeprang. Mr. Begley further represents that Jim Kotrous does not have a cell phone. All of the officials responded affirmatively to the following statement: “I have diligently searched my phone and no text messages were withheld by me as part of my response to Knox County Attorney John Thomas.”

ACTION BY THE ATTORNEY GENERAL

Under our enforcement authority set forth in 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 that is custodian of such record has otherwise failed to comply with such sections” With respect to the text messages, we are generally satisfied with the actions taken by Mr. Begley to obtain written assurances from the officials involved. We will request that he follow up with Mr. DeShazer to obtain his assurance as to the completeness of his search, and provide that information to you no later than the close of business on November 1. We note further that Mr. Thomas confirmed, via an email to you from his legal assistant, that all text messages were produced. We will request that Mr. Thomas undertake obtaining a written assurance from Mr. Mackeprang regarding his search for records, and provide this information to you no later than November 1 as well.

³ Mr. Nielsen’s email to Ms. Fischer stating that he has “no emails, notes taken or text messages about the proposed wind farm” is attached to your petition as Exhibit E. In our view, no further assurance from Mr. Nielsen is necessary.


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However, despite our requests, Mr. Thomas has not indicated whether any records were withheld in the course of his records production. His August 3 email indicates that he had at least two letters that were attorney-client communications and may be privileged. As you know, Neb. Rev. Stat. § 84-712.05(4), pertaining to attorney-client communications and attorney work product, would provide a statutory basis to withhold those letters. If, as it appears, Mr. Thomas did not disclose these two letters in reliance on § 84-712.05(4), he did not do so in a manner which complied with § 84-712.04. We will remind him that if he denies access to responsive records in the future, compliance with § 84-712.04 is mandatory. Finally, we will remind Mr. Thomas again that § 84-712 does not require any person seeking access to public records to provide the reason for his or her request. See *State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993).

If you disagree with our actions taken regarding this file, you may wish to consider the other remedies available to you under the NPRS.

Sincerely,

MIKE HILGERS
Attorney General



Leslie S. Donley
Assistant Attorney General

c: John Thomas (via email only)
David D. Begley (via email only)

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