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June 7, 2010

H. Diane Freitas
[redacted]

RE: *File No. 10-M-104; Clay Center Public Schools Board of Education and South Central Nebraska Unified School District #5 Board of Education; H. Diane Freitas, Complainant*

Dear Ms. Freitas:

This disposition letter is in response to your complaint received by us on January 21, 2010, in which you have requested that this office investigate alleged violations of the Nebraska Open Meetings Act (hereinafter, the "Act"), Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2008; Supp. 2009), by the Clay Center Public Schools Board of Education ("Clay Center") and the South Central Nebraska United School District #5 Board of Education ("South Central"). As is our normal practice with such complaints, we forwarded a copy of your complaint to the public bodies which are the subjects of the complaint. In this case, we forwarded your complaint to attorney Kelley Baker, of the Harding & Shultz law firm, whom we understood to be counsel for both boards. We were subsequently advised that Rex R. Schultze of the Perry Guthery law firm would respond on behalf of Clay Center. We received responses from the boards in February 2010. We have now had an opportunity to review your complaint and the boards' responses in detail. Our conclusion and future action in this matter are set forth below.

FACTS

Our understanding of this case is based upon your complaint and the responses we received from Mr. Baker and Mr. Schultze.

You indicate that you attended an advertised joint meeting of the two boards, which was held on January 12, 2010. There were about 40 people in attendance. You state that before the meeting was convened, the boards went into "Executive Session"

for approximately 10 minutes. Following the executive session, the boards then convened the scheduled meeting and announced that there would be no public comment at this meeting. You state:

> When prodded by a board member to explain to the citizens present, they had their legal counsel state the justification as "that their [sic] had been ample opportunity for public comment on the agenda items at previous meetings" and that this action of suspending public comment, at what I consider at the last minute, was not a violation of the Nebraska Open Meetings Act.

According to Mr. Baker, each board called its meeting to order before voting on whether to go into closed session to receive legal advice from their counsel. Each board then met separately in closed session for about ten minutes before reconvening in open session. Mr. Baker informs us that the closed sessions were called to discuss a settlement agreement concerning the employment termination of the Clay Center superintendent at the end of the 2009-2010 contract year. Mr. Baker further advises that the reduction of the superintendent position was a consequence of decisions made by both boards to reorganize (i.e., Clay Center to merge with Sandy Creek Public Schools (a member of South Central)). Mr. Baker states that

> [t]he merger of Sandy Creek and Clay Center, and to a lesser extent, Clay Center's joining the unification, had been the subject of vigorous, animated discussions at several board meetings. In fact, the Clay Center Board had held a meeting with its patrons on this subject on January 10th, merely two days before the board meeting in question. The proposed merger and personnel issues had been discussed, with input from the public, at several joint board meetings, the most recent of which were held on December 9 and December 28, 2009.

With respect to the December 28, 2009, meeting, Mr. Baker indicates that the South Central Board "engaged in a dialogue" with the Clay Center Board and patrons of both districts regarding the Clay Center superintendent's employment. As a result, the South Central Board concluded that it would not have a public comment session at the January 12 meeting.

Mr. Schultze advises us that there were two meetings held on January 12, 2010—the joint meeting of the two boards at 5:00 p.m. and a meeting of the Clay Center Board at 7:00 p.m. He indicates that the 5:00 p.m. meeting was a special meeting to discuss personnel matters related to the merger between Clay Center and Sandy Creek. Mr. Schultze indicates that the Clay Center Board held a "special community information meeting" on January 10, 2010, to allow the public to comment

on the merger and related personnel matters. Mr. Schultze informs us that you attended this meeting and addressed the board. Mr. Schultze points out that the January 10 meeting was held after the agenda for the January 12, 2010, meeting had been prepared. He indicates that the Clay Center Board did provide for public comment at the 7:00 p.m. regular meeting held on January 12.

Finally, Mr. Baker indicates that you were upset by the boards' decision not to have a public comment session at the January 12 joint meeting. According to Mr. Baker: "Ms. Freitas was incensed by this decision and yelled at both boards, accusing them of un-American and undemocratic behavior."

In your complaint, you request that we provide you a written response "as to the place of public comment in public meetings in accordance with the Nebraska Open Meetings Act." You conclude by stating:

> I don't believe the intent of the "Nebraska Open Meetings Act" was to limit "Freedom of Speech" but strict legal interpretation has indeed created this exact scenario. Public debate and discourse is a cornerstone of American Democracy and to see it denied is frightening.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The statutory provisions relating to the public's right to speak at public meetings are found at Neb. Rev. Stat. § 84-1412 of the Open Meetings Act. Those particular provisions provide:

> (1) Subject to the Open Meetings Act, the public has the right to attend and the right to speak at meetings of public bodies . . . .
>
> (2) It shall not be a violation of subsection (1) of this section for any public body to make and enforce reasonable rules and regulations regarding the conduct of persons attending, speaking at, videotaping, televising, photographing, broadcasting, or recording its meetings. **A body may not**

> **be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings.**
>
> (3) No public body shall require members of the public to identify themselves as a condition for admission to the meeting nor shall such body require that the name of any member of the public be placed on the agenda prior to such meeting in order to speak about items on the agenda. The body may require any member of the public desiring to address the body to identify himself or herself.

(Emphasis added.)

ANALYSIS

Our enforcement authority under § 84-1414 of the Open Meetings Act requires us to determine whether the public body (or bodies) involved have violated the provisions of the Act. Here, however, it appears that you have conceded that the two school boards were merely acting in compliance with state law when they decided to forgo public comment at the joint meeting on January 12, 2010. Rather, your complaint focuses on whether certain provisions of the Open Meetings Act somehow infringe on your constitutional right of free speech. Since we believe a response to your constitutional inquiry will validate Nebraska's public meetings law, and the actions of the school boards taken on January 12, we will briefly address your issue.

A Florida case, *Rowe v. City of Cocoa, Florida*, 358 F3d 800 (11th Cir. 2004), is helpful in illustrating how the right to free speech, in the context of an public meeting of a governmental body, is not absolute. In *Rowe*, the Eleventh Circuit Court of Appeals affirmed the decision of the trial court which found that the city's residency requirement for speaking during city council meetings did not violate an individual's First Amendment rights to freedom of speech and expression and his Fourteenth Amendment right to equal protection. Rowe was a non-resident of the City of Cocoa who frequently attended the city council meetings, "speaking several times on matters of general interest and public concern." *Id.* at 802. However, at two particular meetings, the mayor invoked the residency rule, limiting Rowe's comments during the public comment period to matters appearing on the city council's agenda. In concluding that the residency requirement did not violate the aforementioned constitutional provisions, the court stated:

> The City Council's Rules of Procedure do not, on their face, violate the First Amendment. "The freedom of expression protected by the First Amendment is not inviolate; the Supreme Court has established that the

> First Amendment does not guarantee persons the right to communicate their views 'at all times or in any manner that may be desired.'" *Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989) (quoting *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647, 69 L. Ed. 2d 298, 101 S. Ct. 2559 (1981)). This Court has held in *Jones* that a city commission meeting is one forum where speech may be restricted "to specified subject matter." *Jones*, 888 F.2d at 1332 (quoting *City of Madison, Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176 n.8, 50 L. Ed. 2d 376, 97 S. Ct. 421 (1976)). Stated differently, city commission meetings are "limited" public fora — i.e., "a forum for certain groups of speakers or for the discussion of certain subjects." *Crowder v. Housing Auth. of City of Atlanta*, 990 F.2d 586, 591 (11th Cir. 1993) (citing *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 46 n.7, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983)). As such, "the government may restrict access to limited public fora by content-neutral conditions for the time, place, and manner of access, all of which must be narrowly tailored to serve a significant government interest." *Id.* (citing *Perry*, 460 U.S. at 45-46).

Id. at 802-803. The Court then indicated that there was a significant government interest in having meetings of public bodies conducted in an orderly and efficient manner. *Id.* at 803. "As a limited public forum, a city council meeting is not open for endless public commentary speech but instead is simply a limited platform to discuss the topic at hand. The rules on their face simply do not impermissibly restrict speech." *Id.* at 803.

Moreover, it is well established that school boards are also "limited public fora." "A school board meeting, when open to the public, is a limited public forum for discussion of subjects relating to the operation of the schools. When a school board sits publicly to conduct public business and to hear the views of citizens it may not discriminate among speakers on the basis of the content of their speech, although it may confine its meeting to specified subject matter." There may also be reasonable time, place and manner limitations so long as they are "content-neutral and narrowly tailored to serve a significant governmental interest." *Featherstone v. Columbus City School, District Board of Education*, 92 Fed. Appx. 279; 2004 U.S. App. LEXIS 4929 at 282 (6th Cir. Mar. 12, 2004) (citations omitted).

Accordingly, the Nebraska Legislature has enacted a number of time, place and manner restrictions in the Open Meetings Act. The Legislature has also seen fit to give the public bodies subject to the Act the authority "to make and enforce reasonable rules and regulations regarding the conduct of persons attending, speaking at, videotaping, televising, photographing, broadcasting, or recording its meetings." § 84-1412(2). In

this context, the right to address a public body is conveyed to members of the public through a public comment period or through whatever other means the body chooses to allow public comment. This right is not absolute so long as the public body gives citizens the opportunity to speak at some of its meetings. Further, if and when public comment will be part of a meeting is at the discretion of the public body.

In the present case, the school boards represented to us that public comment periods were included in several meetings leading up to the meeting at issue. For example, the boards met and publicly discussed the proposed merger and related personnel issues during two joint sessions held on December 9 and December 28, 2009. Clay Center held a meeting on January 10, 2010, during which you were allowed to address the board. On January 12, the boards decided that another public comment session was not warranted. Consequently, we find the boards' actions acceptable in light of the statutory language in § 84-1412(2), which only requires that a public body set aside *some* time at *some* of its meetings for public comment. Under the circumstances here, there was no violation of the Open Meetings Act.

CONCLUSION

In view of the foregoing, we believe that the Clay Center Public Schools Board of Education and South Central Nebraska Unified School District #5 Board of Education Lincoln Public Schools Board of Education did not violate the Open Meetings Act when the boards declined to hold a public comment period during the joint meeting on January 12, 2010. Since we have concluded that no violation occurred, we are closing this file. If you disagree with our analysis, you may wish to discuss these matters with your private attorney to determine what additional remedies, if any, are available to you under the Open Meetings Act.

Sincerely,

JON BRUNING
Attorney General

Leslie S. Donley
Assistant Attorney General

c: Kelley Baker
Rex R. Schultze