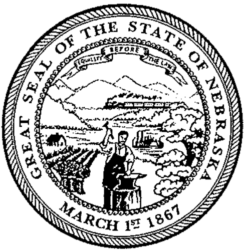

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January 26, 2011

Robert I. Blevens
Blevens & Damman
129 N. 5th St
Seward, NE 68434

Re: *File No. 10-M-122; City of Seward City Council; Robert Blevens*

Dear Mr. Blevens:

This letter is in response to your correspondence in which you requested that this office investigate alleged violations by the Seward City Council ("City") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2008, Supp. 2009). In accordance with our normal procedures, we requested a response from the City after we received your complaint, and we subsequently received a response from the City Attorney, Larry Brauer. We have now had an opportunity to review your allegations and the City's response in detail, and our conclusions are set out below.

FACTS

Our understanding of the facts in this case is based upon your correspondence, its supporting documentation, and the response from the City. We have identified the following Open Meetings Act allegations in your correspondence: (1) the agenda for the April 6, 2010 meeting was altered with the addition of a non-emergency item at the beginning of the meeting, (2) the agenda item relating to the May 4, 2010 closed session was not sufficiently descriptive, (3) the closed session of May 4, 2010 was improper, (4) the closed session of May 18, 2010 was improper, and (5) the City is overstepping the limitations of agenda items listed as "discussion items."

ANALYSIS

AGENDA

Neb. Rev. Stat. § 84-1411 (2009) provides the agenda requirements for purposes for the Open Meetings Act.

> (1) Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the principal office of the public body during normal business hours. Agenda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting. Except for items of an emergency nature, the agenda shall not be altered later than (a) twenty-four hours before the scheduled commencement of the meeting or (b) forty-eight hours before the scheduled commencement of a meeting of a city council or village board scheduled outside the corporate limits of the municipality. The public body shall have the right to modify the agenda to include items of an emergency nature only at such public meeting.

The purpose of the agenda requirement is to give some notice of the matters to be considered at the meeting so that persons who are interested will know which matters are under consideration. *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (2007); *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).

Alteration of Agenda at the Beginning of the April 6, 2010 meeting

Your complaint states that an agenda item entitled "Request for City Support on Expansion of Milford Landfill" was added at the beginning of the April 6, 2010 meeting by the Mayor. This item was not designated as an emergency item. Apparently, there was an oversight by the City in failing to include this item on the agenda, as a council member requested during the March 16, 2010 meeting that this item be discussed at the next meeting. The "Notice of Meeting" for April 6, 2010 (dated March 31, 2010), along with the minutes from the April 6, 2010 meeting you have enclosed in your complaint support your statements. We found an identical agenda on the City's website during our inquiry into this matter.

The agenda item in question was taken up at the April 6, 2010 meeting, with testimony and action by the city to authorize the Mayor to write a letter supporting the expansion of the Milford Landfill.

The item was again placed on the April 20, 2010 agenda and the motion to support the expansion of the landfill was readopted by the City. The Notice of Meeting and minutes for the April 20, 2010 meeting you have sent to us shows this to have taken place.

The City has responded, explaining that the public had been supplied with the correct version of the agenda, and only the City Council members' agenda was missing the agenda item, so the item was added to the agenda without declaring it an emergency. While the City does not believe they were in violation of the Open Meetings Act, the City does admit to being in violation of a local ordinance concerning meeting agendas. However, we will not evaluate whether the City violated its own ordinance by the late inclusion of this agenda item, as we have no supervisory authority over local ordinances.

Despite the City's assertion that the agenda that was available to the public more than 24 hours before the April 6, 2010 meeting listed the agenda item relating to the landfill expansion, the materials enclosed in your complaint, and found on the City's website, would suggest otherwise. You have supplied the March 31, 2010 version of the Notice of Meeting for April 6, 2010. The City's website contains an identical agenda for that meeting. The agenda item is not listed. The City has supplied no other version of this agenda which would indicate the agenda item was properly on the agenda more than 24 hours before the meeting. In addition, the minutes of the April 6, 2010 meeting make no mention of a difference between the City Council's version of the agenda and the public's version of the agenda. The minutes state "Mayor Glawatz explained that at the March 16, 2010 Council meeting, Councilmember Singleton had requested an agenda item to request City support on expansion of the Milford landfill. *This item was added as Agenda item No. 1aa.*" Minutes of April 6, 2010 meeting (emphasis added).

Therefore, we can make no other conclusion than that the agenda item "Request for City Support on Expansion of Milford Landfill" was improperly added to the City's agenda at the beginning of the April 6, 2010 meeting, in violation of Neb. Rev. Stat. § 84-1411 (1). We will remind the City, by a copy of this letter sent to the City Attorney, that the agenda for an open meeting may not be altered, except with items of an emergency nature, less than 24 hours before the meeting.

However, the City correctly states, and you acknowledge, that the City has cured its violation of the Open Meetings Act by its action at the April 20, 2010 meeting. Thus,

this situation does not warrant a lawsuit by this office to void the vote of April 6, 2010. *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).

"Sufficiently Descriptive"

You have also complained that the agenda for the May 4, 2010 City Council meeting lists an item, "to discuss the sale of park property on 7th Street." You also make a complaint related to the discussion of this item in closed session, which will be addressed herein, below. The description of "park property on 7th Street" has led to confusion, as the City was not referring to the main park located at 7th and Park Avenue, but a small strip of property one block south of this address on 7th Street.

The City has responded, admitting that the strip of property discussed at the May 4, 2010 meeting is not known to the public as park property, and that it understands how the agenda item in question may have caused confusion.

The Open Meetings Act requires agenda items to be "sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting." Neb. Rev. Stat. § 84-1411(1).

It seems clear that the agenda item "sale of park property on 7th Street" was not sufficiently descriptive to indicate the actual parcel of property the City would discuss. Therefore, we believe the City has violated the Open Meetings Act with respect to this May 4, 2010 agenda item. However, as the City has indicated that no further negotiation has taken place since the May 4, 2010 meeting, and that if the item is returned to an agenda in the future it will be better described, this office will take no further action regarding this issue at this time.

CLOSED SESSIONS

You also complain that the City has violated the Open Meetings Act in holding executive, or closed, sessions on May 4, 2010 and May 18, 2010.

Neb. Rev. Stat. §84-1410 (2009) addresses closed sessions.

> (1) Any public body may hold a closed session by the affirmative vote of a majority of its voting members if a closed session is clearly necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual and if such individual has not requested a public meeting. The subject matter and the reason necessitating the closed session shall be identified in the motion to close.

Closed sessions may be held for, but shall not be limited to, such reasons as:

(a) Strategy sessions with respect to collective bargaining, real estate purchases, pending litigation, or litigation which is imminent as evidenced by communication of a claim or threat of litigation to or by the public body;
(b) Discussion regarding deployment of security personnel or devices;
(c) Investigative proceedings regarding allegations of criminal misconduct; or
(d) Evaluation of the job performance of a person when necessary to prevent needless injury to the reputation of a person and if such person has not requested a public meeting.

Nothing in this section shall permit a closed meeting for discussion of the appointment or election of a new member to any public body.

May 4, 2010

You have alleged that the closed session of May 4, 2010 to "discuss the sale of park property on 7th Street" was improper, as not only was the motion lacking the indication of why the executive session was necessary to either protect the public interest or to prevent needless injury to someone's reputation, but that the topic discussed in closed session was improper.

"Any public body may hold a closed session by the affirmative vote of a majority of its voting members *if a closed session is clearly necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual and if such individual has not requested a public meeting. The subject matter and the reason necessitating the closed session shall be identified in the motion to close.*" Neb. Rev. Stat. § 84-1410(1) (emphasis added).

In its motion for closed session, the City failed to identify the reason for the closed session and why it was necessary either to protect the public interest or prevent needless injury to a person's reputation. The motion for closed session was deficient in that respect and violated the Open Meetings Act. The City is required by the Open Meetings Act to consider whether a closed session is "clearly necessary." We question whether the closed session here was "clearly necessary" and what the City believes the "public interest" to be that warranted a closed session for what appears to be a general discussion as to the interest of the City in selling piece of property.

You also claim that the reason for the closed session, the sale of park property on 7th Street, was an improper topic of discussion, as it is not specifically set out in Neb. Rev. Stat. § 84-1410 as proper for a closed session. The City denies this allegation, and states it had received an offer to purchase the property in question and went into closed session to discuss that offer.

Neb. Rev. Stat. § 84-1410(1) provides that "Closed sessions may be held for, but shall not be limited to, such reasons as: strategy sessions with respect to collective bargaining, real estate purchases . . ." While this is not an exhaustive list of reasons acceptable for closed sessions, it certainly provides guidance as to what the Legislature deemed appropriate. The term "strategy sessions" and the list following suggest that the reasons for a closed session are to be based upon financial considerations or negotiations. A closed session would be appropriate if the City were in active negotiations or were meeting to discuss the price for the sale of park property. However, a closed session is not appropriate when a public body merely wishes to have a general discussion of the policy or merits of buying or selling a piece of property.

While it is not entirely clear from the agenda and minutes what exactly the City discussed while in closed session, the minutes do not indicate the closed session was limited only to discussion surrounding the financial component of selling the property. Based upon the limited information in the minutes of the May 4, 2010 meeting, we agree that the City's closed session to discuss, in general, the sale of park property, was improper.

We also do not believed that a public body may go into closed session any time there is a discussion of "land transactions." A closed session must be clearly necessary to serve the public interest, which in this case, would be the economic concerns surrounding the potential sale of park property. The "public interest" is in the public body ensuring it enters into the most economically advantageous contract, not merely whether the city should investigate or continue to negotiate the sale of property. We would caution the City on its use of closed sessions for anything related to land transactions, and limit them to discussions necessary for the negotiation process.

There was apparently some discussion as to whether the agenda item in question was an appropriate topic for a closed session amongst the members of the City Council and the City Attorney during this meeting. We would remind that City that "If a public body is uncertain about the type of session to be conducted, open or closed, bear in mind the policy of openness promoted by the Public Meetings Laws and opt for a meeting in the presence of the public." *Grein v. Bd. Of Education of the School District of Fremont*, 216 Neb. 158, 168, 343 N.W.2d 718, 724 (1984).

Therefore, we believe the City violated the Open Meetings Act by going into closed session to generally discuss an offer that had been made on a piece of property owned by the City. However, as the City has informed us that no further negotiations have taken place, this office will take no other action on this violation. We would encourage the City to reauthorize the City Attorney, in open session, to continue negotiations, should it appear that either the City or the potential purchaser wishes to participate in further negotiations.

We do not agree with your allegation that this was somehow a "secret meeting," despite the discussion earlier that the agenda item was not sufficiently descriptive.

May 18, 2010

Your complaint as to the closed session on May 18, 2010 is much the same as that relating to the May 4, 2010 closed session, and the same analysis applies here. You allege that the agenda item "Executive Session - Twin Oaks Utilities, Inc. – Discussion of offer to sell water & sewer system to City" was improper for a closed session and that the City did not properly move to enter into executive session, as the reasons for the closed session, the "public interest," was not specified. We again conclude that the City violated the Open Meetings Act by failing to indicate in the motion the reasons for the closed session. The City must be able to articulate what public interest is being served by the closed session. If it cannot, the topic should be discussed in open session instead.

As with the May 4, 2010 closed session, we conclude that the City's actions were improper under the Open Meetings Act in the topic of discussion it undertook during that closed session. Again, it does not appear that the discussions were limited to negotiation by the City of the price to potentially be paid for the utility system. The minutes indicate this was a more general discussion of the potential purchase of the utility and whether the City was interested. The City still has the opportunity to cure this violation of the Open Meetings Act, and we would strongly encourage the City to do so at its next regular meeting. See *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281.

"DISCUSSION ITEMS"

You also complain, in several instances, that the City is overstepping agenda items listed as "discussion items" by taking formal action on these matters. However, the Open Meetings Act does not distinguish between discussion or action items, or provide for limitations on items listed as "discussion items." It certainly seems reasonable that if an item is listed on the agenda for a public body's open meeting, the public body may take some sort of action on that item. The Open Meetings Act does

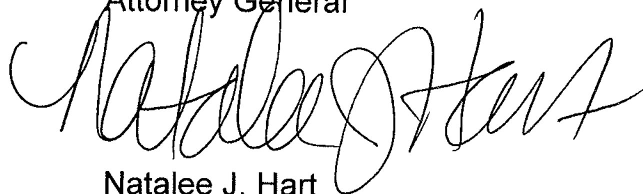
not limit the public body to taking action only on certain agenda items, depending how they are classified. Therefore, there is no violation of the Open Meetings Act with respect to this portion of your complaint.

CONCLUSION

If you disagree with the analysis we have set out above, you may wish to review the provisions of the Open Meetings Act to determine what additional remedies, if any, are available to you under those statutes.

Sincerely,

JON BRUNING
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Larry Brauer, City Attorney

02-186-30