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May 21, 2012

Robert Harms
[redacted]

Re: *File No. 11-M-145; City of Tekamah Mayor/City Council; Complainant Robert Harms*

Dear Mr. Harms:

This letter is in response to your correspondence in which you requested that this office investigate alleged violations by the City of Tekamah Mayor and City Council ("City") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2008, Cum. Supp. 2010, Supp. 2011). 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 Jeff Miller on behalf of the City. 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 understand your complaint to be that the City of Tekamah Mayor and City Council have denied your right to speak at meetings of the Council. You believe you have a right to be placed on the agenda of the City Council and speak on a topic of your choosing, without limitation from the City. For the following reasons, we do not agree with your interpretation of the Open Meetings Act.

ANALYSIS

You have alleged that you were denied your right to address the City Council on October 26, 2011 and November 10, 2011. Your letter states that on October 26 (the City clarifies that the meeting was actually October 27), you were on the agenda to speak at the meeting, but that you were interrupted and not permitted to finish. According to you, this was done to "suppress information regarding the Mayors (sic) activities." What those activities are, or why they would need suppression, you do not explain. You state that unnamed "city officials" told you that you had a right to speak and that the Mayor was wrong to interrupt you.

You also allege that you asked to be placed on the agenda for the November 10 meeting, but that they Mayor "abruptly verbally changed the schedule policy" and would not permit you to be placed on the agenda.

The City explains that until December 2011, they had a policy for citizens to request that they be placed on the agenda for City Council meetings. In order to be scheduled under the agenda item "Scheduled Citizens and Visitors To Address The Council," the consent of the Mayor or a Councilman had to be given. You were added to the agenda for the October meeting by the City Clerk. However, this was done without the consent of the Mayor or a Councilman because you requested to be on the agenda at 4:00 p.m. the day before the City Council meeting and she could not reach anyone for the necessary approval. Although you were on the agenda, your topic of comment was not, as the City states that you refused to provide the Clerk with the subject matter on which you wished to speak. The following month, you were not placed on the agenda, as you did not receive the necessary permission, and based upon the City's policy, the City Clerk did not have the authority to add you to the agenda for the November 10 meeting without the requisite consent.

In order to assist our inquiry, the City provided background information regarding your ongoing dispute with a neighbor about a fence, and the efforts of the City to have that fence removed via a lawsuit. It is our understanding from the City that on October 27 and November 10 you wished to discuss this fence dispute. As the matter was in litigation, the City felt it was inappropriate for this issue to be discussed in an open forum. Additionally, on October 27, as you had not provided the Clerk with the topic of your comments, and notice had not been given that you were to speak on the pending litigation, you were interrupted by a fellow member of the public who objected to your speaking on litigation in which she was involved. It was not the Mayor or a member of the City Council who interrupted your presentation, but the Mayor did agree that this matter should not be discussed in open session.

The Open Meetings Act contains several provisions which deal with the public's right to speak at open meetings of public bodies, most of which are set out in the following portions of § 84-1412:

> (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, [or] speaking at . . . 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.*

Based upon § 84-1412 and other applicable authorities, our office has previously stated that public bodies in Nebraska generally operate as a form of representative democracy. *See Distinctive Printing and Packaging Company v.* Cox, 232 Neb. 846, 443 N.W.2d 566 (1989); *State ex rel. Strange v. School District of Nebraska* City, 150 Neb. 109, 33 N.W.2d 358 (1948). That is, Nebraska citizens elect individuals to represent them on various boards, commissions, etc., rather than having all who are present at a particular meeting of a public body act as members of that body. Therefore, when members of the public attend meetings of public bodies in Nebraska, they most often attend as observers, not members of the body itself, *and they have no right, apart from periods set aside for public comment, to engage in the body's debate, to question members of the body, to comment on particular decisions,* or to vote on the issues at hand. Those latter rights go to the members of the public body, who ran for and were elected to office. While any particular public body may certainly choose to allow citizens to participate in its meetings, citizens attending a meeting of a particular public body are not members of that body.

In addition, this office believes that the following apply to the ability of a member of the public to address a public body.

1. Under the portion of § 84-1412 (2) emphasized above, a public body must set aside *some time* at *some* of its meetings for members of the public to address it. Accordingly, there is no absolute right for members of the public to address a public body at any given meeting or on any given agenda item, so long as there is some time at some meetings set aside for public comment. Public bodies can rightfully refuse to allow public comment at a given meeting, or as they consider a particular agenda item.

2. Public bodies have the right to make *reasonable* rules for those members of the public who choose to address them. That includes reasonable limits on the use of time, rules as to the topics upon which a member of the public may comment, and the conduct of the persons addressing the public body.

3. Public bodies may not require that the name of any member of the public be placed on the agenda prior to a meeting in order for that person to speak about items on the agenda at that meeting. However, that statutory provision in § 84-1412 (3) does not appear to apply to discussion, by members of the public, of items *not already* on the agenda. Under the latter circumstances, where individuals wish to speak about items not already on the agenda, it appears that public bodies may require that those persons seek to be placed on the agenda prior to the meeting in which they wish to speak. Reasonable rules may be enforced by the public body as to how a member of the public may request to be on the agenda, and whether that request is approved.

4. Public bodies should set aside some time at some of their meetings for members of the public to address them on any topic whatsoever, so long as those comments are not obscene or threatening in any way. Public bodies should not use agenda access requirements to control limit the topics upon which citizens can address them.

5. Members of the public may not be required to identify themselves to gain entry to a meeting of a public body. However, they may be asked to identify themselves if they wish to speak to the public body.

The City is not required to allow members of the public to speak at a particular open meeting, or every open meeting, provided that the City allows the public to address the City Council at some meetings. You do not complain that you have never been allowed to address the City Council.

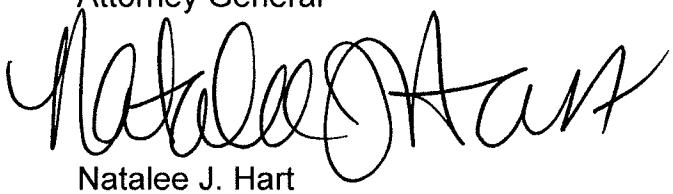
In addition, it is within the City's purview to make and enforce reasonable restrictions for public comment. The City has done so, and we are not of the opinion that any of their restrictions are unreasonable. It is for the City Council, and that public body alone, to determine what items are appropriate for the agenda of a given meeting. While the public may be permitted to be placed on an agenda for a meeting to address the City, at the City's discretion, they have not abused that discretion here. As your proposed agenda item concerned on-going litigation, it was not inappropriate for the City to decline your request to be placed on the November agenda or to discuss the dispute at the October open meeting, as it was not already on the agenda for discussion by the City Council. In addition, it was not the City that initially objected to your topic of comment on October 26, it was another member of the public who was directly involved in the litigation upon which you wanted to speak. Therefore, there is no violation of the Open Meetings Act related to your complaint.

CONCLUSION

For the reasons stated above, we do not find any violations of the Open Meetings Act by the City. 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 Open Meetings Act.

Sincerely,

JON BRUNING
Attorney General



Natalee J. Hart
Assistant Attorney General

Cc: Jeff Miller

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