



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

June 10, 2016

Chris Dunker
Lincoln Journal Star
926 P Street
Lincoln, NE 68508

RE: *File No. 16-M-114; University of Nebraska Board of Regents; Lincoln Journal Star, Chris Dunker, Complainant*

Dear Mr. Dunker:

This letter is in response to your correspondence received by us in which you requested that this office investigate alleged violations by the University of Nebraska Board of Regents (the "Board") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2014, Supp. 2015). In accordance with our normal procedures, we requested a response from the Board after we received your complaint, and we subsequently received a response from Erin Busch, Esq., Director of University Records. We have now had an opportunity to review your allegations and the Board'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, along with the response from the Board. We have identified your Open Meetings Act complaint to be that it appears to you that the Board has violated the Open Meetings Act in establishing and expressing unanimous support of 2016 Neb. Laws LB 1109 ("LB 1109"), without the vote of the full Board in a properly convened open meeting. LB 1109 amended Neb. Rev. Stat. § 84-712.05(15), a portion of Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09, to allow the University of Nebraska to identify a single priority candidate for president or chancellor of the University of Nebraska system. The bill was introduced in January 2016 by Senator Murante on behalf of Regent Howard Hawks. You believe a violation of the Open Meetings Act to have occurred as unanimous Board support of LB 1109 was communicated to the Nebraska Legislature by the testimony and letters in support of the bill by individual members of the Board of Regents. In February 2016, Regent Tim Clare expressed in the legislative committee hearing that he was testifying on behalf of

the Board, and that the bill had the unanimous support of the Board. However, the minutes of Board meetings reflect that no vote of the Board as to LB 1109 preceded Regent Clare's testimony. You state that Regent Clare has clarified that he came to the conclusion that the Board unanimously supported the bill through informal discussions with his fellow Board members via in-person and phone conversations. Also in February 2016, Regent Kent Schroeder expressed the Board's support of the bill via a letter addressed to the bill's sponsor, Senator Murante. You assert that if the Board wished to take a position on this bill, it should have done so only following a vote in an open session. The Board denies your allegations that any portions of the Open Meetings Act have been violated. Our conclusions are set forth below.

ANALYSIS

Your complaint is that the Board violated the Open Meetings Act by individual Board members expressing the unanimous support of the full Board as to LB 1109 without a vote of the full Board in an open session of a properly convened open meeting. As the minutes of Board meetings do not indicate that a vote was taken by the Board as to LB 1109, your complaint necessarily implies that you believe a meeting of the Board occurred in which unanimous support was given to LB 1109, but which was not held under the Open Meetings Act. Over time, our office has consistently taken the position that two things must occur for a public body to hold a meeting that is subject to the requirements of the Open Meetings Act. First, we have indicated that a quorum of a public body must be present to constitute a "meeting." Second, we believe that a meeting of a public body only occurs if that public body engages in some of the activities set out in the statutory definition of "meeting" found at Neb. Rev. Stat. § 84-1409(2), i.e., the public body must engage in "briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body." In our view, when both of these elements have been satisfied, a "meeting" of a public body has occurred under the Open Meetings Act.

It is our understanding that the Board is composed of eight voting members, and that a majority of the members constitute a quorum. In other words, a quorum is reached by the attendance of five Board members. We have no information or evidence, and you have not alleged that a quorum of the Board met and discussed LB 1109. Without a quorum present, no meeting subject to the Open Meetings Act occurred. While we understand that the individual Regents represented that they spoke on behalf of the entire Board, we have no evidence that anything more than individual discussions were had between Board members which lead to the conclusion that support for the bill was unanimous. We do not believe that the Board circumvented, or intended to circumvent, the Open Meetings Act by having these individual discussions. Members of a public body are permitted to speak to other individual members of that public body outside of an open meeting. A Board member reaching an independent

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conclusion that each of his fellow members of the Board supports a particular proposal does not violate the Open Meetings Act. While perhaps the Board members should not have represented to the Legislature that they spoke "on behalf of the Board," when the full Board had not held a public discussion regarding LB 1109, rather than on behalf of themselves as individual members of the Board, we do not believe there was a violation of, or any intent to violate, the Open Meetings Act in doing so.

Additionally, you cite to Neb. Rev. Stat. § 84-1410(2) in support of your complaint that the Board should have voted upon a resolution to voice unanimous support for LB 1109 before legislative testimony was given in support of the bill. The section of the Open Meetings act provides that "formal action shall mean a collective decision or a collective commitment or promise to make a decision on any question, motion, proposal, resolution, order, or ordinance or formation of a position or policy . . ." However, this particular provision applies only to the portion of the Open Meetings Act dealing with closed sessions, and not the entire Open Meetings Act. The provision applicable to your complaint is found in Neb. Rev. Stat. § 84-1414(1) which states that any "motion, resolution, rule, regulation, ordinance, or formal action of a public body made or taken in violation of the Open Meetings Act" is void or voidable. The Board here took no formal action as to LB 1109. Consequently, even if there had been a violation of the Open Meetings Act, there would be no action to void or be voidable.

CONCLUSION

For the reasons stated above, we do not believe that the Board has violated the Open Meetings Act. 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,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Erin Busch

02-631-29