

STATE OF NEBRASKA
Office of the Attorney General

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November 3, 2016

Scott Miller



RE: *File No. 16-MR-127; Village of McGrew Board of Trustees; Complainant,
Scott Miller*

Dear Mr. Miller:

This letter is in response to your complaint 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 (2014, Cum. Supp. 2016), and the Nebraska Public Records Statutes, (hereinafter the "NPRS"), Neb. Rev. Stat. §§ 84-712 to 84-712.09 (2014, Cum. Supp. 2016), by the Village of McGrew Board of Trustees ("Board"). As is our normal practice with such complaints, we forwarded copies of your complaint and its supporting documentation to the public body which is the subject of the complaint. As an initial matter, upon initial receipt of your complaint, we reviewed that portion related to the NPRS and determined that, as you had received all records requested by you as of the time of your complaint, that we would address both your Open Meeting and Public Records complaints at one time. We have received a response from the attorney for the Board, Mark Kovarik, and have now had an opportunity to review in detail your complaints, all of the accompanying documentation, and the Board's response. Our conclusions in this matter are set forth below.

FACTS

Our understanding of this matter is based upon your complaint and the response we received from the Board. You have made complaints about numerous meetings of the Board, each of which will be addressed in detail below. Your Open Meeting complaints can be summarized as being primarily related to the Board's reformation of a Board of Health for the Village of McGrew, the notices of meeting and the publication of notice, and whether certain agenda items were sufficiently descriptive to give the public notice of what business would be conducted at certain meetings.

We have identified the following Open Meetings Act complaints, which will each be addressed herein:

- (1) On May 12, 2016, the Board took action on several items not found on its agenda, including:
 - a. the creation of a Board of Health;
 - b. appointing members to the Board of Health, including members of the Board of Trustees and naming a member of the Board as "Marshall" (sic) of the Board of Health;
 - c. the announcement of a Board of Health meeting immediately following that of the Board of Trustees, and
 - d. discussion of the replacement of playground equipment.
- (2) On May 12, 2016, the newly appointed Board of Health held a meeting without previously publicized notice, under the guise of an "emergency meeting."
- (3) The agenda for the June 9, 2016 meeting of the Board of Trustees was amended less than 24 hours before the start of the meeting, as it was not actually posted at one of the designated locations until the morning of the meeting.
- (4) The Board of Health met on June 15, 2016 without a previously published agenda; and
- (5) In April and May 2016 the Board considered items not specifically on the published agenda for its meetings.

Your Public Records complaints relate primarily to the agenda and minutes of Board meetings and the accessibility thereto for members of the public. We have identified the following NPRS complaints in your petition:

- (1) Minutes of the meetings of the Board are not kept in hard copy at the Village offices, but electronically by the clerk on a laptop computer which may be located at her home.
- (2) Your public records requests of June 3, 2016 and June 9, 2016 were not fulfilled in their entirety within four business days of the written request.
- (3) Since 2014, the Board has "failed to keep written, certified (by signature of the Board of Trustees Chair) copies available for public inspection" of Board minutes, agendas, notices, and the like.

In your complaint, in addition to specific allegations related to the Act and the NPRS, you also make general allegations of Board meeting processes which you allege occur on a "monthly basis." These generalized allegations are not accompanied by dates on which they allegedly occurred, or supporting documentation. As we cannot investigate such vague complaints, we will not respond to these general allegations

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herein. Additionally, any allegations related to the Board which occurred more than one year prior to the date of your complaint are outside the statute of limitations for void or voidable actions of a public body found as found in Neb. Rev. Stat. § 84-1414.

We also note that your complaint asks us to review a Village ordinance. However, this office has no general supervisory authority over governmental subdivisions in Nebraska, including the Board. We have enforcement duties related to the Nebraska Open Meetings Act and the Nebraska Public Records Statutes, but do not have authority over Village ordinances. As such, we will not discuss this portion of your complaint.

ANALYSIS: OPEN MEETINGS ACT

Neb. Rev. Stat. § 84-1408 (2014) of the Nebraska Open Meetings Act provides:

It is hereby declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret.

Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies, except as otherwise provided by the Constitution of Nebraska, federal statutes, and the Open Meetings Act.

The primary purpose of the open meetings law is to ensure that public policy is formulated at open meetings. *Marks v. Judicial Nominating Comm.*, 236 Neb. 429, 461 N.W.2d 551 (1990). The Nebraska open meetings laws are a statutory commitment to openness in government. *Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002); *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984).

You have alleged a number of Open Meetings Act complaints related to the agendas and notices of meetings for meetings held by the Board of Trustees and the Board of Health in May and June 2016.

The Open Meetings Act requires a public body to give “reasonable advance publicized notice” of each of its meetings, which is to include either the agenda, or notice of where the agenda is available for public inspection. Neb. Rev. Stat. § 84-1411 (1) (2014). The agenda must be kept “continually current” and may not be altered, except for items of an emergency nature, within 24 hours of the meeting. *Id.* “Agenda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting.” *Id.*

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Board of Trustees Meetings

You have complained about the actions of the Board as to its May 12, 2016 and June 9, 2016 meetings. The allegations as to these two meetings are related. As to the May 12 meeting, you complain primarily about the creation and appointment of members to the Board of Health. Those appointments were discussed again at the June 9 meeting. You complain that any open meeting violations that occurred on May 12 were not cured because the June 9 meeting agenda was not properly amended and noticed.

On May 12, 2016, the Board met and took action on a number of topics related to the Village Board of Health. Under the agenda item "Property Zoning Issue – Junk Cars," the Board voted to "set up a Board of Health," appointed a member of the Village Board as the marshal of the Board of Health, and appointed members to the Board of Health. The Board also announced that the Board of Health would be meeting immediately following the Board's meeting that same evening. You complain that these actions violate the Act. First, our review of the documentation submitted by you and the Board reveals that the Board of Health was not "created" at this meeting, but rather "revived." A Board of Health for the Village previously existed, but no longer had active members. Consequently, the only action of the Board was to appoint members to the Board of Health to revive it and to name the marshal. The Board argues that the agenda item "Property Zoning Issue – Junk Cars" was sufficiently descriptive to put the public on notice for the action it took, and that the appointment of the Board of Health is "incidental" to the Village of McGrew's enforcement of its nuisance ordinances as to junk cars on properties. We disagree that the agenda item was sufficiently descriptive on May 12 to include the actions taken as to the Board of Health. We do not believe that the Board properly took up the topic of appointing a Board of Health during the agenda item labeled "Property Zoning Issue – Junk Cars." It is not a reasonable assumption that members of the public would understand that a Board of Health could be appointed during the discussion of property zoning. We believe the Board has violated the Open Meetings Act with respect to this portion of your complaint. However, our inquiry does not end there.

Public bodies are permitted to cure their violations of the Open Meetings Act. *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979). Related to the May 12 actions as to the Board of Health, it appears that the Board attempted to cure its open meeting violations on June 9, 2016 by including an agenda item "confirm Board of Health Appointments." Your complaint as to the June 9 meeting is that the agenda was modified less than 24 hours before the start of the meeting to include the confirmation of Board of Health members and the addition of a "Hearing on Objections to Determination re: lots 1-7 block 24" under "Nuisance Properties." You state that the original agenda was posted on June 6, 2016 at the post office and two other locations where the Board

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posts its meeting notices. However, while the notice was amended on June 8 and posted at the other two locations, the post office notice was not actually posted until the day of the meeting, June 9, which was less than 24 hours before the start of the meeting. The Board informs us that the Post Office is only open from 8 a.m. to noon and the meeting agenda was amended in the afternoon of June 8, after the post office closed for the day. The notice was left in the door of the post office. The photograph you provided of the notice clearly shows that the notice was placed at the post office, it simply was not tacked up on the cork board until the following morning. The agenda was amended more than 24 hours before the start of the meeting, timely posted in two of the three locations and subsequently posted at the post office when it opened for business on June 9. Based on this, we do not believe the Board to be in violation of the Open Meetings Act as to this portion of your complaint.

Because the agenda item confirming Board of Health appointments was properly on the agenda for the June 9, 2016 meeting, the violations that occurred on May 12 related to the Board of Health appointments were adequately cured by the Board. Thus, no further action by our office is necessary as to the portion of your complaint.

As to your final complaint concerning the May 12, 2016 Board meeting, the discussion of replacement of playground equipment, the Board states that this topic was not brought up by the Board, but by a member of the public during the public comment period. While it is not clear whether the Board engaged in any discussion with the member of the public on this topic, the Board took no action regarding the presentation given by the member of the public. The minutes of the meeting reflect that the presentation occurred during "New Business" of the Board, but the Board did not initiate this presentation and allowed the member of the public to present his or her comments on the playground outside the scheduled public comment period to accommodate his or her schedule. While the Board does not appear to have violated the Act with respect to this portion of your complaint, we would have two suggestions for the Board on this matter. First, the minutes should more accurately reflect that this was a "public comment" regarding playground equipment. Second, the Board should be cautioned that it should not engage in any discussion with members of the public on matters that are not on the agenda. While we are not clear as to whether this occurred on May 12, 2016, for future purposes, the Board should be aware that discussion of topics not on the agenda, even those brought up during public comment period, would be a violation of the Open Meetings Act.

Your final complaint as to the notice and agenda for Board meetings is that in April and May 2016, the Board of Trustees "regularly consider[ed] items not specifically on the published agenda." While you did not point to any specific instances, we believe you are referring to the agenda item listed on the April 12, 2016 Board agenda which lists item "VI. *New Business.*" The minutes from this meeting indicate that the Village

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Clerk made one informational note to the Board during "New Business," which did not require Board discussion or action; there is nothing to void or be voidable as to this item. However, the Board also voted on hiring an individual to clean the Community building during "New Business." The public was not made aware that the Board would be discussing and acting on such a topic during this meeting. The agenda item "New Business," in and of itself is not sufficiently descriptive to allow members of the public to be informed as to what will be discussed during this particular agenda item. The Board must list each item of "New Business" it will undertake during its meeting in order to be in compliance with the Act. As this is the first complaint filed with this office as to this Board, we will simply admonish the Board as to this violation of the Act and recommend that the Board take immediate action to ensure that future agendas will meet the requirements of the Open Meetings Act for items to be "sufficiently descriptive."

Board of Health Meetings

You have made several complaints regarding the Board of Health that was appointed on May 12, 2016. The Board of Health was created to take action regarding properties containing abandoned, junk, or salvage cars, some of which were taking delivery of cars and/or allowing the salvage of parts from the vehicles on the properties.

First, you complain that the Board of Health held a meeting immediately following the Board of Trustees' meeting on May 12, 2016 without prior notice or a published agenda, with the Board of Health citing an emergency. The Act permits emergency meetings without reasonable advance publicized notice. Neb. Rev. Stat. § 84-1411(5). Any action taken by a public body in an emergency meeting must pertain only to the emergency. *Id.* The Nebraska Supreme Court has defined "emergency" as "any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency; a sudden or unexpected happening; an unforeseen occurrence or condition." *Steenblock v. Elkhorn Twp. Bd.*, 245 Neb. 722, 726, 515 N.W.2d 128, 130 (1994). The Board has responded by saying that it was necessary to hold the Board of Health meeting as an emergency meeting due to the interactions between Village representatives and those retrieving parts or delivering vehicles on the properties discussed at the Board of Health meeting having "suddenly and unexpectedly escalated and teetered on the verge of violence." During the day on May 12, a confrontation occurred between one of the men appointed to the Board of Health and an employee of a local auto sale business. However, the Board admits that the problem of the abandoned, junk, or salvage cars had begun some months earlier. While we understand the Village's concern regarding the alleged threats of violence that occurred on May 12, we do not believe that the facts in this matter gave rise to an "emergency." A reasonable delay in order to provide proper notice of the Board of Health meeting and its agenda would likely not have caused any additional harm. Given that the Village was aware, at least since March 2016, of the presence of large numbers of junk cars on

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these properties, even with the threats of violence, the Board of Health was not acting on an "sudden or unexpected happening or an unforeseen occurrence or condition." Consequently, we believe the May 12, 2016 Board of Health meeting violated the Open Meetings Act.

As to the May 12 Board of Health meeting, it appears that two actions were taken, each to refer a property to the Board of Trustees for action as a nuisance property and to notify all parties responsible for the property of that referral and the requirement to abate the nuisance. The notice to the property owners, as evidenced by the notice provided to you regarding your property, lists the procedure for the appeal of the nuisance determination and your right to request a hearing. The Board of Trustees then took action on the referral of the properties at its June 9, 2016 meeting, and a hearing was held on one of the properties, owned by you, as requested. Both you and the other property owner were given the opportunity to contest the findings of the Board of Health, and present your case as to why your property should not be declared a nuisance, before the full Village Board of Trustees. You did so. Even with the violation of the Open Meetings Act by the Board of Health, we do not believe you were prejudiced by the lack of notice of the Board of Health meeting. Accordingly, we will admonish the Board of Health for its violation of the Act and caution the Board of Health to provide the requisite notice under the Act, except under sudden and unforeseen circumstances. As the Board of Health has now been informed as to what constitutes an "emergency," we trust that it will take care to provide proper notice of all future meetings under the Open Meetings Act.

Your second complaint regarding the Board of Health is your allegation that it did not publish its agenda prior to its June 15, 2016 meeting. The notice for the meeting on that date states "The McGrew Board of Health will meet for Their annual Re-Organizational Meeting on Wednesday June 15, 2016 at 5:00 p.m. in the Community Room. Meetings are open to the public and everyone is encouraged to attend." The Board's attorney states that at the meeting, the Board of Health "convened, reorganized, and had no other business and adjourned." The Act, Neb. Rev Stat. § 84-1411(1), requires the notice of a meeting to contain either the agenda or a statement of where the agenda is kept. It does not specify what form the "agenda" is to take, particularly when there is only one item to be discussed. Agenda items must be "sufficiently descriptive" to give the public "reasonable notice of the matters to be considered at the meeting." *Id.* As the notice of the meeting of the Board of Health stated it was to be a "reorganizational" meeting and the only action the Board of Health took was to "reorganize," its notice contained a sufficient description of what the Board of Health was to consider at its June 15 meeting. We do not believe the Open Meetings Act was violated with respect to this portion of your complaint.

ANALYSIS: NEBRASKA PUBLIC RECORDS STATUTES

Your complaint also contained allegations relating to the Nebraska Public Records Statutes. When your public record petition was initially received, we responded to you stating that while our office typically has fifteen days in which to respond to a public records petition, as you had made a number of Open Meeting and Public Record complaints, and you were in receipt of all records requested from the Village of McGrew, that we would respond to your public records petition at the same time as your Open Meetings Act complaints. We will now address that petition.

Location of Meeting Minutes

As to your assertion that minutes of Board meetings must be kept at the Village offices, the NPRS contain no such requirement. The Open Meetings Act requires that minutes of meetings of a public body "shall be written and available for inspection within ten working days or prior to the next convened meeting, whichever occurs earlier," and provides an additional ten working days for villages if the employee compiling the minutes is absent due to serious illness or emergency. Neb. Rev. Stat. § 84-1413. The NPRS require a public body to provide copies, or make records available for examination during the hours the office of the public body is open "for the ordinary transaction of business." Neb. Rev. Stat. § 84-712. However, the NPRS make no requirement as to where any particular record must be stored. It is not uncommon for records of public bodies to be stored "off-site" of the day-to-day office space. A public body is not in violation of the NPRS by not maintaining hard copies of all records at its offices, provided that when a written public records request is received, and the public body has records responsive to the request, the public body either provides copies or makes the records available at its offices to the requestor. *Id.* In this case, the Village is not in violation of the NPRS by maintaining minutes of Board meeting minutes on the clerk's laptop, which may be located at her home and not at the Village offices.

Requirement to fulfill public records requests within four business days

You provide a substantial amount of information regarding two public records requests made by you on June 3, 2016 and June 9, 2016. As best as we can tell, your complaint regarding these two public records requests is that the records requested were not provided in their entirety within four business days. It is our understanding that all records were provided by the Village by June 20, 2016. The NPRS, Neb. Rev. Stat. § 84-712(4), requires that

[u]pon receipt of a written request for access to or copies of a public record, the custodian of such record shall provide to the requester as soon as is practicable and without delay, but not more than four business days

after actual receipt of the request, an estimate of the expected cost of the copies and either (a) access to or, if copying equipment is reasonably available, copies of the public record, (b) if there is a legal basis for denial of access or copies, a written denial of the request together with the information specified in section 84-712.04, or (c) if the entire request cannot with reasonable good faith efforts be fulfilled within four business days after actual receipt of the request due to the significant difficulty or the extensiveness of the request, a written explanation, including the earliest practicable date for fulfilling the request, an estimate of the expected cost of any copies, and an opportunity for the requester to modify or prioritize the items within the request. The requester shall have ten business days to review the estimated costs, including any special service charge, and request the custodian to fulfill the original request, negotiate with the custodian to narrow or simplify the request, or withdraw the request. If the requester does not respond to the custodian within ten business days, the custodian shall not proceed to fulfill the request. The four business days shall be computed by excluding the day the request is received, after which the designated period of time begins to run. Business day does not include a Saturday, a Sunday, or a day during which the offices of the custodian of the public records are closed.

You submitted a public records request on June 3, 2016, which from our understanding of your petition was fulfilled in its entirety on June 7, 2016, within the four business day requirement of the NPRS. You then submitted a second public records request on June 9, 2016 for all meeting minutes, agendas, and notices of the Board of Trustees from September 2015 through May 2016. All materials were provided to you by the Village by June 20, 2016, the seventh business day following your request. This is a violation of the NPRS's requirement that records be provided within four business days, absent a written explanation by the public body of a reasonable delay. However, as you have received all records requested, and our authority under the NPRS in a circumstance such as this is limited to ordering disclosure of the record sought, we will not take action against the Village, other than to remind it of the requirement found in this section of the NPRS.

Certified copies of records

Your final public record complaint is that since 2014, the Board has "failed to keep written, certified (by signature of the Board of Trustees Chair) copies available for public inspection" of Board minutes, agendas, notices, and the like. There is no requirement in the NPRS that records must be "certified." As it appears that you have been provided with copies of all records you have requested, we find no violation of the NPRS with respect to this portion of your petition.

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ACTION BY THE ATTORNEY GENERAL

For the reasons stated above, we conclude that the Board of Trustees and the Board of Health violated the Open Meetings Act on two separate occasions and violated the "four business day" provision of the NPRS. However, the Board of Trustees cured its violation of failing to provide adequate notice of items related to the Board of Health on which it took action at its May 12 meeting. The Board of Health failed to provide adequate notice of its May 12, 2016 meeting, which we do not believe met the definition of an "emergency" meeting. The question now becomes what action to take in light of our conclusions that the Boards have violated the Open Meetings Act and the NPRS. We do not believe that a criminal prosecution for a "knowing" violation of the Open Meetings Act is appropriate under the facts of this matter. Further, we will not pursue a civil suit to void because the Board of Trustees has cured its violation and the Board of Health is unlikely to repeat its particular violation, given the facts and circumstances surrounding its May 12 meeting. Additionally, as noted, there is no action to be taken against the Village for its violation of the NRPS, as you have received all requested records. Instead, we will admonish the Board of Trustees and the Board of Health, through a copy of this letter to its legal counsel Mr. Kovarik, that all requirements of the Open Meetings Act as to notice and the sufficiency of agenda items, and the requirements of the NPRS as found in Neb. Rev. Stat. § 84-712(4), are to be strictly adhered to in the future.

Since we have determined that no further action by this office is appropriate at this time, we are closing this file. If you disagree with our analysis, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under the Open Meetings Act and the NPRS.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Mark Kovarik