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March 5, 2018

Melissa Engel
[redacted]

RE: *File No. 17-M-107; Omaha Public Schools Board of Education; Melissa Engel, Complainant*

Dear Ms. Engel:

This letter is in response to the complaint you submitted via the Attorney General's Constituent Complaint Form on January 25, 2017, in which you alleged a violation of the Open Meetings Act[1] by Marque Snow, a member of the Omaha Public Schools Board of Education ("Board'). When we receive complaints of this nature, our normal practice is to contact the public body involved and request a response to the allegation(s) raised in the complaint. In the present case, we contacted Board in-house counsel Megan D. Neiles-Brasch and requested a response. On April 26, 2017, we received a written response from outside counsel David J. Kramer, who responded on behalf of the Board. We have now completed our review of your complaint and Mr. Kramer's response. Our conclusion and future action in this matter are set forth below.

RELEVANT FACTS

Our understanding of the facts regarding your complaint is based on your correspondence and the response we received from the Board. Please note that while your complaint specifically names Mr. Snow, we have considered the actions of all Board members under the circumstances identified in your complaint.

The Board convened a regular meeting on January 9, 2017. On that particular date, there were eight seated members of the Board and one vacancy. During the meeting, the Board attempted to elect a president pursuant to Neb. Rev. Stat. § 79-567 (2014), which requires that Board members annually elect a president and vice president from their membership at their regular meeting in January. In accordance with Board

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1 Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014, Cum. Supp. 2016, Supp. 2017) ("Act").

policy, two candidates were nominated for president and votes were taken by secret ballot.[2] While the votes varied from ballot to ballot, neither candidate garnered more than four votes to win the election. Members of the Board who were not nominated also received votes during the course of the evening. Finally, around 1:20 a.m. on the morning of January 10, 2017, after more than 120 rounds of voting, the Board voted to lay over the election of officers to its next regular meeting scheduled for January 23, 2017. At this meeting, Lacey Merica was elected president and Marque Snow was elected vice president.[3]

On January 25, 2017, the Omaha World-Herald published an article about the election of officers, which included the following excerpt:

> Board members said there had been no shortage of phone calls and vote-wrangling to arrive at Monday's consensus. Snow and Merica heard from staff and union members, parents, state senators, and members of the business community.
>
> "There was a lot of behind-the-scenes of board members working together . . . to come up with this compromise," Snow said.

Based on the World-Herald's reporting, you allege that the Board's actions appear to be a "violation of the open meetings act."

THE BOARD'S RESPONSE

According to Mr. Kramer, the Board and the individual Board members do not deny that discussions took place among Board members regarding the election of officers in an effort to resolve the impasse. Board members also discussed this subject with a wide array of parties, including OPS staff, parents, members of the public, and current and former elected officials, and were "lobbied by both internal and external stakeholders." However, he states that no quorum of the Board was present for any of these discussions, and that the discussions were often conducted via telephone calls "and in one on one settings." In addition, there was no formal action taken prior to the meeting convened on January 23. In this regard, Mr. Kramer states that

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[2] Neb. Rev. Stat. § 84-1413(3) provides that "[t]he vote to elect leadership within a public body may be taken by secret ballot, but the total number of votes for each candidate shall be recorded in the minutes."

[3] According to the meeting minutes, Ms. Merica was elected president on a 5-3 vote. Mr. Snow was elected vice president with five votes for Mr. Snow, one vote for Board member Perlman, one vote for Board member Williams, and one blank vote.

> . . . Board members indicated that they were not intentionally trying to avoid the presence of a quorum. Instead, they were simply having informal and spontaneous conversations with one another in an effort to resolve the stalemate without any intention to circumvent the requirements of the Act.

In support of the Board members' actions, Mr. Kramer calls our attention to the Nebraska Supreme Court case *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007). In *City of Elkhorn*, the "pivotal issue" was whether the City of Omaha violated the Open Meetings Act in the course of its proceedings to adopt an ordinance to annex the City of Elkhorn. Elkhorn argued that three informational sessions attended by less than a quorum of Omaha City Council members violated the Act because they "gave council members an opportunity to formulate public policy in private, which violated § 84-1410(4).[4] *Id.* at 880, 725 N.W.2d at 805. Omaha argued that the provisions of the Act apply only to a "public body," as that term is defined in the Act, and that a public body does not include subgroups of less than a quorum. *Id.*

The court found that since no more than three council members attended any of the informational meetings, no quorum of the city council was ever reached. It noted that the subgroups did not constitute "subcommittees," which are generally exempt from the Act,[5] since no business was referred to the subgroups at issue. The court further indicated that

> even construing § 84–1409(1)(b) broadly, we conclude that if the Act does not apply to a subcommittee, it would also not apply to an even lesser subgroup.
>
> * * *
>
> By excluding nonquorum subgroups from the definition of a public body, the Legislature has balanced the public's need to be heard on matters of public policy with a practical accommodation for a public body's need for information to conduct business.

Id. at 881, 725 N.W.2d at 805-806.[6]

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[4] This provision states, in pertinent part, that "[n]o closed session, informal meeting, chance meeting, social gathering, email, fax, or other electronic communication shall be used for the purpose of circumventing the requirements of the act."

[5] Neb. Rev. Stat. § 84-1409(1)(b) states, in pertinent part, that "[p]ublic body does not include (i) subcommittees of such bodies unless a quorum of the public body attends a subcommittee meeting or unless such subcommittees are holding hearings, making policy, or taking formal action on behalf of their parent body . . . ."

[6] Mr. Kramer also noted cases from other jurisdictions which appear to support the Board's actions. *See, e.g.*, *Mabry v. Union Parish School Bd.*, 974 So. 2d 787, 790 (La. App. 2008) ("[W]e find that the informal exchange of ideas and opinions preliminary to a meeting of elected officials is important for the

Mr. Kramer states that the discussions and the various compromises offered by interested stakeholders did not "rise to the level of board action." Several Board members indicated that they did not know how the vote would turn out when they arrived at the Board meeting on January 23, 2017. Also, since a vote to elect leadership may be taken by secret ballot, there is no way to determine who voted for whom during either meeting. Finally, Mr. Kramer states that no quorum of the Board met between January 9th and January 23rd, and no formal action was taken with respect to the officer elections until the January 23, 2017, meeting.

DISCUSSION

In a disposition letter[7] issued in 2010, this office analyzed whether serial communications by members of a school board outside of a public meeting constituted a violation of the Open Meetings Act. In that case, certain board members, through a series of telephone calls, discussed and approved contract terms relating to the hiring of a school superintendent—terms which exceeded the negotiation guidance previously set by the board. Based on the acquiescence of a majority of board members, one board member subsequently extended an offer of employment to the superintendent candidate. In our analysis as to whether the actions of the members of the school board violated the Open Meetings Act, we wrote, in pertinent part:

> The most difficult determination which must be made in any specific case involving serial communications by members of a public body is whether those communications have reached the point where they are sufficiently developed so as to evidence an intent to circumvent the Act. With respect to making that determination, we find additional guidance in *Hispanic Education Committee v. Houston Independent School District*, 886 F. Supp. 606 (So. Dist. Tex. 1994), a case cited by our Supreme Court in *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007). In *Hispanic Education Committee*, the plaintiff alleged that the defendant school district board of trustees violated the Texas open meetings law when it met in groups of fewer than a quorum to discuss appointing one of its members as superintendent. . . . The court disagreed, finding that as long as a quorum of the school district board was not present and no attempt was made to take action, "these conferences [were] not meetings of the

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issues of agenda setting and compromise that make a deliberative body function efficiently."); and *St. Aubin v. Ishpeming City Council*, 197 Mich. App. 100, 103, 494 N.W.2d 803, 804-05 (1992) ("We find this conduct, an informal canvas [*sic*] by one member of a public body to find out where the votes would be on a particular issue, is not violative of the OMA.").

[7] *File No. 10-M-107; Beatrice Public Schools Board of Education; Patrick Ethridge, Editor, Beatrice Daily Sun, Complainant* (June 3, 2010).

> board." *Id.* at 610. The court also determined, during its analysis, that the real issue in the case was "*whether informal discussions became a substitute for a formal deliberative session of the governing body.*" *Id.* (emphasis added).
>
> It seems to us that the central issue identified by the federal court in the *Hispanic Education Committee* case—whether informal discussions among members of the school board became, under the circumstances, a substitute for a formal deliberative session of that body—offers a useful standard in the present situation to help determine whether the communications among Board members . . . were sufficiently developed so as to evidence some intent to circumvent the Open Meetings Act.

Disposition Letter in File No. 10-M-107 at 9-10.

We have carefully considered the circumstances in the present case in light of the standard set out above. There is little question that Board members engaged in ample discussion with each other after the January 9 meeting in an effort to resolve the impasse. Board members have readily admitted it. However, there is no evidence that those discussions involved a quorum of the Board. And unlike the school board members in File No. 10-M-107, whose telephone discussions resulted in finalizing contract terms and extending an offer of employment for a school superintendent, the OPS Board members took no formal action outside of a public meeting. Any formal action came in the form of the two votes for Board leadership occurring on January 23, which by law may be conducted by secret ballot. Consequently, we conclude that the Board members' actions did not manifest an intent to circumvent the Open Meetings Act. Since no violation of the Open Meetings Act occurred under the circumstances presented, we are closing this file.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

Leslie S. Donley
Assistant Attorney General

c: David J. Kramer

49-1952-29