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Office of the Attorney General

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DOUGLAS J. PETERSON
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ASSISTANT ATTORNEY GENERAL

May 3, 2019

D. Ross Beins


Re: *File No. 19-M-112; Aurora Airport Authority; D. Ross Beins, Complainant*

Dear Mr. Beins:

This letter is in response to your correspondence received by us in which you requested that this office investigate an alleged violation by the Aurora Airport Authority Board (the "Board") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2014; Cum. Supp. 2018). In accordance with our normal procedures, we requested a response from the Board after we received your complaint. We subsequently received a response from Michael H. Powell, attorney for the Board, and responses from four members of the Board, the Aurora Airport manager, and a member of the public who was present at the meeting. We have now had an opportunity to review your allegations and the Board's responses 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 responses from and on behalf of the Board. Your Open Meetings Act concerns relate to a meeting of the Board held on February 12, 2019. You are a member of the Board, and it's Chairman. For several months out of the year, you reside out of state in Arizona and have been participating in Board meetings via conference call during this time. The Board consists of four other members, who appear in person at the meetings. Your allegation is that on February 12, 2019, you participated in the regular Board meeting via telephone. Following the conclusion of the meeting, you disconnected the call. However, you believe the other members of the Board continued the meeting without you, and without an agenda, minutes, or notice of the continuation of the meeting. You state:

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I have since been advised that a special meeting of the four (4) other authority members had been planned ahead of time and was to meet behind closed doors in the airport conference room after adjournment of the regular meeting.

This special meeting was obviously planned in advance because the acting Airport Manager, who was in attendance at the regular meeting, was told when he arrived that after the regular meeting was over he would need to leave so they could have a special meeting.

The acting Airport Manager has since explained to me that as he left, the conference room door was closed with the four (4) members remaining in the room and he is unaware as to how long the secret meeting continued.

You also state that you were not given notice by the other members of the Board that they intended to continue the meeting without your telephonic presence on this date. You believe this "special" meeting to be a violation of the Open Meetings Act.

We received letters from each of the other four Board members who you allege were present at this "special" meeting on February 12, 2019. We also received letters from Terry Ott, Airport Manager¹ and Teresa Bontz, a member of the public who was in attendance at the meeting.

Each of the four members of the Board deny that any continuation of the meeting occurred as you have alleged. The other Board members also deny that Mr. Brown and other meeting attendees were asked to leave the meeting. Two of the Board members' letters reference "small talk" amongst individual members of the Board and the members of the public who were present at the meeting following the conclusion of the meeting, as all present were packing up and walking out. They deny that any Board business was discussed during this time.

The letter from Teresa Bontz does not indicate that she was aware of a "special" meeting that occurred, however, her letter states that she walked out following the conclusion of the meeting with Mr. Brown and another member of the public who was

¹ While the minutes of the meeting of February 12, 2019 state that Mr. Ott was present at the meeting, the letters from the Board members and Mr. Ott state that he was not present and Jerry Brown was appearing in his place as acting Airport Manager. We did not receive a letter from Mr. Brown, who is referenced in your letter as the acting Airport Manager who informed you of the "special" meeting. Mr. Ott also wrote a letter concerning your complaint. However, he was not present at the meeting and all information imparted therein is from third parties and not from his own personal experience. We did not consider Mr. Ott's letter in making our determinations.

present at the meeting. Her letter suggests that the four Board members remained in the room after she left. However, she makes no mention of being asked to leave, or that the door was closed following their departure.

In the responses of the other Board members, email correspondence dated between February 16 and February 22, 2019 was provided to us showing discussions held amongst the five members of the Board concerning modification of lease agreements which were discussed at the February 12, 2019 meeting. The emails were provided to us as an indication that you had also made an allegation directly to the members of the Board that the lease agreements had been discussed by the remaining four members following the conclusion of the meeting on February 12, 2019.

ANALYSIS

"Secret" Meeting of the Board

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) (2011), 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 five members, and that a majority of the members constitute a quorum.² In other words, a quorum is reached by the attendance of three Board members. While four Board members remained after adjournment of the meeting on February 12, 2019, those four board members all firmly deny that any discussion as to Board business was held. Two Board members state that "small talk" was had between members of the Board and with the members of the public who were present. But they maintain that they did not discuss any Board business, including the lease agreements which appear to be at issue, nor did they take any action following the conclusion of the meeting. As you were not actually present following the meeting, we have no direct evidence that a "special" meeting or a "meeting after the meeting" on February 12, 2019 occurred. All four remaining members of the Board who were present deny they continued the meeting on this date. Therefore, we cannot find any violation of the Open Meetings Act as to your complaint.

² See Neb. Rev. Stat. § 17-105 (2007).

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However, in responding to your complaint, the Board provided us with email correspondence from February 16 through February 22, 2019 in which all five members of the Board participated. These emails were used to discuss lease agreements of the Airport Authority and make decisions as to how best to amend these agreements. The emails discussing the lease agreements were sent to all five members of the Board, constituting a quorum. Our review of these emails shows a discussion of public business and decisions being made via these emails as to the provisions to include in the lease agreements and how best to amend them. E-mails or other similar contact between members of a public body in which a quorum is included in the distribution would qualify as "presence" for determination as to whether a meeting has occurred, as alternate communication, other than face-to-face, can be considered in determining whether a public body has violated the Open Meetings Act. "Telephone conference calls, emails, faxes, or other electronic communication shall not be used to circumvent any of the public government purposes established in the Open Meetings Act." Neb. Rev. Stat. § 84-1411(3)(h) (2014). "No closed session, informal meeting, chance meeting, social gathering, e-mail, fax, or other electronic communication shall be used for the purpose of circumventing the requirements of the act." Neb. Rev. Stat. § 84-1410(4) (2014). These emails, therefore, constitute a "meeting" of the Board which was not held in the open, in violation of the Open Meetings Act.

While we do not believe that the Board conducted this email meeting deliberately, or had the intent to circumvent the Open Meetings Act, we will instruct the Board, through a copy of this letter, that, if it has not already been, the violation can be and should be cured by holding a discussion as to the lease agreements and reconsidering those matters in a subsequent meeting which complies with all statutory requirements. *Pokorny v. City of Schuyler*, 202 Neb. 334, 341, 275 N.W.2d 281, 285 (1979) ("[W]here a defect occurs in proceedings of a governmental body, ordinarily the defect may be cured by new proceedings commencing at the point where the defect occurred."). If the Board has not already undertaken a discussion and vote as to the lease agreements discussed via email in a subsequent meeting, the Board should place the lease agreements on the agenda for its next meeting. At that time, it should discuss those matters which were discussed via email, including the terms to be included in the revised lease agreements. It should then vote on the lease agreements in open session. The Board must also refrain from holding discussions on public business via email in the future. We trust that the Board will undertake these remedial measures and will take no further action on this matter.

Appearance by Telephone

Your complaint, and some of the responses from the Board confirm, that you reside in Arizona for several months out of the year and appear by telephone for meetings held during this time. The Open Meetings Act authorizes meetings by

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telephone conference call only for certain public bodies.³ The Aurora Airport Authority is not statutorily authorized to conduct meetings by telephone. Additionally, Neb. Rev. Stat. § 84-1411(6) (Cum. Supp. 2018) expressly provides that “[a] public body may allow a member of the public or any other witness *other than a member of the public body* to appear before the public body by means of video or telecommunications equipment.” (Emphasis added.) Since § 84-1411(6) prohibits members of a public body from appearing at a public meeting by telephone, your appearance by telephone during the time when you are in Arizona violates the Open Meetings Act and is impermissible. We will advise the Board, through a copy of this letter to the Board’s attorney, that all members of the Board must be present in-person at the meetings of the Board and no member is permitted to appear by telephone.

CONCLUSION

For the reasons stated above, we do not believe the Board violated the Open Meetings Act as to the allegations in your complaint that a “secret” meeting was held immediately following the February 12, 2019 meeting. However, we do believe that the Board violated the Open Meetings Act by its email communications in February 2019 and by allowing you to appear by telephone at meetings of the Board. However, as explained above, no further action is necessary by this office. 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: Michael H. Powell

02-719-29

³ See Neb. Rev. Stat. § 84-1411(3) “A meeting of a board of an educational service unit, of the Educational Service Unit Coordinating Council, of the governing body of an entity formed under the Interlocal Cooperation Act, the Joint Public Agency Act, or the Municipal Cooperative Financing Act, of the governing body of a risk management pool or its advisory committees organized in accordance with the Intergovernmental Risk Management Act, of a community college board of governors, of the governing body of a public power district, of the governing body of a public power and irrigation district, or of the Nebraska Brand Committee may be held by telephone conference call if . . .” certain conditions and restrictions are met.