

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

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

October 23, 2020

Via email at [REDACTED]
Cathy Johnson

RE: *File No. 20-MR-115; Platte County Agricultural Society Board of Directors;
Cathy Johnson, Complainant*

Dear Ms. Johnson:

This disposition letter is in response to the open meetings portion of your complaint received by our office on May 21, 2020, and the email you sent the undersigned on July 10, 2020. You have alleged that the Board of Directors ("Board") of the Platte County Agricultural Society ("PCAS") violated the Open Meetings Act ("Act"), Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2014, Cum. Supp. 2018, Supp. 2019), by allowing subordinate committees to take formal action on behalf of the Board. We sent your complaint to the PCAS's general manager, Brian Palmer, and requested a response to the allegations raised. Pursuant to our request, on June 29, we received a response to your complaint from attorney Elizabeth J. Lay, Jarecki Maul P.C., L.L.O., whose firm represents the Board. We have now completed our review of your complaint and correspondence and the response provided to us by Ms. Lay. Our conclusion and future action in this matter is set forth below.

Before we begin, we will point out that your complaint contains items of concern that fall outside the scope of the Open Meetings Act. However, our enforcement authority is limited to determining whether a public body has complied with the various procedural provisions of the Act relating to notice, agenda, closed session, voting, minutes, etc. Our office does not scrutinize decisions or actions made by a public body that are inherent to the public body's governance. Consequently, any matters that do not implicate the Open Meetings Act will not be addressed.

RELEVANT FACTS

Our understanding of the facts in this matter is based upon your complaint and the materials you provided, and the response and information we received from Ms. Lay.

You are a member of the Board. The Board is comprised of fifteen members. The Board is subject to the Open Meetings Act under express provisions in Neb. Rev. Stat. § 2-261 (2012). A quorum is reached by the attendance of ten members in good standing.

The specific items in your complaint are summarized below:

Sidewalk Project

By letter dated October 17, 2019, the city engineer for the City of Columbus informed the PCAS that the City was recommending the construction of a sidewalk on certain property owned by the PCAS. The engineer indicated that the city council would be discussing the matter at its meeting on November 4, 2019, and, if approved, the PCAS would have to complete construction of the sidewalk no later than May 15, 2020. In the event the PCAS was unable to complete the project within this timeframe, the city would assume the project and bill the PCAS accordingly.

Mr. Palmer informed the Board of the city's correspondence during its monthly meeting held on October 28, 2019, and was advised by Board members to solicit bids and move forward with the project. According to the February 24, 2020, meeting minutes: "Brian [Palmer] reported a letter from the city was received regarding the sidewalk that is required to be put in from the aquatic center south to 17th street and then in front of Mory's Haven." In an April 3, 2020, email to Board Chair Brock Pillen, Mr. Palmer attached two bids obtained for the sidewalk project. He indicated that "[u]nder normal circumstances I would present these bids to the board at a meeting. I am planning on giving the job to Gehring and getting it completed unless you or the board have any reason or objections to this." In an April 28, 2020, email to you from Mr. Pillen, he indicated that "Budget and Finance agreed to the side walk which did not require full board approval." However, you continued to question the Board's failure to approve the project in emails to Mr. Pillen and others.

According to Ms. Lay, since "the budget and finance committee is a subcommittee of the Board of Governors, and in the spirit of transparency, this item will be added to the July 27, 2020 board meeting agenda for discussion, along with an invoice for the installation of the sidewalk, and a vote will be taken on the item by the full board to accept the bid and pay the invoice on the project."

Cathy Johnson
October 23, 2020
Page 3

Cancelling Horseracing at Ag Park

In a May 6, 2020, email to the members of the Board, Mr. Pillen wrote:

PCAS Board - Please see attached letter to CER [Columbus Exposition and Racing]. After numerous discussion with CER and a number of our board members CER asked us to write the attached letter for them to use when requesting to be waived of the need to physically race horses At [*sic*] Ag Park this year and still maintain their license. This decision was a mutual decision between CER and PCAS. Options to race later in the summer were discussed but were not able to make happen. Any questions please let us know. (Emphasis added.)

The attached letter stated, in pertinent part:

After extensive conversation within the executive committee of the Platte County Ag Society (PCAS) as well as the majority of our PCAS Board and numerous discussions with Columbus Exposition and Racing (CER), PCAS has decided that we would prefer not to offer our facility for horse racing in the month of June. . . .

You indicate in your complaint that you asked “two other board members and neither of them were notified until the letter went to the whole board after it was approved.” You question the need for a board when everything is decided by either the executive committee or the budget and finance committee. You state that as a new Board member, you reviewed the bylaws and found nothing to suggest that decisions could be made without the full Board’s approval.

According to Ms. Lay, due to the COVID-19 pandemic, the CER contacted the PCAS requesting a decision on the contract for live horseracing for the 2020 year. The CER sought this decision because it needed to apply for a waiver with the State Racing Commission for the year to retain its racing license. Ms. Lay indicates that since the Board’s regular meetings were also impacted by the pandemic,¹ “the Executive Committee met and determined that live horseracing wasn’t a feasible option during the 2020 year due to Co-Vid19 and issued a letter to that effect to CER” so it could pursue a waiver. Ms. Lay represents that this item was placed on the agenda for the June 1, 2020, meeting, and subsequently approved by a majority of the Board.

¹ There is no question that the pandemic has significantly impacted the ability of public bodies to safely conduct business. However, under Governor Ricketts’ Executive Order No. 20-03 (March 17, 2020), which was extended by Executive Order No. 20-24 (May 19, 2020), any public body could hold a public meeting remotely so long as members of the public and media had access to the meeting, and the public body complied with the other requirements in the Act.

DISCUSSION

Neb. Rev. Stat. § 84-1408 (2014) of the 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 Act is a statutory commitment to openness in government. *Wasikowski v. Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002); *Steenblock v. Elkhorn Township Board*, 245 Neb. 722, 515 N.W.2d 128 (1994); *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984).

In our enforcement capacity over the Act, this office has indicated that two things must be present before a “meeting” under the Act occurs. First, a quorum of the public body must be in attendance. Second, the public body must engage in at least one of the activities included in the definition of meeting set out in Neb. Rev. Stat. § 84-1409(2) (2014), i.e., “briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body” In the absence of either element, we have concluded that no meeting of a public body has occurred. Under Neb. Rev. Stat. § 84-1409(1)(b)(i), a subcommittee² is not subject to the Act *except* when a quorum of the public body is present at the subcommittee meeting or “such subcommittees are holding hearings, making policy, or *taking formal action on behalf of their parent body*” (Emphasis added.)

In *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979), a taxpayer filed suit against the city seeking to void actions of the city council relating to a land purchase due to alleged violations of the open meetings law. The court found that the city council had violated the law with respect to two special meetings due to inadequate notice, an improper closed session, and noncompliance with § 17-106, which required a written call and object for special meetings for cities of the second class. However, the court disagreed with the trial court’s order permanently enjoining the city “‘from carrying out any action authorized’ at the [invalid] meetings,” finding such an order would permanently prevent the purchase of the land and appeared contrary to “the intent or purpose of the public meetings law.” *Id.* at 341, 275 N.W.2d at 285. Instead, the court held that “[i]t is a general principle of law that where a defect occurs in proceedings of a

² While not defined in the Act, “subcommittee” is generally defined as “[a] group within a committee to which the committee may refer business, standing in the same relation to its parent committee as the committee stands to the deliberative assembly.” Black’s Law Dictionary (11th ed. 2019), committee.

Cathy Johnson
October 23, 2020
Page 5

governmental body, ordinarily the defect may be cured by new proceedings commencing at the point where the defect occurred.” *Id.* at 341, 275 N.W.2d at 285.

In discussing what effect the two special meetings had as a result of the violations, the court stated:

The effect of the invalidity of the meetings of March 16 and March 25 is the same as if the meetings had never occurred. No action authorized at those meetings could be sustained by reliance upon the proceedings of the council at those meetings. This does not mean the council could not authorize the purchase of the land at a subsequent meeting which complied with all statutory requirements. This is what happened at the meeting of March 29, 1977.

Id. at 341, 275 N.W.2d at 285.

Your complaint alleges that the budget and finance committee and the executive committee took formal action on behalf of the full Board with respect to the sidewalk project and cancelling horseracing for the 2020 season. You assert that those actions violated the Act. We agree. However, those two items have been considered and approved by the entire Board in meetings held June 1 and July 27. And under *Pokorny*, the defects created by the two subcommittees have been cured by subsequent proceedings which complied with the statutory requirements of the Act.

We will now briefly address the issues raised in your July 10, 2020, email. You indicate that you learned after being out of town that eight of the fifteen Board members allegedly went to the Maximus bar in Columbus following the Board meeting held on June 29. According to your source, the members spoke openly about what had been discussed during the closed session. You were also ridiculed for filing a complaint with this office.

You further indicate that prior to the commencement of the June 29 meeting, Ms. Lay requested that you to stay out of the closed session. You declined. You and Ms. Lay finally agreed that as soon as she explained the response to the complaint to the other Board members, you could return to the meeting. You also indicate that when you returned to the meeting, Ms. Lay emphasized “how important it was to start doing things right and that the executive session discussion was to stay in the room.” You question why you were asked to leave when a PCAS employee [Mr. Palmer] was allowed to stay in the closed session. You further question why the Board went into closed session in the first place, since certain Board members allegedly disclosed the content of the closed session in a bar some 20-30 minutes after the meeting.

As noted, a meeting under the Act only occurs when there is a quorum of members present and the members are discussing public business or taking formal action. Since there was no quorum at the bar on June 29, no meeting subject to the Act occurred. However, by discussing what their attorney said during the closed session, those

Cathy Johnson
October 23, 2020
Page 6

However, by discussing what their attorney said during the closed session, those members waived any privilege attached to those communications. We would not recommend such conduct to any public officers serving on public bodies in Nebraska. In addition, under Neb. Rev. Stat. § 84-1410 (2014), public bodies may hold a closed session by the affirmative vote of a majority of its voting members if a closed session is clearly necessary (1) for the protection of the public interest, or (2) to prevent needless injury to the reputation of an individual, if such individual has not requested a public meeting. There are no provisions in § 84-1410, or anywhere else in the Act, that prohibit members of a public body from disclosing matters discussed in a closed session. Nor are there provisions that govern who may attend a closed session. We find both matters inherent to a public body's *governance*, over which we have no authority or jurisdiction.

ACTION BY THE NEBRASKA DEPARTMENT OF JUSTICE

Neb. Rev. Stat. § 84-1414 (2014) sets out civil and criminal enforcement options available with respect to violations of the Open Meetings Act. In particular, subsection (4) provides that

[a]ny member of a public body who *knowingly* violates or conspires to violate or who attends or remains at a meeting knowing that the public body is in violation of any provision of the Open Meetings Act shall be guilty of a Class IV misdemeanor for a first offense and a Class III misdemeanor for a second or subsequent offense.

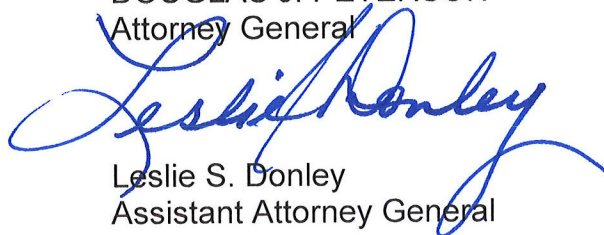
(Emphasis added.) In the present case, the Board took affirmative steps to cure the violations committed by the two subcommittees. Consequently, we will decline to take any further action with respect to this file. However, we will admonish the Board, through a copy of this letter to Ms. Lay, that the purpose of the Act is “to ensure that the formation of public policy is public business [and] not conducted in secret . . .” *Schauer v. Grooms*, 280 Neb. 426, 442, 786 N.W.2d 909, 923 (2010). Members of the public have a clear, legal right to openness in government which requires the Board to conduct its business in public without any attempt to hide its activities through subcommittees. We will also point out to the individual members of the Board that, in light of our discussion and conclusions with respect to subcommittees, it will be more difficult for them to argue in the future that they did not “knowingly” violate the Open Meetings Act should any further questionable conduct occur. In this regard, we are providing a copy of this disposition letter to the Platte County Attorney, Carl Hart, who has concurrent enforcement authority over the Act.

Cathy Johnson
October 23, 2020
Page 7

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, may be available to you under the Open Meetings Act.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Elizabeth J. Lay
Carl Hart

49-2581-29