STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#93065

NO.
STATE OF NEBRASKA
OFFICIAL
AUG 11 1993
DEPT. OF JUSTICE

DATE: July 27, 1993

SUBJECT: Application of the Nebraska Public Meetings Statutes to Activities of the Board of Parole

REQUESTED BY: George D. Green, General Counsel
Nebraska Department of Corrections

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

You have asked a series of questions involving the interaction among certain statutes dealing with the duties of the Nebraska Board of Parole (the "Board") and the Nebraska Public Meetings laws, ***Neb. Rev. Stat. §§*** 84-1408 to 84-1414 (1987, Cum. Supp. 1992). Our responses to your various questions are set out below.

We will begin with your final question since it deals with the overall applicability of the Public Meetings Statutes to the activities of the Board. Specifically, you asked whether the Board is a public body for purposes of Section 84-1409 and the Public Meetings Statutes, since the Board acts in a judicial capacity when it deliberates concerning a grant of parole.

We believe that the Board is clearly a public body under Section 84-1409 because it is an "independent board . . . created by . . . statute" as described in that section. However, Subsection (1) of Section 84-1409 also provides that the Public Meetings Statutes shall not apply to "judicial proceedings," and we have issued previous opinions which indicate that hearings before various agencies are judicial in nature and not subject to the Public Meetings Statutes. *See* Op. Att'y Gen. No. 210 (May 16, 1984) (Hearing before hearing officer appointed by State Personnel Board not subject to Public Meetings law); Op. Att'y Gen. No. 184 (January 31, 1984) (Hearing before Nebraska Equal Opportunity

David K. Arterburn
L. Jay Bartel
J. Kirk Brown
David T. Bydalek
Laurie Smith Camp
Elaine A. Chapman
Delores N. Coe-Barbee
Dale A. Comer
James A. Elworth
Lynne R. Fritz
Royce N. Harper
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Donald A. Kohtz
Joseph P. Loudon
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Harold I. Mosher
Fredrick F. Neid
Marie C. Pawol
Kenneth W. Payne
Paul N. Potadle
Jan E. Rempe
James H. Spears
Mark D. Starr
John R. Thompson
Barry Wald
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

printed on recycled paper

Commission not subject to Public Meetings law); 1975-76 Rep. Att'y Gen. 127 (Hearing before County Board of Mental Health not subject to Public Meetings Law).

Generally, a parole board performs a judicial function when it acts on matters relating to parole. 67A C.J.S. *Pardon & Parole* § 43. In addition, in *Inmates of the Nebraska Penal and Correctional Complex v. Greenholtz*, 436 F.Supp. 432, 437 (D. Neb. 1976), the United States District Court for the District of Nebraska indicated that, "[t]he [Parole] Board members, in considering which inmates should be granted a discretionary parole, were performing a quasi-judicial function and are clothed with quasi-judicial immunity." On the basis of this authority, we believe that the Board is acting in a judicial capacity when it conducts a parole hearing. Therefore, those proceedings are not strictly subject to the Public Meetings Statutes.

While the Public Meetings Statutes may not apply to instances where the Board conducts a parole hearing, other portions of the statutes still require those proceedings to be open to the public. For example, *Neb. Rev. Stat.* § 83-1,111 (1987) provides, in pertinent part:

> If, in the opinion of the reviewers, the [parole] review indicates the offender is reasonably likely to be granted parole, the Board of Parole ***shall schedule a public hearing before a majority of its members. At such hearing the offender may present evidence, call witnesses, and be represented by counsel.*** . . . Any hearing and review shall be conducted in an informal manner, but a complete record of the proceedings shall be made and preserved.

(emphasis added). We believe that this provision makes it clear that parole hearings must be conducted in public, and, based upon the requirement that those hearings be scheduled, some requirement for notice and an agenda is also created. We also believe that the actual decision process of the Board concerning a particular offender's parole, which must be by "majority vote of the board" under Section 83-1,111 (2), is subject to the Public Meetings Statutes, and should be conducted in public.

You also posed a number of questions concerning the parole review process conducted by the Board. That process is described in Section 83-1,111:

> Every committed offender shall be interviewed and have his or her record reviewed by two or more members of the Board of Parole or a person designated by the board within sixty days before the expiration of his or her

> minimum term less any reductions. . . . A review by the majority of the members of the board may be conducted not more than once annually. Any hearing and review shall be conducted in an informal manner, but a complete record of the proceedings shall be made and preserved.

As noted above, Section 83-1,111 contemplates that the Board will schedule a public hearing before a majority of its members if the parole review indicates that the offender is likely to be granted parole. Alternatively, the offender can request a hearing before the Board if, in the opinion of the reviewers, the review indicates that the offender is likely to be denied parole.

From your opinion request, we understand that the Board, by past practice, has held closed parole reviews and open parole hearings. Transcripts of parole reviews have not been made public, and parole reviews have been conducted with and without a quorum of the Board present. Your remaining questions all deal with the parole review process.

You asked if the parole reviews contemplated by Section 83-1,111 may be closed under the Public Meetings Statutes since Section 83-1,111 otherwise specifically requires parole hearings to be public. We believe that Section 83-1,111 does allow private parole reviews, the provisions of the Public Meetings Statutes notwithstanding.

The current language of Section 83-1,111 dealing with parole reviews was added to that statute by LB 1242 passed by the Legislature in 1986. There are several portions of the legislative history of that bill which indicate that the Legislature intended parole reviews to be private; while parole hearings, in contrast, were intended to be public proceedings. For example, the purpose of LB 1242 was described as follows:

> LB 1242 is intended to make statutory changes concerning the parole process reflect actual practice. Currently, section 83-1,111 requires the Board of Parole to have a hearing within sixty days of the expiration of sentence of every committed offender. This statute indicates that this is a "final" hearing, which implies that the offender must be granted parole.
>
> ***In practice the Parole Board conducts private reviews of the records of committed offenders and then holds public hearings concerning the parole of those offenders. LB 1242 changes Section 83-1,111 to reflect this practice.***

Introducer's Statement of Intent on LB 1242, 89th Neb. Leg., 2nd Sess. (Feb. 10, 1986) (emphasis added). In addition, Counsel for

the Legislature's Judiciary Committee described the purpose of LB 1242 in the following terms:

> Okay, LB 1242 is intended to make changes in parole review statutes in order to make them conform with the practices of the Board of Parole. Evidently, the Board of Parole conducts private hearings or private reviews of the records of the committed offenders. . . . LB 1242 would allow this interview to be conducted by a member of the Board of Parole or by someone by the staff, and ***is intended to make distinctions between the public hearings, which are conducted by the whole Board of Parole, and the reviews of the records.***

Committee Records on LB 1242, 89th Neb. Leg., 2nd Sess. 25 (Feb. 10, 1986) (emphasis added). On the basis of this legislative history, it appears to us that parole reviews conducted for individual offenders under Section 83-1,111 may be conducted in private, and are not subject to public meetings requirements. The parole hearing process, on the other hand, must be conducted in public as discussed above.

You also asked what effect the presence of a quorum of members of the Board has on the issue of whether or not a parole review is public, and whether the Board can conduct a parole review without a quorum of members being present.

As set out above, we believe that the parole reviews contemplated by Section 83-1,111 are intended to be private and not subject to public meetings requirements. As a result, the presence of a quorum of members of the Board at such a review does not subject that review to public meetings requirements unless the Board attempts to proceed to a parole hearing or attempts to conduct other general Board business. With regard to your remaining question, while ***Neb. Rev. Stat.*** § 83-196 (1987) provides that a quorum of the Board is three members, Section 83-1,111

specifically authorizes a parole review by "two or more" members of the Board. Therefore, it certainly seems that a quorum of the Board is not needed to conduct a parole review.

Sincerely yours,

DON STENBERG
Attorney General

Dale A. Comer
Assistant Attorney General

Approved by:

Attorney General

05OP009.793