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December 10, 2010

Todd Mitchell
408 Elm Street
St. Paul, NE 68873

RE: *File No. 10-M-136; Howard County Board of Commissioners; Todd Mitchell, Complainant*

Dear Mr. Mitchell:

This disposition letter is in response to your complaint e-mailed to us on August 13, 2010, in which you requested that this office investigate alleged violations of the Nebraska Open Meetings Act (hereinafter, the "Act"), Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2008; Cum. Supp. 2010), by the Howard County Board of Commissioners (the "Board"). As is our normal practice with such complaints, we forwarded a copy of your complaint to the public body which is the subject of the complaint. In this case, we forwarded the complaint to Rance Lierman, Board chairman. On October 5, 2010, we received a response from commissioners Lierman, Bill Sack and Jim Sidel. On October 7, 2010, the undersigned e-mailed the other two members of the Board, Jim Seifert and Lauren Scarborough, and requested that they provide us any information with respect to the events in the complaint. We received e-mail responses from both gentlemen on October 8, 2010. We also requested a copy of the meeting agenda and minutes for the August 10, 2010, meeting from County Clerk Marge Palmberg. We have now had an opportunity to review in detail your complaint and the responses submitted by the commissioners. Our findings and conclusion in this matter are set out below.

YOUR COMPLAINT

You are employed as the Howard County Highway Superintendent. The Howard County Board of Commissioners is comprised of five members, and three members constitute a quorum. You first allege in your complaint that three of the commissioners, Lierman, Sack and Sidel, met privately "as a subcommittee" to discuss your removal from office. You indicate that this information was revealed to you by the other two commissioners who were not included on the private discussion. You further indicate

that while waiting in the hallway of the courthouse before a scheduled presentation you were to give to the Board on August 10, 2010, one of the commissioners informed you that commissioners Lierman, Sack and Sidel had secretly met to try to force you to resign. According to this commissioner, this plan was revealed during a closed session of the entire Board.

Later at this meeting, you were presented with two letters of complaint from two county employees. You state that you were asked to respond to the complaints "on the spot by the commissioners during the open meeting." At this juncture, the county attorney Robert Sivick advised that you could read the complaints so you could respond, and that you had the option to respond in open or closed session. You state that the meeting was adjourned until 5:30 p.m., at which time you addressed the complaints in open session.

According to the meeting minutes, Michelle Woitalewicz and Dan Fredrick read their complaint letters which they had prepared at the request of Chairman Lierman. Public comment ensued. Finally, at 6:40 p.m., the Board approved a motion to go into closed session for the "purpose of personnel." It is our understanding that you were *not* included in the closed session. At 7:13 p.m., the Board approved a motion to come out of closed session. Chairman Lierman then read a statement which appears to be a job improvement plan for you. A motion to approve the plan was made, seconded and passed. The meeting adjourned at 7:18 p.m.

Your final allegation relates to a meeting held the following night. You state that a constituent contacted you and told you that the three commissioners (Lierman, Sack Sidel) met again the next evening at the courthouse in violation of the Open Meetings Act.

In their response, commissioners Lierman, Sack and Sidel represent that "[p]rior to the meeting on August 10, 2010, there were individual phone calls made between the three commissioners named, but there were no teleconferences or face-to-face meetings held." Commissioners Lierman, Sack and Sidel did not directly respond to the second allegation. With respect to the third allegation, the three commissioners state that they met on August 11, 2010, because they believed there was a planned budget discussion scheduled. Because the other two members were absent, Ms. Palmberg attempted to contact them by phone. At some point, Mr. Seifert contacted Ms. Palmberg. Mr. Seifert indicated that he would be unable to attend the meeting; additionally, he questioned whether the meeting had been publicly noticed. It appears then that Ms. Palmberg went to the meeting room and advised that Mr. Seifert and Mr. Scarborough would be unable to attend. It was also disclosed that the meeting had *not* been publicly posted. According to Commissioner Lierman, it was determined that the

commissioners could not go forward with the budget discussion, and they left the courthouse without any further discussion.

According to Mr. Seifert and Mr. Scarborough, they were initially asked by the other commissioners to help draft a response to this office. However, a response was drafted and sent to us without their knowledge or input. Mr. Seifert and Mr. Scarborough independently confirm your first allegation, i.e., that the other three commissioners discussed a plan to seek your resignation outside of an open meeting or a proper closed session.

RELEVANT STATUTORY PROVISIONS

The statute relating to closed sessions, Neb. Rev. Stat. § 84-1410, provides, in relevant part:

> (1) Any public body may hold a closed session by the affirmative vote of a majority of its voting members if a closed session is clearly necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual and if such individual has not requested a public meeting. The subject matter and the reason necessitating the closed session shall be identified in the motion to close. Closed sessions may be held for, but shall not be limited to, such reasons as:
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> > (a) Strategy sessions with respect to collective bargaining, real estate purchases, pending litigation, or litigation which is imminent as evidenced by communication of a claim or threat of litigation to or by the public body;
> >
> > (b) Discussion regarding deployment of security personnel or devices;
> >
> > (c) Investigative proceedings regarding allegations of criminal misconduct; or
> >
> > (d) Evaluation of the job performance of a person when necessary to prevent needless injury to the reputation of a person and if such person has not requested a public meeting.
>
> * * *
>
> (4) Nothing in this section shall be construed to require that any meeting be closed to the public. No person or public body shall fail to invite a

> portion of its members to a meeting, and no public body shall designate itself a subcommittee of the whole body for the purpose of circumventing the Open Meetings Act. ***No 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.***

(Emphasis added.)

ANALYSIS

The primary purpose of the public 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 public 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). The Nebraska public meetings laws are broadly and liberally construed so as to obtain the objective of openness in favor of the public. *Wasikowski; Grein, supra.*

1. *Serial Communications by Commissioners Lierman, Sack and Sidel*

Earlier this year, this office issued a disposition letter in response to an open meetings complaint filed by the editor of the Beatrice Daily Sun against the Beatrice School Board.[1] The complaint alleged that the school board had violated the Open Meetings Act when various members engaged in improper communications during its process to hire a new superintendent. In formulating our response to that complaint, we discussed at length serial communications by members of a public body, and whether those communications constituted an illegal meeting. Because the question in *Beatrice* is nearly identical to the question presented here, we will borrow liberally from our previous response.

There are no Nebraska cases which directly address this issue. However, in Op. Att'y Gen. No. 04007 (March 8, 2004), we addressed the impact of certain amendments to the Public Meetings Statutes,[2] which specifically prohibited the use of e-mails, faxes

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[1] *File No. 10-M-107; Beatrice Public Schools Board of Education; Patrick Ethridge, Editor, Beatrice Daily Sun, Complainant.*

[2] The "Public Meeting Statutes" became the "Open Meetings Act" with the passage of 2004 Neb. Laws LB 821, § 34.

and other electronic communications to circumvent the public government purposes of the Act. In our opinion, we indicated that "some element of intent or purposeful action" on the part of members of the public body was necessary to establish circumvention of the statutes. *Id.* at 4. We also indicated that "[w]hether such intent to circumvent exists in a particular instance is a factual determination which must be resolved on a case-by-case basis." *Id.*

Additionally, we noted that in a previous opinion, Op. Att'y Gen. No. 94035 (May 11, 1994), we had

> cautioned against "extensive" correspondence among members of a public body which might constitute actionable conduct in circumvention of the Public Meeting Statutes. . . . Consistent with that opinion, we have generally taken the position, for enforcement purposes, that a minimal exchange of correspondence or minimal electronic communication among members of a public body does not trigger the existing circumvention prohibitions.

Id. at 4-5 (citation omitted). In conclusion, we stated:

> [I]n our view, the passage of LB 1179, Section 2(3)(h) would not prohibit a member of a public body from communicating on a topic with other members of that body by e-mails, faxes or other electronic communication, even if that communication was directed to a quorum of the public body at issue. On the other hand, if that communication elicited responses and further communications, then at some point, it would be possible to argue that the public body was intentionally using electronic communications to circumvent the Public Meetings Statutes.

Id. at 5-6.

In *Beatrice*, we also stated that "[t]he 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." In their response, commissioners Lierman, Sack and Sidel concede that telephone conversations were made among the three commissioners, but they did not teleconference or meet face to face. Accordingly, we must focus on whether the individual phone calls were so developed as to establish an intent to circumvent the Open Meetings Act.

Unlike *Beatrice*, where we were provided a detailed account of the communications among the school board members, here the extent of telephone calls made among the three commissioners is unclear. However, a complete review of the facts indicates that the first thing that Commissioner Lierman said at the executive session on August 10, 2010, was that he was going to ask for your resignation. It appears that he had the support of commissioners Sidel and Sack. Both Commissioner Seifert and Commissioner Scarborough indicate that his statement came out of the blue. They both represent that the three commissioners had their minds made up, while they in turn knew nothing about any problems regarding your employment. Commissioner Seifert further questioned the likeliness of two complaints "handed in at the same time on the same person." It seems to us that the communications among the three commissioners went beyond "a minimal exchange of correspondence or minimal electronic communication."[3] The record supports our finding that commissioners Lierman, Sack and Sidel, a quorum of the Board, came to a decision regarding your employment with the county by communicating by telephone until a consensus was reached. There is no other way to view the actions of these three individuals. Consequently, we believe that Commissioner Lierman, Commissioner Sack, and Commissioner Sidel violated the Open Meetings Act when they discussed and decided upon a course of action relating to your employment outside of an open meeting.

2. *Responding to Complaints Against You in Open Session*

You state that two complaint letters were given to you following your presentation with the representative from the Department of Revenue. You indicate that you were required to respond "on the spot." According to the minutes, "[m]ore discussion followed as to an executive session with Michelle Woitalewicz, Dan Fredrick, Todd Mitchell but it was decided to recess until 5:00 pm this evening for more time to review the letters pertaining to the situation." As a result, you were able to read the complaint letters and prepare any necessary responses. Under these circumstances, we do not believe that the Board violated the Open Meetings Act.

We have far more difficulty with the closed session which followed the public commentary. In order to be valid, a closed session must be clearly necessary for the protection of the public interest or to prevent needless injury to the reputation of an individual, and that individual has not requested an open forum. If a public body's reason for going into closed session does not fall under either of these two statutory reasons, *the session is improper*. We further note that subsection (4) of § 84-1410 provides, in pertinent part, that "[n]othing in this section shall be construed to require that any meeting be closed to the public." Here it appears that the Board went into a closed session to discuss your job performance anyway, despite your earlier request to

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[3] *See infra* at 5.

keep the meeting open while discussing the complaints which were lodged against you. In this context, the Board must advise you that it will be discussing you and your job performance, and ask you whether you want the discussion in open session. It appears that this was not done. Additionally, we note that after the closed session, Commissioner Lierman read a six-point improvement plan concerning your job performance, which appears to have been formulated and drafted during the closed session. As a result, we believe that the Board violated the Open Meetings Act when it went into closed session to discuss your job performance.

Moreover, even if the closed session was proper, it appears that the Board failed to comply with the Open Meetings Act with respect to the technical requirements relating to closed sessions. In that regard, Neb. Rev. Stat. § 84-1410(1) requires that "the subject matter and the reason necessitating the closed session shall be identified in the motion to close." In the present case, Commissioner Sack's motion to close did not include the reason for the closed session—i.e., protection of the public interest or the prevention of needless injury to the reputation of an individual. Additionally, Neb. Rev. Stat. § 84-1410(2) requires that the presiding officer restate the limitation of the subject matter of the closed session once a motion to close is approved by the public body. According to the minutes, Chairman Lierman failed to restate the limitation of the subject matter of the closed session. As a result, the Board failed to meet the technical requirements relating to closed sessions in violation of the Act.

3. *The Three Commissioners' Attempt to Hold a Meeting on August 11, 2010*

Your final allegation relates to the purported meeting held by commissioners Lierman, Sack and Sidel on August 11, 2010. In their response, the commissioners state that they believed a "planned budget discussion" was scheduled. However, once it was established that no notice had been given for the discussion, the commissioners left the courthouse with no further discussion.

Neb. Rev. Stat. § 84-1411(1) of the Open Meetings Act requires a public body to "give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes." The notice must be transmitted to the members of the public body and to the public. The notice must also contain an agenda of items known at the time of the publication or a statement that the agenda will be available for public inspection at the principal office of the public body during normal business hours. Agenda items must "be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting." Subsection (1) further provides that an agenda shall not be altered later than (a) twenty-four hours before the scheduled commencement of the meeting or (b) forty-eight hours before the scheduled commencement of a meeting of a city council or village board

scheduled outside the corporate limits of the municipality, except for items of an emergency nature. The modification to the agenda for emergency items must occur at the public meeting.

Since the three commissioners disbanded once it was learned that notice for a meeting had not been given, we are unable to conclude that the three commissioners violated the Open Meetings Act. However, we do have concerns that the three commissioners, a quorum of the Board, met at the courthouse to have a "*planned* budget discussion" when there was clearly no notice and no agenda. Additionally, the fact that the other two commissioners had no idea there was a "meeting" is particularly troublesome. We would strongly suggest that the Board formally adopt the notification methods for regular and special meetings at its next regular meeting, memorialize those methods in its meeting minutes, and follow them accordingly.

ACTION BY DEPARTMENT OF JUSTICE

The question now becomes what action to take in light of our conclusion that commissioners Lierman, Sack and Sidel violated the Open Meetings Act when they discussed Board business outside of the parameters of an open meeting. We must also address what action to take considering the Board violated the Open Meetings Act with respect to the propriety and the technical requirements of the closed session held during its meeting on August 10, 2010. We have carefully assessed whether a criminal prosecution based on the facts of this case is warranted, and have determined that it is not. Further, a civil suit to void is not necessary because the City Council has the ability, under the holding in *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W. 2d 281 (1979), to cure any defects arising out of an improper closed session, by taking those actions again in a meeting which meets all of the statutory requirements. Instead, we will admonish the members of the Board, by forwarding a copy of this response to Mr. Sivick, that closed sessions are only permissible when clearly necessary to protect the public interest or prevent needless injury to an individual's reputation and that individual has not requested a public meeting. If the Board is unable to make such a showing, then the closed session is improper.

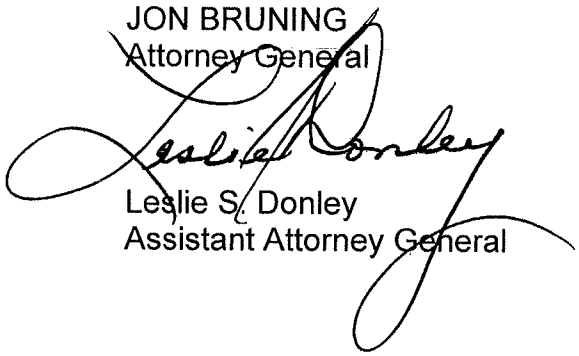
We will also let this disposition letter serve as an admonishment to commissioners Lierman, Sack and Sidel, that their conduct discussed herein was unacceptable. We would also like to point out to these commissioners that they have now been fully advised as to how their conduct violated the Open Meetings Act. As a result, it will be far more difficult for those individuals to argue in the future that they did

not "knowingly" violate the Act should any further questionable conduct occur. In the event of future violations, we will consider at that time whether criminal sanctions[4] are appropriate.

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,

JON BRUNING
Attorney General



Leslie S. Donley
Assistant Attorney General

cc: Robert Sivick
Howard County Attorney

49-577-30

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[4] Neb. Rev. Stat. § 84-1414(4) provides: "Any 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."