STATE OF NEBRASKA
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April 14, 2011

Peggy Davidson
1503 Lane St.
PO Box 222
Falls City, NE 68355-0222

Re: *File No. 11-M-109; Falls City Council; Peggy Davidson*

Dear Ms. Davidson:

This letter is in response to your correspondence in which you requested that this office investigate alleged violations by the City Council of Falls City ("Council") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2008, Cum. Supp. 2010). In accordance with our normal procedures, we requested a response from the Council after we received your complaint, and we subsequently received a response from Timothy Hersh and Hal Sutter on behalf of the Council. We have now had an opportunity to review your allegations and the Council's response in detail, and our conclusions are set out below.

## FACTS

Our understanding of the facts in this case is based upon your correspondence, its supporting documentation, and the response from the Council. We have identified the following Open Meetings Act allegations in your correspondence:

(1) Amendment of the agenda at the meeting of May 17, 2010 to address a non-emergency issue;
(2) Rearrangement of the agenda of the January 17, 2011 Council meeting;
(3) Discussion of an agenda item in closed session on January 17, 2011 without the Council designating the issue for closed session;
(4) Irregularities in the Motion or Motions relating to City Board appointments on February 7, 2011; and
(5) Allegations relating to public comment by you at the February 7, 2011 meeting.

You have also enclosed minutes from other meetings of the Board, including from Council meetings other than those listed above. But, as you have made no specific

Open Meetings Act complaints regarding these meetings, we will not address these meetings.

## ANALYSIS

### Agenda

***May 17, 2010***

Neb. Rev. Stat. § 84-1411 (2010) provides the agenda requirements for purposes for the Open Meetings Act.

> (1) Each public body shall 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. Such notice shall be transmitted to all members of the public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the principal office of the public body during normal business hours. Agenda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting. Except for items of an emergency nature, the 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. The public body shall have the right to modify the agenda to include items of an emergency nature only at such public meeting.

The purpose of the agenda requirement is to give some notice of the matters to be considered at the meeting so that persons who are interested will know which matters are under consideration. *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (2007); *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).

Your complaint states that an agenda item was added at the meeting of May 17, 2010, and the Council does not dispute this. While you did not enclose either the agenda or minutes for this meeting, the Council did provide this office with the minutes.

On May 17, 2010, the minutes state "Council person Sutter requested that under old business that Item (garbage/trash) be added for discussion/clarification because of wrong communication on the subject being stated by the public and the business reputation of the party involved. A discussion was held on mandatory trash pickup. All in the audience were given the opportunity to speak on the subject. Several people

spoke on this issue." The Council states, and we find no reason to dispute, that no action was taken on this issue by the Council.

We have concerns about the Council adding this agenda item at the beginning of the meeting, without designating the item as an emergency. We also fail to see how this item would be an emergency, had the Council designated it as such. It is a violation of the Open Meetings Act to add an item of a non-emergency nature to the agenda. However, as the Council took no action relating to this agenda item, it is unnecessary for this office to take any action as to this allegation. We do caution the Council to avoid adding any non-emergency items to its agenda within 24-hours of its meetings.

***January 17, 2010***

Your second complaint is that the Council rearranged the agenda items of the January 17, 2010 meeting at the beginning of that meeting and then tabled the final agenda item. You do not allege, nor do any of the materials submitted to our office indicate, that any items were added or removed from the agenda. In addition, the item with which you are concerned, the appointments to City Boards, was item #6 out of seven items that were to be discussed before the closed session. Item #6 was moved after the closed session. While the closed session lasted nearly an hour on January 17, 2010, and may have inconvenienced those who wished to be present for the discussion of appointment of City Boards, the Open Meetings Act was not violated. It is also not a violation of the Open Meetings Act to table an agenda item for discussion at another time. We find no violation of the Open Meetings Act related to this portion of your complaint.

**Closed Session, January 17, 2010**

You next allege that the Council discussed the City Board appointments during the closed session on January 17, 2010, because the Council came out of closed session and tabled those appointments. While it is not entirely clear from the Council's motion what the subject matter of the closed session was, as the motion stated only "personnel", it does not appear that the closed session was called for the purpose of discussing City Board appointments, as the Deputy City Clerk and the Police Chief were included. You infer that the Council must have improperly discussed the appointments during the closed session. We cannot make the same inference. We find nothing to indicate that the Council discussed the City Board appointments, or specifically your appointment to the Library Board, during this closed session. We cannot find a violation of the Open Meetings Act related to this allegation.

**February 7, 2011 Motions**

Your next complaint is that at the February 7, 2011 meeting, when City Board appointments were again on the agenda, that there was an irregularity in the motions

made and seconded. The Open Meetings Act does not make any provisions regarding motions in this context, nevertheless, we will address your concern. Specifically, you state that a "Motion was made and seconded to accept all board appointments. Then Hal Sutter made a motion to accept all appointees with the exception of library board (me)." However, the Council denies this, and the minutes of the meeting contradict your claim. The minutes from the February 7, 2011 meeting state:

> A motion was made by Council member Rieschick and seconded by Council member Moore to remove from the table various Board Appointments. Roll was called on this motion and the Council members voted as follows: [Votes]. Motion carried. A motion was made by Council member Sutter and seconded by Council member Campbell to accept the appointees to the boards/committees, excluding the Library Board appointment as listed and presented. Roll was called on this motion and the Council members voted as follows: [Votes]. Motion carried."

The video you enclosed of this meeting confirms the substance of these two motions. The Council only made one motion regarding the actual City Board appointments. The first motion was to remove the issue from being tabled at the previous meeting. We find no violation of the Open Meetings Act related to this complaint.

**Public Comment**

Your final complaint relates to the discussion you had with the Council during the February 7, 2011 meeting after the Council voted not to approve your appointment to the Library Board. You state that you have the "right" to quiz the council. We do not agree.

The Open Meetings Act contains several provisions which deal with the public's right to speak at open meetings of public bodies, most of which are set out in following portions of § 84-1412:

> (1) Subject to the Open Meetings Act, the public has the right to attend and the right to speak at meetings of public bodies. . . .
>
> (2) It shall not be a violation of subsection (1) of this section for any public body to make and enforce reasonable rules and regulations regarding the conduct of persons attending, [or] speaking at . . . its meetings. *A body may not be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings.*

Based upon § 84-1412 and other applicable authorities, our office has previously stated that public bodies in Nebraska generally operate as a form of representative democracy. *See Distinctive Printing and Packaging Company v.* Cox, 232 Neb. 846,

443 N.W.2d 566 (1989); *State ex rel. Strange v. School District of Nebraska* City, 150 Neb. 109, 33 N.W.2d 358 (1948). That is, Nebraska citizens elect individuals to represent them on various boards, commissions, etc., rather than having all who are present at a particular meeting of a public body act as members of that body. Therefore, when members of the public attend meetings of public bodies in Nebraska, they most often attend as observers, not members of the body itself, *and they have no right, apart from periods set aside for public comment, to engage in the body's debate, to question members of the body, to comment on particular decisions,* or to vote on the issues at hand. Those latter rights go to the members of the public body, who ran for and were elected to office. While any particular public body may certainly choose to allow citizens to participate in its meetings, citizens attending a meeting of a particular public body are not members of that body.

Therefore, the Open Meetings Act does not grant the right to "quiz" members of the public body. You were provided with the opportunity by the Council to address their decision to withhold your appointment to the Library Board, despite there not being an official public comment period on the agenda. While the Council allowed you to speak when you demanded their attention, members of the public do not have the right under the Open Meetings Act to request that the public body hear their comments, except during a public comment period designated by the public body. The Council was under no obligation to respond to those questions, nor were they under any duty to engage you in a question and answer session. Members of the Council were more than accommodating to you on February 7, 2011. There is no violation of the Open Meetings Act related to this portion of your complaint.

**Closed Session**

You have enclosed minutes from the meetings of January 17, 2011 and February 7, 2011, each of which include an executive session. While you have not alleged any specific violations related to the closed sessions on these dates, this office feels it necessary to address deficiencies in the Council's motions for these closed sessions.

The Open Meetings Act states:

> (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:
>
> (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.

Neb. Rev. Stat. § 84-1410 (2008).

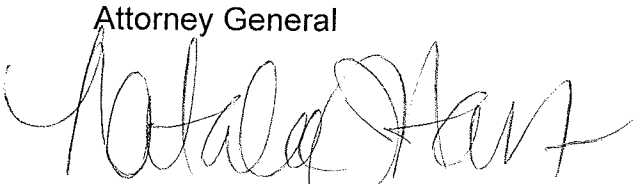
On January 17, 2011, the Council states the reason for the closed session to be "personnel." On February 7, 2011 the reason is the "Falls City ambulance Squad." Neither of these reasons are sufficient to meet the requirements of the Open Meetings Act. The Council is required to state *both* the subject matter and the reason for the closed session, *and* indicate why the closed session was clearly necessary for the protection of the public interest or the prevention of needless injury to the reputation of an individual. The Council will be advised, through a copy of this letter, to review the requirements of the Open Meetings Act related to closed sessions and ensure that it is complying with all the requirements of the Act when it votes to enter into closed sessions.

## CONCLUSION

For the reasons stated above, we do not find any violations of the Open Meetings Act by the Council. 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



Natalee J. Hart
Assistant Attorney General

Cc: City Council

02-239-30