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

JON BRUNING
ATTORNEY GENERAL

DALE A. COMER
ASSISTANT ATTORNEY GENERAL
CHIEF, LEGAL SERVICES BUREAU

March 12, 2013

Mr. Patrick Radigan
1905 G St., Apt. 1
Lincoln, NE 68510

Re: *File No. 12-M-110; UNL/Campus Rec Advisory Board; Radigan*

Dear Mr. Radigan:

We are currently in the midst of reviewing several of our files under the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2008, Cum. Supp. 2012) (the "Act"), which remain open and pending from 2012. One such file involves a complaint which we received from you on March 31, 2012, against Dylan Knuth and the Campus Recreation Advisory Council (the "Council") at the University of Nebraska-Lincoln ("UNL"). We have completed our review of your complaint, and our conclusions are set out below.

FACTS

Our understanding of the facts regarding your complaint is based upon your complaint and upon materials available on the UNL Campus Recreation website.

You apparently were on an intramural basketball team which played in a league sponsored by UNL's Campus Recreation Center in early 2012. An issue arose as to the eligibility of two of your players, and they were ruled ineligible to play. As a result, you appealed that ruling to the Council, and during the appeal process, you appeared before the Council and argued your case for player eligibility. However, you were then asked to leave the room while the Council deliberated, and you had no opportunity to hear the Council's discussion or to receive feedback from the Council. You also were not provided with a transcript of what was said during the Council's deliberations, and you have no idea what the Council's vote was. In response to a subsequent inquiry from you, Mr. Knuth, the Council President, informed you that the Council had conducted its deliberations in a closed session as it was allowed to do under the intramural appeals process. You contend that the Council's closed session violated the Open Meetings Act.

ANALYSIS

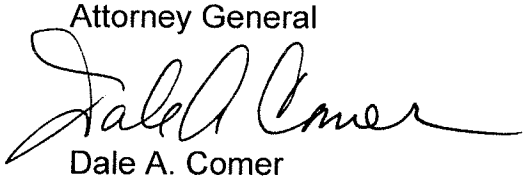
As we have noted previously, "[a] threshold question in any analysis under the public meetings statutes involves the issue of whether the entity concerned is a 'public body' subject to those statutes." Op. Att'y Gen. No. 92020 (February 12, 1992). Therefore, in this instance, we must determine, at the outset, if the Campus Recreation Advisory Council is even subject to the Open Meetings Act. Our Opinion No. 92020 provides some guidance on that issue, and we have enclosed a copy of that opinion for your information.

In our Opinion No. 92020, we considered whether two committees which provided recommendations to the UNL Chancellor were subject to the Open Meetings Act. Ultimately, we concluded that they were not, in great part because they were essentially advisory committees to the Chancellor in his administrative/management function rather than legislative, policy-making bodies. It appears to us that much the same reasoning applies to your complaint involving the Council, since the UNL Campus Recreation website indicates that the Council's purpose is to act as an advisory board to the Campus Recreation Staff. Moreover, the website also indicates that the Council is the final appellate body within the Office of Campus Recreation. In that role and to the extent that the Council exercises any quasi-judicial functions, the Council's activities would arguably not be subject to Act under § 84-1409 (b). For those reasons, we do not believe that the Council is subject to the Open Meetings Act, and there is no basis for further action by this office regarding your complaint. Accordingly, we are closing this file.

If you disagree with the analysis set out above, you may wish to consult with your private attorney to determine what, if any, additional remedies might be available to you.

Sincerely,

JON BRUNING
Attorney General



Dale A. Comer
Assistant Attorney General
Chief, Legal Services Bureau

Enclosure

05-448-30

STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
FAX (402) 471-3297

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#92020

STATE OF NEBRASKA
OFFICIAL
FEB 12 1992
DEPT. OF JUSTICE

DATE: February 12, 1992

SUBJECT: Alleged Public Meetings Violations involving the University of Nebraska and the Board of Regents

REQUESTED BY: John Gould, Chair; Common Cause/Nebraska

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

In correspondence dated November 18, 1991, you requested that this office conduct an inquiry to determine whether certain activities of the University of Nebraska-Lincoln and its Board of Regents violated our State public meetings statutes, Neb.Rev.Stat. §§ 84-1408 et seq. (Reissue 1987). Specifically, you were apparently concerned that certain budget reduction deliberations by the UNL Academic Planning Committee and the UNL Budget Reduction Review Committee were conducted in violation of the public meetings statutes. You were also concerned with the propriety, under the public meetings statutes, of a certain meeting involving members of the Board of Regents and the University administration.

Subsequent to receipt of your letter, we contacted counsel for the University and requested a written analysis of the facts surrounding both situations together with a legal analysis of the applicable law. We also requested investigatory assistance from the Nebraska State Patrol with respect to the meeting in question. We received a response from University counsel on December 20, 1991, and we have also received investigatory reports from the Patrol. After reviewing those materials and the appropriate statutes, we have concluded that no violations of the public meeting statutes occurred. Consequently, we plan no further action with respect to this matter at this time.

L. Jay Bartel
J. Kirk Brown
Laurie Smith Camp
Elaine A. Chapman
Delores N. Coe-Barbee
Dale A. Comer
David Edward Cygan
Mark L. Ells
James A. Elworth
Lynne R. Fritz
Royce N. Harper
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Donald A. Kohtz
Sharon M. Lindgren
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Harold I. Mosher
Fredrick F. Neid
Paul N. Potadle
Marie C. Pawol
Kenneth W. Payne
LeRoy W. Sievers
James H. Spears
Mark D. Starr
John R. Thompson
Susan M. Ugai
Barry Waid
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

I. BUDGET REDUCTION COMMITTEES.

Your first question involved activities of the UN-L Academic Planning Committee (APC) and the UN-L Budget Reduction Review Committee (BRRC). Those committees are in the process of preparing recommendations to the UN-L Chancellor for base reductions in the UN-L budget as mandated by the Legislature. While the procedures adopted by those committees require the majority of their activities to be conducted in public, the same procedures allow certain deliberations of the committees to be done in executive or closed session. You apparently question the propriety of any such closed sessions.

A threshold question in any analysis under the public meetings statutes involves the issue of whether the entity concerned is a "public body" subject to those statutes. Neb.Rev.Stat. § 84-1409 (Cum. Supp. 1990) defines a public body as follows:

> (a) governing bodies of all political subdivisions of the State of Nebraska,
>
> (b) governing bodies of all agencies, now or hereafter created by the Constitution of Nebraska, statute, or otherwise pursuant to law, of the executive department of the State of Nebraska,
>
> (c) all independent boards, commissions, bureaus, committees, councils, subunits, or any other bodies, now or hereafter created by the Constitution of Nebraska, statute, or otherwise pursuant to law,
>
> (d) the Certificate of Need Review Committee,
>
> (e) all study or advisory committees of the executive department of the State of Nebraska whether having continuing existence or appointed as special committees with limited existence,
>
> (f) advisory committees of the bodies referred to in subdivisions (a), (b), and (c) of this subdivision, and
>
> (g) instrumentalities exercising essentially public functions.

Therefore, the University committees at issue in the present instance must fit within the definitions set out above, or they are not subject to the public meetings statutes.

The APC was created by the UN-L Bylaws promulgated by the Board of Regents. The APC consists of 15 members including various

faculty, deans, vice chancellors, and the president of ASUN. No regents are members of the APC. The committee's general purpose under UN-L Bylaw 1.9.8 is "[t]o facilitate the duties of the Chancellor. . .", and to enable the Academic Senate to fulfill its responsibilities. Under UN-L Bylaws 1.9.8.2F and 1.9.8.4, the APC can recommend changes in programs, including their elimination, and the APC ". . . shall assist the Chancellor in seeking remedies for a financial exigency. Such remedies may include elimination of faculty, staff and administrative positions."

The BRRC is an ad hoc committee formed by the APC with the approval of the UN-L Academic Senate and UN-L student government. It is generally charged with the duties of serving ". . . as an information gathering and advisory resource for the Chancellor and APC." Procedures for the Review of Budget Reduction Proposals Developed by the Academic Planning Committee of the University of Nebraska-Lincoln, revised September 9, 1991, p. 3. The membership consists of the APC plus additional individuals representing student affairs programs, business and finance programs, UN-L support staff, UN-L graduate and undergraduate students, faculty, and the Academic Senate. No regents are members of the BRRC.

On December 17, 1986, the APC adopted Procedures for the Review of Budget Reduction Proposals Developed by the Academic Planning Committee of the University of Nebraska-Lincoln. Those procedures were revised on September 9, 1991. Under those procedures, the BRRC hears budget reduction proposals and responses to them at public meetings. The BRRC then makes budget reduction recommendations to the APC. The APC, in turn, considers those recommendations, and makes its own budget reduction recommendations to the Chancellor. The procedures adopted by the APC allow certain deliberations of both committees to be conducted in closed or executive session.

The governing body of the University of Nebraska for purposes of § 84-1409 is obviously the University of Nebraska Board of Regents. Therefore, the committees at issue here which report to the Chancellor rather than to the Regents, and which do not include Regents as members are clearly not "governing bodies" of the University. Neither are they advisory committees to the Board of Regents. As a result, the committees here do not fall under the bulk of the definition of "public body" set out in § 84-1409.

Under § 84-1409, "public body" does include "all study or advisory committees of the executive department of the State of Nebraska whether having continuing existence or appointed as special committees with limited existence." In State ex rel. Spire v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991), the Nebraska Supreme Court indicated that the Board of Regents is part of the executive branch of state government. Therefore, it could be

argued that, in a broad sense, the committees at issue here are "study or advisory committees of the executive department of the State." However, the legislative history of LB 325 from 1975, the original version of § 84-1409 which first created the language concerning advisory committees of the executive branch, indicates that it was not the intent of the Legislature at that time to subject the management or administrative functions of public bodies to public meetings requirements. Floor Debate on LB 325, 84th Nebraska Legislature, First Session, May 14, 1975, at 4604, 4605. Rather, public meetings requirements were to apply to policy making bodies, exercising legislative or quasi-legislative functions. Floor Debate on LB 325, 84th Nebraska Legislature, First Session, May 14, 1975, at 4616, 4617. As Senator Anderson, the original introducer of LB 325 stated,

> . . . in the definition of a public body that is covered by the open meetings act, there was some concern expressed at the hearing that the way the language is set it could cover management teams, it cover a mayor meeting with the department heads or something like this. That was not the intent of the act. I indicated that at the hearing. The committee amendment was development (sic) to make sure that management teams could not be included in the definition of public body under the act.

Floor Debate on LB 325, 84th Nebraska Legislature, First Session, May 14, 1975, at 4605.

It seems to us that the committees at issue here are really part of the management structure of the University as opposed to legislative or quasi-legislative bodies. Their function with respect to the budget reduction process is to make recommendations to the Chancellor, and to assist in his management responsibilities for the Board of Regents. Since they are part of the management structure, they are not subject to the public meetings statutes. On the other hand, the policy making and legislative body which will act on the budget reduction recommendations is the Board of Regents, and that body is, of course, subject to the public meetings statutes. This situation is thus somewhat analogous to the situation considered in our Opinion of the Attorney General No. 11, January 20, 1983. In that opinion, we indicated that the Environmental Control Council was a public body subject to the public meetings statutes while the Department of Environmental Control was not. Management or administrative groups within the Department of Environmental Control which report to the director would thus not be subject to the public meetings statutes.

It also could be argued that the committees here are "instrumentalities exercising essentially public functions" under Section 84-1409(g). However, the legislative history of this

language,which was added to the statute in 1989, indicates that it was specifically intended to reach the Nebraska Investment Finance Authority and other entities which have been granted the power and authority to issue bonds and to borrow and expend public money. Floor Debate on LB 311, 91st Nebraska Legislature, First Session, May 9, 1989, at 6039, 6040. This description obviously does not fit the committees at issue here.

In sum, since the two University committees in the present instance are essentially advisory committees to the Chancellor in his administrative/management function, we do not believe that they are public bodies under § 84-1409. Therefore, they are not covered by the public meetings statutes. We would note, however, that the internal operating procedures established by these committees themselves require that most of their business be conducted in public. For example, a summary of all budget reduction proposals which they considered was published in the Scarlet and the Daily Nebraskan, and, their meetings were open for observation at all times when public testimony was being heard. Moreover, the ultimate budget reduction decision process by the Board of Regents will be fully open to the public since that Board is clearly subject to the public meetings statutes. Therefore, it could hardly be said that this budget reduction process is being conducted in secret.

II. REGENTS SUBCOMMITTEE MEETING.

Your second inquiry involves a meeting of the General Affairs Subcommittee of the Board of Regents which occurred on November 14, 1991. You believe that this subcommittee meeting was closed to the public in violation of the public meetings statutes.

Neb.Rev.Stat. § 84-1409 (Cum. Supp. 1990) provides that the provisions of the public meetings statutes, ". . . shall not apply to subcommittees of [public bodies] unless such subcommittees are holding hearings, making policy, or taking formal action on behalf of their parent. . ." In addition, § 84-1410(4) (Reissue 1987) also provides that a public body may not ". . . designate itself a subcommittee of the whole body for the purpose of circumventing . . . the public meeting statutes." In light of these statutory provisions, to ascertain whether the closed meeting in question violated the public meetings statutes, it must be determined whether the group which met constituted a valid subcommittee of the Board of Regents, whether that group engaged in holding hearings, making policy or taking formal action on behalf of the Board of Regents, and whether that group constituted a subcommittee of the whole Board of Regents designated as a subcommittee for the purpose of circumventing the public meetings statutes.

The University of Nebraska Board of Regents apparently has seven standing subcommittees including the General Affairs Subcommittee. Those subcommittees often meet on the day prior to the monthly Board of Regents meeting, and subcommittee members receive notice of the subcommittee meetings in a monthly schedule of activities letter sent by the Corporation Secretary of the University of Nebraska. Subcommittee meetings may be held concurrently in different rooms or in different buildings, and, in such cases, an effort is made to schedule meetings so as to minimize overlap in membership.

On November 8, 1991, the Corporation Secretary of the University sent the Board of Regents his monthly schedule of activities letter including the agenda for the November 15, 1991, Regents meeting. That letter included notification of a meeting of the General Affairs Subcommittee on November 14, 1991, from 4:00 to 5:00 p.m. That letter also stated that the press would not be notified of the subcommittee meeting, apparently, to notify subcommittee members that the meeting would be closed.

The General Affairs Subcommittee is chaired by Regent Margaret Robinson and includes Regents Rosemary Skrupa and Charles Wilson. On November 14, 1991, at approximately 4:15 p.m., Regent Robinson convened the scheduled meeting of the General Affairs Subcommittee. Regent Wilson was the only other subcommittee member present as Regent Skrupa was ill an unable to attend. Regent Don Blank, Chair of the Board of Regents, was also present in his ex officio capacity as were Regents Nancy O'Brien and John Payne. The latter two individuals were present at the beginning of the meeting and elected to remain because of their interest in the meeting's subject matter. Regents Robert Allen and Nancy Hoch are not members of the subcommittee and were not present. President Massengale, and other University administrative officials also attended the meeting.

As best we can ascertain from the investigatory materials provided to us, the purpose of convening the subcommittee meeting was to seek better coordination among administration officials in performing legislative liaison functions. Those Regents at the meeting apparently expressed their desire for improvement of coordination of legislative liaison tasks, and the administrative officers present apparently indicated some methods for accomplishing the same. From our information, no substantive matters regarding legislation were discussed, and there was no discussion of the Regents' policies relating to legislation or other matters. No action of any kind was taken by the subcommittee, and the meeting adjourned at 5:00 p.m.

Under these facts, we do not believe the closed meeting here constituted a violation of the public meetings statutes. First of

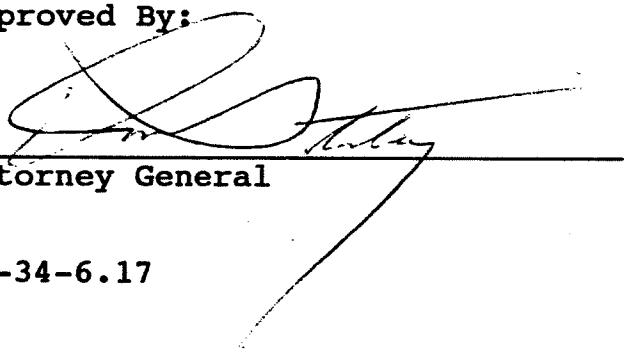
all, the meeting in question involved a duly constituted subcommittee of the Board of Regents which, as noted above, is exempted from the public meetings statutes in certain instances under § 84-1409. Second, as best we can tell, the subcommittee in question did not hold hearings, make policy or take formal action on behalf of the Board of Regents. Finally, there is nothing to indicate that the Board of Regents designated itself as a subcommittee of the whole body for the purpose of circumventing the public meetings laws. The subcommittee in question is a standing committee under the Board of Regents rules and all of the Regents were not even in attendance or expected to attend. As a result, we do not believe that this meeting involved a violation of the public meeting statutes.

Sincerely,

DON STENBERG
Attorney General

Dale A. Comer
Assistant Attorney General

Approved By:



Attorney General

05-34-6.17