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October 15, 2013

Terry Cossel
1020 Court
Beatrice, NE 68310

RE: *File No. 12-M-142; Beatrice Public Schools Board of Education; Terry Cossel, Complainant*

Dear Mr. Cossel:

This letter is in response to your complaint received by us on December 6, 2012, in which you allege that the Beatrice Public Schools Board of Education (the "Board") violated the Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2008, Cum. Supp. 2012) (the "Act"), with respect to a closed session held on December 4, 2012. As is our normal practice with complaints alleging violations of the Act, we contacted the public body involved and requested a response. In this case, we forwarded your complaint to then Board president Tobias Tempelmeyer. On January 7, 2013, we received correspondence from attorney Gregory H. Perry, who responded on behalf of the Board. However, we also received additional material from Mr. Perry in April 2013. On December 22, 2012, you e-mailed the undersigned additional correspondence, which we determined did not warrant a separate response from Mr. Perry. We have now had an opportunity to consider your complaint and your e-mail and the Board's response in detail. Our conclusion and future action in this matter are set forth below.

FACTS

Our understanding of the facts in this matter is based on your complaint and the information contained in the Board's response. We also requested and received from Mr. Perry the agendas and minutes for certain meetings referenced in this letter.

This matter arises from the Board's handling of another superintendent search, necessitated by the death of Dr. Jon Lopez in September 2012.[1] In your complaint, you state, in pertinent part:

> I was unable to attend the Beatrice School Board meeting last night, Dec. 5, 2012, [*sic*] pertaining to reviewing applications for a superintendent. According to their agenda and the Beatrice Daily Sun they went into executive session. Apparently the reason was to discuss the qualifications of the various candidates and winnow down the field to four. I do not believe this falls under either of the two permissible reasons to enter executive session.

We note that the agenda item for the closed session at issue reads:

> 4. Executive Session
> a. To discuss personnel for the protection of public interest and or the prevention of needless injury to the reputation of an individual and if such individual has not requested a public meeting.

According to the meeting minutes:

> A motion was made by Randy Coleman and seconded by Jon Zimmerman to go into Executive Session to discuss personnel for the protection of public interest and or the prevention of needless injury to the reputation of an individual and is [*sic*] such individual had not requested a public meeting.
>
> [Roll Call Vote]
>
> Motion Passed
>
> The Board of Education went into closed session at 7:05 PM. Monte Lofing entered the meeting at 7:41 PM. Immediately prior to the closed session the presiding officer restated on the record of limitations the subject matter of closed session.
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> The Board of Education returned to open session at 9:52 PM.

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[1] In File No. 10-M-107, this office investigated your allegations of open meeting violations by the Board stemming from its superintendent search in 2009-2010. We ultimately concluded that the Board violated the Open Meetings Act during the process with respect to improper serial communications conducted outside a public meeting and improper closed sessions.

Upon reconvening in open session, the Board moved and approved a motion to interview four candidates for the superintendent position. The meeting then adjourned at 9:54 p.m.

According to the Board, interviews were held during the week of December 10, and were held in open session. Mr. Perry states that "[o]n December 18, the Board held a meeting and voted, in open session, to hire Pat Nauroth to become the new superintendent commencing July 1, 2013."

ANALYSIS

I. *The Propriety of the Closed Session Held on December 4, 2012.*

As you know, Neb. Rev. Stat. § 84-1410 of the Open Meetings Act allows public bodies to close their meetings when it becomes clearly necessary for the protection of the public interest or to prevent needless injury to the reputation of an individual and the individual does not want the discussion held in open session. In the present case, the Board went into closed session on December 4, 2012 "to discuss personnel for the protection of the public interest and or the prevention of needless injury to the reputation of an individual and if such individual has not requested a public meeting." You allege that the apparent reason to close the meeting—to discuss the superintendent candidates and winnow the number of candidates down to four—did not fall under either statutory reason to close.

In its response, the Board has advanced three arguments to support its assertion that the meeting had to be closed "in order to attract the best candidates, and to protect non-finalists from the injury sustained from others learning of their applications." We will address each of those arguments below.

A. First, the Board asks us to consider the changes made to Neb. Rev. Stat. § 84-712.05(15) of the Public Records Statutes in 2007. (2007 Neb. Laws LB 389, § 1.) The Board points out that the purpose of the Nebraska Public Records Statutes, like the Open Meetings Act, is "to promote open government." Prior to 2007, § 84-712.05(15) defined "finalist" as "any applicant who is offered and who accepts an interview by a public body or its agents, representatives, or consultants for any public employment position." With the passage of LB 389, "finalist" was further defined to include those individuals "whose candidacy survives all preliminary cuts and reaches the final pool of applicants numbering four or more from which the applicant is to be selected. When there are only four or fewer original applicants, and when the final pool of applicants is less than four, then every applicant for the position will be considered a finalist." Committee Records on LB 389, 100th Neb. Leg., 1st Sess. 23 (Feb. 1, 2007) (Statement of Sen. Aguilar).

As currently written, § 84-712.05(15) allows public bodies to withhold from disclosure, "unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties," the following public records:

> Job application materials submitted by applicants, other than finalists, who have applied for employment by any public body as defined in section 84-1409. For purposes of this subdivision, (a) job application materials means employment applications, resumes, reference letters, and school transcripts and (b) finalist means any applicant (i) who reaches the final pool of applicants, numbering four or more, from which the successful applicant is to be selected, (ii) who is an original applicant when the final pool of applicants numbers less than four, or (iii) who is an original applicant and there are four or fewer original applicants . . . .

The Board argues that when the Legislature amended § 84-712.05(15) in 2007, "it effectively made the determination that protecting such confidentiality is necessary to protect the public interest and to avoid injury to the non-finalists" and that this determination should apply equally "to the confidentiality of non-finalists during a school board meeting." The Board further asserts that "[t]he floor debate on LB 389 . . . reflects that maintaining the confidentiality of non-finalist applicants is necessary to protect the public interest, as it allows governmental entities to get a broad pool of applicants," and it "avoids causing injury to the non-finalists."

This argument is neither new nor fanciful. In 2008, we considered the same argument offered in response to an open meetings complaint brought against the City of Ogallala. In our disposition letter to File No. 08-MR-104 (October 10, 2008), we stated, in pertinent part:

> In his response, [City Attorney] McQuillan points to Neb. Rev. Stat. § 84-712.05 of the Nebraska Public Records Statutes as being instructive on this issue. Mr. McQuillan argues that because 84-712.05(15) [footnote omitted] allows a public body to withhold job application materials submitted by applicants (other than finalists) from public disclosure, it became necessary to discuss such materials in a closed setting. Mr. McQuillan exhorts us to read § 84-1410 of the Open Meetings Act in harmony with § 84-712.05(15). He argues that requiring a candidate's applications and supporting documents to be discussed in an open forum, prior to that candidate becoming a finalist, would render ineffective the exception set forth in § 84-712.05(15), "and would promote the injury of a candidate's reputation rather than prevent it." McQuillan Letter at 2.
>
> We are aware of the competing public policies at play here. The Open Meetings Act and the Public Records Statutes together represent

the cornerstone of openness and access to governmental bodies and information. They are, however, two very different sets of statutes. The Open Meetings Act does not reference the Public Records Statutes, and vice versa. Assuming *arguendo* that a closed session in this instance was proper, there is nothing in the Open Meetings Act that addresses the confidentiality of documents discussed in closed session. [Footnote omitted.] We can find no statutory basis to support the argument that an otherwise improper closed session becomes proper when necessary to protect certain documents from disclosure. Moreover, the exceptions enumerated in § 84-712.05 of the Public Records Statutes simply permit a public body to withhold certain records; the exceptions do not require that such records be withheld. *Burlington Northern Railroad Company v. Omaha Public Power District*, 703 F. Supp. 826 (D. Neb. 1988); *aff'd Burlington Northern Railroad Company v. Omaha Public Power District*, 888 F.2d 1228 (8th Cir. 1989).

As a result, the answer as to whether the closed sessions were proper in this context is not exactly clear. However, in the end we must rely on the Nebraska Supreme Court case *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984), to support our conclusion that the meetings at issue should have been kept open. *Grein* involved an action to void a contract between a school board and a contractor which resulted from discussion held during an improper closed session of the board. Among the court's critical holdings in *Grein* are the following:

> (1) "Provisions permitting closed sessions and exemption from openness of a meeting must be narrowly and strictly construed." 216 Neb. at 165, 343 N.W.2d at 723.
>
> (2) "The 'public interest' mentioned in § 84-1410 is that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities." *Id.*
>
> (3) "[G]ood faith or good intention on the part of the public body is irrelevant to the question of compliance with the provisions of the Public Meetings Laws authorizing a closed session." *Id.* at 167, 343 N.W.2d at 724.
>
> (4) "The prohibition against decisions or formal action in a closed session also proscribes 'crystallization of secret decisions to a point just short of ceremonial acceptance,' and rubberstamping or reenacting by a pro forma vote any decision reached during a closed session." *Id.*

Finally, the *Grein* Court concluded:

> **From all this there evolves a guiding principle relatively simple and fundamental: If a public body is uncertain about the type of session to be conducted, open or closed, bear in mind the policy of openness promoted by the Public Meetings Laws and opt for a meeting in the presence of the public.**

216 Neb. at 168, 343 N.W.2d at 724 (emphasis added).

> We appreciate the City Council's attempt to garner community support and input during its search for a new city manager. However, the City Council chose to appoint a committee for this task which was subject to the Open Meetings Act. *See* Neb. Rev. Stat. § 84-1409 (1)(a)(v). As a result, the screening of candidates should have been done primarily in open session, with closed sessions permitted to discuss discrete issues meeting the statutory requirements. [Footnote omitted.] We fully understand that the discussion of some of the candidates' applications may have warranted a closed session to protect injury to their reputations. But not all of the candidates. Moreover, as indicated in *Grein*, the Committee's good faith motivation for the closed sessions, i.e., protecting non-finalists' applications from disclosure, is not a cure for noncompliance of the Open Meetings Act. Consequently, we find the Committee's closed sessions to review the city manager candidate's qualifications were improper.[2]

Disposition Letter to File No. 08-MR-104 (October 10, 2008), pp. 5-7. We believe our reasoning with respect to File No. 08-MR-104 applies equally in the present instance. While we understand the Board's argument is based upon the Public Records Statutes, we conclude, for the reasons stated immediately above, that the Public Records Statutes do not support a closed session in this instance.

B. In addition, the Board asks us to consider two public record cases—one involving the search for a new president at Arizona State University and another brought

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2. For the record, on page 5, we stated that the two sets of statutes do not reference each other. That is incorrect. Three sections of the Nebraska Public Records Statutes reference the Open Meetings Act: Section 84-712.05(15) specifically references § 84-1409 of the Act with respect to the definition of "public body"; sections 84-712.07 and 84-712.08 each reference § 84-1413, which includes the provision "[t]he minutes of all meetings and evidence and documentation received or disclosed in open session shall be public records and open to public inspection during normal business hours."

under the federal Freedom of Information Act—to support the "public interest and injury" assertions advanced above. While these cases illustrate the necessity to balance the potential public or private harm with the interests of the state and the general policy of access and disclosure, no such balancing test is necessary in Nebraska. Unlike Arizona and the federal government, Nebraska has a specific statutory provision that allows a public body, at its discretion, to withhold from disclosure job application materials for non-finalist applicants. Moreover, the cases cited are public records cases, not open meetings cases. They lend little support to the notion that public meetings may be legitimately closed based on a public records statute, which is what the Board is asking us to consider here.

C. Finally, the Board asks us to consider the "appointment exception to closed sessions" found in Neb. Rev. Stat. § 84-1410. This exception, which appears at the end of subsection (1), provides:

> Nothing in this section shall permit a closed meeting for discussion of the appointment or election of a new member to any public body.

The Board goes on to state:

> Why would the Legislature create such an exception? Because, like the identity of non-finalist applicants for employment positions, maintaining the confidentiality of the identity of persons who are non-finalist candidates for a vacancy on a public board meets the public interest and injury to reputation criterion for holding a closed session.

The Board's argument with respect to the appointment exception in § 84-1410 is not entirely clear to us. However, the Legislature obviously created a prohibition on closed sessions for the appointment of members to a public body to specifically prevent the use of secret meetings for that purpose. The Board contends that the appointment exception for closed sessions was necessary because, without it, public bodies could go into closed session for member appointments both to prevent needless injury to a person's reputation *and* to protect the public interest in the confidentiality of persons who were non-finalist candidates for a public board. We disagree. As discussed below, the focus of the public interest described in § 84-1410 is protection of the public's money, not the confidentiality of job applicants. Under those circumstances, we believe that the Legislature added the appointment exception in § 84-1410 primarily to prevent any closed sessions which might be justified as necessary to prevent needless injury to a person's reputation. That conclusion is generally supported by the legislative history of the appointment exception, which indicates that its purpose was to ensure that members appointed to a public body were scrutinized in the same fashion as elected members. Floor Debate on LB 325, 84th Leg., 1st Sess. 4619-4620 (May 14, 1975) (Statement of Sen. Anderson). We do not believe that the appointment exception

supports the notion that closed sessions of a public body are justified to protect the confidentiality of non-finalist job applicants.

Ultimately, the issue is whether the Board's closed session to discuss the qualifications of the twelve superintendent candidates and narrow that list down to four finalists was clearly necessary for the protection of the public interest or to prevent needless injury to the reputations of these individuals, and the twelve candidates all waived their legal rights to have their qualifications discussed in a public meeting. The Board purportedly went into closed session to discuss "personnel" and then recited both statutory reasons as its basis to close the meeting. So it is unclear to us the *actual* reason for the closed session. Keeping in mind the *Grein* court's holding that "[p]rovisions permitting closed sessions and exemption from openness of a meeting must be narrowly and strictly construed,"[3] we considered the propriety of the December 4, 2012, closed session.

"Protection of the public interest" is not defined in the Open Meetings Act, but has been judicially defined in *Grein*:

> The "public interest" mentioned in Neb. Rev. Stat. § 84-1410 is that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities.[4]

The examples set out in § 84-1410(1)(a) allow a public body to close its meeting to discuss collective bargaining, real estate purchases, negotiation, pending or threatened litigation. Generally speaking, these examples are designed to allow a public body to protect the public fisc—to negotiate contract terms and real estate transactions, avoid a law suit, design a strategy, get the "best deal." In other words, *save the citizens whom it represents money*. In the present case, the Board represents that "[t]he narrowing of candidates to a finalists pool must be done in closed session in order to attract the best candidates . . . ." We believe this assertion is speculative at best. Can the Board say with any certainty that it attracted the best candidates by closing the meeting in question? In comparison, how is the public interest benefitted by having the qualifications of the twelve candidates discussed privately? How does that save money? We would suggest that the citizens and the taxpayers of the school district would receive a far greater benefit by knowing who applied for the position, what their qualifications were, and what they proposed to bring to the job.

As noted above, the Board also claimed that the closed session on December 4, 2012, was necessary to prevent needless injury to an individual's reputation. Here, the Board convened its meeting at 7:00 p.m., moved to go into closed session at 7:05 p.m., came out of the closed session at 9:52 p.m., took a unanimous vote on the four finalists,

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[3] *Grein* at 165, 343 N.W.2d at 723.
[4] *Id.*

and then adjourned at 9:54 p.m. In our previous disposition letter to the Board, we stated that

> [w]hile we can see how, under certain circumstances, a closed session may be in order to discuss a particular aspect of a candidate's background in order to prevent needless injury to his or her reputation, *this does not mean that the entire discussion may be closed to the public.* (Emphasis in original.)

Disposition Letter to File No. 10-M-107 (June 3, 2010), p. 12.

Consequently, we are unable to conclude, based on the arguments advanced by the Board, and from our own analysis, that the Board's December 4, 2012, closed session was clearly necessary to protect the public interest or to prevent needless injury to the applicants' reputations. Additionally, the Board appears to have come to a consensus as to which four candidates would be advanced for further consideration during its closed session, which is expressly prohibited in § 84-1410(2) and in *Grein*. For these reasons, we believe the Board violated the Open Meetings Act with respect to this closed session.

II. *The Events Set Out in Your December 22, 2012, E-Mail.*

The second component of your complaint relates primarily to the meeting held on December 13, 2012, and your attempts to get information from Board members and staff as to what occurred at this meeting in the days immediately following it. According to an editorial in the Beatrice Daily Sun,[5] you indicate that "the board president said that the board would take a recess and go into executive session. However, once the public left the room the board did not go into executive session, although the public was led to believe otherwise." You state that you were able to confirm by speaking to the district secretary that the Board did not go into executive session. You state that you left several voicemails for the Board president to no avail. When you did talk to someone (the district secretary, the superintendent, the Board vice-president), you advised that since the Board stayed in open session during its December 13 meeting, all of the matters discussed was public information, and that you had a right to receive it. You state that despite this, they refused to provide you the requested information. Believing that this information had been "withheld illegally," you appeared at the Board meeting on December 18, 2012, and raised the issue during the public forum period. You conclude: "No one would have ever been the wiser that the board led the public astray by staying in open session after they cleared the room by saying they were going into executive session."

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[5] Chris Dunker, *When wires get crossed*, Beatrice Daily Sun, December 21, 2012, 2:47 PM (online edition).

The Board recorded the events in its minutes as follows:

> At 8:40 PM the Board took a five minutes [*sic*] recess. At 8:45 PM the Board of Education returned to discuss candidates. An Executive Session would be called if any Board member had any comments that may cause needless injury to the reputation of an individual. All other discussions/decisions would be conducted in open session. The Board began the discussion of the candidates in open session by reviewing the input sheets from all the interview groups listing strengths and weaknesses of each candidate. The Board then took turns expressing what they thought were strengths and weaknesses of each candidate. After some discussion the Board narrowed the pool down to two finalists. The Board then once again took turns discussing the strengths and weaknesses of the two finalists. The Board came to consensus on one candidate. The Board spent time discussing salary and total package to offer the candidate. Tobias Tempelmeyer was instructed by the Board of Education to call the candidate and make an offer.

An announcement that would lead an audience to believe that the meeting was essentially over is problematic. However, in this instance we do not believe that the Board intentionally sought to deceive the public. Apparently, with no one remaining in the meeting room, closing the meeting was no longer necessary for the Board. However, we concur with your assertion that since the meeting was open to its conclusion, the minutes should have contained information regarding the finalists and ultimately, the individual selected by the Board to be superintendent. Neb. Rev. Stat. § 84-1413 requires the Board to include in its minutes "the time, place, members present and absent, and the substance of all matters discussed." Since the Board discussed the four finalists in an open meeting, it should have included this information in its minutes. We believe the minutes were purposefully vague.

ACTION BY THE DEPARTMENT OF JUSTICE

This office has carefully weighed the Board's actions in the present case. We believe that the Board, despite its missteps, did not evince the necessary intent to violate the Open Meetings Act. In coming to this conclusion, we considered again the actions and events which occurred during its superintendent search in 2010. There are several key differences. Here we find neither a purposeful circumvention of the Act by Board members nor a series of improper closed sessions convened to discuss candidates. More importantly, counsel for the Board has made a plausible argument to support the propriety of the closed session held by the Board on December 4, 2012. While we ultimately disagree with this argument, it makes criminal prosecution unwarranted.

Finally, we would like to take this opportunity to suggest to the members of the Board who were involved in both superintendent searches that a school superintendent is a *public* employee who is hired by the governing body of a local political subdivision. In that context, we believe that the notion that candidates' identities can be kept confidential when they are the subject of a general discussion during a public meeting is unsupported under our current law. We urge Board members to err on the side of openness, and refrain from conduct which raises issues of impropriety under the Act.

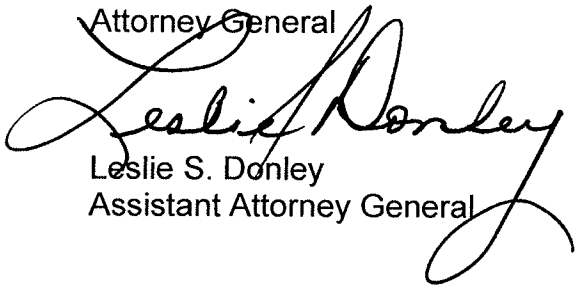
CONCLUSION

We believe that the Beatrice Public Schools Board of Education violated the Open Meetings Act when it convened a closed session on December 4, 2012, to discuss the twelve candidates for the superintendent position. Further, the minutes for the December 13, 2012, meeting, should have reflected the actual Board discussion.

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,

JON BRUNING
Attorney General



Leslie S. Donley
Assistant Attorney General

cc: Gregory H. Perry

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