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December 15, 2015

Coranne Moss
415 S. 12th St
Wymore, NE 68466

Re: *File No. 15-M-138; Blue Rivers Area Agency on Aging; Complainant Coranne Moss*

Dear Ms. Moss:

This letter is in response to your multiple correspondence received by us in August and September 2015 in which you requested that this office investigate alleged violations by the Blue Rivers Area Agency on Aging ("BRAAA") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2014). In accordance with our normal procedures, we requested a response from the BRAAA after we received your complaints; we subsequently received its response, signed by Ivan Zimmerman, Chairman of the Board of Directors of the BRAAA. We have now had an opportunity to review your allegations and the BRAAA's response, and our conclusions are set out below.

FACTS

Our understanding of the facts in this case is based upon your correspondence, supporting materials provided by you, and the BRAAA's Response. We have identified a number of distinct Open Meeting Act complaints made by you as to the BRAAA's meetings held on August 24, 2015 and two policies of the BRAAA which have been adopted by that body. We believe your Open Meetings Act complaints to be:

(1) The agenda for the August 24, 2015 meeting was not available at the time of the public notice for that meeting, and requests by you to obtain that agenda were "ignored" by the BRAAA;
(2) Different versions of the agenda for the August 24, 2015 meeting were provided to different individuals;
(3) The agenda for the August 24, 2015 meeting lacked specificity as to the agenda item "Gage County Nutrition Program" and BRAAA Board members refused to confirm what was to be discussed;

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(4) The BRAAA discussed an item that was not on the agenda, namely e-mails between the BRAAA and the Beatrice Senior Center with respect to the "nutrition program";
(5) The meeting room for the August 24, 2015 meeting was not large enough for the audience in attendance and was only changed after a complaint;
(6) The draft minutes for the August 24, 2015 meeting contained inaccurate statements of what occurred during the meeting;
(7) A deceased BRAAA Board member's name was called during a roll call vote on August 24, 2015;
(8) The rules set forth by the BRAAA for public comments are not in conformance with the Open Meetings Act; and
(9) One of the defined "Board Member Responsibilities" for respecting confidentiality of information is not in conformance with the Open Meetings Act.

ANALYSIS

Agenda

You have made a number of complaints relating to the agenda for the August 24, 2015 BRAAA meeting. The Open Meetings Act requires that

> [e]ach 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.

Neb. Rev. Stat. § 84-1411 (2014).

You first complain that you requested an agenda for this meeting, which was not provided immediately upon request, and that your requests for the agenda were repeatedly "ignored" by BRAAA staff. Your August 31, 2015 letter attached the agenda for the August 24, 2015 meeting of the BRAAA, refers to a newspaper article concerning the meeting on August 24, and makes a number of other complaints about the August 24, 2015 BRAAA meeting. However, you also reference the July 27, 2015 meeting agenda. We are unsure whether your complaint regarding the availability of

the agenda relates to the July 27, 2015 meeting or the August 24, 2015 meeting. The BRAAA addressed the availability of the agendas for both meetings in its response. As to the August 24, 2015 meeting, the BRAAA states that the agenda was available at the time the public notice was published in a number of local newspapers. We find no violation of the Open Meetings Act with respect to the notice and availability of this agenda. As to the July 27 meeting, the BRAAA admits the agenda was not available as of July 16, the date the notice was sent to the local newspapers for publication, as some of the papers in which the notice is published are printed daily and others weekly. We are unclear as to when notice was actually published by the various newspapers. However, we believe notice was published at least by July 21, as that was the date you requested the agenda. The BRAAA explains that the agenda was finalized on July 21, but was not yet final when you initially requested it that morning. However, the final agenda was provided to you later that same day. As you were provided the July 27 BRAAA meeting agenda on the day upon which you requested it, and that was six days before the meeting was held, absent any evidence that notice was published before July 21, we find no violation of the Open Meetings Act as to this portion of your complaint. However, we would point out to the BRAAA that an agenda, kept continually current, must be available as of the date of the notice of a meeting.

You also complain that differing versions of the agenda for the August 24 meeting were provided to you, a staff member of the Beatrice Senior Center, and to a member of the Beatrice Senior Center Board on the same day. We have reviewed both versions of the agenda. The substantive content of each is the same as to agenda items to be discussed. The difference between the two agendas is that the version provided to the Senior Center Board member contains more detail on the limitations to be made on public comment, detailing the BRAAA Board's rules as to comment. The BRAAA explains that the agenda you received, not containing the detailed rules concerning public comment, was a draft agenda, which had been previously updated. The agenda had been timely amended to clarify the BRAAA Board's "expectation of the reasonable rules of conduct for public comment." When the error was discovered that you had not received the current version of the agenda, it was then sent by the BRAAA to its primary contact with the Senior Center, the board member, rather than to you. As the BRAAA states that it timely amended the agenda, and you were mistakenly given a draft version of the agenda, we cannot find that the BRAAA violated the Open Meetings Act with respect to this portion of your complaint. The BRAAA, however, should take steps to ensure that only the latest version of the agenda is provided upon request, to ensure that previous versions of the agenda are not being distributed.

You next complain that the agenda item for the August 24, 2014 meeting "Gage County Nutrition program" was not sufficiently descriptive to allow the public reasonable notice as to what would be discussed by the BRAAA on August 24. You state that the August 24 meeting was "to discuss specifically a contact (sic) meal proposal from the

BRAAA Board to the Beatrice Sr. Center" but the Board would not confirm if the contract meal proposal was on the agenda as "Gage County Meal program." You did, at some juncture, receive confirmation from the secretary of the BRAAA that the contract between the BRAAA and the senior center was what would be discussed during this meeting. The BRAAA's response indicates that "Gage County Nutrition program" was the same language used on the July 2015 agenda to discuss the same topic – that of the contract between the BRAAA and the senior center. The sufficiency of an agenda item might be measured, at least to some degree, in the context of the other meetings of the public body immediately prior to the public meeting in question. *Hansmeyer v. Nebraska Public Power District*, 6 Neb. App. 889 (1999). Additionally, the language used by the BRAAA mirrors that found in the Older American Act to describe the program to be discussed at the meeting. We note that the article you provided regarding the August 24 meeting indicates that a large number of people arrived for this meeting to address the BRAAA Board concerning the contract between the BRAAA and the senior center. We believe that if nearly 60 people attended to listen and to comment, the agenda item was sufficiently descriptive to allow the public notice of what was to be discussed at the August 24 meeting. We find no violation of the Open Meetings Act related to whether the agenda item was sufficiently descriptive.

Finally, as to the agenda, you complain that the BRAAA discussed an item that was not found on the agenda. You point to the minutes for the August 24 meeting, which show that the BRAAA Board discussed e-mails concerning the working relationship between the BRAAA and the Beatrice Senior Center with respect to the nutrition program. This item was discussed during the agenda item "Gage County Nutrition program," which included the contract between the BRAAA and the Beatrice Senior Center. We believe that the topic of discussion of the e-mails was appropriate, as it related to the contract at issue. We find no violation of the Open Meetings Act related to this discussion.

Meeting Room

You have complained that the BRAAA's August 24 meeting was scheduled to be held in a room too small for the audience that arrived to attend the meeting. The Open Meetings Act states that "[n]o public body shall, for the purpose of circumventing the Open Meetings Act, hold a meeting in a place known by the body to be too small to accommodate the anticipated audience." Neb. Rev. Stat. § 84-1412(4) (2014).

We understand that the BRAAA typically holds its meetings at the Beatrice Senior Center. However, due to the discussion on the agenda for the August 24 meeting of the contract between the BRAAA and the Beatrice Senior Center, the BRAAA determined that it be best to hold the meeting at a neutral location, and chose a local restaurant. The BRAAA did not expect nearly 60 people in attendance at the

meeting, as it anticipated "minimal public interest" in the nutrition program. When a large public audience arrived at the meeting, the meeting was moved to a larger room at the same facility, to accommodate all the members of the public. It appears to us the BRAAA's actions were reasonable and there was no intention to circumvent the Open Meetings Act. We find no violation of the Open Meetings Act as to this portion of your complaint.

Minutes

Your submission of September 11, 2015 contains a complaint that the draft minutes of the August 24, 2015 meeting do not accurately represent statements that were made at the meeting. Particularly, the portion of the minutes under the agenda item "Gage County Nutrition program" indicate a statement was made by Julie Hippen regarding the Beatrice Senior Center and its ability to manage grant funds. Your complaint states that Ms. Hippen did not make this statement at the meeting. The BRAAA responds to your allegation by stating that the minutes you provided to this office and upon which your complaint was based were draft minutes that were amended before they were finalized by the BRAAA Board. The final minutes of the meeting, as presented to his office by the BRAAA, do not contain the language you complained was inaccurate. However, we are concerned that the BRAAA did not amend and finalize its minutes until November 2, 2015, when the Open Meetings Act requires the minutes of a public body's meetings to be written and available for inspection within ten working days. Neb. Rev. Stat. § 84-1413(5) (2014). While the BRAAA did prepare minutes in early September, as they were available to you before September 11, 2015, the minutes do not indicate that they are a "draft" version. Additionally, the Open Meetings Act does not provide for minutes to be later amended as to the substance of what occurred. What should be available to the public within ten working days is an accurate account of what occurred at the meeting of the BRAAA. While the BRAAA may have internal governance procedures relating to the approval of minutes by the Board, and may call the minutes "draft minutes" until that approval is ratified, the Open Meetings Act requires the accurate representation of what occurred to be complied by the public body within ten business days. We will remind the BRAAA of its responsibilities under the Open Meetings Act in this regard by copy of this letter. However, we do not believe that any action by this office is required at this time as to this matter, as the minutes have already been corrected and disseminated.

Roll Call Vote

As to the August 24, 2015 meeting, your final complaint is that the name of a deceased BRAAA Board member was called during the roll call vote. The BRAAA responded by stating that the deceased member's name was inadvertently called during the roll call vote, but that former member was not included in the count of members

towards the quorum needed to proceed with the meeting. Additionally, the deceased member clearly did not actually vote during the meeting. We find no violation of the Open Meetings Act as to this portion of your complaint.

Public Comment

You also complain about the policy recently adopted by the BRAAA as to public comment. Absent a specific complaint regarding the denial of a right to speak at a particular open meeting, this office typically does not review policies for public comment, in general. In keeping with that, we decline to review this policy, as you have not made a specific complaint regarding your right to speak at an open meeting. We will, however, provide the general guidelines we have provided over the years as to public comment at open meetings of public bodies.

Neb. Rev. Stat. § 84-1412 provides that the public has the right to attend and speak at meetings of public bodies. However, a public body may "make and enforce reasonable rules" as to public participation, including a requirement that the public may address the Board only during a specially designated "public comment" time during the meeting. "A body may not be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings." § 84-1412 (2).

Through the years, our office has developed a number of guidelines which we believe govern the public's right to speak at open meetings of public bodies. One of those guidelines is 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.

In addition there is no absolute right for members of the public to address a public body at any given meeting or on any given agenda item, so long as there is some time at some meetings set aside for public comment. Public bodies can rightfully refuse to allow public comment at a given meeting, or as they consider a particular agenda

item. A public body is not required to allow members of the public to speak at a particular open meeting, or every open meeting, provided that the public body allows the public to address them at some meetings. The public body is not required to allow a citizen to speak during any agenda item other than one designated as "public comment."

You do have one specific complaint related to the public comment period at the September 21, 2015 meeting of the BRAAA. You question whether the public comment period must be held at the beginning of the meeting. The Open Meetings Act does not require the public comment period to be at any particular time during the meeting; a public body may hold public comment at the beginning of its meeting, at the end, or at any point in between. There is no violation of the BRAAA as to this portion of your complaint.

Board Member Responsibilities

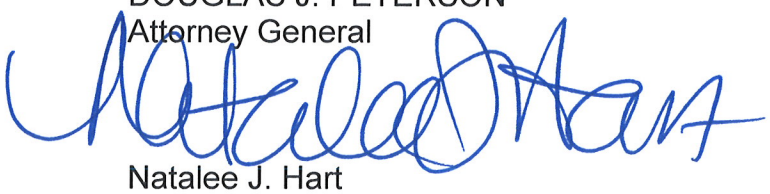
You have also made a complaint regarding the "Board Member Responsibilities" policy adopted by the BRAAA. As with the public comment policy, absent a particular Open Meeting Act complaint relating to this policy, we lack the authority to review the policy in general. As a result, we decline to review this portion of your complaint.

CONCLUSION

For the reasons stated above, we do not believe the BRAAA has violated the Open Meetings Act as to most of the allegations found in your complaints. We do find that the BRAAA should ensure that agendas are available at the time of notice and that the minutes of each meeting, containing an accurate representation of what occurred, are available for inspection within ten working days. 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,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

Cc: Ivan Zimmerman

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