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February 25, 2011

Gary Burke, Esq.
P.O. Box 713
113 East 2nd Street
Ogallala, NE 69153

RE: *File No. 10-M-127; City of Bridgeport Library Board; Connie Arellano, Complainant*

Dear Mr. Burke:

This disposition letter is in response to the complaint you filed with us on behalf of Connie Arellano on October 14, 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 City of Bridgeport Library Board (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 Bill Boyer, City Administrator, City of Bridgeport. On November 12, 2010, we received a response from Howard Olsen, of the Simmons Olsen Law Firm, who responded on behalf of the Board. We have now had an opportunity to review in detail your complaint and the response submitted by the Board. Our findings and conclusion in this matter are set out below.

From the outset, we note that Ms. Arellano contacted this office using our on-line constituent complaint form on July 28, 2010. When we contacted Ms. Arellano about her complaint on August 5, 2010, she advised that she was in the process of hiring an attorney to take her "case." Consequently, we took no further action on this file, other than contacting Ms. Arellano on September 23, 2010, to get an update, until we received the aforementioned complaint. We would also reiterate that we agreed to review this matter, under the general enforcement language in Neb. Rev. Stat. § 84-1414, with the understanding that time had expired to file any civil proceeding to render void or voidable any action of the Board.

FACTS

You indicate that Ms. Arellano served as the Library Director for the City of Bridgeport. In that capacity, Ms. Arellano also served as the secretary for the Board during its meetings. With respect to Ms. Arellano's specific allegations against the Board, you submit the following:

> Mrs. Arellano questions the validity of closed session meetings that did not have all Board members present to discuss personnel actions. Further, Mrs. Arellano was not given an opportunity to defend herself before the Board in the July 7 meeting. The City Administrator told Mrs. Arellano that the Board discussed Mrs. Arellano's personnel situation in the first closed session. This was not reflected in Board minutes and Mrs. Arellano asserts that this is a violation of Nebraska's Open Meetings Act. A volunteer fireman was reprimanded and suspended in April of 2009 and this personnel action was detailed in City Council Meeting minutes and on the City of Bridgeport website. These minutes were subsequently rewritten and reposted.
>
> Mrs. Arellano resigned her position as Library Director on July 22, 2010 [sic], but did not receive notice of a special meeting held on July 24, 2010 [sic] at 11:00 AM to discuss her resignation with the Board. Mrs. Arellano wished to advise the Board of her reasoning for disciplining Laurie Leonard (allegations of leaving children unattended) but was denied this opportunity when she failed to receive notice of the special meeting.

Additionally, we note that the complaint included three exhibits: Ms. Arellano's "original notes" of the July 7, 2009, meeting (Exhibit 1); the "revised" July 7, 2009, meeting minutes (Exhibit 2); and an e-mail string between Ms. Arellano and Mr. Boyer, with a redlined version of the meeting minutes (Exhibit 3).

According to Mr. Olsen, Ms. Arellano resigned her position by letter dated July 22, 2009, addressed to the Bridgeport Public Library Board Members and the City Council. Her resignation letter states, in pertinent part: "Please accept my resignation effective immediately. Thank you for giving me the opportunity to serve the public these past five years." The resignation letter contains no request to address the Board about her resignation. Mr. Olsen also indicates that Ms. Arellano made no verbal request to discuss her resignation. He also indicates that "Ms. Arellano knew the location and place of the special meeting, having been given such notice by hand delivery. That meeting was to consider a recommendation for the termination of Ms. Arellano which likely prompted her resignation."

With respect to the e-mail communication between Ms. Arellano and Mr. Boyer, Mr. Olsen asks us to consider Ms. Arellano's final entry: "You are right. I accept your correction on the minutes. Thanks for pointing that out to me. Connie." He indicates that the last paragraph on the July 7, 2009, minutes was struck because neither a motion nor a vote took place, and that the current minutes support that.

Finally, Mr. Olsen advises that all board members do not have to be present to discuss personnel matters.

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. Not All of the Board Members Were Present to Discuss Personnel Actions.

Ms. Arellano's first allegation is that not all of the Board members were present to take part in the closed session to discuss personnel actions. According to the meeting minutes, four out of five Board members were present at the meeting on July 7, 2009. Technically, the Act only requires "the affirmative vote of a majority of its voting members" to go into closed session. There is no requirement that all members of the public body be present to convene a closed session. Nor is there any special provision requiring the full membership to be present when discussing "personnel actions" in closed session. In the present case, each of the closed sessions convened on July 7, 2009, were approved by four Board members, clearly a majority of its voting members. As a result, we find no violation of the Act.

2. Ms. Arellano Was Not Given An Opportunity to Defend Herself at the July 7, 2009, Meeting.

A. Propriety of the Closed Session.

Section 84-1410 of the Open Meetings Act 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:
>
> > (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.
>
> Nothing in this section shall permit a closed meeting for discussion of the appointment or election of a new member to any public body.
>
> (2) The vote to hold a closed session shall be taken in open session. The entire motion, the vote of each member on the question of holding a closed session, and the time when the closed session commenced and concluded shall be recorded in the minutes. If the motion to close passes, then the presiding officer immediately prior to the closed session shall restate on the record the limitation of the subject matter of the closed session. The public body holding such a closed session shall restrict its consideration of matters during the closed portions to only those purposes set forth in the motion to close as the reason for the closed session. . . .

Ms. Arellano alleges that she was not given an opportunity to defend herself at the July 7, 2009, meeting, when the Board went into its first closed session to discuss her "personnel situation." According to the minutes published on the City of Bridgeport's website at http://www.cityofbport.com/uploads/LIB-20090707.pdf :

> Christensen made a motion for the Library Board and City Administrator Boyer to adjourn to executive session to discuss a personnel issue, Brauer seconded the motion. Roll Call: Yeas: Brauer, Christensen, Linders, Sides. Nays: None. Absent: Thompson. At 7:40 pm, Chairperson Sides announced that the Library Board and City Administrator, would be moving to executive session to discuss a personnel issued [sic]. No action would be taken while the board was in executive session. At 8:39 pm, the board returned to regular session.

While Neb. Rev. Stat. § 84-1410(1) allows public bodies to go into closed or executive session when it is necessary to protect the public interest or to prevent needless injury to the reputation of an individual, this section also requires the public body to remain in open session if the individual whose reputation is at issue requests that the discussion be held in public. This specific provision is reiterated in § 84-1410(1)(d), which sets out one example why a public body may close its meeting: "Evaluation of the job performance of a person when necessary to prevent needless injury to the reputation of a person <u>and if such person has not requested a public meeting</u>." (Emphasis added.) Thus, the language in § 84-1410 infers that, prior to convening a closed session believed necessary to prevent the needless injury to an individual's reputation, a public body must notify the individual who is the subject of the proposed closed session. In that way, the individual has the ability to request that the meeting remain open, as contemplated by the statute.

Under the circumstances here, which apparently involved a negative evaluation of Ms. Arellano's job performance, it appears to us that an executive session might have been proper under the provisions of § 84-1410. However, there is nothing in the record which indicates that the Board informed Ms. Arellano that she was the subject of the closed session prior to its commencement. Consequently, we believe the Board violated the Open Meetings Act when it went into closed session to discuss a personnel situation involving Ms. Arellano, and did not give her the opportunity to have that discussion held in open session.

B. Technical Aspects of Closing the Meeting Were Not Followed.

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." Here, the minutes indicate that a motion was made "to adjourn to executive session to discuss a personnel issue." The 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. As a result, the motion to go into closed session was improper under the Act.

3. The Minutes Do Not Reflect The Closed Session Involving Ms. Arellano.

Ms. Arellano also alleges that the minutes should have reflected that the Board discussed a personnel situation involving her while in closed session. We agree. Neb. Rev. Stat. § 84-1413(1) of the Act requires a public body to keep minutes of its meetings which include "the time, place, members present and absent, and the substance of all matters discussed." There is nothing in the minutes that indicates Ms. Arellano was the subject of the first closed session. And, as discussed above, the minutes should have reflected the purported reason for the closed session—to prevent the needless injury to the reputation of an individual.

4. The Board Failed to Give Ms. Arellano Notice of the July 24, 2009, Special Meeting.

According to information received from both parties, Ms. Arellano resigned her position as director of the Bridgeport Public Library Board on July 22, 2009. Beyond that fact, the parties strongly disagree. On one hand, Ms. Arellano states that she did not receive notice of the special meeting held on July 24, 2009, to discuss her resignation. She also contends that she wanted to advise the Board of her reasoning for disciplining a library staffer, but was denied this opportunity when she did not receive notice of the special meeting. To the contrary, Mr. Olsen states that the purpose for the special meeting was to consider a recommendation to terminate Ms. Arellano's employment as library director, and that Ms. Arellano received notice of the meeting by *hand delivery*. Mr. Olsen also indicates that the scheduling of the meeting likely prompted Ms. Arellano's resignation.

However, the only issue for us to decide is whether the Open Meetings Act required the Board to give Ms. Arellano specific notice of the meeting. In that regard, Neb. Rev. Stat. § 84-1411(1) of the Act provides, in pertinent part:

> 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. . . .**

(Emphasis added.) We were not provided any specific information as to how the Board gives notice of its regular and special meetings. However, a review of the minutes of

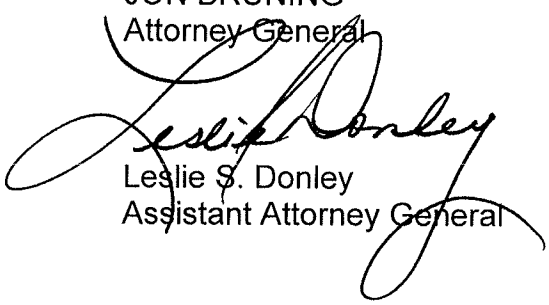
the July 24, 2009, meeting, indicates that advance notice of the meeting was given by posting notice at the Bridgeport City Hall, the local post office, and the Prairie Winds Community Center. The minutes also indicate that notice was given to all members of the Library Board. We have identified no provision in the statute that requires a public body to provide notice to a particular individual regarding a public meeting, except under those circumstances discussed in section 2.A. *supra.* Since it appears that the Board met the notice requirements set out in § 84-1411 with respect to the July 24, 2009, meeting, we find no violation of the Act.

ACTION BY DEPARTMENT OF JUSTICE

The question now becomes whether to pursue a criminal prosecution in light of our conclusion that the members of the Board violated the Open Meetings Act with respect to the propriety and the technical requirements of the closed session conducted during its July 7, 2009, meeting. Based on the facts of this case, we do not believe a criminal prosecution for a knowing violation of the Act is warranted. Instead, we will suggest to the members of the Board, by forwarding a copy of this response to Mr. Olsen, 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.

Sincerely,

JON BRUNING
Attorney General



Leslie S. Donley
Assistant Attorney General

cc: Howard Olsen, Esq.

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