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#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.

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Alfonza Whitaker
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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

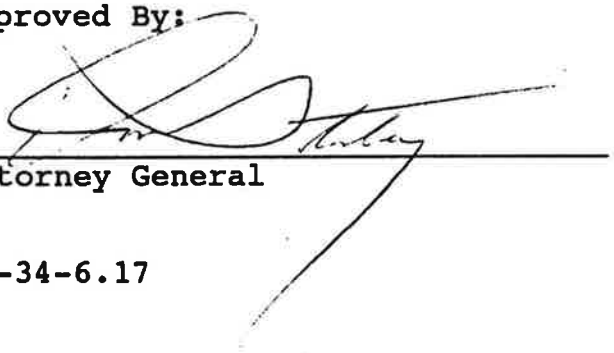
all, the meeting in question involved a duly constituted subcommittee of the Board of Regents which, as noted above, is exempted from the public meetings statutes in certain instances under § 84-1409. Second, as best we can tell, the subcommittee in question did not hold hearings, make policy or take 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

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DON STENBERG
ATTORNEY GENERAL

February 12, 1992

Mr. John W. Payne, Chairman
Nebraska Board of Regents
P.O. Box 340
Kearney, NE 68847

Dear Mr. Payne:

Enclosed for your information is a copy of our response to Mr. John Gould, Common Cause Nebraska and Mr. Tom White, Editor of the Lincoln Star concerning whether the November 14, 1991 meeting of the General Affairs Subcommittee of the Board of Regents violated Nebraska's public meetings statutes. While we conclude that no violations of law occurred, I believe that some additional comment is warranted.

The basic purpose of our public meetings statutes is stated in Neb.Rev.Stat. §84-1408 (Reissue 1987) as follows:

> It is hereby declared to be the policy of this State that formation of public policy is public business and may not be conducted in secret.
>
> Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies, except as otherwise provided....

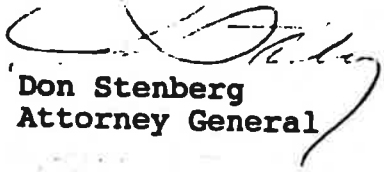
In other words, in a democratic government, the people have a right to be informed of and participate in the formation of public policy. Obviously this cannot occur if the people are not given notice of, or allowed to attend, meetings.

Our public meetings statutes do provide various exceptions and, in this case, those exceptions apply as explained in detail in our opinion. However, the fact that a particular meeting may be conducted in secret is not the same as saying that the meeting should be conducted in secret.

Properly serving the public is more than meeting minimal legal requirements. Our institutions of government work best when there is a feeling of public confidence and trust. Secret meetings, even if legal, tend to undermine the public confidence and trust.

I would therefore urge the Board of Regents and its subcommittees to conduct their business in a more open manner in the future than was the case in this instance.

Yours truly,



Don Stenberg
Attorney General

DS:bs

Enclosure

cc: Richard Wood
Tom White
John Gould