

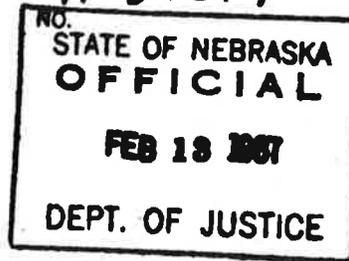
STATE OF NEBRASKA  
Department of Justice



LINCOLN, NEBRASKA 68509 • TEL. (402) 471-2882

ROBERT M. SPIRE  
Attorney General

# 87019



DATE: February 13, 1987

SUBJECT: Application of Nebraska Open Meetings Law to  
Department of Health Certificate of Need Review  
Committee

TO: Gregg F. Wright, M.D., M.Ed., Director of Health  
Department of Health

WRITTEN BY: Robert M. Spire, Attorney General

Dear Dr. Wright:

On January 8, 1987, the Department of Health Certificate of Need Review Committee held a public hearing on an application of St. Elizabeth's Community Health Center. After receiving comments and exhibits in open session, the Committee adjourned to a closed session to deliberate. After the closed session, the Committee reconvened in open session. Without further discussion, it then (a) voted on the application and (b) announced its intention to conduct further hearings in a similar manner.

(1) Does this hearing procedure violate the Nebraska Open Meetings Law? Yes.

(2) What is the effect of this violation on the decision reached by the Committee on January 8? The decision is invalid. The Committee must reconsider its January 8 decision at a new hearing. This new hearing must be entirely open, including Committee deliberations.

(3) What about the Committee's announced plan to conduct future hearings with a closed deliberations portion? The Committee must change this plan to provide for open deliberations.

I. An Outline of the Applicable Law

Nebraska's Open Meetings Law is described at Neb.Rev.Stat. §§84-1408, et seq.<sup>1</sup> In summary, it provides that public bodies must meet, receive information, listen to comments from the public, and deliberate in open session. There are exceptions to the open session requirement, such as protection of privacy rights of individuals and certain "judicial proceedings" conducted by a Court or "other judicial body." The only exception relevant to the January 8 hearing is the "judicial proceedings" concept. In other words, as a public body the Committee is subject to the Open Meetings Law unless exempted as an "other judicial body."

Is the Committee an "other judicial body?" No, for these reasons:

(1) The "judicial" exemption is designed to accommodate situations where privacy, due process or personal liberty issues are involved. An example is a county mental health board proceeding. Why? Such a proceeding is truly judicial in nature. A state prosecutor is involved. The mentally ill person is represented and has certain due process rights. Rules of evidence may apply. Objections to evidence are made and ruled on, and the liberty of the mentally ill person is at issue. This qualifies as an exempted "judicial proceeding." It does not in any way resemble a Certificate of Need hearing.

(2) The Open Meetings Law is intended to be interpreted broadly. Openness is to be favored when judgments on it are made. Justice Shanahan of the Nebraska Supreme Court has spoken forcefully on this issue in a recent Nebraska case, Grein v. Board of Education of the School District of Fremont, 216 Neb. 158 (1984). At pages 164-165, Justice Shanahan states:

"Public meetings laws are broadly interpreted and liberally construed to obtain the objective of openness in favor of the public. . . . Provisions permitting closed sessions and exemption from openness of a meeting must be narrowly and strictly construed."

(3) Legislative intent for a broad interpretation is clear from an analysis of legislative committee testimony and floor debate in January 1983 on LB 43, an amendment to the Open Meetings Law. Here are examples of this intent:

---

<sup>1</sup> This is the only Latin reference which will appear in this legal opinion. I promise.

- (1) Senator Hoagland (January 7, 1983, before the Legislature's Committee on Government, Military and Veteran's Affairs): "It is vitally important for those of us in government to promote the increased awareness of all citizens of governmental activities and afford citizens every opportunity to witness the operations of their political subdivisions. Only then do we have the kind of accountability we need in a democratic society."
- (2) Senator Landis (March 21, 1983, during floor debate): "We did make clear that the hearing, or the meeting had to be conducted with a good faith attempt to let people hear what is going on."
- (3) Senator Higgins (March 22, 1983, during floor debate) through questions and comments made it clear that she considered the Open Meetings Law important to "promote an increased awareness by all citizens of government activities and afford the people every opportunity to witness the operation of government, . . . ."

(4) Neb.Rev.Stat. §71-5850 (Reissue 1986) requires the review committee to provide, in writing, its decision and the findings and conclusions on which it based its decision, within thirty days after the conclusion of the hearing. It did so on January 14, 1987, with respect to the January 8th hearing. Although this procedure informs interested parties, it is not a substitute for the open deliberations requirement of the Open Meetings Law.

## II. Relevant Legal, Historical and Public Policy Factors

My legal conclusions are based on the analysis described above. In addition, these comments may be helpful in understanding the legal context in which the concerns here arise.

(1) Lawyers and judges must try to follow the spirit, as well as the letter, of the law. A careful study of Nebraska's Open Meetings Law makes it apparent that the Law's primary goal is open government. I repeat, open government.

Indeed, the history of open meetings laws nationally demonstrates their purpose to be the elimination of secrecy surrounding deliberations and decisions upon which public policy is based. And it is the entire decision making process, not just part of it, which is the subject of open meetings laws.

Openness is the primary ingredient in public confidence in government. Citizens may disagree with decisions of public bodies. But usually they will respect those bodies if they sincerely feel that the decision process is genuinely open.

(2) In a truly democratic society people must have a right to observe for themselves how their officials function and why those officials do what they do. Secrecy in government is devastating. It eliminates accountability. And accountability is fundamental to our governmental system.

Accountability to whom? To other governmental entities? To the press? To public officials? Yes, there must be accountability to all of these. But there also must be accountability directly to each of us ordinary citizens. This is why we have the First Amendment, open meetings laws and a commitment to education for all. We want to be the informed and responsible citizenry necessary to make a democracy work.

(3) Under our system of law, it is process which is crucial. Those who adopted our Constitution 200 years ago placed their faith in laws, not men. They established a constitutional system based on the premise that if you had proper processes controlling the operations of government, then the results would be good.

In short, you bet on the processes of (a) checks and balances and (b) openness. You don't bet on the benevolence or wisdom of individuals. Most people are fair, moral and responsible. But government must be based on processes that are not contingent upon people always being right and fair. We're not perfect. We need some protection from ourselves.

(4) It is difficult for a group, whether it is a county board, the Certificate of Need Committee, or any other public body to hear facts that often are in conflict; to ask questions; and (probably the most difficult situation of all) being required to sit before the public and weigh the evidence (pro and con), discuss it as a body, and take some final action which, almost certainly, will be offensive to someone. This is a situation most persons will elect to avoid if allowed to do so. Very understandable. But these difficulties are unavoidable if we are to have open meetings. They are a price we pay for the benefits of open government.

Discomfort on the part of the members of a public body is outweighed by their duty to inform the public of all the considerations upon which their actions are based. For it is the right of the public to know, not the right of the public body members to avoid discomfort, that we are protecting. They are

Gregg F. Wright, M.D., M.Ed.  
February 13, 1987  
Page -5-

about the public's business--very important business--and must involve the public in every stage of their work as completely as possible. Respect flowing from the public to these official representatives starts with an open process.

(5) My personal experience with public decision making has been that I cannot, in public, always articulate the basis for my decisions. My conclusions may not be well thought out. Perhaps I am unsure. But in any event, being required to articulate the reasons for what I do in public has always made me more careful in conducting public business. I think it works that way on other public officials and is a good thing for both the officials and the public.

(6) If public deliberations required by the Open Meetings Law are to have any real significance they cannot be superficial. Justice Shanahan's opinion in the Grein Case (cited above, at pages 163 and 168) is pertinent here:

"The Nebraska Public Meetings Laws are a statutory commitment to openness in government. As a result of open meetings, there will be development and maintenance of confidence, as well as participation, in our form of government as a democracy. The public can observe and within proper limits participate in discussions and deliberations of a public body. 'Deliberation' means the act of weighing or examining reasons for and against a choice or measure, and connotes not only collective discussion but collective acquisition and exchange of facts preliminary to the ultimate decision.

. . . . 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."

(7) My opinion here is just that and nothing more. Reasonable people may disagree. Some of these reasonable people may be judges or legislators. In this opinion I and my colleagues try to anticipate how a court would rule in this situation. But we are not a court. And our Legislature makes these laws, not my office or a court. The Legislature, very properly, can add to, subtract from, or otherwise change the Open Meetings Law as it sees fit.

Gregg F. Wright, M.D., M.Ed.  
February 13, 1987  
Page -6-

### III. Special Factors

It is important that the Department of Health and the Certificate of Need Review Committee fully understand that our opinion here is directed only at the procedure followed by the Committee, and not the merits of the Committee's decisions. We address only the legal procedures involved. In no way do we express an opinion on or concern ourselves with decisions reached by the Committee.

Why do we have an Open Meetings Law? The answer is majestically carved in stone above the north entrance of our magnificent Nebraska State Capitol Building:

"The Salvation of the State is Watchfulness in the Citizen."

Most sincerely yours,



Robert M. Spire  
Attorney General

RMS/bae