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August 3, 2023

Via email at [REDACTED]
Amber Wells

RE: *File No. 22-M-159; Elkhorn Public Schools Board of Education; Amber Wells, Complainant*

Dear Ms. Wells:

This letter is in response to your complaint submitted on October 26, 2022. This letter will address your allegations of violations of the Nebraska Open Meetings Act ("Act"), Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014, Cum. Supp. 2022), by the Elkhorn Public Schools Board of Education ("Board"). In accordance with our normal procedure with respect to such complaints, we sent a copy of your complaint materials to the Board for a response. On November 21 and February 1, we received responses from Attorney Justin Knight on behalf of the Board. We have now completed our review of your complaint, and our findings and conclusion are set out below.

FACTS

Our understanding of the facts in this case is based upon your complaint, Board minutes, and the responses we received from the Board.

Pursuant to Board Policy 203.06, the Board formed seven standing committees: the American Civics and Curriculum Committee, the Building and Grounds Committee, the Board Policy Committee, the Negotiations Committee, the Common Ground Advisory Committee, the Legislative Committee, and the Finance/Insurance Committee. The committees were formed to "seek[] information, discussion and/or investigation." The policy states that "[c]ommittees will report findings and recommendations to the board for its consideration and action." Each committee consists of up to three Board members. The superintendent and other employees of the school district attend meetings to provide information to the committees. Notice of the standing committee meetings is not published and no agenda or meeting minutes are provided to the public.

The Finance Committee reviews bills and claims as part of its review of the district's overall finances. The committee may then recommend to the Board that such bills or claims be approved or denied. The Board approves some bills and claims as part of its consent agenda at regular meetings.

The Board holds a regular meeting once a month. The length of meetings varies. You have suggested that meetings average 30 minutes in length.

ALLEGED VIOLATIONS

In general, you allege that the Board's use of committees violates the intent of the Act. Specifically, you allege that:

1. The Board generally meets only once per month and meetings last an average of 30 minutes;
2. The Board utilizes a committee structure;
3. The Board's committees do not publicize agendas or minutes;
4. The Superintendent sits on every committee;
5. Information from committees is submitted to the full Board outside of public meetings so that votes are pre-determined and there is little to no discussion when items are reviewed during Board meetings;
6. The Board approves bills for payment without any discussion and the bills or check register are not provided to the public;
7. No other Omaha-metro school board operates the same way as Elkhorn's School Board.

DISCUSSION

The Act is a statutory commitment to openness in government. *Wasikowski v. Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002). "The purpose of the open meeting law is to insure that public policy is formulated at open meetings of the bodies to which the law is applicable." *Pokorny v. City of Schuyler*, 202 Neb. 334, 339, 275 N.W.2d 281, 284 (1979). The open meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public. *State ex rel. Upper Republican NRD v. District Judges*, 273 Neb. 148, 728 N.W.2d 275 (2007).

Both the Attorney General and the county attorney of the county in which the public body ordinarily meets have the authority to enforce the Act. Neb. Rev. Stat. § 84-1414(2). However, only the district court can declare the act of a public body void. Neb. Rev. Stat. § 84-1414(1).

1. Meeting Frequency and Length

You allege that the Board violated the Act, or the spirit of the Act, by holding shorter and less frequent meetings than other school boards in the area. Specifically, you allege that the Board holds meetings once per month for an average of 30 minutes. The Act does not govern the length and frequency of meetings. We note, however, that pursuant to Neb. Rev. Stat. § 79-554, school boards in Class III districts are required to hold a regular meeting “on or before the third Monday of every month.” No statute requires that board meetings be held for any specific length of time. For these reasons, we find no violation of the Act related to meeting frequency or length.

2. & 3. Standing Committees

You next allege that the Board’s use of standing committees violates the Open Meetings Act because the standing committees do not publish notice or minutes of their meetings. Specifically, you state that Board members “are forming committees and making decisions with no transparency of content or outcome.”

The Act applies only to public bodies. Pursuant to the Act, “[e]very meeting of a public body shall be open to the public . . . except as otherwise provided by the Constitution of Nebraska, federal statutes, and the Open Meetings Act.” Neb. Rev. Stat. § 84-1408. Therefore, to determine whether the Act has been violated we must first determine whether the standing committees are public bodies subject to the Act. The Act defines “public body,” in relevant part, as follows:

(1)(a) Public body means (i) governing bodies of all political subdivisions of the State of Nebraska, (ii) governing bodies of all agencies, created by the Constitution of Nebraska, statute, or otherwise pursuant to law, of the executive department of the State of Nebraska, (iii) all independent boards, commissions, bureaus, committees, councils, subunits, or any other bodies created by the Constitution of Nebraska, statute, or otherwise pursuant to law, (iv) 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, (v) advisory committees of the bodies referred to in subdivisions (i), (ii), and (iii) of this subdivision, and (vi) instrumentalities exercising essentially public functions; and

(b) Public body does not include (i) subcommittees of such bodies unless a quorum of the public body attends a subcommittee meeting or unless such subcommittees are holding hearings, making policy, or taking formal action on behalf of their parent body

Neb. Rev. Stat. § 84-1409.

The Board, as the “governing body of a political subdivision,” is a public body governed by the Act. The standing committees created by the Board may be considered public bodies and subject to the Act if they are either advisory committees to the Board under Neb. Rev. Stat. § 84-1409(1)(a)(v), or subcommittees which either contain a quorum of Board members or hold hearings, make policy, or take formal action on behalf of the Board.

We first consider whether the standing committees are advisory committees to the Board within the meaning of Neb. Rev. Stat. § 84-1409(1)(a)(v). Typically, advisory committees under this provision are made up, at least in part, of members who are not a part of the parent public body. By their very nature, advisory committees provide opinions and advice from subject matter experts and stakeholders who are not a part of the committee. By contrast, a committee made up solely of Board members cannot advise the Board. It is axiomatic that a public body cannot advise itself.

The standing committees, in this instance, are not advisory committees to the Board under Neb. Rev. Stat. § 84-1409(1)(a)(v). Pursuant to Board Policy 203.06, each of the standing committee consists of up to three Board members appointed by the Board president. We note that the “Committees and Officers” page of the Elkhorn Public School website previously listed non-board members along with Board members under the heading of each standing committee. In response to an inquiry from this office, Mr. Knight clarified that “each standing committee has designated ‘advisers’ who may be asked by the committee to provide information in advance of a committee meeting, during a committee meeting, or after the committee meets. These ‘advisors’ are district administrators whose jobs relate to the committee’s work.” Mr. Knight confirmed that no non-board member is a member of any standing committee. We find that the standing committees are not advisory committees.

Finding that the standing committees are not advisory committees, we next consider whether they are subcommittees. A subcommittee “is generally defined as a group within a committee to which the committee may refer business.” *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 880-881, 725 N.W.2d 792, 805 (2007) [*City of Elkhorn*]. As previously stated, each standing committee consists of up to three Board members. Pursuant to Board Policy 203.06, each standing committee is tasked with seeking information, discussion, and investigation of designated issues. Therefore, we find that the standing committees are subcommittees of the Board.

Subcommittees are generally not subject to the Act pursuant to Neb. Rev. Stat. § 84-1409(1)(b). The definition of “public body” specifically excludes subcommittees “unless a quorum of the public body attends a subcommittee meeting or unless such subcommittees are holding hearings, making policy, or taking formal action on behalf of their parent body.” Neb. Rev. Stat. § 84-1409(1)(b)(i). While we find that the standing committees are subcommittees, we do not find that they are subject to the Act pursuant to Neb. Rev. Stat. § 84-1409(1)(b)(i). First, the three-board member standing committees

do not constitute a quorum of the Board.¹ Second, the committees do not hold hearings, make policy, or take formal action. Without a quorum, the standing committees do not have the power to take formal action on behalf of the Board. Board Policy 203.06 provides that the standing committees are “created for the specific tasks of seeking information, discussion and/or investigation.” Pursuant to this policy, the committees are expected to report findings and recommendations to the full Board for its consideration and action. These activities do not bring the subcommittees within the Neb. Rev. Stat. § 84-1409(1)(b)(i) exception.

The Nebraska Supreme Court has explained that “[b]y excluding nonquorum subgroups from the definition of public body, the Legislature has balanced the public’s need to be heard on matters of public policy with a practical accommodation for a public body’s need for information to conduct business.” *City of Elkhorn*, 272 Neb. at 881, 725 N.W.2d at 806. Because we find that they are not public bodies, the standing committees are not subject to the Act. For this reason, the standing committees are not required to publish notice of meetings or make agendas and minutes available to the public.

4. & 5. Superintendent

You next allege that the “superintendent sits on every committee” and improperly provides information to the Board that is not public. Specifically, you allege that the superintendent’s updates allow “information from the committees [to be] submitted to the full board, all outside of the view of the public. Hence, at the public board meeting there is little to no discussion of the items reviewed by the committees, as the board has already been briefed and the votes pre-determined.”

In his response, Mr. Knight states that the superintendent is not a member of any committee. Instead, he and other district staff members attend meetings at the request of a committee to provide information related to the committee’s work. The superintendent also occasionally provides a superintendent’s report at regular Board meetings. Mr. Knight denies that the superintendent gives “separate or secret updates to any committee or ‘count[s] votes’ behind the scenes.”

As discussed above, it is not a violation of the Act for the superintendent and other district employees to attend committee meetings and to provide information to the committees at those meetings. For example, in *City of Elkhorn*, the Court held that it was not improper for subgroups of less than a quorum of Omaha City Council members to attend informational sessions outside of the Council’s regular public meetings. 272 Neb. at 881, 725 N.W.2d at 806. The Court stated that the Act “does not require policy makers to remain ignorant of the issues they must decide until the moment the public is invited to comment on a proposed policy.” *Id.* Further, the Court stated that the “public would be

¹ The board of a Class III school district consists of six members. Neb. Rev. Stat. § 79-547(1). A majority of members, four in this instance, are needed for a quorum. Neb. Rev. Stat. § 79-554.

ill served by restricting policymakers from reflecting and preparing to consider proposals, or from privately suggesting alternatives.” *Id.*

Your complaint does not explain how you believe votes are being predetermined or allege any specific instance where you believe votes were, in fact, predetermined. Similarly, your complaint does not identify any specific Board action that was taken after “little to no discussion of the items reviewed by the committees.” It is a “long-held principle in Nebraska that, absent contrary evidence, public officers are presumed to faithfully perform their official duties.” *Thomas v. Peterson*, 307 Neb. 89, 98, 948 N.W.2d 698, 706 (2020). While we agree that the perfunctory approval of a decision reached outside of a public meeting is potentially violative of the Act, we cannot determine whether a violation occurred in the absence of specific allegations and facts.

6. Finance Committee

You next allege that the finance committee reviews bills outside of the public view which are then voted on by the Board without any discussion. You assert that, even though the bills are voted on at a public meeting, “a crucial part of the process is outside the public view.” In addition, you note that, unlike other metro school boards, the Board does not provide copies of bills or check registers to the public.

In his response, Mr. Knight explains that “the finance committee oftentimes reviews bills and claims in connection with their review of the overall district’s finances” and “may recommend approval or denial of claims or bills, but it is ultimately up to the full Board to decide.” Mr. Knight states that the Board makes a copy of all reproducible materials, including claims and bills, available for public inspection at each meeting in accordance with Neb. Rev. Stat. § 84-1412(8) and publishes a list of claims approved at each meeting in the *Douglas County Gazette* in compliance with Neb. Rev. Stat. § 79-580.

The Act does not require a public body to discuss any matter for a particular length of time before voting. While courts have been concerned with a public body “perfunctorily approving a decision in a public meeting that was apparently reached in a private meeting,” we have no evidence that a quorum of Board members have met in private to make decisions about the approval of bills and claims. *Koch v. Lower Loup Natural Resources District*, 27 Neb. App. 301, 316, 931 N.W.2d 160, 170 (2019).

Without evidence to the contrary, we accept Mr. Knight’s assertion that the Board makes a copy of reproducible materials, including bills and claims, available for inspection by the public at each meeting in compliance with Neb. Rev. Stat. § 84-1412(8). Outside of the requirement to make at least one copy of reproducible written materials discussed in a meeting available, upon request, for public examination and copying, the Act has no specific requirement that bills or check registers be distributed to the public. For this reason, we find no violation of the Act related to this set of allegations.

We note, however, that other statutes outside of the Act make this type of information accessible to the public. First, pursuant to Neb. Rev. Stat. § 79-580, a list of claims approved at each meeting of a Class III school board must be published in a newspaper within 10 days of a meeting. Mr. Knight asserts that the Board complies with this requirement by publishing a list in the *Douglas County Gazette*. Second, a member of the public may make a request to obtain public records maintained by the Board pursuant to the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2022).

7. Other Omaha-metro Area School Boards

Finally, you allege that no other Omaha-metro area school board operates in the same manner as the Board. Within the confines of the Act, it is the prerogative of each public body to determine how to organize and conduct its business. Having found no violation of the Act, this office has no authority to direct the way the Board operates.

CONCLUSION

For the reasons stated above, we are unable to conclude that the Board's use of standing committees violates the Act. Since no further action by this office is required, we are closing this file. If you disagree with our analysis, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under the Open Meetings Act.

Sincerely,

MIKE HILGERS
Attorney General



Elizabeth O. Gau
Assistant Attorney General

cc: Justin Knight (via email only)
03-068-30