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June 3, 2010

Patrick Ethridge, Editor
Beatrice Daily Sun
200 N. 7th Street
Beatrice, NE 68310

RE: *File No. 10-M-107; Beatrice Public Schools Board of Education;
Patrick Ethridge, Editor, Beatrice Daily Sun, Complainant*

Dear Mr. Ethridge:

This disposition letter is in response to your complaint received by us on February 3, 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; Supp. 2009), by the Beatrice Public Schools Board of Education (the "Board"), for alleged improper communications made by Board members during its process to hire a new superintendent. 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 Gregory Perry, of Perry, Guthery Haase & Gessford, P.C., L.L.O., legal counsel for the Board. On March 9, 2010, we received a response from attorney Rex R. Schultze, of the Perry firm, who responded on behalf of the Board. In addition to this response, we also received written comments from Board members Terry Cossel, Monte Lofing, and Jon Zimmerman. We have now had an opportunity to review in detail your complaint and the responses submitted by Messrs. Schultze, Cossel, Lofing and Zimmerman. Our findings and conclusion in this matter are set out below.

YOUR COMPLAINT

In your complaint, you state that during the January 28, 2010, Board meeting, four Board members made allegations that the Board had violated the Open Meetings Act while hiring its new superintendent. Specifically, you state: "The allegations stem from the fact that board president Jim Spangler individually called members of the board until securing the necessary five votes to approve a contract, at which time he then

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contacted Dr. Jon Lopez with an offer to become the district's next superintendent and formed what he called a 'gentleman's agreement.'"

You further indicate that when asked of the allegations, Mr. Spangler told the Beatrice Daily Sun:

Marcia Herring (the district's representative for Nebraska Association of School Boards search firm) said time is of the essence, so go ahead and poll the board members over the phone. To cover myself, I called an attorney and asked, he said that decision would have been made in executive session anyway, and that it would be fine. I individually called board members, when I got to the five needed to approve, I stopped calling. The others, then, that I wasn't able to get a hold of, or didn't come home until the evening, I did reach them, and either left a voicemail or told them direction of the offer and that he had accepted and we have a gentlemen's agreement.

FACTS

Unlike the majority of the open meeting complaints we investigate, where we receive one "official" response from the public body involved, this complaint has elicited responses from individual Board members who disagree with the submitted response. As a result, and in an effort to present all versions of the events, the facts set out below are unusually lengthy. You will note that the version of events set forth below is different from the account reported to the media. Also, to the extent the evidence as to what occurred is contradictory, we will rely on the evidence presented to us in the form of affidavits. Finally, we have examined the minutes for the Board meetings beginning December 16, 2009, through February 18, 2010.

The Board is comprised of nine members. The current Board members are Jim Spangler, President; Terry Cossel, Vice President; Randy Coleman; Mitch Deines; Monte Lofing; Lisa Pieper; Tobias Tempelmeyer; Steve Winter; and Jon Zimmerman. The Board had been engaged in a process to replace the school district's current superintendent who is retiring in June. As part of this process, the Board narrowed its search to four candidates. These candidates were individually interviewed by the Board during special meetings convened on January 18 through January 21. According to the meeting minutes, the Board went into closed session at the conclusion of each interview "to assess the Superintendent candidate and discuss potential salary package."

During its closed session on January 21, Board members Mitch Deines and Terry Cossel were directed to contact each of the candidates and inquire whether, if offered

the position as superintendent of Beatrice Public Schools, the candidate would accept a salary of \$140,000, plus the district's benefit package. According to Mr. Cossel, he and Mr. Deines were able to contact three of the four candidates the following morning, but were unable to reach Dr. Lopez. Mr. Deines subsequently contacted Dr. Lopez, who advised that the annual salary would have to be further negotiated.

The Board held another special meeting on January 25, 2010, and almost immediately moved to go into closed session "to assess the Superintendent candidates." During this closed session, Mr. Deines reported that three of the candidates, except Dr. Lopez, would accept an annual salary of \$140,000. According to Mr. Spangler, at this time a majority of the Board indicated its preference to have Dr. Lopez serve as the district's next superintendent. Affidavit of James Spangler at ¶ 6. The Board members then directed Mr. Spangler "to discuss a potential annual salary range of \$140,000 to \$150,000 with Dr. Lopez." *Id.*

According to Mr. Cossel, the Board directed Mr. Spangler to contact Dr. Lopez to see if he would accept the job if offered \$145,000. If not, Mr. Spangler was then to offer \$150,000. If the answer was still "no," "then Mr. Spangler was to be done with him and then see if the next candidate would accept the position if it was offered to him. He was told to use those specific words and furthermore was told there were to be no further negotiations." Response of Terry Cossel, March 9, 2009 [sic] at 1-2.

On January 26, Mr. Spangler called Dr. Lopez. During the course of the conversation, Mr. Spangler asked Dr. Lopez whether an annual salary of \$145,000 would be acceptable. Dr. Lopez indicated that he would have to talk to his financial advisor and would get back to him. On the same day, Mr. Spangler e-mailed Board member Tobias Tempelmeyer and asked him to forward a copy of the draft contract to Dr. Lopez. Spangler Affidavit at ¶ 7.

On January 27, Dr. Lopez e-mailed Mr. Spangler and Mr. Tempelmeyer. In his e-mail, Dr. Lopez inquired, among other things, whether the Board would consider a three-year contract instead of a one-year contract. According to Mr. Spangler:

I interpreted Dr. Lopez's questions regarding an extended contract term and other benefit issues to mean that Dr. Lopez would probably require more than \$145,000 annually and more than a one-year contract if selected as the next superintendent. I felt that based on the direction I was given, I could have asked Dr. Lopez if an annual salary of \$150,000 would be acceptable. However, I was unsure about how to handle Dr. Lopez's question about a multi-year contract as the board had never discussed this issue.

Spangler Affidavit at ¶ 8. Mr. Spangler then contacted Ms. Herring to discuss Dr. Lopez's request for a multi-year contract. Ms. Herring indicated "that Dr. Lopez was interviewing or had interviewed with other school districts for superintendent positions, that other candidates had contacted her to ask whether the Board had made a decision and that, in her opinion, time was of the essence." *Id.* at ¶ 9. Mr. Spangler indicates that Ms. Herring advised him to contact the other Board members to determine whether a multi-year contract should be part of the superintendent's compensation package. *Id.*

Mr. Spangler then called one of the district's attorneys, Greg Perry, to ask whether it was appropriate to contact the other Board members about Dr. Lopez's request. Mr. Perry advised "that discussions regarding negotiations of the terms of employment with a prospective new superintendent would be a matter appropriate for an executive session." *Id.* at ¶ 10. Mr. Perry told Mr. Spangler that, based on the foregoing, "[he] could call the other board members to inform them about Dr. Lopez's request for a multi-year contract." *Id.*

Sometime after his discussion with Mr. Perry, Mr. Spangler met with Mr. Tempelmeyer. Mr. Tempelmeyer indicated that he would not be opposed to a two-year contract for the superintendent position. *Id.* at ¶ 11. Mr. Spangler indicated that the other Board members needed to know that Dr. Lopez had asked about a multi-year contract. Mr. Tempelmeyer volunteered to contact some of the Board members, and was asked by Mr. Spangler to call Board members Deines, Cossel and Zimmerman. Affidavit of Tobias Tempelmeyer at ¶ 9.

Later that day, Mr. Spangler telephoned Board members Pieper, Winter and Coleman. In separate conversations with Ms. Pieper and Mr. Winter, Mr. Spangler informed them that Dr. Lopez had asked about a multi-year contract and other benefits. "Both Ms. Pieper and Mr. Winter responded that they would not be opposed to offering the next superintendent a two-year contract." Spangler Affidavit at ¶ 12. Mr. Spangler indicates that he was unable to reach Mr. Coleman, and left him a voice mail message. When Mr. Coleman did return the call to Mr. Spangler, he indicated that he would be opposed to a two-year contract. *Id.* Mr. Spangler further indicates that he did not call Monte Lofing, because Mr. Lofing did not have a cell phone, regularly worked out of town, and because Mr. Spangler did not have contact information for him. Spangler Affidavit at ¶ 13. However, Mr. Lofing indicates that he was contacted by Mr. Spangler later that evening. E-mail of Monte Lofing to the undersigned, March 9, 2010.

According to Mr. Cossel:

I contacted Jim Spangler at 12:42 [on January 27] about my concerns on the obvious superintendent choice, he then told me about the problems he was encountering in the process. He told me that Dr. Lopez wanted a

three year contract and more benefits. At that time I told Jim he did not have the authority to negotiate those details because the board had only charged him with offering our contract and \$145,000 to \$150,000 in salary; anything above that would take board approval. He then told me that he needed leeway to negotiate and I told him that although I understood, the fact remained he would have to go back to the board to offer anything different. He then stated he had a similar conversation with board member Steve Winter and Steve had told him that the [sic] thought he had the authority to do so. . . .

Response of Terry Cossel, February 19, 2010, at 2.

After his conversations with Board members Cossel, Deines and Zimmerman, Mr. Tempelmeyer telephoned Mr. Spangler. Mr. Tempelmeyer advised "that Mr. Deines had stated that he would be comfortable with a two-year superintendent contract, that Mr. Cossel would not discuss the matter and that Mr. Zimmerman accepted the information and felt it would need to be discussed by the Board." Tempelmeyer Affidavit at ¶ 11. After this conversation, Mr. Spangler "believed that [he] had sufficient information to respond to Dr. Lopez's question about a multi-year contract." Spangler Affidavit at ¶ 15. Mr. Spangler then called Dr. Lopez on January 27, and asked him "if an annual salary of \$150,000 and a two-year contract would be acceptable compensation. Dr. Lopez stated that both would be acceptable." *Id.* at ¶ 16. Mr. Spangler further states:

Based on this conversation, I believed that, if the board of education voted to select Dr. Lopez as the next superintendent of schools, Dr. Lopez would accept such offer if compensation terms included a salary of \$150,000 per year and an initial contract term of two years.

Id. Mr. Cossel states that on the evening of January 27

Jim [Spangler] called me and said he had polled the five people that supported Jon Lopez and had come to a "gentleman's agreement" on a verbal contract at \$150,000 a year on a two year contract. He went on to say that Lopez would be released from his contract at Milliard [sic] in February and agreed to withdraw his name right away from being considered a candidate for Norris School District Superintendent position. I told him what he had done was illegal and he said he wished I didn't feel that way. I told him that I did and he then told me that he had talked to one [of] our school attorneys, Greg Perry, and Greg said it was okay to do this because it would have happened in closed session anyway. I then

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told Jim that the difference was at a closed meeting the public would have at least been informed that there was going to be one

Response of Terry Cossel, February 19, 2010, at 3-4.

The Board convened a special meeting on January 28 at 6:30 p.m. Immediately upon convening, the Board approved a motion to go into closed session "to assess the Superintendent candidates." It appears from the minutes of the meeting that this closed session lasted eight minutes. Upon reconvening into open session, Mr. Winter moved to "offer a contract for the position of Superintendent of Schools to Jon Lopez contingent upon negotiations with the Board Chair." The motion was seconded, with Board members Winter, Spangler, Deines, Tempelmeyer, and Pieper voting "for" and Board members Lofing, Zimmerman, Cossel, and Coleman voting "against." The meeting then adjourned at 6:50 p.m. No substantive information about the Board's selection of Dr. Lopez or the allegations of possible violations under the Open Meetings Act is recorded in the meeting minutes.

The Board convened a special meeting on February 18, 2010, at 7:15 p.m. A motion was made by Mr. Winter to "approve the Superintendent contract with Dr. Jon Lopez." The motion was seconded. Voting "aye" was Mr. Winter, Mr. Spangler, Mr. Deines, Mr. Tempelmeyer, and Ms. Pieper. Board members Lofing, Zimmerman, Cossel and Coleman voted "nay." The meeting adjourned at 7:20 p.m.

Consequently, you have asked us to clarify whether the Board, or any of its members, violated the Open Meetings Act as a result of this conduct.

RELEVANT STATUTORY PROVISIONS

Neb. Rev. Stat. § 84-1408 (2008) of the Nebraska Open Meetings Act provides:

It is hereby declared to be the policy of this state that the 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 by the Constitution of Nebraska, federal statutes, and the Open Meetings Act.

Under the Act, "[p]ublic 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. . . . Neb. Rev. Stat. § 84-1409(1)(a). However, "[p]ublic 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(1)(b). "Meeting" is defined as "all regular, special, or called meetings, formal or informal, of any public body for the purposes of briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body. . . ." Neb. Rev. Stat. § 84-1409(2).

The statute relating to closed sessions, Neb. Rev. Stat. § 84-1410, 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.

(4) Nothing in this section shall be construed to require that any meeting be closed to the public. No person or public body shall fail to invite a portion of its members to a meeting, and no public body shall designate itself a subcommittee of the whole body for the purpose of circumventing the Open Meetings Act. **No closed session, informal meeting, chance meeting, social gathering, email, fax, or other electronic communication shall be used for the purpose of circumventing the requirements of the act.**

(Emphasis added.)

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. *Actions Taken on January 27, 2010.*

We are aware of no Nebraska cases which discuss serial communications by members of a public body, and whether those communications constitute an illegal meeting. However, in Op. Att'y Gen. No. 04007 (March 8, 2004), we addressed the impact of certain amendments to the Public Meetings Statutes,¹ which specifically prohibited the use of e-mails, faxes and other electronic communications to circumvent the public government purposes of the Act. In our opinion, we indicated that "some element of intent or purposeful action" on the part of members of the public body was necessary to establish circumvention of the statutes. *Id.* at 4. We also indicated that "[w]hether such intent to circumvent exists in a particular instance is a factual determination which must be resolved on a case-by-case basis." *Id.*

We noted that in a previous opinion, Op. Att'y Gen. No. 94035 (May 11, 1994), we had

¹ For your information, the "Public Meeting Statutes" became the "Open Meetings Act" with the passage of 2004 Neb. Laws LB 821, § 34.

cautioned against "extensive" correspondence among members of a public body which might constitute actionable conduct in circumvention of the Public Meeting Statutes. . . . Consistent with that opinion, we have generally taken the position, for enforcement purposes, that a minimal exchange of correspondence or minimal electronic communication among members of a public body does not trigger the existing circumvention prohibitions.

Id. at 4-5 (citation omitted). In conclusion, we stated:

[I]n our view, the passage of LB 1179, Section 2(3)(h) would not prohibit a member of a public body from communicating on a topic with other members of that body by e-mails, faxes or other electronic communication, even if that communication was directed to a quorum of the public body at issue. On the other hand, if that communication elicited responses and further communications, then at some point, it would be possible to argue that the public body was intentionally using electronic communications to circumvent the Public Meetings Statutes.

Id. at 5-6.

The most difficult determination which must be made in any specific case involving serial communications by members of a public body is whether those communications have reached the point where they are sufficiently developed so as to evidence an intent to circumvent the Act. With respect to making that determination, we find additional guidance in *Hispanic Education Committee v. Houston Independent School District*, 886 F. Supp. 606 (So. Dist. Tex. 1994), a case cited by our Supreme Court in *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007). In *Hispanic Education Committee*, the plaintiff alleged that the defendant school district board of trustees violated the Texas open meetings law when it met in groups of fewer than a quorum to discuss appointing one of its members as superintendent. The plaintiff also alleged that the improper meetings violated federal constitutional law in that they effectively denied the community and potential Hispanic candidates for superintendent free political expression and equal protection. The court disagreed, finding that as long as a quorum of the school district board was not present and no attempt was made to take action, "these conferences [were] not meetings of the board." *Id.* at 610. The court also determined, during its analysis, that the real issue in the case was "whether informal discussions became a substitute for a formal deliberative session of the governing body." *Id.* (emphasis added).

It seems to us that the central issue identified by the federal court in the *Hispanic Education Committee* case—whether informal discussions among members of the

school board became, under the circumstances, a substitute for a formal deliberative session of that body—offers a useful standard in the present situation to help determine whether the communications among Board members regarding Dr. Lopez were sufficiently developed so as to evidence some intent to circumvent the Open Meetings Act. In other words, did the informal, serial discussions among Board members in this case ultimately take the place of or substitute for a formal, deliberative discussion of the Board's actions with respect to hiring Dr. Lopez?

A complete review of the facts in this instance indicates that Mr. Spangler, with the assistance of Mr. Tempelmeyer, made a series of telephone calls to other Board members during which a material term in Dr. Lopez's contract was discussed. Upon concluding the calls, Mr. Spangler and Mr. Tempelmeyer compared notes as to what everybody had said. Not stopping there, Mr. Spangler then conveyed this information to Dr. Lopez and a "gentlemen's agreement" was struck. The end result was that Mr. Spangler lined up the necessary five votes to approve any motion to offer the contract to Dr. Lopez, and did so outside of the parameters of a public meeting. And, as is discussed below, there was no further substantive discussion of the Board's decision regarding hiring Dr. Lopez at either of the Board's meetings on January 28 or February 18.

On balance, it appears to us that the conduct exhibited by Mr. Spangler and certain members of the Board went beyond "a minimal exchange of correspondence or minimal electronic communication."² Had Mr. Spangler merely advised the Board members about the new development in the contract negotiations, without any further communication, his conduct may have been acceptable. However, Mr. Spangler did more than just advise the Board members that Dr. Lopez wanted a three-year contract. There was a series of telephone calls directed to the entire Board, a subsequent conference by Mr. Spangler and Mr. Tempelmeyer to exchange information, and a "gentlemen's agreement" for a job offer with Dr. Lopez. In essence, that informal consultation process became a substitute for a formal deliberative session of the Board, which is further illustrated by the lack of any additional public discussion of hiring the new superintendant at subsequent Board meetings. Consequently, we believe that Mr. Spangler, Mr. Tempelmeyer, Mr. Deines, Ms. Pieper, and Mr. Winter violated the Open Meetings Act when they acted in concert to discuss and decide on official Board business in private.

2. *The Vote Taken on January 28, 2010.*

As described on page 6 above, the Board convened a meeting on January 28. During the approximately eleven-minute period the Board remained in open session,

² See *infra* at 9.

Messrs. Cossel, Coleman, Lofing, and Zimmerman read statements into the record regarding possible violations of the Open Meetings Act. According to Mr. Cossel, no other Board member spoke. Notably, no substantive discussion relating to offering the superintendent contract to Dr. Lopez was made by the Board. Following the statements, a roll call vote was taken on the motion to offer the contract to Dr. Lopez, and was approved on a 5 to 4 vote.

It is precisely this type of conduct that the Nebraska Supreme Court found unacceptable in *Grein v. Board of Education*, 216 Neb. 158, 343 N.W.2d 718 (1984). *Grein* involved an action to void a contract between the school board and a contractor submitting the second-lowest bid on a school boiler project, on the ground that the contract resulted from an improper closed session of the board. Following the closed session, and upon reconvening, "the board, without further discussion or deliberations about bids on the boiler project, immediately voted to accept the bid of the second-lowest bidder." *Id.* at 162, 343 N.W.2d at 721. The board argued that the vote taken in open session was valid. However, the Court disagreed, stating:

The necessary inference is that the vote during the reconvened open session was the extension, culmination, and product of the closed session. To deny that deduction would not be a tax but a surtax on credibility, and naiveté to the *n*th degree.

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.

Id. at 167-68, 343 N.W.2d at 724. The Court found that the vote in *Grein* violated the public meetings law, "and subjected the action to nullification, namely, being declared void by a court as provided in § 84-1414." *Id.* at 168, 343 N.W.2d at 724. We also conclude that the vote taken by the Board on January 28, 2010, which essentially rubberstamped the votes lined up by Mr. Spangler the day before, violated the Open Meetings Act and this express holding in *Grein*.

3. *Propriety of January Closed Sessions.*

Our examination of the meeting minutes indicates that the Board went into closed session on January 13, 2010, "to select candidates to be interviewed and to discuss the salary package for each candidate selected to be interviewed." This closed session convened at 7:21 p.m. and ended at 10:20 p.m. On January 18, the Board went into closed session "to assess the Superintendent candidate and discuss potential salary

package.” This closed session lasted fifty-five minutes. On January 19, the Board went into closed session “to assess the Superintendent candidate and discuss potential salary package.” This closed session lasted fifty minutes. On January 20, the Board went into closed session “to assess the Superintendent candidate and discuss potential salary package.” This closed session lasted one hour. On January 21, the Board went into closed session “to assess the Superintendent candidate and discuss potential salary package.” This closed session lasted approximately one hour. On January 25, the Board went into closed session “to assess the Superintendent candidates.” This closed session lasted almost two hours. On January 28, the Board went into closed session “to assess the Superintendent candidates.” This session lasted eight minutes.

In order to be valid, a closed session must be clearly necessary for the protection of the public interest or to prevent needless injury to the reputation of an individual, and that individual has not requested an open forum. If a public body’s reason for going into closed session does not fall under either of these two statutory reasons, *the session is improper*. We further note that subsection (4) of § 84-1410 provides, in pertinent part, that “[n]othing in this section shall be construed to require that any meeting be closed to the public.” Here, it appears to us that the Board went into closed session as if it were a pro forma exercise. There is nothing to indicate that these closed sessions, totaling over nine hours, were necessary to protect the public interest or to prevent the needless injury to the reputation of an individual. While we can see how, under certain circumstances, a closed session may be in order to discuss a particular aspect of a candidate’s background in order to prevent needless injury to his or her reputation, *this does not mean that the entire discussion may be closed to the public*. In this regard, *Grein* instructs us that “[p]rovisions permitting closed sessions and exemption from openness of a meeting must be narrowly and strictly construed.” *Id.* at 165, 343 N.W.2d at 723. Consequently, we have serious concerns as to whether any of these closed sessions were necessary to protect the public interest and/or to protect any of the candidates’ reputations from needless injury. Under the circumstances here, it appears to us that the automatic closed sessions to discuss the superintendent’s qualifications were improper.

4. *Procedural Defects in the Motions to Close.*

Assuming *arguendo* that the closed sessions were proper, the Board failed to comply with the Open Meetings Act with respect to the technical requirements relating to closed sessions. In 2006, the Nebraska Legislature revised the Open Meetings Act, and in particular the procedural requirements relating to motions to go into closed session. See 2006 Neb. Laws, LB 898, § 1. Specifically, LB 898 added three new requirements: (1) the subject matter of the closed session and the reason necessitating the closed session must be identified in the motion to close; (2) the entire motion on the

reason to close must be included in the minutes; and (3) if the motion to close passes, then the presiding officer must restate on the record immediately prior to the closed session the limitation of the subject matter of the closed session. Accordingly, every motion to go into closed session must contain two things—the subject matter and the reason to close. One example of a proper motion might be: “I move to go into closed session to discuss a pending lawsuit against the Board, and for the protection of the public interest.”

In the present case, all of the Board’s motions fell short of the procedural requirements of the statute. While the motions indicated the subject matter—i.e., assess the superintendent candidates and discuss potential salary package—they did not indicate the *reason* to close. As a result, the Board violated the Open Meetings Act when it failed to meet the technical requirements set out in Neb. Rev. Stat. § 84-1410(2) relating to motions to close.

ACTION BY THE DEPARTMENT OF JUSTICE

The question now becomes what action to take in light of our conclusion that the Board violated the Open Meetings Act with respect to the actions taken by a majority of its members on January 27, the pro forma vote taken on January 28, and for the seven improper closed sessions conducted during the month of January. We have carefully assessed whether a civil suit to void is appropriate under the circumstances here, and have determined that it is not. We also do not believe that a criminal prosecution of the Board members for a knowing violation of the Open Meetings Act is warranted, because here the record establishes that the actions taken were at the advice of counsel. However, we would like to make it very clear that this office will neither consider nor tolerate a public body’s reliance on counsel (or consultants) as a defense to a criminal proceeding or as a mitigating factor in the event that allegations of similar violations of the Act are raised in the future. In this regard, we are sending a copy of this disposition letter to the Nebraska Association of School Boards for its review and consideration. And we would strongly urge the association, as well as individual school boards, to make sure that their consultants are fully conversant with the provisions of the Open Meetings Act.

We will also let this disposition letter serve as an admonishment to the individual members of the Board, by forwarding a copy to Mr. Schultze, that their conduct during this superintendent search process was unacceptable. We would further remind the Board that closed sessions are only permissible when clearly necessary to protect the public interest or prevent needless injury to an individual’s reputation. If the Board is unable to make this determination, then a closed session is improper.

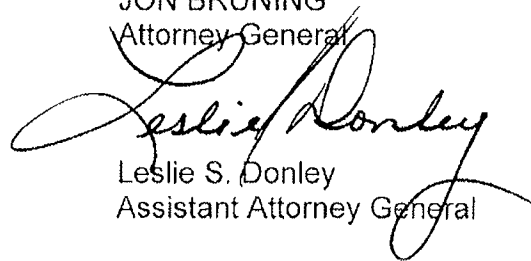
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Finally, we would like to briefly address the superintendent search process itself. This is the third open meetings complaint handled by the undersigned in which a superintendent search process was at the center of alleged violations of the Open Meetings Act. In each instance, allegations were made that the school board involved had engaged in improper closed sessions, and each time we found those allegations to be true. Additionally, in each instance it appeared that the school board members had relied on the advice of their superintendent search consultant(s). Moreover, while this office fully understands how important it is for a school district to hire the best individual it can to serve as its superintendent, this does not permit a school district to close its meetings with impunity when deliberating on a candidate's qualifications for the job. We also do not believe that negotiating a contract should become so onerous and secretive that it requires school board members to resort to discussing these matters outside of a public meeting, or a properly convened closed session. From our perspective, any embarrassment or discomfort which may be experienced by a superintendent candidate or a school board member during this process "is far outweighed by the policy favoring openness in the meetings of a public body." *Grein* at 166, 343 N.W.2d at 724.

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,

JON BRUNING
Attorney General



Leslie S. Donley
Assistant Attorney General

cc: Rex R. Schultze
Dr. John Bonaiuto
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49-491-30