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November 30, 2012

Ruddy L. Svoboda
[redacted]

RE: *File No. 12-M-111; David City City Council; Ruddy Svoboda, Complainant*

Dear Mr. Svoboda:

We are writing in response to your letter we received on April 19, 2012, in which you allege violations of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2008; Cum. Supp. 2010; Supp. 2011) (the "Act"), by the David City City Council ("City Council"). As is our normal practice, we contacted the public body which is the subject of the complaint. In the present case, we forwarded your complaint to City Council President Gary Kroesing, and requested a response. City Attorney James M. Egr responded on behalf of the City Council. We have now had an opportunity to review your complaint and Mr. Egr's response in detail. Our conclusion and future action in this matter are set forth below.

YOUR COMPLAINT

Our understanding of this case in based solely upon the contents of your letter and Mr. Egr's response.

The alleged open meetings violation occurred on March 14, 2012. You indicate that one item on the agenda for that meeting read: "Consideration of going into executive session to discuss a personnel matter." You indicate that this was also the reason stated during the meeting to close the meeting.[1] You indicate that when the closed session began, the discussion focused on "a single complaint that had

[1] According to the official meeting minutes, "Council member Scribner made a motion to go into executive session to discuss a personnel matter. Council member Smith seconded the motion. Voting AYE: Council members Kroesing, Vandenberg, Smith, Svoboda, Rogers, and Smith. Voting NAY: None. The motion carried."

supposedly been made about the Chief of Police by a citizen." You indicate that the chief of police was not present, and had not been informed that a discussion about him was to take place in closed session. You indicate that the discussion then shifted to dissolving the police department entirely. You state that the discussion culminated with taking a vote to determine who would support this action. After further discussion, the session ended. You indicate that Mr. Egr then instructed the council members not to mention this to anyone.

You question whether the other council members were aware of the possible violations of the Open Meetings Act, but assert that the City Attorney should have known and advised the City Council accordingly. You conclude: "It is my contention that the 'open Meetings Act' was intentionally and knowingly violated in order to withhold information from the general public as to the intentions of certain Council Members."

THE CITY'S RESPONSE

Mr. Egr states that the City Council did go into executive session on March 14, 2012. He states that at the time the City Council went into executive session, he was not aware of the personnel matters to be discussed. Mr. Egr states that a complaint about the chief of police was discussed, as well as "in general concern about the David City Police personnel." Mr. Egr indicates that the executive session was not to terminate the chief of police or take any action against the chief (or any of the police officers), therefore the presence of the chief was not necessary. Mr. Egr states that a discussion about the personnel problems of the police department took place, including the topics of overtime, hiring and retention, a garnishment issue relating to one officer, "and the overall status and capability of the Police Department personnel."

Mr. Egr states that there was *no* discussion about dissolving the police department. However, "[t]here was discussion about alternatives to the continued personnel problems in the Police Department and should the City look at merging with the Butler County Sheriff's office for law enforcement and using Police Department personnel for the City Code enforcement and the Butler County Sheriff's Department for criminal enforcement matters." (Emphasis omitted.) Mr. Egr also states that no vote was taken during the executive session, but each council person was asked his "views and position." He states that he did remind the mayor, the city clerk and the members of the City Council that this was an executive session, and that the discussion should remain in the "Council Chambers."

Mr. Egr states that you actively participated in the discussion in executive session. He does not believe that a violation of the Act occurred, and that "no one

intentionally and/or knowingly violated the Open Meetings Act in order to withhold information from the general public as to the intentions of certain Council Members." Finally, Mr. Egr indicates that the "Police Department"[2] was on the agenda for the City Council meeting held on April 11, 2012. And that the City Council subsequently affirmatively voted to pursue discussions with the Butler County Board.

DISCUSSION

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.*

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).

We will now address your allegation that the City Council violated the Open Meetings Act when it went into executive session on March 14, 2012, to discuss "a personnel matter," but ended up discussing the dissolution of the David City Police Department.

Neb. Rev. Stat. § 84-1410(1) of the Open Meetings Act provides, in pertinent part:

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[2] Specifically, the agenda item reads: "Consideration of merging the police department with the County Sheriff's department." Additionally, we understand that there is an ancillary issue relating to identifying the person who requested that this item be placed on the agenda. Mr. Egr asserts that Neb. Rev. Stat. § 84-1412(3) of the Open Meetings Act prevents the disclosure of this information. We disagree. There is nothing in state law that would require the City Clerk to disclose the name of the individual in question if requested. In this regard, Mr. Egr's reliance on § 84-1412(3) is misplaced.

> 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;
>
> (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;

Additionally, "[p]rovisions permitting closed sessions and exemption from openness of a meeting must be narrowly and strictly construed." *Grein* v. *Board of Education of the School District of Fremont*, 216 Neb. 158, 165, 343 N.W.2d 718, 723 (1984).

Thus, 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. 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." With these statutory provisions in mind, we have considered your version of events against the version provided to us by Mr. Egr.

As indicated above, Mr. Scribner made a motion to go into executive session to discuss a "personnel matter." We find this motion problematic for a number of reasons. First, "a personnel matter" is an extremely vague, nondescript term which fails to give members of the public sufficient information as to what the City Council would be discussing in its closed session. Second, the City Council failed to state the subject matter *and* the reason for the closed session, i.e., protection of the public interest or prevention of needless injury to the reputation of an individual, in its motion to close, as

required under § 84-1410(1). Third, the "personnel matter" involved a purported complaint against the chief of police, which necessitated a closed session to prevent needless injury to the chief's reputation. Accordingly, the chief should have been told and given an opportunity to have the discussion in open session. Here, it appears the chief of police was not notified. In this regard, Mr. Egr asserts that since it appeared that no *disciplinary* action would be taken against the chief of police (or any police officers), the chief's presence at the closed session was not necessary. However, this assertion is contrary to the plain language of the statute. Clearly, if a public body seeks to close a meeting and cites for its reason the prevention of needless injury to the reputation of an individual, that individual has to be given the opportunity to have that discussion held publicly.

Based on the documentation provided to us, it appears that the City Council used a vague, nondescript subject for its closed session to facilitate a discussion about the future operation of the police department, which we understand to be a very contentious topic in David City. And while the discussion may have started out with a complaint against the chief, the discussion evolved into the personnel problems of the police department, and whether the city should consider merging with the Butler County Sheriff's Office. We note that the parties disagree as to whether the City Council discussed *dissolving* the police department. However, we can safely conclude that what was discussed in the closed session clearly exceeded the subject matter set out in the motion to close. For the foregoing reasons, we believe the City Council violated the Open Meetings Act, both as to the propriety of the closed session, and the technical, statutory requirements relating to the motion to close.

We would also like to point out to you two other provisions of the Open Meetings Act that directly pertain to the circumstances here. First, Neb. Rev. Stat. § 84-1410(3) provides that

> [a]ny member of any public body shall have the right to challenge the continuation of a closed session if the member determines that the session has exceeded the reason stated in the original motion to hold a closed session or if the member contends that the closed session is neither clearly necessary for (a) the protection of the public interest or (b) the prevention of needless injury to the reputation of an individual. Such challenge shall be overruled only by a majority vote of the members of the public body. Such challenge and its disposition shall be recorded in the minutes.

Additionally, Neb. Rev. Stat. § 84-1414(4) provides:

> Any member of a public body who knowingly violates or conspires to violate or who attends or remains at a meeting knowing that the public body is in violation of any provision of the Open Meetings Act shall be guilty of a Class IV misdemeanor for a first offense and a Class III misdemeanor for a second or subsequent offense.

In the present case, we note that you did not seek to challenge the continuation of the closed session by asking that a vote be taken under § 84-1410(3), although it appears you had serious concerns about the propriety of the closed session. You also did not leave the closed session, but stayed and actively participated in the discussion. For your information and future reference, in the event you remain in a meeting knowing that the other members of the public body are violating the Open Meetings Act, you too are subject to the criminal penalties set out in Neb. Rev. Stat. § 84-1414(4).

ACTION BY DEPARTMENT OF JUSTICE

The question now becomes what enforcement action to take in light of these violations. We have carefully assessed whether a criminal prosecution based on the facts of this case is warranted, and have determined that it is not. We believe that it would be difficult to prove a knowing, intentional violation of the Act. This is particularly true since it appears that the City Council relied heavily on the advice of the City Attorney during this process.

Further, while we have the statutory option to sue to void the City Council's actions, the Nebraska Supreme Court has held that violations of the Open Meetings Act can be cured by subsequent action of a public body in a meeting which complies with all of the statutory requirements of the Act. In *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979), a city resident and taxpayer brought suit to declare void action taken by the city council relating to the purchase of land for use as a sanitary sewage system. The violations of the open meetings law determined by the court in *Pokorny* involved improper notice, improper executive session, and vague, nondescriptive agenda items. In finding for the plaintiff, the Nebraska Supreme Court stated:

> The important question in this case is what was the effect of the invalid meetings of March 16 and March 25. The trial court enjoined the defendants permanently "from carrying out any action authorized" at the meetings of March 16, 1977, and March 25, 1977. Carried to its logical conclusion this order would prevent the City from ever purchasing the land. We do not think this was the intent or purpose of the public meeting law.

> *It is a general principle of law that where a defect occurs in proceedings of a governmental body, ordinarily the defect may be cured by new proceedings commencing at the point where the defect occurred. . . . We think this principle is applicable here.*

Id. at 340, 275 N.W.2d at 285 (citations omitted) (emphasis added). In light of *Pokorny*, even if a court were to find that the City Council had violated the Act with respect to its unlawful closed session, it would also likely find that any deficiencies in the process were cured by the City Council's subsequent action at its meeting on April 11, 2012.

Since we have determined that no further action by this office is warranted, we are closing this file. If you disagree with our analysis herein, you may wish to discuss this matter with your private attorney to determine what additional remedies may be available to you under the Open Meetings Act.

Sincerely,

JON BRUNING
Attorney General

Leslie S. Donley
Assistant Attorney General

cc: James M. Egr

49-920-30