

STATE OF NEBRASKA
Office of the Attorney General

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NATALEE J. HART
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November 8, 2013

Danny R. Wallace
102 S. Pear
PO Box 163
Maywood, NE 69038-0002

Re: *File No. 13-M-122; Maywood Board of Trustees; Complainant Danny Wallace*

Dear Mr. Wallace:

This letter is in response to your correspondence received by us in which you requested that this office investigate alleged violations by the Maywood Village Board (the "Board") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2008; Cum. Supp. 2012; Supp. 2013). In accordance with our normal procedures, we requested a response from the Board after we received your complaint, and we subsequently received a response from the Board's attorney, Jon Schroeder¹. We have now had an opportunity to review your allegations and the Board's response in detail, and our conclusions are set out below.

FACTS

Our understanding of the facts in this case is based upon your correspondence, along with the response from the Board. We have identified three Open Meeting Act complaints made by you.

- (1) A meeting occurred between two board members, outside of an open meeting;
- (2) The Board did not recognize you to speak at its June 10, 2013 open meeting during an agenda item on which you wished to voice an opinion; and

¹ While you allege that it would be a conflict of interest for Mr. Schroeder to represent the Board's interest as to your Open Meetings Act complaints, as he is also the County Attorney, we disagree. Mr. Schroeder passed your complaints on to this office for handling in order to avoid a conflict of interest. He is not prohibited from responding on behalf of the Board, and representing their interests in this matter.

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- (3) The Board's closed session on August 14, 2013 was called for an improper reason.

While you have filed four separate complaints², all dated August 21, 2013, only the above identified items are related to the Open Meetings Act. The remainder, including issues related to whether the Board is required to interview all job applicants, rather than select applicants (including yourself); complaints regarding the manner in which the Board conducted a survey of residents, and who distributed the survey; and issues you have regarding the way in which a Board member flies the American Flag are outside the purview of this office, as they are not related in any way to the Open Meetings Act. This office has no general supervisory authority over governmental subdivisions in Nebraska. Consequently, all of these other matters are outside the enforcement authority of this office and will not be addressed herein.

ANALYSIS

"Closed Meeting" between two Board members

Your first complaint is that the Board violated the Open Meetings Act by two Board members having a discussion about semi-truck parking and surveying the public outside of an open meeting. Over time, our office has consistently taken the position that two things must occur for a public body to hold a meeting that is subject to the requirements of the Open Meetings Act. First, we have indicated that a quorum of a public body must be present to constitute a "meeting." Second, we believe that a meeting of a public body only occurs if that public body engages in some of the activities set out in the statutory definition of "meeting" found at Neb. Rev. Stat. § 84-1409(2) (2011), i.e., the public body must engage in "briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body." In our view, when both of these elements have been satisfied, a "meeting" of a public body has occurred under the Open Meetings Act.

It is our understanding that the Board is composed of five members, and that a majority of the members constitute a quorum.³ In other words, a quorum is reached by the attendance of three Board members. As only two members of the Board were engaged in the discussion regarding surveying the citizens of Mayfield, no "meeting" has occurred. Therefore, there is no violation of the Open Meetings Act with respect to this portion of your complaint.

² Your complaints were filed with the Board directly. The Board's attorney, Mr. Schroeder, forwarded these complaints to this office for investigation. Your complaints did not contain any contact information for you. We contacted the Village Clerk who provided your mailing address to us.

³ See Neb. Rev. Stat. § 17-105 (2007).

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Public Participation at Meetings

You also complain that the Board would not recognize you to speak during an agenda item on June 10, 2013. The agenda item was not designated as a public comment period, but the Board was discussing an issue for which you had an opinion you wished to express.

Neb. Rev. Stat. § 84-1412 provides that the public has the right to attend and speak at meetings of public bodies. However, a public body may “make and enforce reasonable rules” as to public participation, including a requirement that the public may address the Board only during a specially designated “public comment” time during the meeting. “A body may not be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings.” § 84-1412 (2).

Through the years, our office has developed a number of guidelines which we believe govern the public’s right to speak at open meetings of public bodies. One of those guidelines, applicable here, is that public bodies in Nebraska generally operate as a form of representative democracy. See *Distinctive Printing and Packaging Company v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989); *State ex rel. Strange v. School District of Nebraska City*, 150 Neb. 109, 33 N.W.2d 358 (1948). That is, Nebraska citizens elect individuals to represent them on various boards, commissions, etc., rather than having all who are present at a particular meeting of a public body act as members of that body. Therefore, when members of the public attend meetings of public bodies in Nebraska, they most often attend as observers, *not members of the body itself*, and they have no right, apart from periods set aside for public comment, to engage in the body’s debate, to question members of the body, to comment on particular decisions, or to vote on the issues at hand. Those latter rights go to the members of the public body, who ran for and were elected to office. While any particular public body may certainly choose to allow citizens to participate in its meetings, citizens attending a meeting of a particular public body are not members of that body.

In addition there is no absolute right for members of the public to address a public body at any given meeting or on any given agenda item, so long as there is some time at some meetings set aside for public comment. Public bodies can rightfully refuse to allow public comment at a given meeting, or as they consider a particular agenda item. The Board is not required to allow members of the public to speak at a particular open meeting, or every open meeting, provided that the Board allows the public to address them at some meetings. You do not complain that you have never been allowed to address the Board. The Board is not required to allow a citizen to speak during any agenda item other than one designated as “public comment.” The Board has not violated the Open Meetings Act with respect to this portion of your complaint.

Closed Session

Finally, you complain about the closed session called by the Board on August 14, 2013. You allege that at this meeting, the Board entered into a closed session to discuss "possible upcoming legal issues." Your allegation is that the Board's closed session was called for an improper topic of discussion. You did not enclose the minutes from this meeting in support of your claim. However, the Board provided the minutes in its response. Those minutes reflect that the Board entered into closed session "for potential litigation."

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;

(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;

(e) For the Community Trust created under section 81-1801.02, discussion regarding the amounts to be paid to individuals who have suffered from a tragedy of violence or natural disaster; or

(f) For public hospitals, governing board peer review activities, professional review activities, review and discussion of medical staff investigations or disciplinary actions, and any strategy session

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concerning transactional negotiations with any referral source that is required by federal law to be conducted at arms length.

Nothing in this section shall permit a closed meeting for discussion of the appointment or election of a new member to any public body.

In its response, the Board has provided more information to this office on the topics discussed in closed session, both of which fall into the category of "potential litigation." The Board discussed threatened litigation by Tim Herman in relation to a building permit. Additionally, the Board states that it also discussed potential litigation relating to the possible passage of an ordinance to prevent the parking of semi-trucks within the Village limits. Both topics were appropriate for discussion during the closed session, and there is no violation of the Open Meetings Act related to the matters discussed. The Board may discuss more than one topic in a closed session, provided the motion to close covers both topics, which in this case was satisfied by the category of potential litigation.

However, while the topics were acceptable for a closed session, and it was reasonable for the Board to discuss both in one closed session, the Board's motion to enter into closed session was deficient in one respect. While the Board stated that the closed session was for "potential litigation," it did not indicate why the closed session was necessary: whether for the protection of the public interest or the needless injury to the reputation of an individual, as required by Neb. Rev. Stat. § 84-1410 (1). Consequently, the motion to enter into closed session was technically deficient. The Board should ensure, for all future motions to close, that it identifies both the subject matter and the reason necessitating the motion to close. We trust that the Board will follow this step, and future motions to close will fully comply with the Open Meetings Act. For those reasons, we will not take any action against the Board for the minor deficiency in its August, 2013 motion to close.

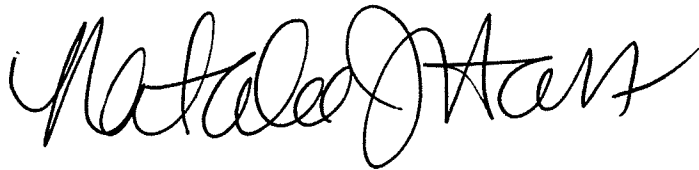
CONCLUSION

For the reasons stated above, we believe that the Board has violated the Open Meetings Act in one very limited respect. However, as explained above, no further action is necessary by this office. 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.

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Sincerely,

JON BRUNING
Attorney General

A handwritten signature in black ink, appearing to read "Natalee J. Hart". The signature is written in a cursive, flowing style with some loops and flourishes.

Natalee J. Hart
Assistant Attorney General

cc: Jon Schroeder

02-382-30