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Office of the Attorney General

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May 14, 2018

Rhonda Hogeland
[REDACTED]
[REDACTED]

RE: *File No. 17-M-137; Village of Orleans Board of Trustees; Rhonda Hogeland, Complainant*

Dear Ms. Hogeland:

This letter is in response to your complaint, received by this office on August 18, 2017, in which you allege violations of the Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014, Cum. Supp. 2016, Supp. 2017) ("Act") by members of the board of trustees for the Village of Orleans ("Board"). When we receive complaints of this nature, our normal practice is to contact the public body involved and request a response to the allegations raised in the complaint. In the present case, we contacted the Board chair, Deloy Veldhouse, and requested a response. On September 22, 2017, we received a response from Board attorney Bryan S. McQuay. We have now completed our review of your complaint and Mr. McQuay's response, and our conclusion and future action in this matter are set forth below.

RELEVANT INFORMATION

Your complaint included a photograph of a sign you indicate was posted at the Village of Orleans post office. That sign read, in its entirety:

NOTICE OF SPECIAL MEETING

CLOSED TO THE PUBLIC

Notice is hereby given that a Special Meeting of the Chairman and Village Board of Orleans, Nebraska will be held at 6:00 P.M. on Thursday, August 17, 2017 at the Village Office. No action may be taken on items not on the agenda.

AGENDA

BUDGET WORKSHOP

Judy Werner
Orleans Village Clerk

In your complaint, you question the legality of the posted notice. You state that “[t]hey are budgeting my tax dollars and it is a closed meeting? Please direct me to the state statute that says this is legal.”

In his response to our office, Mr. McQuay informs us that the Board denies that any violation of the Act took place. He states, in pertinent part:

A budget workshop meeting was held that was not open to the public. This was the boards’s [*sic*] first meeting with a new accountant to discuss the current state of the village finances. No votes were taken and nothing was decided. All votes regarding the budget occurred at the September regular meeting.

I have encouraged the board to hold future budget meetings as open to the public so that the residents of Orleans can be involved in the process.

DISCUSSION

Neb. Rev. Stat. § 84-1408 (2014) of the 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 Act is a statutory commitment to openness in government. *Wasikowski v. 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 open meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public. *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010).

In our enforcement capacity over the Act, this office has indicated that two things must be present before a “meeting” under the Open Meetings Act occurs. First, a quorum of a public body must be present. Second, the public body must engage in at least one of the activities included in the definition of “meeting” set out in Neb. Rev. Stat. § 84-1409(2) (2014), i.e., “briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body” In the absence of either element, we have concluded that no “meeting” of a public body has occurred. Under Neb. Rev. Stat. § 84-1409(1)(b)(i), a public body subject to the Act does not include a subcommittee of the public body except when a quorum of the public body is present at the subcommittee meeting or “such subcommittees are holding hearings, making policy, or taking formal action on behalf of their parent body” Public bodies are not subject to the Act when “conducting judicial proceedings.”¹ Neb. Rev. Stat. § 84-1409(1)(b)(ii).

Neb. Rev. Stat. § 84-1410 (2014) of the Act allows public bodies to hold a closed session when approved by “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.” (Emphasis added.) The statute contains six examples of reasons to go into closed session—e.g., to discuss real estate purchases, pending litigation, or to evaluate the job performance of an employee when necessary to prevent needless injury to his or her reputation and such employee has not requested a public meeting. Neb. Rev. Stat. § 84-1410(1)(a) and (d). This list is not exclusive, and there may be other reasons to close a public meeting. Public bodies must also comply with several technical requirements set out in the Act pertaining to closed sessions, e.g., identifying the subject matter to be discussed and the statutory reason to close the meeting in the motion to close. Section 84-1410(4) further provides, in part, that “[n]o 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 [A]ct.”

¹ See, e.g., *McQuinn v. Douglas County School District No. 66*, 259 Neb. 720, 731, 612 N.W.2d 198, 206 (2000) (“A board exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner. . . . ‘Adjudicative facts’ are those ascertained from proof adduced at an evidentiary hearing which relate to a specific party.”).

In Op. Att’y Gen. No. 17-004 (June 5, 2017), we addressed whether the Open Meetings Act required the Public Service Commission to discuss internal management and operational issues in a public meeting “in order to have a quorum of Commissioners present for those discussions.” *Id.* at 1. The commission wished to discuss these matters collectively, but sought clarification as to whether the discussions needed to be done in public. *Id.* We stated that the only time it would be appropriate for a quorum of commissioners to meet and discuss commission business *outside* of the requirements of the Act would be in those instances when the commission is acting in a quasi-judicial manner. *Id.* at 3-4.

While we concluded that the commission could not meet privately to discuss the issues outlined in the request letter, we considered whether those issues might be appropriate topics for a closed session. One of the issues the commission sought to discuss involved “informal budget discussions with various departments and preparation of the proposed budget.” We determined that since the commission’s budget discussions would not likely result in injury to an individual’s reputation, the commission would have to establish that a closed session under these circumstances is clearly necessary to protect the public interest. We noted that in *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984), a case involving a closed session by a school board to discuss the low bid on a construction project, the Supreme Court held that the “public interest” referenced in § 84-1410 relates to the “pecuniary or legal rights and liabilities” of the community and its citizens. While the court agreed that the question as to whether the school board should accept the low bid involved the public interest, the answer to the question ultimately impacted the district’s taxpayers. Thus, the protection of the public interest demanded that the discussion regarding the low bid be held publicly. Based on *Grein*, we concluded that a serious question exists as to whether a closed discussion to discuss budgets and budget preparation would be warranted. Op. Att’y Gen. No. 17-004 at 7.

In the present case, the only possible way the meeting at issue could be considered proper is if the Board was “conducting judicial proceedings.” However, we understand from Mr. McQuay that the Board met privately to discuss village finances with the new accountant—matters which would not require the Board to act in a quasi-judicial manner. In addition, there is nothing in the record to suggest that the Board even attempted to close the meeting under the provisions of § 84-1410, and even if it did, a discussion about village finances would likely not justify a closed session. Also, the fact that the Board took no formal action during the meeting does not excuse or mitigate an improper, private meeting.

In the present case, the Board advertised its meeting as a budget workshop closed to the public. According to counsel, the meeting was in fact closed. The Board’s actions in this regard demonstrate to this office a fundamental lack of understanding of the Open Meetings Act, which requires that *all* meetings of a public body be open to the public,

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except in those limited instances when a closed session may be appropriate. Consequently, we believe these actions constitute a clear violation of the Act.

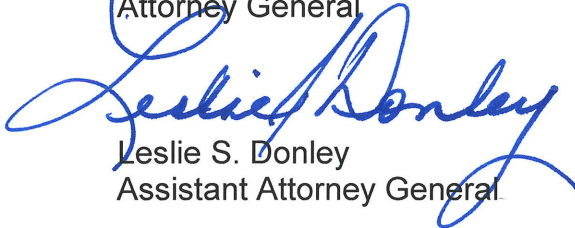
ACTION BY THE DEPARTMENT OF JUSTICE

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 closed meeting held on August 17, 2017. Neb. Rev. Stat. § 84-1414 provides two possible remedies—i.e., filing a civil suit to void any action taken by the public body in violation of the Act or criminal prosecution of the members of the public body.² We have carefully considered whether a criminal prosecution is warranted based on the facts of this case, and have determined that it is not. Further, a civil suit to void is not necessary here because the Board took no formal action during the meeting. Instead, we will admonish the members of the Board, by sending a copy of this disposition letter to Mr. McQuay that, in the future, all meetings convened by this Board must fully comply with the requirements of the Open Meetings Act. We will also inform the Board that, as a result of the discussion set out above, it will be far more difficult for members of the Board to argue in the future that they did not “knowingly” violate the Open Meetings Act should any further questionable conduct occur.

Since no further action will be taken by this office with respect to this matter, we are closing our file. If you disagree with the analysis set forth above, you may wish to consult with your private attorney to see what additional remedies, if any, may be available to you under the Open Meetings Act.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Bryan S. McQuay

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² Neb. Rev. Stat. § 84-1414(4) (2014) provides that “[a]ny 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.”