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September 26, 2022

Via email at [REDACTED]
Carolyn Semin
PO Box 145
Kilgore, NE 69216

RE: *File No. 22-R-134; Cherry County Board of Commissioners; Carolyn Semin, Complainant*

Dear Ms. Semin:

This letter is in response to the complaint submitted by you on July 5, 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, Supp. 2021), amended 2022 Neb. Laws LBs 742, 908 and 922, by the Cherry County Board of Commissioners ("Board") at a meeting held on June 28, 2022. 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 August 1, 2022, we received a response from Cherry County Attorney Eric Scott. 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 response we received from the Board.

The agenda for the Board's June 14, 2022 meeting listed "Discuss/Act-Cherry County Road Superintendent" as an agenda item. During the meeting, the Board voted to hire Doug Boyer as the new Cherry County Road Superintendent.

During its June 28, 2022 meeting, the Board voted to enter closed session "for the purpose of salary negotiation, at the request of Doug Boyer, with the Board and Doug Boyer to be present." When the Board came out of closed session, it voted "to authorize Commissioner Ward to proceed with finalizing the terms and conditions of the Cherry County Road Superintendent's employment to be presented at the next meeting." During

the July 12, 2022 meeting, Commissioner Ward discussed his negotiations with Doug Boyer, including the agreed-upon salary and job description changes. The Board subsequently voted to accept the job description changes and set Mr. Boyer's salary.

ALLEGED VIOLATIONS

Your complaint raises several allegations related to the Board's use of a closed session during its June 28, 2022 meeting. First, you allege that the Board held a closed session for an improper reason. Next, you allege that the presiding officer failed to restate on the record, prior to the closed session, the limitation of the subject matter to be discussed in the closed session. Finally, you allege that the Board did not limit its discussion to the topic identified in the motion to enter closed session.

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).

The Act permits a public body to "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." Neb. Rev. Stat. § 84-1410(1). The motion to close must identify both the "subject matter and the reason necessitating the closed session." *Id.* If the motion to close passes, the presiding officer must "restate on the record the limitation of the subject matter of the closed session." Neb. Rev. Stat. § 84-1410(2). The public body is required to "restrict its consideration of matters during the closed portions to only those purposes set forth in the motion to close as the reason for the closed session" and to reconvene in open session before taking any formal action. *Id.*

You allege that the Board violated the Act by holding a closed session to discuss salary negotiation. The June 28, 2022 meeting minutes state only that the Board voted "to enter executive session for the purpose of salary negotiation, at the request of Doug Boyer, with the Board and Doug Boyer to be present." The motion included the subject

matter, salary negotiation, but failed to identify the reason for the closed session. The Board must determine and state in its motion to close whether 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” Neb. Rev. Stat. § 84-1410(1). We note that there is nothing about salary negotiation that is inherently damaging to such reputation. Certainly, no specific concerns about the public interest or damage to Mr. Boyer’s reputation were raised by the Board or Mr. Boyer. The mere possibility that issues requiring a closed session may arise is not sufficient justification to close the meeting. Rather, as this office has previously opined, “a closed session is permitted only when such matters have arisen and must be dealt with.” Neb. Op. Att’y No. 94035 (May 11, 1994). However, we also stated, in response to a question whether interviews with individual applicants by a quorum of a public body must be done in public that “[t]here may be occasions . . . where candid discussion by the Board or the candidate could elicit responses which might be injurious to the reputation of an individual, and those circumstances might warrant a closed session of the Board” *Id.* Consequently, it is not entirely clear whether the Board’s closed session to negotiate Mr. Boyer’s salary was inappropriate. While we cannot definitely determine the propriety of the subject matter for the closed session, we find that the Board violated the Act when it failed to identify the statutory reason for the closed session in its motion to close.

Following the closed session, the Board did not take any reversible action relating to Mr. Boyer’s employment. While the Board voted to permit Commissioner Ward to finalize negotiations, it took a separate vote at a later meeting to approve his salary and terms of employment. Those votes have not been challenged and we have no reason to believe that they were not valid. As the Board took no reversible action as a result of the closed session, we will take no formal action to address this violation. We will, however, remind the Board, through a copy of this letter to its attorney, of the importance of strictly following the requirements of the Act. In addition, we stress that, if a public body is “uncertain about the type of session to be conducted, open or closed, bear in mind the policy of openness promoted by the Public Meeting Laws and opt for a meeting in the presence of the public.” *Grein v. Board of Educ. of School Dist. of Fremont, Dodge County*, 216 Neb. 158, 168, 343 N.W.2d 718, 724 (1984).

You next allege that the chair failed to restate the subject matter to be discussed immediately prior to the closed session. Section 84-1410(2) requires that, if the motion for a closed session passes, “then the presiding officer immediately prior to the closed session shall restate on the record the limitation of the subject matter of the closed session.” We will remind the Board, through a copy of this letter to its attorney, of the importance of strictly adhering to the technical requirements of the Act.

Finally, you allege that the Board discussed topics during the closed session that were not identified in the motion to close. The Act states that “[t]he public body holding such a closed session shall restrict its consideration of matters during the closed portions to only those purposes set forth in the motion to close as the reason for the closed

session.” Neb. Rev. Stat. § 84-1410(2). You point to the difference between the motion to close, which identified the subject matter as salary negotiation, and the motion made after the Board returned to open session, which authorized Commissioner Ward to “proceed with finalizing the terms and conditions” of Mr. Boyer’s employment. You suggest that salary negotiation should not have included a discussion of the terms and conditions of employment. It is not clear from these limited facts whether the closed session discussion encompassed more than salary negotiation. However, we will remind the Board to be as specific as possible when identifying the subject matter to be discussed during the closed session and to limit its closed session discussion to the identified subject matter.

In addition to the alleged violations, your complaint asked whether the Act contains any provisions for a “neutral presence” in the closed session. The Act does not require anyone other than the members of the public body to be present during a closed session. The Act is intended to promote a policy of openness and, therefore, places limitations on the reasons a public body can enter a closed session. As discussed above, the public is entitled to know the subject matter to be discussed and the reason for the closed session but is not entitled to be present during the session.

CONCLUSION

For the reasons stated above, we are unable to conclude that the closed session to negotiate Mr. Boyer’s salary was inappropriate. In this respect, there could be circumstances during such a discussion where a closed session might be warranted. However, we find that the Board failed to meet certain technical requirements in § 84-1410(1) and (2). We will remind the Board that all portions of the Act relating to closed sessions must be met in the future.

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,

DOUGLAS J. PETERSON
Attorney General



Elizabeth O. Gau
Assistant Attorney General