



STATE OF NEBRASKA  
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February 9, 2022

RE: *File No. 21-M-103; Bennington Public Schools; Multiple Complainants*

Multiple complaints were registered with this office between January and June of 2021 alleging violations of the Open Meetings Act ("Act"), Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2014, Supp. 2021) by members of the Bennington Public Schools Board of Education ("Board"). We followed normal practice and sent notice of representative complaints to the Board and requested a response. We subsequently received two responses on March 5, 2021 and January 28, 2022 from the Board's attorney, Derek Aldridge, who responded on behalf of the Board. We have now completed our review of the complaints and the responses we received from the Board. Our findings and conclusions in this matter are set out below.

### **ALLEGED VIOLATIONS**

Upon review of the complaints, we have identified seven alleged violations of the Open Meetings Act, as follows:

1. The Board allows public comment during a "public forum" prior to the start of each meeting but does not allow public comment during meetings;
2. The Board does not make all meeting materials available to the public during the meetings;
3. The Board requires the public to receive permission from the superintendent to record meetings and that permission is not always granted;
4. Minutes are not always published within 10 days of the meeting;
5. Minutes do not adequately describe issues raised during the public forum;
6. The March 8, 2021 agenda was not sufficiently descriptive to give the public notice of the potential legal actions to be discussed;
7. The meeting time of the June 14, 2021 meeting was changed without affording the public reasonable advanced notice.

The complaints also raise several allegations related to the actions of the Board that resulted in changes in the superintendent's contract and pay. These allegations do not implicate the Act. Instead, these allegations relate to the Superintendent Pay Transparency Act (SPTA), Neb. Rev. Stat. §§ 79-2401 through 79-2405 (2014). This office has no enforcement authority over the SPTA. While the SPTA has certain monetary

sanctions for noncompliance, those provisions are enforced by the Commissioner of Education. Neb. Rev. Stat. § 79-2404. For these reasons, this office will not further address allegations related to the superintendent's contract or pay.

## 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).

### 1. Public Comment

Complainants allege that the Board is violating the public's right to speak at its meetings by allowing public comment only during a time set aside as a "public forum." The public forum appears on the meeting agenda. It takes place after attendance is taken but before the meeting is called to order. The public forum is recorded in the meeting minutes. The complainants allege, however, that the board treats the public forum as separate from the regular meeting. Specifically, they allege that certain board members have made statements to the public indicating that the public forum is not a part of the regular meeting and, for that reason, the board is prohibited from engaging in discussion or acting on issues raised during that time. One complainant states that establishing the public forum outside the regular meeting as the only avenue for public comment "feels like a way to subvert [the Act] or at least discount any public input."

It is our opinion that the public forum offered by the Board is, in fact, a part of the regular meeting and, for that reason, is subject to the provisions of the Act. The Act governs all meetings of public bodies in Nebraska. Neb. Rev. Stat. § 84-1408. Meeting is defined to include "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). Meeting minutes establish that the public forum generally takes place in the presence of a quorum of board members at the time and place publicized in the meeting notice. The Act prohibits the use of "informal meeting[s] . . . for the purpose of circumventing the [Act]." Neb. Rev. Stat. § 84-1410(4). When the Board is gathered at the time and place of a regularly scheduled meeting its conduct is governed by the Act. There is no provision of the Act which requires a meeting to be specifically called to order, and the Board cannot use the fact that the public forum takes place before the formal call to order to avoid the requirements of the Act.

Having determined that the public forum is indeed a part of the regular meeting, we now consider whether the public's right to speak during the meeting was violated. The

statutory provisions relating to the public's right to speak at public meetings are found at Neb. Rev. Stat. § 84-1412 of the Act, which provide:

(1) Subject to the Open Meetings Act, the public has the right to attend and the right to speak at meetings of public bodies, and all or any part of a meeting of a public body, except for closed sessions called pursuant to section 84-1410, may be videotaped, televised, photographed, broadcast, or recorded by any person in attendance by means of a tape recorder, a camera, video equipment, or any other means of pictorial or sonic reproduction or in writing.

(2) It shall not be a violation of subsection (1) of this section for any public body to make and enforce reasonable rules and regulations regarding the conduct of persons attending, speaking at, videotaping, televising, photographing, broadcasting, or recording its meetings, including meetings held by virtual conferencing. A body may not be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings.

(3) No public body shall require members of the public to identify themselves as a condition for admission to the meeting nor shall such body require that the name of any member of the public be placed on the agenda prior to such meeting in order to speak about items on the agenda. The body shall require any member of the public desiring to address the body to identify himself or herself, including an address and the name of any organization represented by such person unless the address requirement is waived to protect the security of the individual.

Based upon these statutory provisions, along with other applicable authorities, this office has formulated several general "rules" which set out the public's right to speak at open meetings of public bodies. Those rules pertinent to your complaint include the following:

1. Public bodies in Nebraska generally operate as a form of representative democracy, i.e., 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.<sup>1</sup> 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. Consequently, members of the public 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 in any fashion, citizens attending a meeting of a particular public body are not

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<sup>1</sup> See *State ex rel. Strange v. School District of Nebraska City*, 150 Neb. 109, 33 N.W.2d 358 (1948).

members of that body.

2. Under the language found in Neb. Rev. Stat. § 84-1412(2), public bodies must set aside some time at some of their meetings for members of the public to address them, and we strongly encourage public bodies in Nebraska to allow public comment as frequently as possible. Public comments may be accepted on a particular agenda item or during a specified public comment period. The Act does not require that a public comment period be offered at any particular point in a meeting, and if and when public comment will be part of a meeting is at the discretion of the public body.
3. Since Neb. Rev. Stat. § 84-1412(2), in effect, requires public bodies to set aside some time at some of their meetings for members of the public to address them, the statute does not create an absolute right for members of the public to address a public body at any given meeting or on any given agenda item. Consequently, public bodies can rightfully refuse to allow public comment at a given meeting, or as they consider a particular agenda item, provided that they do offer opportunities for citizens to speak to them on other occasions.
4. Public bodies have the right to make reasonable rules for those members of the public who choose to address them. That includes setting reasonable time limits for public comment.

Pursuant to these rules, we do not find that the public's right to speak at Board meetings has been violated. The public's rights as audience members attending a Board meeting do not extend to engaging or questioning members of the Board, commenting on particular decisions, or taking part in the formation of Board policy. The public is present primarily to observe the Board, and to make public comment if they choose, when it is offered by the Board. As indicated above, § 84-1412(2) does not require that a public body have public comment every time it meets—so long as it sets aside some time at some of its meetings for this purpose. In the instant case, the public forum was properly included in the publicized agenda and meeting minutes. Most importantly, the public was given the opportunity to speak to the Board about any relevant topic during each meeting. In this way, the public forum fulfilled the Act's requirements relating to the public's right to speak.

Having established that the public forum provided the public sufficient opportunity to address the Board at regular meetings, we now consider how the actions of the Board mislead the public about the nature of the public forum and the applicability of the Act. The Act does not require a meeting to be called to order. However, the strategic placement of the public forum before the call to order causes the public to reasonably believe that the public forum is not a part of the meeting and, therefore, not governed by the Act. The Board is admonished to end this practice. If the Board chooses to formally call its meetings to order it should do so at the time noticed for the start of the meeting, prior to the beginning of the public forum. We remind the Board that public comment,

while not required at every meeting, is governed by the Act and must be treated as part of the meeting. Board members must refrain from advising the public to the contrary.

## 2. Meeting Materials

The complainants allege that on several occasions the Board discussed and took action on reports, construction change orders, and other documents that were not available at the meeting for review by members of the public. The Act requires public bodies to “make available at the meeting . . . for examination and copying by members of the public, at least one copy of all reproducible written materials to be discussed at an open meeting, either in paper or electronic form.” Neb. Rev. Stat. § 84-1412(8). The Board contends that the documents were projected on a screen in the meeting room for all to view and suggests that, had a member of the public asked, they would have been provided with the opportunity to review the documents. However, one complainant alleged that, following the March 8, 2021 meeting, she “had to ask and then drive down the next day to obtain all the documents reviewed and addressed by the board.” A second complainant indicated that meeting documents were not available at the December 14, 2020, March 8, 2021, April 12, 2021, and May 5, 2021 meetings. We remind the Board that the Act requires it to provide, at the meeting, at least one complete copy of all documents to be discussed during the meeting for members of the public to examine or copy. The temporary projection of sometimes lengthy and complicated documents on a screen in the meeting room is insufficient to meet this requirement.

## 3. Recording Meetings

One complainant alleges that the Board violated § 84-1412(1) by not always allowing members of the public to record meetings. The complaint does not offer specifics but suggests that the superintendent has declined to allow members of the public to record in certain instances. The complainant indicates that she never attempted to record a meeting but heard from others that the superintendent had denied their request to record. The complaint does not provide names, dates, or circumstances to support this allegation.

The Act provides that “all or any part of a meeting of a public body, except for closed sessions called pursuant to section 84-1410 may be videotaped, televised, photographed, broadcast, or recorded by any person in attendance.” Neb. Rev. Stat. § 84-1412(1). Notably, the Act allows a public body to “make and enforce reasonable rules and regulations regarding the conduct of persons attending, speaking at, videotaping, televising, photographing, broadcasting, or recording its meetings.” Neb. Rev. Stat. § 84-1412(2). The Board has indicated that the school district has a “Live Broadcast or Videotaping” policy which applies to its meetings. Policy 1004.03 provides that Board meetings may be recorded “as long as it does not interfere with or disrupt [the meeting] and it does not create an undue burden in adapting the buildings and sites to accommodate the request.” Policy 1004.03 gives the superintendent discretion to “determine whether the request is unduly burdensome and whether the broadcast or

videotaping will interfere with or disrupt the [meeting].” The Act permits the Board to make and enforce “reasonable rules and regulations” related to the recording of its meetings. On its face, Policy 1004.03 does not violate the Act. The complainants do not provide sufficient information for this office to evaluate their claims that individuals were wrongfully denied the ability to record.

#### 4. Availability of Meeting Minutes

Complainants allege that, in several instances, meeting minutes were not published within ten days of the meeting. The Act requires a public body to make meeting minutes “available for inspection within ten working days or prior to the next convened meeting, whichever occurs earlier. . . .” Neb. Rev. Stat. § 84-1413(5). In its response, the Board explains that it usually publishes meeting minutes to Bennington’s Sparq webpage. It acknowledged that, in several instances, the minutes were not posted to that webpage within ten days of the meeting. The Board asserts, however, that the meeting minutes were created and available at its office for inspection by the public within ten days of the meeting. The Act does not require that a public body post minutes to a webpage. The Act requires only that the minutes be available for public inspection. We find no evidence that the Board has not complied with this requirement.

#### 5. Specificity of Minutes

Complainants allege that the Board’s minutes do not include the substance of all matters discussed during the meeting. Specifically, it is alleged that minutes do not adequately describe the issues raised by the public. The minutes we have reviewed generally include an item titled “public forum” and, at minimum, list the number of persons who addressed the board. The Act requires a public body to “keep minutes of all meetings showing the time, place, members present and absent, and the substance of all matters discussed.” Neb. Rev. Stat. § 84-1413(1). The Act does not require the Board’s minutes to document the public comment period of a meeting, other than to reflect that public comment occurred at a meeting. The Board’s minutes are only required to show the “substance of all matters discussed” by the Board, not by members of the public. We find that there has not been a violation of the Act with respect to this allegation.

#### 6. Specificity of Agenda

One complainant alleges that the March 8, 2021 agenda was not sufficiently descriptive. Specifically, she asserts that agenda item VII.D described as “Executive Session for Discussion of Potential Legal Action, Administrative and Support Staff Negotiation” did not give notice of what legal action would be discussed. The Board acknowledges that the legal matter it discussed during the closed session on March 8th was a lawsuit against the school district which was pending in the United States District Court of Nebraska.

The Act requires a public body to maintain, and keep continually current, an

agenda at its office for public inspection. Neb. Rev. Stat. § 84-1411(1)(e). The agenda items “shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting.” *Id.* The purpose of the agenda requirement is to give notice of the matters to be considered at the meeting so that persons who are interested will know which matters are under consideration. *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010). The Act does, however, permit a public body to enter a closed session and keep discussion confidential if doing so is “clearly necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual and such individual has not requested a public meeting.” Neb. Rev. Stat. § 84-1410(1).

While the Board legitimately acted to keep its discussion of pending litigation confidential on March 8<sup>th</sup> by moving to a closed session, we do not find that there was a legitimate reason to keep the subject of the closed session confidential. The fact that a lawsuit had been filed against the school district was a matter of public record at the time and the Board was not protecting the public interest or preventing needless injury to the reputation of an individual by keeping the subject matter of its discussion off the agenda. We acknowledge that there are circumstances where the topic of closed session discussion should be withheld for the reasons outlined in Neb. Rev. Stat. § 84-1410(1), e.g., where the public body is considering taking legal action against another party in the future. The best practice, however, is for the public body to include items it intends to discuss during closed session in the agenda unless the fact of that discussion will itself endanger the public interest or cause needless injury to the reputation of an individual. We encourage the Board to follow this practice in the drafting of future agendas.

## 7. Changing of Meeting Times

One complainant alleges that the Board violated the Act’s notice provisions by changing the time of a regular meeting less than 24 hours before the meeting was to begin. Specifically, it is alleged that the meeting notice for the Board’s June 14, 2021 meeting stated that a workshop would start at 5:00 pm and be followed by a regular Board meeting at 7:00 pm. The May 17, 2021 meeting minutes state that the next regular meeting would be “June 14, 2021, at 7:00 p.m. (5:00 p.m. Workshop).” The complainant stated that she contacted the district secretary on June 10, 2021 by email to confirm the meeting time and was sent a copy of the meeting notice which reflected those times. She also states that she spoke with the district secretary on June 13, 2021 who again confirmed the start times of the workshop and Board meeting. At some point unknown to us, the workshop was canceled. The regular Board meeting on June 14, 2021 took place at 5:00 pm.

The Act requires a public body to give “reasonable advance publicized notice of the time and place of each meeting.” Neb. Rev. Stat. § 84-1411(1)(a). The Board has provided evidence that a meeting notice was published in the Douglas County Post-Gazette on June 9, 2021 which stated that a “workshop and regular board meeting” would occur on June 14, 2021 at 5:00 pm. This notice is sufficient to meet the requirements of

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Neb. Rev. Stat. § 84-1411(1) and to notify the public that the event would begin at 5:00pm. While we acknowledge that the complainant may not have received correct or complete information from the district secretary, we do not find that a violation of the Act occurred related to this allegation.

### CONCLUSION

For the reasons stated above, we conclude that the Board violated the Act by not providing at least one complete copy of all reproducible materials to be discussed at the meeting. In addition, we strongly suggest that the Board end the confusing practice of holding the public forum before the meeting is called to order. Board members must cease incorrectly advising the public that the public forum is not a part of the public meeting. Finally, we encourage the Board to specifically identify, within the agenda, the topics to be discussed during each closed session where withholding the nature of the topic is not clearly necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual and such individual has not requested a public meeting. We remind the Board, through a copy of this letter to its legal counsel Mr. Aldridge, that all requirements of the Open Meetings Act must be strictly adhered to in the future.

We do not believe that further action by this office is appropriate at this time and close this file. If the complainants disagree with our analysis, they may wish to discuss this matter with their private attorney to determine what additional remedies, if any, are available under the Act.

Sincerely,

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Attorney General



Elizabeth O. Gau  
Assistant Attorney General

c: Derek Aldridge, Attorney for the Board

03-015-30