STATE OF NEBRASKA

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March 31, 2010

Bill Dunn
321 N. Stark St.
P.O. Box 20
Bennington, NE 68007-0020

Re: *File No. 10-M-110; Bennington City Council; Bill Dunn*

Dear Mr. Dunn:

This letter is in response to your correspondence dated February 17, 2010, in which you requested that this office investigate certain alleged violations by the Bennington City Council, (the "City Council"), or more specifically, the Bennington Project Advisory Committee ("BPAC") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2009). In accordance with our normal procedures, we requested a response from the City Council after we received your complaint, and we subsequently received a response from Jeff C. Miller, City Attorney for the City of Bennington. We have now had an opportunity to review your allegations and the City Council and BPAC'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, information received from the Mayor of Bennington, and the response from the City Attorney. Your Open Meetings Act concerns relate to the Bennington Project Advisory Committee which was formed by the previous mayor to monitor an improvement project of 156th Street in Bennington. The BPAC is comprised of five members, which include two members of the Bennington City Council, the Mayor of Bennington, the Planning Commission Chairman, and the City Engineer. The BPAC reports to the City Council, which in its entirety consists of four members.

On December 12, 2009 and January 5, 2010, you and several other citizens attempted to attend meetings of the BPAC, but were turned away. The BPAC's position is that it is not a public body, not subject to the Open Meetings Act, and is not required to allow citizens at its meetings. That is also the position of the City Attorney in his response to your Open Meetings Act complaint.

ANALYSIS

Your concern is that the BPAC meetings are not open to the public. The Open Meetings Act requires that "[e]very meeting of a public body shall be open to the public." Neb. Rev. Stat. § 84-1408 (2009). The relevant questions for analysis of your complaint are, first, whether the BPAC is a "public body" for purposes of the Open Meetings Act, and if it is, whether that public body held "meetings," as defined in the Open Meetings Act, which were not open to the public.

Whether the BPAC is a Public Body

Neb. Rev. Stat. § 84-1408 states that it is "the policy of this state that the formation of public policy is public business and may not be conducted in secret." As a result, the Nebraska open 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); *Steenblock v. Elkhorn Township Board*, 245 Neb. 722, 515 N.W.2d 128 (1994); *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984). Their purpose is to ensure that public policy is formulated at open meetings of the bodies to which the law is applicable. *Dossett v. First State Bank, Loomis, NE*, 261 Neb. 959, 627 N.W.2d 131 (2001); *Marks v. Judicial Nominating Commission for Judge of the County Court of the 20th Judicial District*, 236 Neb. 429, 461 N.W.2d 551 (1990); *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).

Neb. Rev. Stat. § 84-1409 (2009) defines "public body" for purposes for the Open Meetings Act. This definition, in relevant part, states:

> (1)(a) Public body means (i) governing bodies of all political subdivisions of the State of Nebraska. . .(iii) all independent boards, commissions, bureaus, committees, councils, subunits, or any other bodies created by the Constitution of Nebraska, statute, or otherwise pursuant to law . . .(v) advisory committees of the bodies referred to in subdivisions (i), (ii), and (iii) of this subdivision . . .; and

> (b) Public body does not include (i) subcommittees of such bodies unless a quorum of the public body attends a subcommittee meeting or unless such subcommittees are holding hearings, making policy, or taking formal action on behalf of their parent body. . .

Thus, if the actions and organization of the BPAC are consistent with any of these classifications, it is a public body, and the analysis moves to whether the BPAC held meetings. If the BPAC is not a public body, our analysis ends there, as meetings of a non-public body are not subject to the requirements of the Open Meetings Act.

The City Council itself is the "governing body of a political subdivision," and therefore, the BPAC does not fall under this definition in § 84-1409 (1)(a)(i). Second, the BPAC is not an "independent board, commission, bureau, committee, council, subunit, or any other body" created pursuant to law as found in § 84-1409(1)(a)(iii). As already stated, our understanding is that the BPAC was created by the former mayor and not created by resolution or any other formal action of the City Council, thus, it does not qualify as a public body under this subsection.

Third, and most significantly, we must examine whether the BPAC is an "advisory committee" of the City Council, as defined in § 84-1409(1)(a)(v). Based upon the information we have been supplied, the BPAC was formed by the former mayor and contains five members including two members of the City Council, Mayor Johnson, the Planning Commission Chair, and the City Engineer. The BPAC meets with various individuals and contractors connected to the 156th Street improvement project, reviews reports and information, makes determinations as to options available to the City, and releases reports and recommendations to the City Council following the BPAC meetings. It appears, from information received documenting the January 5, 2010 BPAC meeting, that the BPAC works on behalf of the City of Bennington with contractors and federal and state agencies as to this project. The documentation of the motion of this meeting also indicates that the BPAC has certain authorities:

> I make a motion to approve the City of Bennington – 156th Street, STPC-3805(5), Preliminary Plans and recommend to the City Council that once the Categorical Exclusion document is approved by the Nebraska Department of Roads and Federal Highway Administration, construction documents be finalized and Right-of Way secured. As part of this motion, the Project Advisory Committee would like to make known that they have thoroughly investigated each and every alternative and established that the Preliminary Plans best represent the Purposes and Needs of the Local Road & Street Improvement Programming Request. . .

This motion, made by an unknown member of the BPAC, goes on to state that the BPAC "evaluated the financial, spatial, and technical aspects of each alternative. . ." There was then a vote by the members of the BPAC. It appears from this motion that the BPAC reviewed plans for the 156th Street project, made a determination as to which plan was best, and approved a certain plan. That approval was then sent on to the City Council as a recommendation for proceeding with the project from the BPAC.

Our information indicated that the City Council discussed the recommendations from the BPAC during its open meetings, and allowed public comment at that time. In addition, there was an open house held in October, 2009 in which the BPAC and third parties answered questions and allowed citizen comment on the 156th Street project.

This office has issued two opinions relating to advisory committees of public bodies. The first, Op. Att'y Gen. 95014, dealt with a committee created by the mayor of Omaha. The committee did not contain any members of the city council, nor did it report to the city council; instead, the committee reported to the mayor. This office determined that the committee was not an "advisory committee" subject to the Open Meetings Act, but was serving in a management or administrative function. The second opinion, Op. Att'y Gen. 92020, analyzed whether a committee formed by the Chancellor of the University of Nebraska, which reported directly back to the Chancellor and the membership of which did not contain any of the Board of Regents, was an advisory committee. Again, that committee was determined to be an administrative body of the office of the Chancellor, and was not subject to the Open Meetings Act.

The BPAC is distinguishable from each of these committees in two very important ways, and this City's arguments that the BPAC is comparable are not persuasive. First, while the BPAC was formed by the former mayor, it reports directly to the City Council and not to the mayor. Second, two members of the City Council are also members of the BPAC. Each of these is strong evidence that the BPAC is an advisory committee of the City Council. When also considering the ability of the BPAC to review information, vote on proposals, and make specific recommendations to the City Council, it becomes more probable that the BPAC is an advisory committee under the Open Meetings Act.

The City argues that the BPAC is not an advisory committee because "advisory committees which are subject to the requirements of the Open Meetings Act are those numerous advisory committees which are either created by statute, or are permitted by

statute to be created." We do not agree that the Open Meetings Act is limited in its application to only such advisory committees. The Open Meetings Act itself does not contain such limiting language as the City proposes. Neb. Rev. Stat. § 84-1409(1)(a)(v) very clearly applies to advisory committees of the governing bodies of all political subdivision in the state. Nowhere is that limited to only advisory committees created or provided for in statute.

The City also seems to argue that to constitute an advisory committee, a quorum of the members of the City Council must attend the meetings. This is incorrect. An advisory committee is not required to contain any members of the governing body, let alone a quorum. The City seems to be confusing an advisory committee with a subcommittee, which will be discussed below.

Finally, the City attempts to argue that because "there are hundreds of such construction or project committees, teams or groups . . . across Nebraska," that the BPAC is not an advisory committee or public body. This office cannot speak to these "hundreds" of other such groups, as the analysis as to whether a group is a public body is highly fact intensive, and we lack any facts as to these other groups. However, because of the membership of the BPAC, the fact that it reports directly to the City Council, and based on our information, certainly has advised the City Council with respect to the 156th Street project, we believe that the better answer is that the BPAC is an advisory committee of the City Council, and is therefore a public body subject to the Open Meetings Act. We would note, however, that if the BPAC reported to a department of the City of Bennington or to any single Bennington governmental official, other than a member of the City Council, our conclusion may be different.

Finally, we must consider whether the BPAC is a subcommittee of a governing body of a political subdivision. A subcommittee is generally considered to be made up of only members of the parent body from which it was formed. In this case, a subcommittee of the City Council would be made up only of members of the City Council. However, the information provided to this office is that the BPAC is comprised of two City Council members, Mayor Johnson, the Planning Commission Chairman, and the City Engineer. At no time did the BPAC include a quorum of the City Council, and we have no information to suggest that a quorum of City Council members was ever present at any BPAC meetings. We also could not make any definitive determination that the BPAC was making policy or taking formal action on behalf of the City Council. Thus, we do not believe the BPAC is a subcommittee.

Whether the BPAC held "meetings"

Meeting is defined as "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).

As the BPAC is likely a public body, as discussed above, and its members briefed and discussed the public business of the 156th Street improvement project, the gatherings of the BPAC members are "meetings" under the Open Meetings Act. These meetings should be conducted accordingly. The failure to hold public meetings of the BPAC is a violation of the Open Meetings Act.

CONCLUSION

Based on our analysis, we believe that the BPAC is most likely a "public body" subject to the Open Meetings Act. The BPAC also has held "meetings" under the Open Meetings Act. Thus, we believe the BPAC is subject to the requirements of the Open Meetings Act, and should comply with those requirements for all future meetings.

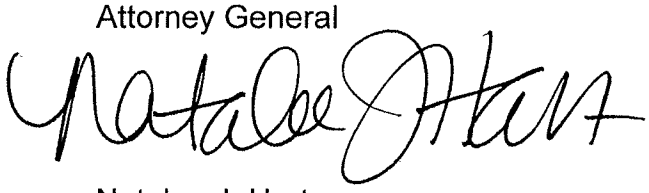
We would also note that the BPAC's past recommendations were discussed at open meetings of the City Council, where, according to information provided by the City Attorney, there was public discussion of those recommendations, the opportunity for public input, and a public vote. Open Meetings Act violations that occurred with respect to the BPAC in the past were cured by this public discussion at the public meeting of the entire City Council, under *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).

We do not believe any formal action against the BPAC or the City Council is appropriate at this time. The BPAC was acting on the advice of the City Attorney in not holding public meetings, and does not appear to have been attempting to circumvent the Open Meetings Act by doing so.

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.

Sincerely,

JON BRUNING
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Jeff C. Miller, City Attorney
Mary Johnson, Bennington Mayor

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