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May 22, 2012

Eric Williams
344 South 9th
Geneva, NE 68361

RE: *File No. 11-M-117; Fillmore Central Public Schools Board of Education; Eric Williams, Complainant*

Dear Mr. Williams:

We are writing in response to your letter dated May 10, 2011, in which you ask our office to take action against the Fillmore Central School Board (the "Board") for alleged violations of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2008; Cum. Supp. 2010; Supp. 2011) (the "Act"). As is our normal practice, we forwarded a copy of your complaint to the public body which is the subject of the complaint. In this case, we forwarded your complaint to the president of the Board, Shawn Maloley. On June 6, 2011, we received a letter from attorney Steve Williams, who responded on behalf of the Board. We have now had an opportunity to review your complaint and the Board's response and documentation in detail. Our conclusion and future action in this matter are set forth below.

Before we begin, we would like to point out that Neb. Rev. Stat. § 84-1414 of the Open Meetings Act gives this office general enforcement authority over the Act. This authority requires us to determine whether a public body has complied with the various procedural provisions of the Act, relating to agenda, notice, closed session, voting, minutes, etc. However, our authority does not extend to scrutinizing substantive decisions made by a public body in the course of a public meeting. These are matters inherent to a public body's *governance*, over which we have no authority or jurisdiction. As a result, we cannot determine the legality or appropriateness of a decision, act, motion, etc. made by a public body which does not implicate a provision of the Open Meetings Act.

YOUR ALLEGATIONS

You have made three main allegations against the Board, which we have restated below:

1. You allege that the Board has two agendas—one for use by the public and one for Board members. You claim the public's agenda is not specific enough to "give the public reasonable notice of the matter to be considered," in violation of § 84-1411.

2. You allege that the meeting minutes do not indicate who spoke during the public comment period or what they said, in violation of § 84-1413, which requires meeting minutes to set out the substance of all matters discussed.

3. You allege that the Board's policy relating to citizen input and placing items on the agenda is not a policy, but rather a rule or regulation. As such, you believe that the Board violated the provisions of the Administrative Procedure Act [Neb. Rev. Stat. §§ 84-901 through 84-920 (2008, Cum. Supp. 2010, Supp. 2011)], when it adopted the policy.

You state that you have brought these allegations as a "last resort" because the Board and its administration have taken no action to fix the issues raised. You conclude: "The Board runs the School in secret without the knowledge of the public. They do not run an open and transparent School Board meeting."

DISCUSSION

Neb. Rev. Stat. § 84-1408 (2008) of the Nebraska 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 primary purpose of the public meetings law is to ensure that public policy is formulated at open meetings. *Marks v. Judicial Nominating Comm.*, 236 Neb. 429, 461 N.W.2d 551 (1990). The Nebraska public 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); *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984).

I.

The statute relating to agendas of public meetings provides, in pertinent part:

> Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the principal office of the public body during normal business hours. Agenda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting. Except for items of an emergency nature, the agenda shall not be altered later than (a) twenty-four hours before the scheduled commencement of the meeting or (b) forty-eight hours before the scheduled commencement of a meeting of a city council or village board scheduled outside the corporate limits of the municipality. The public body shall have the right to modify the agenda to include items of an emergency nature only at such public meeting.

Neb. Rev. Stat. § 84-1411 (Cum. Supp. 2010) (emphasis added).

Your first allegation relates to different agendas for Board members and the public. You claim that the public agenda lacks specificity and that "[a] member of the Public should not be required to hunt up and read the documents underlying an agenda." In support of your allegation, you included an agenda for a budget hearing and regular Board meeting for May 9, 2011, along with a memorandum to Board members from Mark Norvell, Superintendent, dated May 5, 2011. The May 9, 2011, agenda contains such items as "Southeast Nebraska Regional Program Contract," "Accept Resignations," "Middle School Roof Repair," "Amend 2010-2011 Budget," "Architect," "Extra Duty Assignments," "Staff Handbook," and "Board Policy Review."

According to Mr. Williams, the memorandum is not a second agenda, but rather is an informational report given to Board members for consideration prior to the meeting. Mr. Williams states that "[t]he memorandum is not intended to and does not supplant the board agenda." He also advises that the memorandum is a public record, and is available upon request. With respect to the specificity of agenda items, Mr. Williams cites for us the Nebraska Court of Appeals case of *Wolf v. Grubbs*, 17 Neb.

App. 292, 759 N.W.2d 499 (2009). In *Wolf*, the Nebraska Court of Appeals was asked to determine, among other things, whether the agenda item "Meeting Notice" "gave sufficient notice to the public that the board wanted to change the method of publicizing meetings." *Id.* at 307, 759 N.W.2d at 516. Upon review, the *Wolf* court found that the agenda item "was marginally sufficient under the Open Meetings Act to describe the action considered and taken . . . ." *Id.* at 309, 759 N.W.2d at 517. The Board asserts then that, according to *Wolf*, "the standard is not 'perfect' notice; it is 'sufficient' notice."

In the present case, the fact that the Board uses an agenda which has been supplemented with additional information does not constitute a violation of the Act. Ultimately, it is the agenda created for the *public* that must meet the requirements of the statute. In that regard, we have weighed the arguments made by the Board regarding the specificity of the Board's agenda items, and believe the Board's reliance on *Wolf* is misplaced. In 2006, the Legislature amended § 84-1411 to include the sentence "[a]genda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting." 2006 Neb. Laws LB 898, § 2. Prior to that time, "the law required that agendas give 'some notice' of matters to be considered at the meeting." *Id.* at 308; 759 N.W.2d at 516. Because the meeting in *Wolf* referenced above was in 2005, the court was required to apply the old version of the statute. Under the "some notice" standard, the court found the agenda item "Meeting Notice" to be "marginally sufficient." However, whether an agenda item is merely "sufficient" is not the standard today. We have reviewed the agenda items contained in the agenda you provided to us, and believe that several of those items lack the specificity required under the current version of § 84-1411. For example, an agenda item which merely states "Architect" falls far short in providing the public reasonable notice as to what the Board will be considering. As a result, we believe that the Board's agenda for its May 9, 2011, meeting was technically deficient under the statute.

II.

Your second allegation deals with the Board's meeting minutes. Specifically, you claim that the minutes do not list who spoke during the public comment period or what was said. The applicable statute, § 84-1413, provides, in pertinent part:

> Each public body shall keep minutes of all meetings showing the time, place, members present and absent, and the substance of all matters discussed.

There are simply no Nebraska cases or opinions that discuss what must be contained in the minutes of a meeting of a public body under the Open Meetings Act. Also, there are no provisions in the Open Meetings Act that require the minutes of a

public meeting to include the comments of the general public made during a public comment period. Therefore, we are left with the statutory language set forth above, taken in its plain and ordinary meaning. The statute indicates that minutes must contain the (1) time, (2) place, (3) members present and absent, and (4) the substance of all matters discussed. Therefore, it seems to us that the minutes must focus on what the Board did and said, not what individuals who spoke during a public comment period may have said to the Board. As a result, we find no violation of the Open Meetings Act in this regard.

Mr. Williams advises us that the Board has, in fact, included in its meeting minutes the names of patrons who have spoken at meetings and the topics discussed. However, he also states that the Board has not done so consistently. Mr. Williams states that he believes the best practice would be to include this information on a regular basis, and has recommended to the Board "that it institute such a practice immediately so it can provide its patrons with the additional information rather than the statutory minimum."

III.

Your final allegation relates to a 2002[1] Board policy relating to placing items on the agenda. You state that "it takes two school board members and the school superintend [*sic*]. Citizens have asked to be put on the agenda and the school board has not complied." You assert that "this is not a reasonable rule" allowed under § 84-1412. You also assert that when the Board approved the policy, "all that was on the agenda for that meeting was a Board Policy Review." You have asked us to void the policy based on § 84-1414.

Mr. Williams advises that patron requests for items to be added to the Board's agenda are sometimes granted, and sometimes not. However, he states that the policy itself is lawful, and that there is no statutory requirement for a public body to add items to its agenda when requested to do so by a member of the public. He further states that § 84-1412(2) requires a public body to allow for public comment, and that the Board "complies with this requirement by providing an opportunity for public comment at most, if not all, of its meetings subject to reasonable rules and regulations adopted by the board."

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[1] According to documentation we received from Mr. Williams, Internal Board Policy #1525 entitled "Agendas" was adopted in December 1999, and subsequently reviewed in November 2001 and November 2005.

As indicated by Mr. Williams, the Open Meetings Act contains no provision that requires a public body to put items on its agenda when requested by citizens. Further, § 84-1412 allows public bodies "to make and enforce reasonable rules and regulations regarding the conduct of persons attending, speaking at, videotaping, televising, photographing, broadcasting, or recording its meetings." This statute has no application to placing items on a meeting agenda. In the present case, the Board has an internal policy relating to its meeting agendas that is neither subject to § 84-1412 nor subject to the rulemaking provisions under the Administrative Procedure Act.[2] And because we have no general authority over school boards, we are unable to tell you whether we believe the policy is reasonable, ill-advised or otherwise. Consequently, we find no violation of the Act in this regard.

ACTION BY THE DEPARTMENT OF JUSTICE

Since we have determined that the Board agenda for the May 9, 2011, meeting violated the Open Meetings Act, we must determine whether any further action by this office is necessary based on the circumstances here. Two possibilities exist under the statute—filing a civil lawsuit to void the Board's actions or pursuing criminal prosecution against the individual members of the Board. However, we do not believe a civil lawsuit to void is appropriate because the Board could cure any previous defects by revisiting any topic under a proper agenda item. *See Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979). We also do not believe that a criminal prosecution of Board members for a knowing violation of the Open Meetings Act is appropriate because it appears that the Board ceded its responsibility to prepare meeting agendas to Superintendent Norvell. Consequently, consistent with our actions in previous cases, we will admonish the members of the Board, by sending a letter to legal counsel, that the purpose of the cited requirement in § 84-1411 is to give the public actual notice of what the Board plans to discuss, so that people can attend the meeting and observe the Board conduct its business. Finally, we note that Mr. Williams has represented to us that "[f]uture agendas may well contain more descriptive entries in the future in order to provide its patrons with additional information." We hope that this has become the norm, and not a mere possibility.

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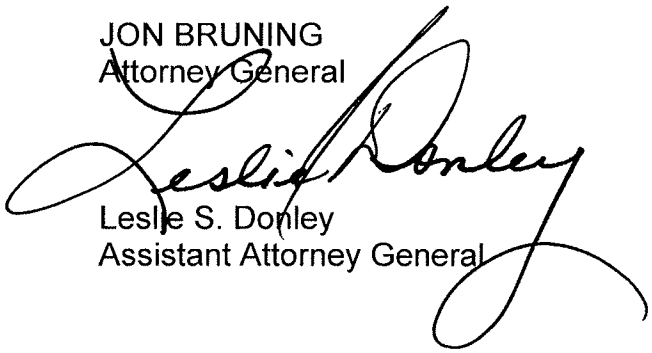
[2] Entities of *state* government, i.e., boards, commissions, departments, etc., may issue rules and regulations when authorized by law to do so. The Administrative Procedure Act does not apply to local political subdivisions, like school boards.

Since we have determined that no further action by this office is appropriate at this time, we are closing this file. If you disagree with our analysis under the Open Meetings Act, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under those statutes.

Sincerely,

JON BRUNING
Attorney General



Leslie S. Donley
Assistant Attorney General

cc: Steve Williams

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