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JON BRUNING
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

July 24, 2012

William Plock
P.O. Box 306
Fairmont, NE 68354

RE: *File No. 11-M-141; Fillmore Central Public Schools Board of Education; William Plock, Complainant*

Dear Mr. Plock:

We are writing in response to your correspondence we received on May 9, 2011, and November 7, 2011, in which you allege violations of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2008; Cum. Supp. 2010; Supp. 2011) (the "Act"), by the Fillmore Central Public Schools Board of Education (the "Board"). As is our normal practice, we contacted the public body which is the subject of the complaint(s). In the present case, we forwarded your first complaint to legal counsel to the Board, Steve Williams, and requested a response, which was timely received by this office. As to your November complaint, we determined that a response from the Board as to the allegations raised therein was unnecessary. We also note that in July 2011, we received additional materials from you supplementing your May complaint. We have now had an opportunity to review your complaints and the Board's response and all submitted 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. Therefore, your allegations relating to which individuals may speak at the

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school(s), i.e., Glenn Freeman, Governor Heineman, etc., will not be addressed in this letter.

YOUR ALLEGATIONS

According to the documentation received, we have identified three allegations against the Board, which are restated below:

1. You allege that Superintendent Norvell controls the agenda at the school board meetings.

2. You allege that the agenda item—"Review and Consider Premium Holiday Agreement between FCEA and FC School Board"—is inadequate to give the public reasonable notice of what the Board would be considering at the meeting.

3. You state that certain material in the Board's packet was not made available to the public.

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.

Your first allegation relates to Superintendent Norvell's "control" over the Board's agenda. In support of your allegation, you included an e-mail exchange between Mr. Norvell and Sherri Nun, wherein Ms. Nun asked to have the American Legion placed on the December 13, 2010, Board agenda to discuss the Veterans Day speaker issue. Ms. Nun's request was denied by Mr. Norvell, but she was invited to attend the Board meeting, and raise any questions she had during the public comment period.

According to documentation which we received from the Board's counsel, the Board has given the responsibility to prepare the Board's agenda to the superintendent. *See* Internal Board Policy #1525, attached.[1] This policy further provides, in pertinent part:

> Any board member, staff member or patron may submit items to be considered for placement on the agenda. This generally should be done at least three days prior to the meeting, unless of an emergency nature. The superintendent and board president shall make final determination as to what items shall be placed on the agenda, except that if the president or any two board members request an item be placed on the agenda, it shall be done. Final action will not be taken on items introduced at a meeting which have not been on the agenda unless such item is of an emergency nature requiring prompt board action.

According to Mr. Williams, 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. We agree. Mr. Williams also 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." And, he states, you have in fact addressed the Board during its public comment period in the past, and did so with respect to the Veterans Day speaker issue referenced above. As a result, we are unable to conclude that the Board has violated the Open Meetings Act by including the school district superintendent in the preparation of meeting agendas.

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[1] Internal Board Policy #1525 entitled "Agendas" was adopted in December 1999, and subsequently reviewed in November 2001 and November 2005.

II.

Your second allegation relates to the agenda item—"Review and Consider Premium Holiday Agreement between FCEA and FC School Board," which appears on the October 10, 2011, Board agenda. According to your complaint, you question whether this agenda item provided adequate notice to the public, and you cite *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979) in support of your allegation.

Neb. Rev. Stat. § 84-1411 of the Open Meetings Act requires that "[a]genda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting." It appears to us that the agenda item in question clearly meets this statutory requirement. As a result, we do not believe the Board violated the Act in this regard.

III.

Your final allegation relates to the material which accompanied the agenda item discussed in II. above. In your complaint, you state that: "This was in the board packet, but not available to the public. Even board members unclear . . ." (Excerpt in original.) To be clear, "this" refers to the agenda for the regular Board meeting on October 10, 2011; an open letter from the Executive Directors of the NASB, the NCSA, and the NSEA, dated July 6, 2011; a legal memorandum from attorneys at the Harding & Shultz law firm, entitled "EHA's Premium Holiday Creates Legal Uncertainly [sic] for School Districts"; and a table entitled "Premium Holiday Agreement." Also attached to these documents are two pages entitled "Stalin's Chickens," which we assume is supplemental material for our file.

The pertinent statute with respect to documentation availability at public meetings is found at § 84-1412, and provides, in pertinent part:

> (8) Public bodies shall make available at the meeting or the instate location for a telephone conference call or videoconference, for examination and copying by members of the public, at least one copy of all reproducible written material to be discussed at an open meeting.

You claim that the documents delineated above were not part of the packet of materials made available to the public. You do not indicate that anybody asked the Board to look at these materials during the meeting and was denied access. Because we cannot tell from the record whether these materials were available, we will simply remind the Board, by sending a copy of this letter to Mr. Williams, that in the future all reproducible written materials discussed by the Board in open session must be made available to the

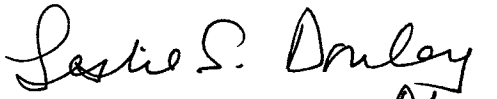
public. This includes any privileged legal memoranda which, once discussed in a public forum, become subject to disclosure.

CONCLUSION

We have carefully considered the allegations you made against the Board of Education for Fillmore Central Public Schools. However, we are unable to conclude that the Board violated the Open Meetings Act in any manner. Consequently, no further action by this office is necessary, and 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

Policy Attached

cc: Steve Williams

49-875-30

INTERNAL BOARD POLICIES

Meetings #1500

Budget Hearing #1520

The Fillmore Central Public School Board of Education will meet annually for purposes of holding a public hearing on its budget document as provided by statute. No official action may be taken during the hearing portion of this meeting.

The purpose of a public budget hearing is to provide interested citizens or groups an opportunity to express their opinions about the proposed budget of the board of education.

Policy Adopted: 12-13-99
Policy Reviewed: *11-12-01*
11-14-05 ***Fillmore Central Public School***

Agendas #1525

Preparation of the agenda shall be the responsibility of the superintendent. The superintendent shall place items on the agenda if requested by the board president or any two board members, as long as the requests are made in a timely fashion. Agendas are normally distributed to board members two to three days (but more than twenty four hours) before the meeting.

Except for items of an emergency nature, the agenda shall not be enlarged later than twenty four hours before the scheduled commencement of the meeting.

A list of bills to be paid shall be included in the agenda of each regular board meeting.

Any board member, staff member or patron may submit items to be considered for placement on the agenda. This generally should be done at least three days prior to the meeting, unless of an emergency nature. The superintendent and board president shall make final determination as to what items shall be placed on the agenda, except that if the president or any two board members request an item be placed on the agenda, it shall be done. Final action will not be taken on items introduced at a meeting which have not been on the agenda unless such item is of an emergency nature requiring prompt board action.

The president of the school board shall preside at all meetings of the district in which he/she is in attendance. In his/her absence the vice president assumes this duty. If both the president and vice president are absent from a duly called meeting, and a quorum of the board are present, the ranking member present in terms of continuous service on the Board shall preside.

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