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July 24, 2012

Leon Jessen
1907 F Ave
Dakota City, NE 68731

Re: *File No. 11-M-144; Dakota County Board of Commissioners; Complainant Leon Jessen*

Dear Mr. Jessen:

This letter is in response to your correspondence received by us in which you requested that this office investigate alleged violations by the Dakota County Board of Commissioners (the "Board") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2008; Cum. Supp. 2010; Supp. 2011). In accordance with our normal procedures, we requested a response from the Board after we received your complaint, and we subsequently received a response from County Attorney Kim Watson. We have now had an opportunity to review your allegations and the Board'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, along with the response from the Board. We have identified six Open Meeting Act complaints made by you.

(1) The Board circumvented the Open Meetings Act by discussing an issue via phone calls after the August 8, 2011 meeting;
(2) You were not placed on the agenda for the August 22, 2011 Board meeting;
(3) The closed session on August 22, 2011 was not justified;
(4) The motion to close on August 22, 2011 was deficient;
(5) The Board made a decision in its closed session on August 22, 2011; and
(6) Your attorney was not permitted to speak on August 22, 2011 during or following the closed session agenda item.

All of your complaints relate to a request by you, and denial by the County, to address flooding on your property by installing a drainage tube.

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ANALYSIS

Discussion outside of an Open Meeting

Your first complaint is that the Board violated the Open Meetings Act by having a discussion with "a definite intent to make a decision" outside of an open meeting. Over time, our office has consistently taken the position that two things must occur for a public body to hold a meeting that is subject to the requirements of the Open Meetings Act. First, we have indicated that a quorum of a public body must be present to constitute a "meeting." Second, we believe that a meeting of a public body only occurs if that public body engages in some of the activities set out in the statutory definition of "meeting" found at Neb. Rev. Stat. § 84-1409(2) (2011), i.e., the public body must engage in "briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body." In our view, when both of these elements have been satisfied, a "meeting" of a public body has occurred under the Open Meetings Act.

It is our understanding that the Board is composed of five members, and that a majority of the members constitute a quorum.[1] In other words, a quorum is reached by the attendance of three Board members.

You allege that after the August 8, 2011 meeting of the Board, you contacted a board member, Mr. McNear, who had been absent from that meeting. You contacted him to "be sure he had read and fully understand the statements" made by you and your attorney at the meeting, before the Board convened on August 22. You state that Mr. McNear told you the Chairman of the Board called McNear outside of a Board meeting and advised that the Board would do as the County Attorney advised as to your drainage issue. You further state "it was his (McNear's) understanding that (Chairman) Bousquet had contacted all of the members of the Board to advised (sic) them of the same decision."

Notwithstanding that your statements are hearsay, and unsupported by any other evidence than your complaint, we will address your concerns. First, you do not allege that any more than two members of the Board spoke at any one time. Therefore, at no time was a quorum of the Board present during the alleged phone calls, and the calls, if they occurred, did not constitute a meeting of the Board subject to the Open Meetings Act.

However, we must also consider whether the alleged phone calls, if they occurred, were utilized in order to circumvent the Open Meetings Act. We do not believe that they were. You have concluded that because the "way the item was put on the agenda," the Board must have come to a decision before the August 22, 2011

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[1] *See* Neb. Rev. Stat. § 17-105 (2007).

meeting as to how they would vote, and that decision must have been made through the phone calls. You do not elaborate on what you mean by "the way the item was put on the agenda." We assume you mean because the Board chose to discuss the item in closed session, with its attorney, rather than in an open session. However, we do not reach the same conclusion as you do. There is nothing suspicious regarding the Board wishing to speak with its legal counsel about an item which may have legal implications, and about which an attorney hired by a member of the public has addressed them. In addition, the closed session on August 22 lasted nearly 20 minutes. This supports the Board's position that the Board had not made a decision before the August 22 meeting, and before it was able to hear from its legal counsel during the closed session. Therefore, we do not believe the Board has violated the Open Meetings Act with respect to this portion of your complaint.

Placement on Agenda

You next complain that you were not placed on the agenda for the August 22, 2011 meeting. You also complain that because the agenda was published 24 hours before the meeting, you did not have "the means to correct the agenda."

The Open Meetings Act contains several provisions which deal with the public's right to speak at open meetings of public bodies, most of which are set out in the following portions of § 84-1412:

> (1) Subject to the Open Meetings Act, the public has the right to attend and the right to speak at meetings of public bodies. . . .
>
> (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, [or] speaking at . . . its meetings. *A body may not be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings.*

Based upon § 84-1412 and other applicable authorities, our office has previously stated that public bodies in Nebraska generally operate as a form of representative democracy. *See Distinctive Printing and Packaging Company v.* Cox, 232 Neb. 846, 443 N.W.2d 566 (1989); *State ex rel. Strange v. School District of Nebraska* City, 150 Neb. 109, 33 N.W.2d 358 (1948). That is, Nebraska 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. 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, and they 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, citizens attending a meeting of a particular public body are not members of that body.

In addition, this office believes that the following apply to the ability of a member of the public to address a public body.

1. Under the portion of § 84-1412 (2) emphasized above, a public body must set aside *some time* at *some* of its meetings for members of the public to address it. Accordingly, there is no absolute right for members of the public to address a public body at any given meeting or on any given agenda item, so long as there is some time at some meetings set aside for public comment. Public bodies can rightfully refuse to allow public comment at a given meeting, or as they consider a particular agenda item.

2. Public bodies have the right to make reasonable rules for those members of the public who choose to address them. That includes reasonable limits on the use of time, rules as to the topics upon which a member of the public may comment, and the conduct of the persons addressing the public body.

3. Public bodies may not require that the name of any member of the public be placed on the agenda prior to a meeting in order for that person to speak about items on the agenda at that meeting. However, that statutory provision in § 84-1412 (3) does not appear to apply to discussion, by members of the public, of items *not already* on the agenda. Under the latter circumstances, where individuals wish to speak about items not already on the agenda, it appears that public bodies may require that those persons seek to be placed on the agenda prior to the meeting in which they wish to speak. Reasonable rules may be enforced by the public body as to how a member of the public may request to be on the agenda, and whether that request is approved.

4. Public bodies should set aside some time at some of their meetings for members of the public to address them on any topic whatsoever, so long as those comments are not obscene or threatening in any way. Public bodies should not use agenda access requirements to control limit the topics upon which citizens can address them.

5. Members of the public may not be required to identify themselves to gain entry to a meeting of a public body. However, they may be asked to identify themselves if they wish to speak to the public body.

The Board is not required to allow members of the public to speak at a particular open meeting, or every open meeting, provided that the Board allows the public to address them at some meetings. You do not complain that you have never been allowed to address the Board. In fact, you were given several opportunities to address the Board about the drainage issue on your property. The Board is not required to place a citizen's item on the agenda at any meeting. The public also does not have any right under the Open Meetings Act to "correct" a public body's agenda. The Board accommodated your request at the August 8, 2011 meeting by allowing you and your attorney to present your issue to them. The Board did not violate the Open Meetings Act by not placing you on the agenda on August 22, 2011 to speak to them again about the same topic.

Closed Session of August 22, 2011

You make three complaints regarding the closed session of the Board on August 22, 2011. You allege that the closed session was not "justified," that the motion to close the meeting was deficient, and that the Board made a decision in the closed session, in violation of the Open Meetings Act.

The Open Meetings Act states:

> (1) Any public body may 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. The subject matter and the reason necessitating the closed session shall be identified in the motion to close. Closed sessions may be held for, but shall not be limited to, such reasons as:
>
> > (a) Strategy sessions with respect to collective bargaining, real estate purchases, pending litigation, *or litigation which is imminent as evidenced by communication of a claim or threat of litigation to or by the public body*;
> > (b) Discussion regarding deployment of security personnel or devices;
> > (c) Investigative proceedings regarding allegations of criminal misconduct; or
> > (d) Evaluation of the job performance of a person when necessary to prevent needless injury to the reputation of a person and if such person has not requested a public meeting.

Neb. Rev. Stat. § 84-1410 (2008)(emphasis added).

Whether the Closed Session was appropriate

First, you allege that the closed session was not justified because you claim you had not made a threat of litigation as of August 22, 2011. We disagree. You indicate that on August 8, 2011, your attorney, Mr. Connealy, made a presentation on your behalf to the Board, regarding your request for a drainage tube. Your letter states you had hired an attorney "to investigate the laws of Nebraska that deal [with] the water flow laws" and his presentation to the Board was as to "the requirements of the County with respect to the issue at hand." Following Mr. Connealy's presentation, the Board indicated it would have the County Attorney investigate the matter and report to the Board.

The Board has provided more detail to us, and indicates that your request dates to June 27, 2011. You appeared at the Board meeting on that date, and addressed the Board during the public comment period of the meeting. The Board has provided a transcript of your comments, and according to the Board, you stated

> There ain't hardly a drop of water in that other ditch. If...I'm not saying that even when you put that tube in I will get rid of all my water . . .That will, you know, I just think, and I'll be honest with you, I don't wanna get to that, but I will. There will be, you will hear from an attorney on this, and he will cite you that Supreme Court case. And so, I don't want get into that kind of fight. . .Supreme Court says you gotta put that (unintelligible). I don't want get into a court. . .

You again addressed the Board on July 11, 2011, along with Mr. Connealy. At that meeting, Mr. Connealy argued to the Board why Nebraska law supports the County installing the requested drainage. On August 8, 2011, the Board states that Mr. Connealy again addressed the Board, and discussed the County's potential liability. The County's letter states that "Mr. Connealy states that if they are successful in bringing a lawsuit, they would be entitled to more than just an order making the County install a culvert. There are bigger issues involved and they don't want to 'go there,' referring to filing a lawsuit." The Board explains that it was "of the understanding that Mr. Jessen's lawsuit was imminent and would be filed if they did not install the tube he was requesting."

Based upon this sequence of events, we believe the Board was reasonable in believing that you had communicated a claim or threat of litigation, and the closed session was necessary for the Board to receive legal advice as to your claim. The Board indicated on August 8 that it would be seeking the advice of the County Attorney as to the matter involving you and the presentation made by you and your attorney. We

do not believe the Board violated the Open Meetings Act in entering into closed session on August 22.

In addition, your conclusion that the Board "had already decided (outside of an open meeting) not to follow my request for a culvert/tube" is not supported by the evidence before this office, and this conclusion cannot be drawn from the Board's decision to enter into closed session on August 22.

Whether the vote to enter into closed session complied with the Open Meetings Act

You also complain that the motion made by the Board to enter into closed session, and the timeline of closing the meeting to the public, violated the Open Meetings Act.

The minutes from the August 22 meeting reflect that the Board moved to go into closed session "to discuss strategy for imminent litigation involving flooding on Leon Jessen's property." While the Board stated that litigation was the reason for its closed session, that is insufficient to meet the requirements of the Open Meetings Act. The Board is required to state both the subject matter and the reason for the closed session, and indicate why the closed session was clearly necessary for the protection of the public interest or the prevention of needless injury to the reputation of an individual. While the subject matter was sufficiently descriptive to meet the requirements of the Open Meetings Act, the motion does not contain the required language as to why the closed session was necessary for the protection of the public interest or the reputation of an individual. The Open Meetings Act also requires that if a motion for closed session passes, the "limitation of the subject matter of the closed session" shall be restated on the record, which is not reflected in the minutes.

Therefore, the Board did not comply with the Open Meetings Act in its motion to enter into closed session. However, as the Board did not take any formal action following the closed session, there is no decision of the Board to void or be voidable under Neb. Rev. Stat. § 84-1414 (2008). While there is no action to take for this Open Meetings Act violation, we will provide a copy of this letter to the Board through the County Attorney, and remind them of the requirement to include both the subject matter and the reason necessitating the closed session in every motion to close[2].

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[2] The Board cites to *Wasikowski v. Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W. 2d 756 (2002) for the proposition that since you did not object during the meeting in question, you have waited your right to object to the allegedly improper closed session. However, we would point the Board to Neb. Rev. Stat. § 84-1414 (3), which states that "It shall not be a defense that the citizen attended the meeting and failed to object at such time." This language was added via 2006 Neb. Laws LB 898, in response to the *Wasikowski* decision.

You also complain that the motion to close the meeting on August 22 was made after the public was asked to leave the meeting room. The Board denies this allegation, and states that the vote was taken as people were getting up to leave the room. Presumably the public understood they were going to be asked to leave at the conclusion of the vote on the motion to close. As a public body, we must assume that the Board is acting in good faith, absent evidence to the contrary. We have no reason to doubt the Board's characterization of the timeline surrounding the motion to close and members of the public leaving the room. Therefore, we do not find a violation of the Open Meetings Act relating to this portion of your complaint.

Whether the Board made a decision in the closed session

The Open Meetings Act requires that, if a closed session is held, the "meeting shall be reconvened in open session before any formal action may be taken. For purposes of this section, formal action shall mean a collective decision or a collective commitment or promise to make a decision . . .or formation of a position or policy." Neb. Rev. Stat. § 84-1410(2). You allege that the Board's decision to take no action following the closed session implies that they took formal action during the closed session. The Board denies your allegation. However, as the definition of "formal action" includes a collective decision or the formation of a position, we agree that the minutes indicate that the Board came to a collective decision during the closed session. "Following roll Chair Bousquet, on behalf of the Board, said that the Board has decided to take no action on this tube." The Board did not make a motion and take a vote on this issue following the closed session. It simply provided this summary of the Board's decision not to take action. But, its decision not to act was, indeed, a decision. We believe this indicates that the Board did make a collective decision during the closed session to take no action on the issue. This qualifies as "formal action" during a closed session, and is in violation of the Open Meetings Act.

The Board, however, may cure this violation by holding a vote on whether to take action on the drainage request, during a properly convened Open Meeting. *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979). We would strongly encourage the Board, through a copy of this letter, to conduct this vote at its next meeting. As the Board has the opportunity to cure the violation, this office will take no further action relating to this portion of your complaint.

Comment by a member of the public

Finally, you complain that your attorney was not permitted to address the Board following the Board's closed session on August 22, 2011. We refer you to our prior discussion relating to your complaint about not being placed on the agenda for this meeting. The Board is not required to allow a member of the public to speak during any

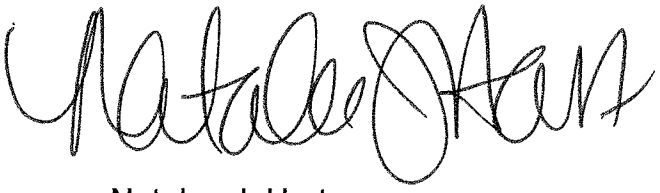
particular agenda item. The Board is only required to set aside some time at some of its meetings for public comment. And, in fact, Mr. Connealy did address the Board during the Public Comment portion of the meeting on August 22. Therefore, you and your attorney were not denied any opportunity to address the Board on that date. In addition, you and Mr. Connealy had previously addressed the Board on more than one occasion on the same issue. The Board has not violated the Open Meetings Act related to this portion of your complaint.

CONCLUSION

For the reasons stated above, we believe that the Board has violated the Open Meetings Act in certain limited respects. However, as explained above, no further action is necessary by this office. 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: Kim Watson

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