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November 27, 2012

Kent M. Franzen
PO Box 251
Wayne, NE 68787

Re: *File No. 12-M-134; Lower Elkhorn NRD; Complainant Kent M. Franzen*

Dear Mr. Franzen:

This letter is in response to your correspondence received by us on October 3, 2012, in which you requested that this office investigate certain alleged violations by the Ad Hoc Variance subcommittee of the Lower Elkhorn NRD of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2008, Cum. Supp. 2010, Supp. 2011). In accordance with our normal procedures, we requested a response from the Lower Elkhorn NRD after we received your complaint, and we subsequently received a response from Dennis Collins, attorney for the NRD. We have now had an opportunity to review your allegations and the NRD'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 and the response from the NRD. Your Open Meetings Act concerns relate to the Ad Hoc Variance Subcommittee ("Subcommittee"), which consists of five members of the NRD. The full NRD has a total of fifteen members. You complain that the Subcommittee violated provisions of the Open Meetings Act related to closed sessions on September 27, 2012. Specifically, you allege that the Subcommittee's presiding officer did not restate the full motion to close on the record before entering into closed session, and that the time the Subcommittee entered into and returned from closed session were not recorded in the minutes of the meeting. The NRD denies your allegations in its response, and asserts that the Subcommittee is not subject to the Open Meetings Act, as it is not holding hearings, making policy, or taking formal action on behalf of the full NRD.

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ANALYSIS

Your complaint is that the Subcommittee committed violations of the Open Meetings Act related to its closed session on September 27, 2012. However, before we can consider whether the Subcommittee was in violation of the Open Meetings Act, we must first determine whether the Subcommittee is even subject to the Open Meetings Act. We previously addressed the issue of subcommittees of the Lower Elkhorn NRD with you in a February 17, 2009 letter in response to allegations you made with respect to the "Information, Planning, and Programs" subcommittee. That analysis applies equally to your current complaint.

As we explained in 2009, Neb. Rev. Stat. § 84-1409 (2011) defines "public body" for purposes of the Open Meetings Act.

> (1)(a) Public body means (i) governing bodies of all political subdivisions of the State of Nebraska, (ii) governing bodies of all agencies, created by the Constitution of Nebraska, statute, or otherwise pursuant to law, of the executive department 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, (iv) all study or advisory committees of the executive department of the State of Nebraska whether having continuing existence or appointed as special committees with limited existence, (v) advisory committees of the bodies referred to in subdivisions (i), (ii), and (iii) of this subdivision, and (vi) instrumentalities exercising essentially public functions; 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, except that all meetings of any subcommittee established under section 81-15,175 are subject to the Open Meetings Act, and (ii) entities conducting judicial proceedings unless a court or other judicial body is exercising rulemaking authority, deliberating, or deciding upon the issuance of administrative orders.

While the full fifteen-member NRD is certainly a public body, and any subcommittee thereof which contains a quorum of the full NRD would also be a public body, the five-member Subcommittee at issue here is only a public body if it is "holding hearings, making policy, or taking formal action on behalf of the parent body." From the information provided to us, it does not appear that on September 27, 2012, the Subcommittee held a hearing or made policy. It appears that the Subcommittee is making recommendations to the full NRD, but it is not taking action on behalf of the full

NRD. Consequently, the Subcommittee is not a "public body" subject to the requirements of the Open Meetings Act.

If the Subcommittee was subject to the Open Meetings Act on September 27, 2012, it would have been required to restate the full motion to close on the record. The NRD does not specifically address this complaint in its response letter. However, while minutes of a meeting are not required by the Open Meetings Act to be an exact transcription of that meeting, they should reflect that all requirements found in the Act have been complied with. The minutes of September 27, 2012 do show that the Subcommittee's Motion to Close was sufficient under the Act. However, they do not show that the full Motion to Close was restated on the record. This would, technically, have been a violation of the Open Meetings Act, had the Subcommittee been required to comply with the Act.

As to your other complaint, that the times that the Subcommittee entered into and adjourned out of the closed session were not reflected in the minutes, the NRD has provided us with corrected minutes from the Subcommittee meeting. Those corrected minutes indicate the required times, and cure any violation that may have occurred by the initial draft of the minutes in your possession failing to show the times related to the closed session. *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).

We note to the NRD, by a copy of this letter, that while the apparent policy of the NRD and its subcommittees is to hold subcommittee meetings pursuant to the terms of the Open Meetings Act, that may be creating confusion among members of the public as to whether these subcommittees are, in fact, subject to the Open Meetings Act. For the NRD's subcommittees to comply with most of the provisions of the Open Meetings Act, but then argue when a complaint is received that the subcommittees are not subject to that Act may be misleading. We suggest the NRD examine its procedures related to subcommittees and the Open Meetings Act. While we certainly encourage the NRD to continue to hold its subcommittee meetings in the open, perhaps the NRD should seek to clarify that while the meetings are open to the public, they are not required to comply with the provisions of the Open Meetings Act in so doing.

CONCLUSION

Based on our analysis, we believe that the Subcommittee at issue is not subject to the Open Meetings Act. 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: Dennis Collins

02-360-30