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November 27, 2012

Wayne Robb
12183 S. 218th St
Gretna, NE 68028

Re: *File No. 12-M-122; Gretna City Council; Complainant Wayne Robb*

Dear Mr. Robb:

This letter is in response to your correspondence in which you requested that this office investigate alleged violations by the Gretna City Council ("City Council") 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 City Council after we received your complaint, and we subsequently received a response from the City Attorney, John Green. We have now had an opportunity to review your allegations and the City Council'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, its supporting documentation, and the response from the City Council. While your letter states that Open Meetings Act violations have occurred since January 2009, you provided us only two agendas for City Council meetings. Therefore, we will address only alleged violations from the June 19, 2012 and July 17, 2012 City Council meetings. In addition, you have made allegations against the Gretna City Planning Commission, but have provided no supporting documentation to substantiate your claims. Therefore, those allegations also will not be addressed herein. Finally, you pose several questions to this office that are not related to the Open Meetings Act regarding capital improvements. This office does not have general supervisory authority over political subdivisions of the State of Nebraska, including the City of Gretna. Thus, we can take no action on your complaints related to these items and they will not be discussed further herein.

We have identified the following Open Meetings Act allegations in your correspondence: (1) the closed session on June 19, 2012, listed on the agenda as "Executive Session: Personnel, Real Estate, Litigation," was improper and (2) the

closed session on July 17, 2012, listed on the agenda as "Executive Session: Personnel," was improper.

## ANALYSIS

You complain that the City Council has violated the Open Meetings Act in holding executive, or closed, sessions on June 19, 2012 and July 17, 2012. You also allege that the executive sessions are a "regular practice" and are "closed to the people and the media." However, it is not a violation of the Open Meetings Act to have a closed session at each City Council Meeting, nor is it a violation of the Act to have those meetings closed to the public and the media, as that is the stated purpose of a closed session.

Neb. Rev. Stat. § 84-1410 (2012) addresses closed sessions.

> (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;
> > (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; . . .
>
> Nothing in this section shall permit a closed meeting for discussion of the appointment or election of a new member to any public body.

The Open Meetings Act also provides that agenda items must be "sufficiently descriptive" to provide members of the public with "reasonable notice" of the matters to be discussed by the public body. Neb. Rev. Stat. § 84-1411(1).

***June 19, 2012***

On June 19, 2012, the City Council Agenda lists agenda item number seven as "Executive Session: Personnel, Real Estate, Litigation." While you make no specific complaints regarding this particular closed session, we believe this agenda item falls under your allegations of "vague, broad subjects" for which executive sessions are held.

The City Council's response does not address this particular meeting. Nor did either you or Mr. Green provide us with the minutes from this meeting, which are pertinent to our analysis. It is the responsibility of the complainant and the public body to provide us with all relevant documentation related to any meeting at issue in an Open Meetings Act complaint. Despite this, we were able to locate the minutes of this meeting on the City Council's website.

The June 19, 2012 minutes reflect the following account of the motion to enter into closed session, and the reconvening of the open meeting following the closed session.

> Motion . . to go into Executive Session for the reasons being to protect public interest and for the prevention of needless injury to an individual in which the following will be discussed: Executive Session: Personnel, Litigation and Real Estate. [Vote]. [Restating of the Motion by the Mayor. Followed by Motion and Vote to return to open session.]
>
> Upon reconvening in open session, [the public was invited back]. Mayor McGuire stated, "We are reconvening at 8:25 o'clock p.m. having been in Executive Session in which nothing was discussed other than the items voted upon; that being Personnel, Litigation and Real Estate"

Following this statement, the meeting was adjourned. No vote was taken following the closed session related to any topic discussed during the closed session.

In its agenda item and motion for closed session on June 19, 2012, the City Council failed to sufficiently identify the subject matters for the closed session. In the first instance, in our view, simply stating "personnel" is not a sufficiently descriptive reason for entering into closed session for either the agenda or the motion to close. The same is true for the topic of "litigation." While "litigation" is a generally acceptable topic for discussion in closed session, the City Council must provide more information as to what is to be discussed in closed session by its members, such as whether the litigation is pending or threatened.

While merely stating "personnel" or "litigation" in the agenda and motion to close is not clearly wrong under the Open Meetings Act, it is not a sufficiently descriptive subject matter for citizens who wish to know the topic to be discussed during closed session. The Legislature has found it necessary to amend the Open Meetings Act to instruct public bodies to provide specificity as to the items discussed in any meeting. The lack of sufficient description by the City Council doesn't comply with the spirit of the Open Meetings Act to provide openness in government. See, Neb. Rev. Stat. § 84-1408. Consequently, we strongly suggest that the City Council be more specific in both its agenda and motions as to topics to be discussed, whether in open or closed session; i.e. "Closed Session to discuss personnel issues relating to performance of city employees."

Finally, we question whether the City Council's discussion of "real estate" was appropriate for a closed session. No information was provided by the City Council in either the agenda or the motion to close as to what real estate was being discussed, i.e., a description or location of the real estate, and/or why the topic was discussed in closed session. We question whether the closed session here was "clearly necessary" or what the City Council believes the "public interest" to be that warranted what appears from the agenda and minutes to be no more than a general discussion of "real estate." This is insufficient for a proper closed session under the Open Meetings Act.

Neb. Rev. Stat. § 84-1410(1) provides that "Closed sessions may be held for, but shall not be limited to, such reasons as: strategy sessions with respect to . . .real estate purchases . . ." While the statute does not provide an exhaustive list of reasons acceptable for closed sessions, it certainly offers guidance as to what the Legislature deemed appropriate. The term "strategy sessions" and the list following suggest that the reasons for a closed session are to be based upon financial considerations or negotiations. A closed session would be appropriate if the City Council was in active negotiations or was meeting to discuss the price for the purchase or sale of a piece of property. However, a closed session is not appropriate when a public body merely wishes to have a general discussion of the policy or merits of buying or selling a piece of property.

We also do not believe that a public body may go into closed session any time there is a discussion of real estate. A closed session must be clearly necessary to serve the public interest, which with respect to real estate, would be the economic concerns surrounding the potential purchase or sale of property. The "public interest" is in the public body ensuring it enters into the most economically advantageous contract, not merely whether the city should investigate or continue to negotiate the purchase or sale of property. We would caution the City Council on its use of closed sessions for anything related to "real estate," and limit them to discussions necessary for the negotiation process.

While it is not clear from the agenda and minutes what exactly the City discussed while in closed session with respect to "real estate," the minutes do not indicate the closed session was limited only to discussion surrounding the financial component of whatever real estate was discussed. Based upon the limited information in the minutes of the June 19, 2012 meeting, we agree that the City's closed session to discuss, in general, "real estate," was improper.

Based on our analysis, we will strongly encourage the City Council, through a copy of this letter, to ensure that agenda items, motions, and minutes related to closed sessions be more descriptive as to the subject matter of the closed session under Neb. Rev. Stat. § 84-1410. However, as no action was taken following the closed session as to the topics discussed therein, there is no decision of the City Council which may be void or voidable. Consequently, no action is necessary by this office, other than a reminder to the City Council of the requirements of the Open Meetings Act.

***July 17, 2012***

The Open Meetings Act issue as to the closed session July 17, 2012 is much the same as that relating to the June 19, 2012 closed session, and the same analysis applies here. The City Council entered into closed session for a discussion of "personnel," which in and of itself is not sufficient to meet the requirements of the Open Meetings Act for stating the subject matter of the closed session.

As with the June 19, 2012 closed session, we conclude that the City Council's actions were inadequate, but not clearly improper, under the Open Meetings Act in the agenda item and motion made to enter into closed session. As before, however, no action was taken following the closed session which is void or voidable. Therefore, there is no action that is necessary by this office related to the agenda or motion at this meeting.

## CONCLUSION

For the reasons stated above, we conclude that the City Council has not followed the spirit of the Open Meetings Act with respect to its procedures for closed session on the two dates for which you provided agenda. However, these deficiencies do not require this office to take any formal action against the City Council. If you disagree with the analysis we have set out above, you may wish to review the provisions of the Open Meetings Act to determine what additional remedies, if any, are available to you under those statutes.

Sincerely,

JON BRUNING
Attorney General

Natalee J. Hart
Assistant Attorney General

cc: John Green, City Attorney

02-361-30