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March 14, 2013

Alfred Pieper
509 4th Avenue
P.O. Box 246
Minatare, NE 69356

RE: *File No. 12-M-125; Minatare City Council; Alfred Pieper, Complainant*

Dear Mr. Pieper:

We are writing in response to your e-mail sent August 9, 2012, in which you ask our "office to look into the financial record, and meeting minutes of the City of Minatare." As is our normal practice with complaints alleging violations of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2008; Cum. Supp. 2012) (the "Act"), we contacted the public body involved and requested a response. In this case, we forwarded your complaint to the then mayor, Don Koralewski. On September 21, 2012, we received a response from Audrey M. Elliott, City Attorney, who responded on behalf of the Minatare City Council (the "City Council"). We have now had an opportunity to review your complaint and the City'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. Consequently, your concerns relating to the financial books, the police force, the fire truck, the City's water supply, etc. will not be addressed. Moreover, we have no general supervisory authority over governmental subdivisions in Nebraska, including cities of the second class.

YOUR OPEN MEETING ALLEGATIONS

In your complaint, you have alleged that the City Council goes into executive session in an effort to keep information from the public. You also allege that the City Council's meeting minutes are not complete as "there are a lot of gaps and missing issues on them." Finally, you allege that the minutes are not made available within the applicable timeframe.

THE CITY'S RESPONSE

Ms. Elliott states that the City Council has gone into executive session using some of the enumerated reasons set out in Neb. Rev. Stat. § 84-1410 (Cum. Supp. 2012), i.e., potential litigation against the City, employee job performances, and contract negotiations. She expressly denies that the City goes into executive session "to avoid topics of budgets or monies." Ms. Elliott states that the City Council has an annual budget meeting, generally in September, "which is publically noticed and later approved at a meeting." She states that the "budgets are open for public hearings during the regular monthly council meetings." Ms. Elliott further states that "pursuant to that statute [§ 84-1410], a person who does not object to the entering into a closed session has waived his right to object. *Wasikowski v. Nebr. Quality Jobs Bd.* 264 Neb. 403, 648 N.W.2d 756 (2002)." She states that you have never voiced any objection until this complaint was lodged with our office.

With respect to meeting minutes, Ms. Elliott states that minutes "are located in the City office and are published in the local newspaper after the monthly or special meetings." With respect to your allegation that the minutes having missing information, in the absence of any particular information as to what may be missing, Ms. Elliott is unable to address your allegation.

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 is that the City Council goes into executive session to avoid disclosing information to the public. You specifically allege that

> [i]t seems like every time the people ask the council members about the financial status of our city, or to have a look at the books, their response is the "books are confidential, non [sic] of the peoples business", or asked at a meeting they immediately go into executive session because they don't want us to know anything.

Your correspondence contains no information or documentation as to when these events allegedly occurred. You also do not indicate the subject matter and the reasons employed by the City Council to close its meetings. Ms. Elliott contends these events do not happen. So we are left with a "he said, she said" scenario. As a result, in the absence of any specific evidence from you, we are unable to conclude that the City Council violated the Act in this regard. However, we have identified a couple of issues in this scenario that we will take this opportunity to address.

<u>Requests for Financial Records and Books</u>

The first issue is your statement that when people ask to see financial records, they are told by members of the City Council that this information is "confidential." Under the Nebraska Public Records Statutes [Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2012)] ("NPRS"), interested persons, upon written request, can access or get copies of the records of a public body in Nebraska. Specifically, § 84-712(4) requires that, upon receipt of a written request for access to or copies of a public record, the custodian of that record must provide one of the following three things to the requester as soon as is practicable and without delay, but not more than four business days after actual receipt of the written request. *First*, the custodian may provide the requester with access to the record or copies of the record, if copying

equipment is reasonably available. *Second*, if there is a legal basis for denying access to or providing copies of the record, the custodian may provide the requester with a written denial of the records request together with the information specified in § 84-712.04. *Third*, the custodian may provide the requester with a written explanation of delay if the entire records request cannot, with reasonable good faith efforts, be fulfilled within four business days after actual receipt of the written request due to the significant difficulty or the extensiveness of the request.

Moreover, under § 84-712.03, anyone denied any rights granted by §§ 84-712 through 84-712.01 may file their own lawsuit or petition our office to investigate the matter. We are required "to determine whether a record may be withheld from public inspection or whether the public body that is custodian of such record has otherwise failed to comply with such sections." If this office determines that a record may not be withheld or that a public body is not in compliance with the NPRS, we will order that the public body disclose the record immediately or come into compliance with the statutes. In the event the public body continues to withhold records or remain in noncompliance, the person seeking disclosure or compliance may file a suit or demand in writing that this office file suit.

As outlined above, you are required to make your request for public records *in writing*. The City Council is under no obligation to provide you public records until this statutory requirement is met. If the City Council fails to respond within four business days after actual receipt of your request, or in your opinion unlawfully withholds the records or is otherwise not in compliance with the NPRS, you can petition our office to look into the matter.

Your Right to Speak at a Public Meeting

The second issue we would like to address is the notion that the City Council is required to respond to questions asked by members of the public during its meetings. Section 84-1412 of the Open Meetings Act sets out several provisions relating to attending and speaking at public meetings, including the following:

> (1) Subject to the Open Meetings Act, the public has the right to attend and the right to speak at meetings of public bodies, and all or any part of a meeting of a public body, except for closed sessions called pursuant to section 84-1410, may be videotaped, televised, photographed, broadcast, or recorded by any person in attendance by means of a tape recorder, camera, video equipment, or any other means of pictorial or sonic reproduction or in writing.

> (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, speaking at, videotaping, televising, photographing, broadcasting, or recording 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.**
>
> (3) No public body shall require members of the public to identify themselves as a condition for admission to the meeting nor shall such body require that the name of any member of the public be placed on the agenda prior to such meeting in order to speak about items on the agenda. The body may require any member of the public desiring to address the body to identify himself or herself.

(Emphasis added.) Through the years, our office has developed a number of guidelines which we believe govern the public's right to speak at open meetings of public bodies. One of those guidelines, applicable here, is 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.

Finally, we note that Ms. Elliott asserts that since you did not object to the City Council going into closed session, you are now precluded from doing so. She cites in support of this assertion the Nebraska Supreme Court case *Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002). In *Wasikowski*, the court held that if a person who is present at a meeting of a public body observes an alleged violation of the Open Meetings Act in the form of an improper closed session and fails to object, then that person waives his or her right to object to the closed session at a later date. However, that case appears to have been legislatively overruled by Legislative Bill 898 from 2006, which provides that it shall not be a defense to a citizen lawsuit under § 84-1414(3) that the citizen attended the meeting and failed to

object at that time. Therefore, any assertion that you have waived your ability to object to a perceived violation of the Open Meetings Act is invalid.

II.

Your second allegation relates to the City Council's meeting minutes. Specifically, you claim that the minutes are missing information and have a lot of gaps, "WHEN THEY DECIDE TO MAKE THEM PUBLIC." (Your emphasis.) Again, you did not provide us any particular information as to what information may have been omitted, or the instances when the minutes were not made available to the public.

For your information, § 84-1413 of the Open Meetings Act states, in pertinent part, that

> [e]ach 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. 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.

Section 84-1413 further provides:

> (4) The minutes of all meetings and evidence and documentation received or disclosed in open session shall be public records and open to public inspection during normal business hours.
>
> (5) Minutes shall be written and available for inspection within ten working days or prior to the next convened meeting, whichever occurs earlier, except that cities of the second class and villages may have an additional ten working days if the employee responsible for writing the minutes is absent due to a serious illness or emergency.

Under the Act, the minutes must be in writing and made available within ten working days or prior to the next convened meeting, whichever is earlier.[1] However, it appears to us that since the City of Minatare is publishing its minutes in the local newspaper, it

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[1] The statute does allow extra time for cities like Minatare when the employee responsible for the minutes is out with serious illness or for an emergency.

has gone above and beyond what is legally required. And without any detailed information from you as to how the City is violating the Open Meetings Act with respect to its minutes, we are unable to conclude that any violations occurred.

CONCLUSION

Since we have determined that the City of Minatare did not violate the Open Meetings Act with respect to its closed sessions or meeting minutes, no further action by this office is appropriate at this time. Consequently, 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: Audrey M. Elliott

49-952-30