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July 3, 2013

Ronald E. Hineline
7997 Co Rd P26
Fort Calhoun, NE 68023

RE: *File No. 12-M-135; Washington County Board of Supervisors; Ronald Hineline, Complainant*

Dear Mr. Hineline:

This letter is in response to your complaint received by us on October 1, 2012, in which you allege that the Washington County Board of Supervisors (the "Board") violated the Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2008, Cum. Supp. 2012) (the "Act"), with respect to a closed session held during its September 25, 2012, meeting. As is our normal practice with complaints alleging violations of the Act, we contacted the public body involved and requested a response. In this case, we forwarded your complaint to Edmund Talbot III, Deputy County Attorney. On October 25, 2012, we received Mr. Talbot's response on behalf of the Board. We have now had an opportunity to fully consider your complaint and the Board's response in detail. Our conclusion and future action in this matter are set forth below.

FACTS

Our understanding of the facts in this matter is based on your complaint and the information contained in the Board's response.

You serve on the Washington County Board of Supervisors. You contend that a closed session conducted on September 25, 2012, may have violated the Open Meetings Act on two grounds. As to the first violation, you state that the agenda item for the closed session at issue read:

> Closed session in order to protect the public interest with respect to negotiating terms and wages for Planning & Zoning Administrator.
> Motion to go into closed session Motion to end closed session
> Open Session: Appoint Planning & Zoning Administrator

However, you indicate that since the administrator position was not a contracted position where negotiations might occur, but rather a "regular permanent county employee position," a closed session was not necessary. You state that "[t]he public interest was in fact not 'protected' as stated in the agenda since the Planning and Zoning administrator's wages are public taxes." You further indicate that when you questioned Mr. Talbot about the closed session, he stated that the closed session complied with the Open Meetings Act.

The second alleged violation relates to the discussion held during the closed session. You indicate that while the stated purpose of the closed session was to discuss "terms and wages," other topics were discussed. You state that the members of the Board's personnel committee who had conducted the interviews discussed the applicants and their various merits as well as their recommended selection for the position. You indicate that there was nothing in this discussion "that could have been viewed as sensitive to the reputation of any of the applicants."

Mr. Talbot informs us:

> I was present during a Board meeting of the Washington County Board of Supervisors held September 25, 2012. Before the meeting started, Ron Hineline indicated that the closed session regarding the planning and zoning administrator should be open. I indicated that I disagreed and the regular board meeting began. It was moved and seconded to go in to closed session pursuant to Nebraska Statute and then restated once the motion passed to go into closed session. Compensation for the Planning and Zone Administrator was discussed. There were comments about other applicants for the purpose of determining a range for salary based upon the pool of applicants. I disagree with Mr. Hineline's assessment that the discussion of the other applicants when determining the salary for the Planning and Zoning Administrator were not sensitive and a part of the determination made by the board in that closed session. The board went out of closed session and, in open session, appointed a Planning and Zoning Administrator and set the wage for that position.

You have asked us to determine whether these events were in fact violations, so that you, the other members of the Board and the County Attorney's Office "may better adhere to the Open Meetings Act."

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).

We will now address your allegations that the Board violated the Open Meetings Act when it went into executive session on September 25, 2012, "with respect to negotiating terms and wages." Neb. Rev. Stat. § 84-1410(1) of the Open Meetings Act provides, in pertinent part:

> 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; . . . .

Thus, in order to be valid a closed session must be clearly necessary for the protection of the public interest *or* to prevent needless injury to the reputation of an individual, and that individual has not requested that the discussion be held in an open forum. If a public body's reason for going into closed session does not fall under either of these two statutory reasons, *the session is improper*. We further note that § 84-1410(2) states, in pertinent part, that

> [t]he public body holding such a closed session shall restrict its consideration of matters during the closed portions to only those purposes set forth in the motion to close as the reason for the closed session. 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 on any question, motion, proposal, resolution, order, or ordinance or formation of a position or policy but shall not include negotiating guidance given by members of the public body to legal counsel or other negotiators in closed sessions authorized under subdivision (1)(a) of this section.

Subsection (4) of § 84-1410 provides, in pertinent part, that "[n]othing in this section shall be construed to require that any meeting be closed to the public." Additionally, "[p]rovisions permitting closed sessions and exemption from openness of a meeting must be narrowly and strictly construed." *Grein* v. *Board of Education of the School District of Fremont*, 216 Neb. 158, 165, 343 N.W.2d 718, 723 (1984).

With these statutory provisions in mind, we have carefully considered your version of events against the version provided to us by Mr. Talbot. As previously noted, you contend that "terms and wages" were not discussed, and that there was nothing in the discussion about the applicants for the administrator position that was "sensitive" enough to warrant a closed session. Mr. Talbot states that compensation for the administrator position was discussed. He also states that comments were made "about other applicants for the purposes of determining a range for salary based upon the pool of applicants." He disagrees with your assessment that the discussion about the other applicants was not "sensitive and a part of the determination made by the board in that closed session."

Unfortunately, the information we received elicited more questions than answers. It does appear that compensation for the successful candidate was discussed because, according to the meeting minutes, the Board came out of closed session and moved to appoint Ms. Wirtz at a starting salary of $48,000. We question to what extent "terms" for

the position were discussed due to previous consideration of this matter.[1] We also question the statement that the other applicants were discussed "for the purposes of establishing a salary range based on the pool of applicants" because it appears that the Board had already set the salary range for the administrator position at its August 14, 2012, meeting.[2] Finally, we question why Mr. Talbot would believe that making any determination in closed session would be acceptable under the Act.

Moreover, whether a particular discussion is of a sensitive nature is not the standard in determining whether to close a public meeting. Rather, the members of the public body must determine that a closed session is clearly necessary to prevent needless injury to the reputation of an individual, and the individual has indicated that he or she does not want the discussion held in open session. If it appears that certain sensitive information could injure an individual's reputation, a closed session would be warranted.

We must also point out that under no circumstances are public bodies permitted to make determinations during a closed session, and then reconvene in open session to formally ratify them. "The prohibition against decisions or formal action in a closed session also proscribes "crystallization of secret decisions to a point just short of ceremonial acceptance," and rubberstamping or reenacting by a pro forma vote any decision reached during a closed session." *Grein* at 167-68, 343 N.W.2d at 724. It appears from the record that the Board engaged in similar conduct with respect to this agenda item.

Ultimately, we believe that the Board went into closed session to select the Planning and Zoning Administrator and to set his or her salary, and did so under the somewhat ambiguous agenda item "negotiating terms and wages for Planning & Zoning Administrator." It does not appear that any "negotiating" occurred or was necessary. We are also unclear as to how the public interest was protected by closing the meeting to discuss the qualifications of the applicants. Consequently, we have serious concerns that this closed session was not appropriate under the circumstances established here.

Finally, we would also like to point out to you two other provisions of the Open Meetings Act that directly pertain to the circumstances here. First, Neb. Rev. Stat. § 84-1410(3) provides that

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[1] At the July 10, 2012, Board meeting, the Board unanimously voted to approve "a list of responsibilities/requirements for a Planning Administrator."

[2] According to the meeting minutes: "Board briefly discussed setting a salary range for the Planning & Zoning Administrator position. Motion Kruse second Clausen to set the salary range at $35,000 to $60,000. Vote-Aye: Clausen, Kruse, Quist, Kruger and Hineline. Abariotes abstained. Nay: None. Motion carried."

> [a]ny member of any public body shall have the right to challenge the continuation of a closed session if the member determines that the session has exceeded the reason stated in the original motion to hold a closed session or if the member contends that the closed session is neither clearly necessary for (a) the protection of the public interest or (b) the prevention of needless injury to the reputation of an individual. Such challenge shall be overruled only by a majority vote of the members of the public body. Such challenge and its disposition shall be recorded in the minutes.

Additionally, Neb. Rev. Stat. § 84-1414(4) provides:

> Any member of a public body who knowingly violates or conspires to violate or who attends or remains at a meeting knowing that the public body is in violation of any provision of the Open Meetings Act shall be guilty of a Class IV misdemeanor for a first offense and a Class III misdemeanor for a second or subsequent offense.

In the present case, you did not seek to challenge the continuation of the closed session by asking that a vote be taken under § 84-1410(3), although you had serious concerns about the propriety of the closed session. You also did not leave the closed session. For your information and future reference, in the event you remain in a meeting knowing that the other members of the public body are violating the Open Meetings Act, you too are subject to the criminal penalties set out in Neb. Rev. Stat. § 84-1414(4).

ACTION BY THE ATTORNEY GENERAL

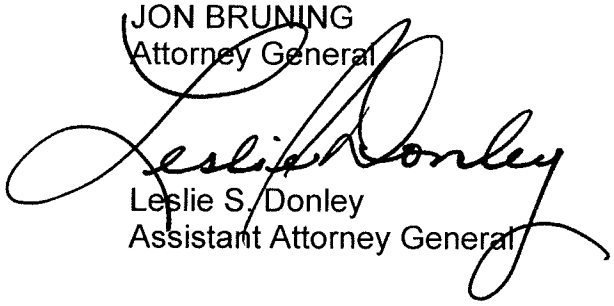
The question now becomes what action to take in light of our conclusion that the Board violated the Open Meetings Act when it conducted this closed session at its meeting on September 25, 2012. We do not believe that a criminal prosecution for a "knowing" violation of the Open Meetings Act is appropriate under the facts of this case, mainly because the Board was presumably acting on the advice of legal counsel during the meeting. Further, a civil suit to void is not necessary because the Board could cure any defects arising out of an improper closed session, by taking those actions again in a meeting which meets all of the statutory requirements. *See Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979). Instead, we will admonish the other members of the Board, by forwarding a copy of this response to Mr. Talbot, that closed sessions are only permissible when clearly necessary to protect the public interest or prevent needless injury to an individual's reputation and that individual has not requested a public meeting. If the Board is unable to make such a showing, then the closed session is improper. In the end, any question about the propriety of a closed session can be resolved by following the court's conclusion in *Grein*:

> From all this there evolves a guiding principle relatively simple and fundamental: If a public body is uncertain about the type of session to be conducted, open or closed, bear in mind the policy of openness promoted by the Public Meetings Laws and opt for a meeting in the presence of the public.

Grein at 168, 343 N.W.2d at 724.

Sincerely,

JON BRUNING
Attorney General



Leslie S. Donley
Assistant Attorney General

cc: Edmund Talbot III

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