STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

JON BRUNING
ATTORNEY GENERAL

NATALEE J. HART
ASSISTANT ATTORNEY GENERAL

November 8, 2013

Tim Wolfe
Via e-mail only
timwolfe@nmccat.com

Re: *File No. 13-M-121; Maywood Public Schools School Board; Complainant Tim Wolfe*

Dear Mr. Wolfe:

This letter is in response to your correspondence received by us in which you requested that this office investigate alleged violations by the Maywood Public Schools School Board (the "Board") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2008; Cum. Supp. 2012; Supp. 2013). 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 the Board's attorney, Steve Williams. 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 five Open Meeting Act complaints made by you.

(1) The Board has not complied with the requirements in Neb. Rev. Stat. § 84-1412 (8) to post and identify the location of the Open Meetings Act in the meeting room;
(2) The Board's closed sessions and its motions to enter into closed session violate Neb. Rev. Stat. § 84-1410;
(3) The Board does not follow its policy on posting notice for Board meetings and the one posted notice is only available during limited hours;
(4) The Board did not provide notice for its August 26, 2013 meeting; and
(5) The Board "won't let you" be placed on its agenda.

You also enclosed a copy of a letter from Auditor Foley in your complaint. As this letter raises no issues as to the Open Meetings Act, it has played no part in our analysis of your complaints against the Board.

ANALYSIS

Open Meetings Act availability

You have first complained that the Board President does not "recognize" the Open Meetings Act at the beginning of every Board meeting and there is no public access to the Act during Board meetings. Neb. Rev. Stat. § 84-1412 requires:

> (8) Public bodies shall make available at the meeting . . . for examination and copying by members of the public, at least one copy of all reproducible written material to be discussed at an open meeting. Public bodies shall make available at least one current copy of the Open Meetings Act posted in the meeting room at a location accessible to members of the public. At the beginning of the meeting, the public shall be informed about the location of the posted information.

As to your first complaint, that the Board President does not inform the public of the location of the Open Meetings Act, the Board has admitted that it has not strictly complied with this Open Meetings Act requirement. The Board has made changes that will ensure that the public is properly informed at each meeting. As to your second complaint, the Board has provided photographs showing this office that the Open Meetings Act is a two foot by three foot framed poster, on an easel, and available near the Board's table, at the front of the meeting room, but not behind it. We cannot find that the Board has failed to provide public access to the Open Meetings Act. The location of the Open Meetings Act should be apparent to anyone in attendance at the meeting, even without express instructions from the Board as to where to locate it. As to this portion of your complaint, while the Board has committed a technical violation of the Act in not pointing out the location of the easel containing the Act at each meeting, it has taken steps to correct this, and this office will take no action against the Board.

Closed Session

You make four complaints regarding the closed sessions of the Board. You allege that

(1) the Board enters into closed session without stating the purpose of the closed session,
(2) that multiple items are discussed in closed session,
(3) the some closed sessions "take hours," and

(4) that the Board returns from closed session and adjourns the meeting.

You have not indicated any dates or specific details as to any of these complaints. You have enclosed minutes from several meetings, suggesting that this office is to search for violations within. While we do not typically seek out violations of the Open Meetings Act, and require a complainant to make specific allegations including the date of the alleged violation, we have reviewed the minutes you enclosed.

Neb. Rev. Stat. § 84-1410 provides, in relevant part:

> (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.

The Open Meetings Act does not place a time limit on closed sessions, nor does it prohibit a public body from returning to open session only to adjourn its meeting. As the Board points out in its response, it places its closed sessions at the end of its meetings for the convenience of those members of the public in attendance. Should you not wish to wait for the Board to return to open session, the agenda is clear that no further business (other than possibly a vote by the Board following its closed session regarding what was discussed therein) will be conducted following the closed session. The Board has not violated the Open Meetings Act by conducting lengthy closed sessions[1], or by adjourning after it reopens the meeting in open session.

You have also alleged that the Board discusses multiple issues in closed session. Discussing multiple issues in closed session is not, in and of itself, a violation of the Open Meetings Act. Provided that all topics fall within the subject matter and reason designated in the motion to close, e.g., protection of the public interest to discuss potential litigation, there is no violation of the Open Meetings Act for discussing more than one matter of "potential litigation" in one closed session. The minutes you provided show no evidence of the Board discussing more than one topic during closed session, whether all falling within the same subject matter and reason or not. You have not provided this office with any specifics regarding the date(s) this may have occurred and which "multiple topics" may have been discussed. Without clear evidence, this office must assume that the Board is acting in good faith and in compliance with the

[1] The minutes of the meetings you provided for May, June, July, and August show closed sessions of 1 hour 2 minutes; 1 hour 56 minutes; 1 hour 2 minutes; and 47 minutes, respectively. While the Board is correct that these are not all "hours"-long as you have alleged, they are likely longer than a member of the public would wish to wait around for the Board to return.

Open Meetings Act and only discussing those subject matters and reasons it has designated in its motion to close as to be discussed. We find no violation of the Open Meetings Act as to this portion of your complaint.

Finally, as to closed sessions, you have alleged that the Board enters into closed session without stating its purpose. You provided minutes to us from the following meetings: May, June, July, and August, 2013. We reviewed the motion to close in each of these meetings and found no deficiencies in May, July, or August. As to the June meeting, the Board stated the reason for the closed session, but did not indicate why the closed session was necessary: whether for the protection of the public interest or the needless injury to the reputation of an individual, as required by Neb. Rev. Stat. § 84-1410(1). The Board has recognized, in its response, that this motion was deficient. The Board has taken steps to ensure that all subsequent motions to close contain both the subject matter and the reason necessitating the motion to close. We trust that the Board will follow those steps, and future motions to close will fully comply with the Open Meetings Act. For those reasons, we will not take any action against the Board for the deficiency in its June, 2013 motion to close.

Policy on posting notice

Your next complaints concern the notice of the Board's meeting. You state that the Board has not followed its policy of posting notice in three places, and posts only at the school. Limited access is available to the notice posted at the school, due to the hours the building is open. The Open Meetings Act requires the public body to give "reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes." Neb. Rev. Stat. § 84-1411(1).

The Board was unable to locate a method of notice having been specifically designated in its meeting minutes. However, the Board did adopt policies at its January 9, 2012 meeting, including a policy for posting notice for meetings. The Board admits that it has not followed its policy, numbered "2008: Meetings" in posting notice in "three prominent places within the school district." The Board has now reaffirmed, in the minutes of its October 14, 2013 meeting, its policy to post at three prominent places. The Board does note, however, that for the last several years, the Board has published notice in the *Frontier County Enterprise* several days before each meeting. This publication satisfies the requirement in the Open Meetings Act to provide "reasonable advanced publicized notice."

As the Board has taken steps to ensure that it follows its policy to post its meeting notices in three places in the district, and has been publishing notice in the local newspaper, any violation of the Open Meetings Act that may have occurred has

been cured, as allowed in *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979), and this office will take no action against the Board. We would suggest to the Board, that if a notice is posted somewhere with limited access or limited hours, that the notice be posted on an exterior window near the front entrance, to the extent possible. This would allow viewing of the notice any day at any time.

Notice of August 26, 2013 meeting

Related to your last complaint regarding notice of meetings, you have alleged that the Board provided no advanced notice of a meeting on August 26, 2013. However, the Board has provided us with the published notice from the *Frontier County Enterprise* dated August 22, 2013 which clearly shows it provided advanced publicized notice, as required by Neb. Rev. Stat. § 84-1411(1) of the August 26, 2013 meeting. There has been no violation of the Open Meetings Act with respect to this portion of your complaint.

Placement on Agenda

Finally, you complain that the Board "won't even let anyone on the agenda." This complaint was addressed with you via e-mail on May 14, 2013 by Assistant Attorney General Leslie Donley. Ms. Donley advised that "[t]here is no individual right to be placed on an agenda, as long as the public body sets aside some time at some of its meetings to allow individuals to speak and address the body. And as long as the school board continues having 'Community Input,' there is no violation of the Open Meetings Act."

Expanding on Ms. Donley's response to you in May, Neb. Rev. Stat. § 84-1412 provides that the public has the right to attend and speak at meetings of public bodies. However, a public body may "make and enforce reasonable rules" as to public participation, including a requirement that the public may address the Board only during a specially designated "public comment" time during the meeting. "A body may not be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings." § 84-1412 (2).

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.

In addition 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. Furthermore, 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.

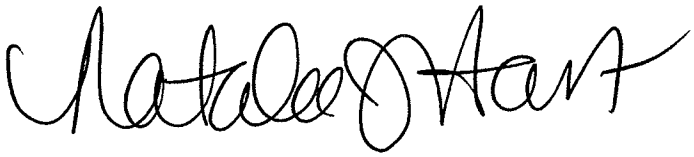
The Board is not required to allow members of the public to speak at a particular open meeting, or every open meeting, provided that the Board allows the public to address them at some meetings. You do not complain that you have never been allowed to address the Board. In fact, the Board has provided a number of minutes from various meetings in 2013. It is clear that you have been provided with an opportunity to address the Board at these meetings, in compliance with your right to attend and speak at meetings of a public body under Neb. Rev. Stat. § 84-1412. The Board is not required to place a citizen's item on the agenda at any meeting. The Board has not violated the Open Meetings Act with respect 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: Steve Williams

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