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June 17, 2014

Mark Koch
500 Edith
PO Box 280
Sargent, NE 68874-0280

Re: *File No. 13-M-130; City of Sargent City Council; Complainant Mark Koch*

Dear Mr. Koch:

This letter is in response to your multiple correspondence in which you requested that this office investigate alleged violations by the Sargent City Council ("City Council") 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 City Council after we received your complaint, and we subsequently received a response from Gwenda Horky, the City Clerk. 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, the DVD provided by you of the October 14, 2013 meeting, the response from the City Council, and the agenda and minutes from that meeting. You have several complaints about the October 14, 2013 City Council Meeting, which we have identified as:

(1) The City Council's meeting on October 14, 2013 occurred on a federal holiday;
(2) The mayor "demanded removal," or turning off, of your taping equipment from the City Council table;
(3) An agenda item was added to the agenda less than 24 hours before the City Council meeting;
(4) The City Council convened an inappropriate closed session;
(5) You were required to remove your recording equipment from the City Council meeting room while the public body went into closed session; and
(6) You were not provided sufficient time to re-set your recording equipment following the closed session.

While you have filed four separate complaints with this office, three dated October 15, 2013 and the fourth dated October 24, 2013, only the above identified items are related to the Open Meetings Act. The remainder, including issues related to the Custer County website and your allegations of insurance fraud against the City are outside the purview of this office, as they are not related to the Open Meetings Act. This office has no general supervisory authority over governmental subdivisions in Nebraska. Consequently, these other matters are outside the enforcement authority of this office and will not be addressed herein.

ANALYSIS

Meeting on a federal holiday

Your first complaint is that the City Council "had no right to convene" on a federal holiday. The October 14, 2013 meeting was held on Columbus Day. This office is unsure of the basis for your belief that there is "no right" for a public body to convene on a federal holiday. The Open Meetings Act does not prevent a public body from convening on a holiday, a weekend, or any other day of the year. The City Council states it has met on Columbus Day for the past four years; employees of the City of Sargent do not have this day off as a holiday. There is no violation of the Open Meetings Act for holding an open meeting on Columbus Day.

Right to record City Council meetings

The Open Meetings Act provides that the public has the right to attend, and to record meetings of a public body. However, that right is not absolute.

> (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.

Neb. Rev. Stat. § 84-1412 (emphasis added). You are within the rights granted to members of the public by the Open Meetings Act in recording the meetings of the City

Council, both by audio and video. However, the City Council may also place reasonable limitations on you in recording the meetings.

Your first complaint as to your ability to record meetings is that you were ordered to either remove your audio taping equipment from the table of the City Council, or turn off the recording device. The City Council agrees that you were asked to move your taping equipment from the City Council's table and place it at your own table. There is no violation of the Open Meetings Act by such a request.

Your second complaint related to this topic is that you were required to remove your taping equipment from the City Council room while the public body met in closed session. You are apparently incensed that the City Council requires citizens to leave the meeting room, rather than the City Council convening their closed session elsewhere. There is no violation of the Open Meetings Act for either action. Neb. Rev. Stat. § 84-1412(1) very clearly prohibits your recording of the City Council during a closed session. The Open Meetings Act also does not require the public body to leave the room in order to hold a closed session; it may require the public to leave the room instead. There is no violation of the Open Meetings Act related to this portion of your complaint.

Your final complaint as to your ability to record the City Council is that you were not provided sufficient time to reset your recording equipment following the closed session, in order to record the entirety of the City Council meeting once they reconvened in open session. The Open Meetings Act does not require the City Council to wait for you to have your recording equipment ready before it conducts its business. There is no violation of the Open Meetings Act related to this portion of your complaint.

You have also provided us with a copy of a proposed ordinance which would require that all recording devices be placed ten feet or more away from the public body during an open meeting. Neb. Rev. Stat. § 84-1412(2) allows the City Council to make and enforce reasonable rules and regulations for the recording of its meetings. This ordinance would be considered a "reasonable rule and regulation" and the City Council would not be in in violation of the Open Meetings Act should they adopt this ordinance.

Agenda

Neb. Rev. Stat. § 84-1411(1) provides the general agenda and notice requirements for purposes for the Open Meetings Act.

> Each public body shall 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. Such notice shall be transmitted to all members of the

> public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the principal office of the public body during normal business hours. Agenda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting. Except for items of an emergency nature, the agenda shall not be altered later than (a) twenty-four hours before the scheduled commencement of the meeting or (b) forty-eight hours before the scheduled commencement of a meeting of a city council or village board scheduled outside the corporate limits of the municipality. The public body shall have the right to modify the agenda to include items of an emergency nature only at such public meeting.

The purpose of these requirements is to give some notice of the matters to be considered at the meeting so that persons who are interested will know which matters are under consideration. *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (2007); *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).

Any item to be discussed by a public body, whether during open or closed session, must be on the agenda for that meeting, unless the public body must add an emergency item for discussion. This office has consistently stated that a proper emergency is one that addresses an issue that is both (a) unforeseen and (b) requires immediate action. You have complained that an item was discussed that was not on the agenda at least 24-hours before the October 14, 2013 meeting, and that a prior request by you to be placed on the agenda had been denied because your request had not been received by the City Council's deadline. We have no further information about your prior request to be on the agenda, and that does not appear to be your primary complaint, so that will not be addressed herein. However, the City Council has admitted that it discussed two items on October 14, 2013 that were not on the agenda for that meeting. We have verified this occurred by reviewing the agenda and minutes for this meeting, in addition to the DVD you provided.

First, at the beginning of the October 14, 2013 meeting, the City Council added the agenda item "addition of a building permit for the Central Nebraska Housing Developers and employees" for discussion during the meeting. That item was, indeed, discussed and voted upon by the City Council.

The City Council has stated that this item was inadvertently omitted from the agenda for the October 14, 2013 meeting. We discussed, via telephone, with Ms. Horky, whether this item was of an emergency nature. The City Council believes it was an emergency, as the building permit needed to be approved before the winter, as the

builder wished to pour cement. However, we do not believe this qualified as an "emergency" for the purposes of the Open Meetings Act. First, the City Council had been aware for several months that the Central Nebraska Housing Developers would be seeking a building permit. Second, the City Clerk indicated to us that as of November 21, 2013, the cement which the builder wished to have in place before winter, necessitating the approval of the building permit on October 14, had still not been poured. The facts associated with the building permit at issue do not appear to us to qualify as a sudden or unexpected happening, or that they were unforeseen and requiring immediate action. It appears to us that the item was mistakenly omitted from the agenda, and the City Council attempted to correct that omission at the beginning of the meeting. However, in this instance, it was a violation of the Open Meetings Act to do so.

In addition, the City Council had discussions and votes related to additional items not on the agenda. First, the City Council discussed "employees" during a closed session, and following that closed session, voted on several employment related items. The City Council offered an individual the Utility Superintendent/City Administrator position, voted to increase the Clerk's wages, voted to advertise a city employment position, and altered the "On-Call time" in four separate votes at the end of the October 14 meeting. None of these items, or anything related, appear on the agenda for this meeting. The City Council did not provide notice that any employment related matters would be discussed during this meeting, and took action on four separate items that did not appear on the agenda. These items were considered by the City Council to be of an emergency nature, as the former City Administrator had been terminated on September 30, 2013. However, as that was two full weeks prior to the meeting on October 14, 2013, the City Council had sufficient opportunity to place any related items on the agenda well before the meeting. None of these items were "unforeseen" or "unexpected." As a result, the City Council is in violation of the Open Meetings Act related to the four votes that occurred following the closed session.

As the City Council took action as to both the building permit and the various employment matters, this is a cause for concern with this office. All of the votes taken as to these matters could be void or voidable, if a suit were to be brought in the District Court. However, the City Council may correct their violation of the Open Meetings Act by retaking these votes, during a properly convened Open Meeting. *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281. We would strongly encourage the City Council, through a copy of this letter, to place these items on the agenda and take the votes at its next regularly scheduled meeting. As the City Council has the opportunity to cure the violations, and we trust that the City Council will take immediate action to correct the violations of the Open Meetings Act, this office will take no further action relating to this portion of your complaint at this point.

Motion for Closed Session

Finally, we will address your complaint regarding the closed session of the City Council held on October 14, 2013.

The Open Meetings Act provides:

> (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.

You allege that the closed session was held in order to appoint a new City Administrator. You believe that this would violate Neb. Rev. Stat. § 84-1410(1), the prohibition against holding a closed session for the "discussion of the appointment or election of a new member to any public body." However, as the City Administrator is not a member of the City Council, if the closed session was called in order to appoint a new City Administrator, it would not violate this provision of the Open Meetings Act.

You have concluded that because the City Council voted following the closed session on October 14, 2013 to offer an individual the position as Utility

Superintendent/City Administrator, that the City Council must then have made this appointment during closed session. The City Council has denied that it made any appointments during the closed session. The minutes reflect that the City Council went into closed session to discuss "employees" and the City Council states that the closed session was held to discuss how current employees were handling the dismissal of the former City Administrator. It is reasonable to believe that the employees, in part, discussed the former City Administrator's job performance, in relation to the current state of City affairs. This discussion is acceptable under the Open Meetings Act. The City Council also states it discussed "wages" during this closed session. Typically, discussions regarding wages are prompted or made in connection with the discussion of an individual's job performance. While the City Council's motion to enter into closed session could have been more clear and precise as to what would be discussed – "employees" is rather vague -- we do not find any violation of the Open Meetings Act related to the closed session on October 14, 2013. However, as already discussed above, the four votes following the closed session must be repeated in a properly convened Open Meeting after they appear on an agenda.

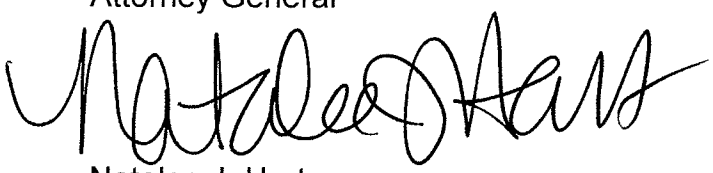
CONCLUSION

For the reasons stated above, we do believe that the Council failed to comply with the Open Meetings Act, on October 14, 2013 as to items of a non-emergency nature discussed and voted upon without appearing on the agenda. As we trust the City Council to immediately rectify these violations, this office will take no further action on this matter, for the time being.

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: Gwenda Horky

02-420-30