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June 17, 2014

Robert Kinsey
414 Lincoln Court
Scottsbluff, NE 69361

Re: *File No. 13-M-140; Gering City Council; Complainant Robert Kinsey*

Dear Mr. Kinsey:

This letter is in response to your correspondence received by us in which you requested that this office investigate alleged violations by the Gering City Council (the "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 the City Attorney, Jim Ellison. 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, along with the response from the City Council. Your complaint is that on October 29, 2013, the City Council went into closed session for what you believe to be an improper reason. The topic of discussion was the ongoing dispute between the City of Gering and Scotts Bluff County regarding an Interlocal agreement concerning E-911 communications equipment and services, and the cost sharing thereof. You point out that this subject had been discussed during open sessions at a number of prior meetings. In addition, you allege that because the Mayor commented following the closed session that the City Council had developed certain "talking points" to discuss with the County in the ongoing negotiations, that supports your allegation that the City Council held improper discussions during the closed session.

The City Council disputes your allegations.

ANALYSIS

Closed Session

Background

Your primary complaint regarding the City Council is that you allege that body entered into an improper closed session on October 28, 2013. The City Council has provided a great deal of background information on the topic of the E911 Contract proposed by Scotts Bluff County. We will not recite that information here, as we understand you are aware of the background. However, we point out that we have been well briefed by the City as to the history of the Interlocal agreement, and the emergency communications equipment and services contracts. We understand that in October 2013, the City was less than two months away from a deadline imposed by Scotts Bluff County to either sign the new Interlocal agreement, or have no emergency communication for the City of Gering. Negotiations were ongoing at that juncture, and it appears to us that those negotiations were at a point where there was much conflict between the City and the County. One issue was whether a prior Interlocal agreement dating to 1990 has been properly terminated by the County.

The agenda for the meeting on October 28, 2013 lists agenda item "8. Contract with Scotts Bluff County for communication services including 911 Emergency Services (Council may go into closed session for this agenda item)." The minutes for the meeting reflect that, following the initial motion to enter into closed session to discuss this agenda item, there was some discussion prompted by questions from the audience. The initial motion provided that the City Council was to:

> enter into a closed session for the purpose of discussion of strategy, negotiation and guidance from legal counsel, legal consequences of the City's potential action, and protection of the public interest as this relates to an Interlocal Agreement for Scotts Bluff County Communications Center Services.

Following questions raised by a reporter in the audience, the motion was withdrawn. The City Attorney's advice was then sought as to whether to enter into closed session, and he advised the City Council the discussion was best held in a closed session, as the City Council "is negotiating for the tax payers in the City of Gering" as to the proposed agreement with Scotts Bluff County. The City Council then moved, in an identical motion to the first, to enter into closed session. The closed session lasted just over 30 minutes.

Following the closed session, the City Council reconvened in open session and the minutes indicate the following.

> The Mayor stated that from closed session they still have some talking points they need to discuss regarding the interlocal agreement with the communications center. They also need to take those talking points to other communities that have stood with us during this time of review.

Two members of the City Council also spoke regarding the amount of money being requested by Scotts Bluff County, and whether an itemization of the funds is necessary before the City Council can agree to sign a new Interlocal agreement with the County. No further discussion was held on October 28, 2013 regarding this issue.

On December 9, 2013, the City Council again discussed the proposed Interlocal agreement. The minutes reflect a very lengthy discussion in open session. The City Council then entered into closed session to discuss:

> strategy, negotiation and guidance from legal counsel, legal consequences of the City's potential action, potential litigation which is eminent, threat of litigation by the public body of the City of Gering and protection of the public interest as it relates to the Communications Center services and an interlocal agreement for the Scotts Bluff County Communications Center.

Following the closed session, the City Council moved to authorize the Mayor to "commence litigation and to prevent Scotts Bluff County from a potential or anticipatory breach of the 1990 interlocal agreement and addendum." The City Attorney subsequently filed a Complaint against the County on December 10, 2013 to enforce the provisions of the 1990 interocal agreement. The City alleges that the County failed to properly terminate this agreement. Negotiations continue between the City and the County.

Law

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. 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;

(e) For the Community Trust created under section 81-1801.02, discussion regarding the amounts to be paid to individuals who have suffered from a tragedy of violence or natural disaster; or

(f) For public hospitals, governing board peer review activities, professional review activities, review and discussion of medical staff investigations or disciplinary actions, and any strategy session concerning transactional negotiations with any referral source that is required by federal law to be conducted at arms length.

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

Our Findings

We understand your position to be that the topic of discussion, the Interlocal agreement with Scotts Bluff County for emergency and non-emergency communications, was improper for a closed session. In part, you believe this to be the case because the City Council previously discussed the topic in open session, that one or more of the other entities to the agreement discussed it in open session, and that the Mayor exited the closed session with a list of "talking points" to discuss with the County. However, none of these reasons is dispositive of whether the City Council entered into an improper closed session. As an initial matter, discussing a topic previously in open session does not preclude a public body from later discussing that topic in closed session. Nor does the fact that another party to the agreement discussed it in an open session. Additionally, the list of "talking points" garnered from the closed session does not indicate that any improper discussion was held. As the topic of discussion was the Interlocal agreement, and the negotiation thereof, it appears to us that a list of items to discuss during that negotiation would reasonably come out of a closed session.

The City Council's motion to enter into closed session indicated that it was for the protection of the public interest and was related to potential legal action with respect to the Interlocal agreement. Based upon the information the City Council has provided as to the history of the Interlocal agreement and the pending negotiations, we believe that the closed session on October 28, 2013 was appropriate. The City was in the midst of what appears to us to be rather contentious negotiations with the County over the Interlocal agreement. In addition, the City did file suit against the County in early December, 2013 concerning the topic of the Interlocal agreement. The Open Meetings act provides that a closed session may be held for the reason of pending or imminent litigation brought, or threatened, by or against the public body. A closed session held just six weeks before litigation is commenced, to discuss the ongoing negotiations and legal implications of whether the City enters into the proposed Interlocal agreement, appears to us to be appropriate. We do not find that the City has violated the Open Meetings Act with respect to its closed session on October 28, 2013.

Alleged "pattern" of improper closed sessions

You have also made allegations of an alleged pattern of improper closed sessions of the City Council during a number of additional City Council meetings in 2012 and 2013. The bulk of the meetings in question occurred more than one year prior to our receipt of your Open Meetings Complaint in November, 2013. As a result, we will focus our review on those additional meetings which occurred subsequent to November, 2012, based upon Neb. Rev. Stat. § 84-1414 (1).

We have reviewed the limited information you provided as to closed sessions held on January 14, 2013 and June 10, 2013 regarding matters related to real estate. The City Council did not address these allegations in its response, and we have only what you have reproduced in your letter. However, based on the information available to us, and the standards set forth above, it does not appear there were any violations of the Open Meetings Act related to the closed sessions on either of these dates.

Standing

The City Council, in their response, alleges that because you are a resident of Scottsbluff and not Gering, you lack standing in order to bring an Open Meetings Act complaint against it. We disagree. The City Council cites to Nebraska case law in support of its position. However, there is no "case or controversy" present in an Open Meetings Act complaint. The Open Meetings Act provides this office, or the county attorney, with the authority to enforce that Act. It also specifically provides that "[a]ny citizen of this state may commence a suit" to enforce the Open Meetings Act. The Act does not limit its enforcement to only those citizens living within the jurisdiction of the

public body at issue. The City Council's jurisdiction argument is not supported by the plain language of the Act.

CONCLUSION

For the reasons stated above, we do not believe that the City Council has violated the Open Meetings Act. 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: Jim Ellison

02-417-30