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June 17, 2014

Robert Willicott
PO Box 245
Blue Hill, NE 68930

Re: *File No. 14-M-106; Webster County Commissioners; Complainant Robert Willicott*

Dear Mr. Willicott:

This letter is in response to your correspondence in which you requested that this office investigate alleged violations by the Webster County Board of Commissioners ("Board") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2008, Cum. Supp. 2012, Supp. 2013). In accordance with our normal procedures, we requested a response from the Board after we received your complaint. However, despite two letters to the Board on February 7 and March 20, 2014, we have not received a response from the Board. Consequently, our inquiry is based solely on the information you provided and the minutes of the relevant meeting we were able to obtain from the Webster County website. We have now had an opportunity to review your allegations and our conclusions are set out below.

FACTS

Our understanding of the facts in this matter is based upon your correspondence and the minutes of the Board meeting from the county website. Your allegation is that on February 4, 2014, you attended the Board's meeting. On the agenda for that meeting was an item referencing "Emergency Management[1]." At the time of this meeting, you were the Webster County Emergency Manager. Your account of the February 4, 2014 states that approximately one hour into the Board's meeting, the Board Chairman informed you that "they weren't going to do anything with Emergency Management and [you] didn't need to stay." However, the Board then did discuss the issue of Emergency Management and voted to terminate your contract as Emergency

[1] Please note this office has not reviewed a copy of the agenda for the February 4, 2014 meeting. Based on the minutes we reviewed, we will assume for the purposes of this letter that your description of the agenda is accurate.

Manager and replaced you with another individual. You have alleged this was a violation of the Open Meetings Act.

Our review of the minutes of the February 4, 2014 meeting reveals the following:

At 10:55 am[2], motion was made by Karr, second by Armstrong to enter into executive session for personnel matters. Karr, Armstrong, Reiher and Buschow voted in favor. Shipman voted nay. Sheriff Schmitz and Chief Deputy Ron Sunday joined in the meeting. At 11:25 am, motion was made by Armstrong, second by Karr to end the executive session and return to the regular meeting. All Members voted in favor of that motion.

After discussion in the open meeting, motion was made by Karr to terminate the Emergency Manager Contract with Robert Willicott effective February 14th and to enter into a new contractual agreement with Ron Sunday for Emergency Manager Services at a cost of $400 per month. All members voted in favor of the motion.

ANALYSIS

You complain that the Board has violated the Open Meetings Act in the manner in which your contract was terminated.

Neb. Rev. Stat. § 84-1410 addresses closed sessions.

(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;

[2] The meeting was convened at 8:30 am. You indicate that at approximately 9:30, you were told your agenda item would not be discussed. This motion to enter into closed session was held nearly an hour and a half after you were told you could leave.

> (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; . . .

We have not had the opportunity to review the agenda for this meeting, but you have indicated that it listed an agenda item categorized as "Emergency Management." Based upon the minutes of the meeting, as quoted above, we have no reason to believe that your description of the agenda is not accurate.

First, we do not interpret your complaint to be that the meeting of February 4, 2014 was not open to the public as required by the Open Meetings Act. The actions of the Board's Chairman in advising you that the agenda item you were interested in would not be discussed and that you could leave are dubious, at best, given that the Board did, indeed take up the agenda item. However, following this discussion, you did leave the meeting voluntarily. The Board did not close the meeting to the public. Consequently, there is no *per se* violation of the Open Meetings Act related to this.

However, in taking up an agenda item apparently related to your job performance and not discussing that item with you and permitting you the opportunity to have the item heard in an open meeting is a violation of the Open Meetings Act. Additionally, the motion to enter into closed session on February 4, 2014 is deficient under the Open Meetings Act.

The Open Meetings Act, § 84-1410 (1) allows a public body to hold a closed session only if it 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." Both the subject matter and the reason for the closed session must be identified in the motion to close.

The minutes of the February 4, 2014 meeting indicate that the Board entered into closed session at 10:55 am to discuss your contract as Emergency Manager. As you were told by the Board Chairman that this item would not be discussed and you could leave the meeting, it is clear to us that the Board did not discuss this issue with you at any time prior to the February 4, 2014 meeting. Thus, you were not given the opportunity to request that the topic be discussed in an open session. This was a violation of the Open Meetings Act.

Additionally, in its motion for closed session the Board failed to sufficiently identify both the subject matter and the reason for the closed session. In our view, simply stating "personnel matters" is not a sufficiently descriptive reason for entering

into closed session. While the job performance of an individual is a generally acceptable topic for discussion in closed session, the Board must provide more information as to what is to be discussed in closed session by its members, such as the person being discussed and whether that person has requested an open session.

Merely stating "personnel matters" in the motion to close is not a sufficiently descriptive subject matter for citizens who wish to know the topic to be discussed during closed session. The Legislature has found it necessary to amend the Open Meetings Act to instruct public bodies to provide specificity as to the items discussed in any meeting. The lack of sufficient description by the Board doesn't comply with the spirit of the Open Meetings Act to provide openness in government. See, Neb. Rev. Stat. § 84-1408. Consequently, we admonish the Board for its deficient motion to enter into closed session and suggest that the Board be more specific in its motions as to topics to be discussed in closed session; i.e. "Closed Session to discuss personnel issues relating to performance and contract of Emergency Manager." We also caution the Board relating to its actions in dismissing you from attendance at the meeting, when less than an hour and a half later, the Board took up the topic of your job performance and terminated your contract. This action by the Chairman was deceitful and inexcusable, even if it did not expressly violate the Open Meetings Act. However, we do not have the authority to instruct the Board to pay you a full months wages, as you request in your complaint.

While the Board violated the Open Meetings Act in its closed session of February 4, 2014, following that closed session, it immediately held discussion in open session. Following that discussion, the Board held a vote, also in open session, to terminate your contract effective February 14, 2014 and enter into a contract with a different individual for Emergency Manager. Thus, the Board has cured its violation of the Open Meetings Act, and this situation does not require further inquiry or action by this office. *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).

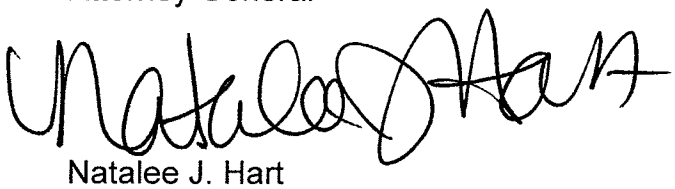
Based on our analysis, we will strongly encourage the Board, through a copy of this letter, to ensure that motions and minutes related to closed sessions be more descriptive as to the subject matter of the closed session under Neb. Rev. Stat. § 84-1410. However, the violations related to the closed session were cured by the Board in the open session and vote the immediately followed. Consequently, no action is necessary by this office, other than a reminder to the Board of the requirements of the Open Meetings Act.

CONCLUSION

For the reasons stated above, we conclude that the Board violated the Open Meetings Act in its closed session on February 4, 2014 as to the contract of the Emergency Manager. However, as this violation was then cured by the discussion and vote immediately following in open session, it does not require this office to take any formal action against the Board. If you disagree with the analysis we have set out above, you may wish to review the provisions of the Open Meetings Act to determine what additional remedies, if any, are available to you under those statutes.

Sincerely,

JON BRUNING
Attorney General



Natalee J. Hart
Assistant Attorney General

Cc: Keith Buschow, Board Chairman

02-416-30