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September 22, 2014

Gary Aldridge
7112 S. 45th St
Lincoln, NE 68516

Re: *File Nos. 14-M-116 and 14-M-119; Lower Platte South Natural Resources District Board of Directors; Complainant Gary Aldridge*

Dear Mr. Aldridge:

This letter is in response to your correspondence dated July 7, 2014 and July 24, 2014 in which you requested that this office investigate alleged violations by the Lower Platte South Natural Resources District Board of Directors (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 responses from the Board after we received your complaints, and we subsequently received responses from Greg Osborn, Chair of the Board. We have now had an opportunity to review your allegations and the Board's responses in detail, and our conclusions are set out below.

FACTS

Our understanding of the facts in these matters is based upon your correspondence, the agendas and minutes from the relevant meetings, and the responses from the Board. We have identified two Open Meeting Act complaints made by you:

(1) At the June 18, 2014 meeting you were not allowed to speak on the agenda item concerning the Board's budget, despite the agenda indicating there would be public comment permitted; and
(2) At the July 16, 2014 meeting the Board did not follow the Open Meetings Act in convening a closed session.

ANALYSIS

Public Participation at Meetings

Your first letter, dated July 7, 2014, alleges that the Board did not allow for public comment during agenda item #7, discussion of the Board's budget, despite the agenda indicating that public comment would be permitted. The agenda item at issue, per the agenda you enclosed in your complaint, states: "Presentation of Draft #1 FY 2015 Budget of Expenditures and public discussion [NO ACTION]." You state that the Board presented the budget summary, but the public was not permitted input during this agenda item. The Board admits that it inadvertently passed over the public discussion during this portion of the meeting.

The Board states that it has adopted a policy on public participation at meetings. Policy C-16 states, in relevant part, "[a]ny person who desires to speak on a specific item on the agenda shall indicate such desire in writing on forms provided by the [Board] and shall identify the agenda item or items on which such person desires to speak. Such forms shall be circulated prior to the meeting or located at or near the entrance of the meeting room or place." The Board's response letter states that while filling out the "form" – which the Board has attached and appears to us to be a simple sign-in sheet on which a person indicates if he or she wishes to speak – is not required, it is encouraged in order for the Board to ensure that each member of the public who wishes to speak is provided the opportunity to do so.

The Board also states that the June 18, 2014 meeting was presided over not by the Chair, who was absent, but the Vice-Chair. As to Agenda Item #7, the General Manager of the Lower Platte South Natural Resources District briefed the Board on the draft budget. The Board members then discussed the budget. However, the Vice-Chair, in conducting the meeting, passed over the public discussion portion of this agenda item. The Board states this was unintentional, and was a result of the Vice-Chair's "desire to keep the meeting moving." The Board states that you spoke with one or more Board members following the meeting, who encouraged you to submit your comments in writing and invited you to attend the July meeting to address the Board.

While the Board indicates that you did not sign in, or speak to anyone about your desire to speak at the meeting before it began, nor did you "rise or in any manner inform the Board of [your] desire to be recognized" when the public comment was passed over during the meeting, we do not believe you were required to do so, either under the Open Meetings Act or the Board's policy, as it has been explained by Mr. Osborn. The Open Meetings Act does not require anyone who wishes to make a public comment to indicate that desire to the public body before the meeting begins. It also doesn't require, or encourage, a member of the public to interrupt the public body in order to

speak during the meeting. The Board's policy, as written, would indicate that the Board makes such a requirement. However, the Board has stated to us that filling out the "form" before the meeting is not required, but is merely encouraged.

Despite this, we do not believe the Open Meetings Act has been violated. 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 or that a member of the public who wishes to speak on a particular agenda item make that known to the public body at the beginning of 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. 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. The Board is not required to allow a citizen to speak during any agenda item other than one designated as "public comment." You do not complain that you have never been allowed to address the Board. The Board states in its response letter that you were able to address the Board as to the budget at the July 16, 2014 meeting.

The Board has not violated the Open Meetings Act with respect to this portion of your complaint. We believe the Board unintentionally missed the "public comment" period related to the budget, which was an unfortunate mistake. Even if the Board had violated the Open Meetings Act in June, allowing public comment on the budget during the July 16, 2014 meeting would have cured any violation that occurred at the June 18, 2014 meeting regarding this issue. *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).

Closed Session

In your letter of July 24, 2014, you complain about the closed session called by the Board on July 16, 2014. You allege that at this meeting, the Board entered into a closed session but did not follow the proper procedures found in the Open Meetings Act for entering into that closed session. Your allegation is that the Board did not restate on the record the limitation of the subject matter of the closed session as required by Neb. Rev. Stat. § 84-1410(2). You also call into question the accuracy of the minutes of this meeting, which reflect that that the Board did, indeed, follow this procedure.

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. ***
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> (2) The vote to hold a closed session shall be taken in open session. The entire motion, the vote of each member on the question of holding a closed session, and the time when the closed session commenced and concluded shall be recorded in the minutes. If the motion to close passes, then the presiding officer immediately prior to the closed session shall restate on the record the limitation of the subject matter of the closed session. The 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.

In its response, the Board states that the Open Meetings Act was complied with. However, the Chair "inadvertently requested the public and non-required persons to leave the room" before the limitation of the closed session was restated on the record. Once the room was vacated, the Chair did restate the purpose of the closed session, as it appears on the minutes. The Board has assured us that it will take care in the future to ensure that the limitation of the closed session is repeated on the record before the room is cleared, in order to prevent any future question as to whether the Open Meetings Act was followed in this respect.

Consequently, we do not find that the Board violated the Open Meetings Act with respect to this portion of your complaint. We do encourage it, however, to follow through with its assurances that the limited purpose of a closed session will be restated on the record before the public is dismissed from the meeting room.

CONCLUSION

For the reasons stated above, we do not believe that the Board has violated the Open Meetings Act as to your complaints. 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: Greg Osborn, Chair
Glenn D. Johnson, General Manager

02-436-30