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October 30, 2014

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

Re: *File No. 14-M-125; City of Lincoln Lancaster County Railroad Transportation Safety District; Complainant Gary Aldridge*

Dear Mr. Aldridge:

This letter is in response to your correspondence received by us in which you requested that this office investigate alleged violations by the City of Lincoln Lancaster County Railroad Transportation Safety District (the "District") 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 District after we received your complaint; we subsequently received its response. We have now had an opportunity to review your allegations and the District's response, and our conclusions are set out below.

FACTS

Our understanding of the facts in this case is based upon your correspondence and the District's Response. We have identified four Open Meeting Act complaints made by you as to the District's September 9, 2014 meeting.

(1) The Agenda does not reference the Open Meetings Act and the District did not advise as to the location of the Open Meetings Act in the meeting room on September 9, 2014;
(2) The agenda was not formally approved during the meeting;
(3) (a) The District violated the Nebraska Budget Act in failing to allow public comment on the District budget during the agenda item designated for approval of the budget and (b) public comment was had on the budget only after the District adopted it; and
(4) The District violated the Nebraska Budget Act by not having a specific agenda item for the public hearing on its budget.

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ANALYSIS

Posting of the Open Meetings Act

You have first complained that the District does not reference the Open Meetings Act in its agenda and did not post a copy of the Act at the September 9, 2014 meeting. 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.

A public body's agenda is not required to reference the Open Meetings Act. Additionally, the District denies that the Open Meetings Act was not displayed at the meeting site. The District conducts its meetings, including the one on September 9, at the Lincoln City Council Chambers at the City-County Building. The District has enclosed photographs in its response which show that the Open Meetings Act is permanently posted and accessible to all members of the public in that meeting room. We cannot find that the District 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 District as to where to locate it. The District indicates that if the location of the Open Meetings Act was not specifically addressed by the District at the beginning of this particular meeting, that was due to "unintentional oversight" and the District will be sure to specifically identify the location of the Open Meetings Act at all future meetings. We cannot be sure whether the District complied with this portion of the Open Meetings Act, as they did not deny your assertion that the public was not informed about the location of the Open Meetings Act. Consequently, as to this portion of your complaint, the Board may have committed a technical violation of the Act in not pointing out the location of the Act at this meeting. However, it has taken steps to correct this, and this office will take no action against the District.

Agenda

You have next complained that the District did not take action during the September 9, 2014 meeting to "accept, approve, modify, change, set aside, substitute, add and/or remove" items from the agenda during the meeting. The Open Meetings Act requires that a public body "give reasonable advanced publicized notice of the time and

place" of its meetings, which shall include the agenda for the meeting, or a statement of where the agenda can be reviewed. Neb. Rev. Stat. § 84-1411 (2013). A public body must keep its agenda "continually current" and may not make changes to that agenda, other than those of an emergency nature, more than twenty-four hours before a scheduled meeting. The public body may alter an agenda at the public meeting only to include "items of an emergency nature." *Id.* The Open Meetings Act makes no requirement that a public body take formal action as to its agenda, whether to adopt, approve, amend, or otherwise change it, during the public meeting. The District is not in violation of the Open Meetings Act with respect to this portion of your complaint.

Public comment

Your third complaint is that you were not permitted to comment during the agenda item "Approve 2014-2015 Budget & Audit." As we have previously explained to you, 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. The District is not required to allow members of the public to speak at a particular open meeting, or every open meeting, provided that the District allows the public to address them at some meetings. The District 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 District. The District states that you were able to address the District prior to any action on the budget. There has been no violation of the Open Meetings Act with respect to this portion of your complaint.

Additionally, you claim that this portion of the meeting was held pursuant to the Nebraska Budget Act. The Open Meetings Act does not address the way in which a public body conducts public hearings under the Budget Act. While in this case the public hearing on the budget was held during the District's regular meeting, the Nebraska Budget Act, Neb. Rev. Stat. §§ 13-501 through 13-513 controls the way in which the District handles the notification of and hearing regarding its budget. The Open Meetings Act does not control the hearing concerning the budget and is silent regarding comment during public hearings. This office has no general supervisory authority over governmental subdivisions in Nebraska, including the District. We have enforcement duties related to the Nebraska Open Meetings Act (Neb. Rev Stat. §§ 84-1407 through 84-1414) and the Nebraska Public Records Statutes (Neb. Rev. Stat. §§ 84-712 through 84-712.09). However, we do not supervise the Nebraska Budget Act or compliance therewith.

Failure to comply with the Nebraska Budget Act in the agenda

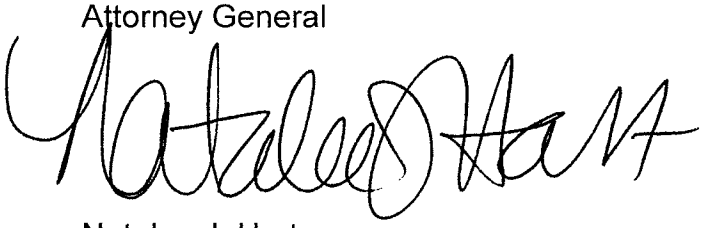
As stated immediately above, this office does not have general supervisory authority over the District and we do not supervise compliance with the Nebraska Budget Act. Consequently, your compliant that the agenda item related to the District's budget does not comply with the Nebraska Budget Act is outside the enforcement authority of this office. We reviewed the budget item with respect to the Open Meetings Act and found no violation of that Act with respect to this portion of your complaint.

CONCLUSION

For the reasons stated above, we do not believe the District 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: Deb Schorr
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