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February 23, 2015

Kim Roecker
15506 Church Rd.
Louisville, NE 68037-3318

RE: *File No. 14-M-132; Louisville School Board; Complainant Kim Roecker*

Dear Ms. Roecker:

This letter is in response to your series of complaints received by us in which you have requested that this office investigate alleged violations of the Nebraska Open Meetings Act (hereinafter, the "Act"), Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2008 & Cum. Supp. 2014), by the Louisville Public Schools School Board ("Board"). As is our normal practice with such complaints, we forwarded copies of your complaints to the public body which is the subject of the complaint. We have received a response from the attorney for the Board, Karen A. Haase, and have now had an opportunity to review your complaint, the Board's response, and all of the accompanying documentation in detail. Our conclusion in this matter is set forth below.

FACTS

Our understanding of this case is based upon your complaints and the response we received from the Board. Your complaints concern three "work sessions" of the Board in September and October 2014 in which the Board discussed its search for a new superintendent for the Louisville Public Schools. These work sessions are attended by the full Board, and as a quorum is present, are subject to the Open Meetings Act. "Work sessions" by a school board are generally utilized as information gathering and discussion sessions, with no votes planned. While you make specific allegations as to these work sessions, which will be discussed in detail below, your complaints can be summarized as being primarily related to the agendas of these work sessions (or lack thereof) and the closed sessions conducted at the meetings. You also make general allegations that "multiple infractions" occur on a "regular basis," that you believe that closed sessions are often used for improper purposes, that closed sessions are used too frequently by the Board, and "a lot of things [are] happening without public knowledge and behind closed doors." These generalized allegations are not

accompanied by dates on which they allegedly occurred, or any supporting documentation. As we cannot investigate such vague complaints, we will not respond to these general allegations herein.

ANALYSIS

Neb. Rev. Stat. § 84-1408 (2008) of the Nebraska Open Meetings Act provides:

> It is hereby declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret.
>
> Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies, except as otherwise provided by the Constitution of Nebraska, federal statutes, and the Open Meetings Act.

The primary purpose of the open meetings law is to ensure that public policy is formulated at open meetings. *Marks v. Judicial Nominating Comm.*, 236 Neb. 429, 461 N.W.2d 551 (1990). The Nebraska open meetings laws are a statutory commitment to openness in government. *Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002); *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984).

Agenda

You have alleged that two work sessions, those on September 14, 2014 and September 25, 2014 did not have agendas made available to the public prior to these meetings. The Open Meetings Act requires a public body to give "reasonable advance publicized notice" of each of its meetings, which is to include either the agenda, or notice of where the agenda is available for public inspection. Neb. Rev. Stat. § 84-1411 (1) (2014). The agenda must be kept "continually current" and may not be altered, except for items of an emergency nature, within 24 hours of the meeting. *Id.*

The Board admits that it did not have an agenda which was made available to the public before the work sessions on September 14 and September 25. The Board states there was some sort of "miscommunication" as to who was charged with the duty of making the agenda for these two meetings. However, the Board asserts that the publicized notice of each of these meetings listed the topic to be discussed, which was the only agenda item. It is permissible for a public body to list the agenda in its notice of meeting in order to meet the requirements of Neb. Rev. Stat. § 84-1411. Our office has not been provided with a copy of the notice to verify the Board's assurances that the notice contained the only agenda item. However, we will assume that the Board is

acting in good faith. Additionally, as the Board has assured us that its practices have been corrected to ensure that work sessions and Board meetings will have agendas made available to the public in compliance with Neb. Rev. Stat. § 84-1411, we will only remind the Board of its statutory duties in this respect.

You also allege that during the September 25, 2014 work session, the Board altered the agenda for its October 1, 2014 meeting. You state that the agenda for that meeting had previously been set by the Board at its September 8, 2014 meeting. The Open Meetings Act allows a public body to alter its agenda up to 24 hours before a meeting. There is no violation of the Open Meetings Act with respect to this portion of your complaint.

Closed Sessions

You have also made a number of complaints relating to closed sessions of the Board at its work sessions on September 25, 2014; October 1, 2014; and October 22, 2014. Closed sessions on all three dates were related to the superintendent search and were utilized by the Board in formulating interview questions, "strategies" for hiring the superintendent, and the review of superintendent candidates.

Neb. Rev. Stat. § 84-1410 of the Open Meetings Act provides, in pertinent 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;

* * * *

(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.

* * * *

(4) Nothing in this section shall be construed to require that any meeting be closed to the public. No person or public body shall fail to invite a portion of its members to a meeting, and no public body shall designate itself a subcommittee of the whole body for the purpose of circumventing the Open Meetings Act. No closed session, informal meeting, chance meeting, social gathering, email, fax, or other electronic communication shall be used for the purpose of circumventing the requirements of the act.

In order to be valid, a closed session must be clearly necessary for the protection of the public interest or to prevent needless injury to the reputation of an individual, and that person has not requested an open forum. If a public body's reason for going into closed session does not fall under either of these two statutory reasons, the session is improper. We further note that subsection (4) of § 84-1410 provides, in pertinent part, that "[n]othing in this section shall be construed to require that any meeting be closed to the public."

September 25 and October 1 Closed Sessions

On September 25 the Board went into closed session "to discuss the stratigies (sic) to be used for superintendent hiring process which is in the school district and the publics (sic) best interest to be discuss (sic) in closed session." This closed session lasted for one hour and thirty minutes. You allege that this closed session was called in order to discuss the interview questions that the Board intended to ask each of the

superintendent candidates. On October 1, a nearly identical motion was made "to enter into executive session to discuss superintendent hiring process which [is] in the school district and publics (sic) best interests to be discussed in closed session." On this date, the closed session lasted just nine minutes. The Board admits that both of these closed sessions were used by the Board to formulate and finalize the interview questions to be asked of the superintendent candidates.

First, we will address the motions made by the Board to close, and the stated reasons for executive session. The motions state that it was in the best interests of both the school district and the public to enter into closed session. While the Open Meetings Act allows a public body to go into closed session 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," the Act does not provide for a closed session when the closed session is in the best interests of the public body. Neb. Rev. Stat. § 84-1410 (1). This is an important distinction of which the Board should be aware. While the motions to close did contain a proper purpose under the Act, that of the public's best interest, they also contained an improper purpose, that of the school district's best interest. The Board will be cautioned, by a copy of this letter, to ensure that it does not include an improper purpose in future motions to close.

Your complaint is with respect to the subject matter of the closed session, which the school district defined in its motions to close as strategies relating to the superintendent hiring process. Both you and the Board have provided additional information that the Board discussed the formulation and finalization of the interview questions to be asked of superintendent candidates during these two closed sessions.

The Board maintains that formulating the interview questions during a closed session was, in this instance, in the best interest of the public, as more than one superintendent candidate was from the local area; the local candidates could be given an advantage if they, or someone they knew, attended a meeting where the interview questions were discussed in the open. This could allow them to formulate answers to the questions before the official interview. The Board states that this is in the public's best interest because requiring all candidates to formulate their answers on the spot, rather than in advance, allows the Board to choose the best candidate for superintendent, as the applicants' ability to think on their feet in answering the interview questions is a strong consideration in choosing a superintendent.

In its response, the Board did not indicate if any of the three local candidates were among the four finalists for the superintendent position. Additionally, we obtained the minutes of the meetings from the Board's special meetings of November 17, 2014 and November 18, 2014. Those meetings indicate that the interviews of the four

finalists were conducted on two separate evenings, two per night. The Board argues that it was attempting to prevent an advantage of one candidate over another in formulating its interview questions in closed session, and yet, by holding interviews on two separate occasions, the two candidates who were interviewed on the second evening could have been provided the exact advantage the Board states it was attempting to avoid.

We have previously stated that we question the necessity of formulating interview questions in closed session and how doing so is in the public interest. The Board has not convinced us any differently in this matter. We fail to see how the Board's discussion of interview questions was "clearly necessary for the protection of the public interest" (emphasis added).

October 22 Closed Sessions

On October 22, the Board entered into twelve separate closed sessions. The first closed session was called to "comment only on concerns about superintendent applicant number one all of which are in the school district's and in the publics (sic) interest to discuss in closed session." Eleven closed sessions followed, for applicants two through twelve, and each lasted between two to nine minutes. Following the closed session discussions, the Board held an open session discussion of approximately 24 minutes of the applicants and chose four to move into its list of final candidates.

The Board states that it went into closed sessions on this date to discuss the "particularly negative, injurious aspects of each candidate's application, to prevent needless injury to the reputations of the candidates." Again, the Board cites to the fact that three of the superintendent candidates were local candidates and "information identified would clearly indicate which candidates were being discussed, and it would have been clearly injurious to the candidates' reputations even though each candidate was specified by a number only."

We will again first discuss the motions to close and the reason the Board gave in each necessitating the closed sessions. The Board stated that it was in the best interest of the school district and the public to discuss the applicants in closed session. As we noted above, the Open Meetings Act does not permit a public body to enter into closed session for its own best interests. We also fail to see how it is in the best interests of the public to discuss any portion of a superintendent candidate's application in closed session. The Board now argues that the closed sessions were utilized to prevent needless injury to the reputations of the candidates. However, that was not the Board's reason stated on the record. Additionally, if a public body enters into closed session to prevent needless injury to the reputation of an individual, that individual must first be given an opportunity to have the matter discussed in open session. The Board

does not indicate that it provided that opportunity to the candidates. We do not believe that the motions to enter into closed session were proper under the Open Meetings Act. The Board believes this to be a "technical" violation of the Open Meetings Act which can be corrected by an amendment to its minutes. We disagree that the minutes of the meeting could be altered at this juncture. The minutes must reflect the motion as made by the Board at the time of the meeting, whether that motion was made properly or not. To amend the minutes to include a reason necessitating a closed session that was not made on the record at the meeting would be entirely improper.

The subject matter given by the Board in each motion, to discuss "concerns" regarding each candidate, is questionable, particularly in light of the fact that the Board had not identified the candidates by name at this meeting, or any other meeting prior. The Open Meetings Act allows a closed session for "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." While we could imagine a scenario where the Board wished to discuss one or more applicants in closed session to protect the reputation of that person, the Board's stated reason for the closed session was not to protect the reputation of the candidates.

Additionally, both you and the Board indicate that the twelve candidates were discussed only by number. In its response, the Board points to Neb. Rev. Stat. § 84-712.05 of the Nebraska Public Records Statutes as being instructive on this issue. The Board argues that because § 84-712.05 (15) allows a public body to withhold job application materials submitted by applicants (other than finalists) from public disclosure, it became necessary to discuss each applicant in closed session to avoid identifying them in the open meeting. The Board reads § 84-1410 of the Open Meetings Act in harmony with § 84-712.05 (15) and argues that it was permitted to discuss "personally-identifiable aspects of each applicant" "when the matters discussed would have injured the reputations of those applicants."

We are aware of the competing public policies at play here. The Open Meetings Act and the Public Records Statutes together represent the cornerstone of openness and access to governmental bodies and information. They are, however, two very different sets of statutes. Assuming *arguendo* that a closed session in this instance was proper, there is nothing in the Open Meetings Act that addresses the confidentiality of documents discussed in closed session.[1] We can find no statutory basis to support the argument that an otherwise improper closed session becomes proper when necessary to protect certain documents from disclosure, including the names and application

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[1] With respect to documents, the Open Meetings Act only requires that "[p]ublic bodies make available at the meeting or the instate location for a telephone conference call or videoconference, 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." Neb. Rev. Stat. § 84-1412(8).

materials from all but the finalists for a position. Moreover, the exceptions enumerated in § 84-712.05 of the Public Records Statutes simply permit a public body to withhold certain records; the exceptions do not require that such records be withheld. *Burlington Northern Railroad Company v. Omaha Public Power District*, 703 F. Supp. 826 (D. Neb. 1988); *aff'd* 888 F.2d 1228 (8th Cir. 1989).

As a result, the answer as to whether the closed sessions were proper in this context is not exactly clear. However, in the end we must rely on the Nebraska Supreme Court case *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984), to support our conclusion that the meeting at issue should have been kept open. *Grein* involved an action to void a contract between a school board and a contractor which resulted from discussion held during an improper closed session of the board. Among the court's critical holdings in *Grein* are the following:

> (1) "Provisions permitting closed sessions and exemption from openness of a meeting must be narrowly and strictly construed." 216 Neb. at 165, 343 N.W.2d at 723.
>
> (2) "The 'public interest' mentioned in § 84-1410 is that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities." *Id.*
>
> (3) "[G]ood faith or good intention on the part of the public body is irrelevant to the question of compliance with the provisions of the Public Meetings Laws authorizing a closed session." *Id.* at 167, 343 N.W.2d at 724.
>
> (4) "The prohibition against decisions or formal action in a closed session also proscribes 'crystallization of secret decisions to a point just short of ceremonial acceptance,' and rubberstamping or reenacting by a pro forma vote any decision reached during a closed session." *Id.*

Finally, the *Grein* Court concluded:

> **From all this there evolves a guiding principle relatively simple and fundamental: If a public body is uncertain about the type of session to be conducted, open or closed, bear in mind the policy of openness promoted by the Public Meetings Laws and opt for a meeting in the presence of the public.**

216 Neb. at 168, 343 N.W.2d at 724 (emphasis added).

The screening of all twelve superintendent candidates should have been done primarily in open session, with closed sessions permitted to discuss discrete issues meeting the statutory requirements.[2] We fully understand that the discussion of some of the candidates' applications may have warranted a closed session to protect injury to their reputations. But not all of the candidates. Moreover, as indicated in *Grein*, the Board's good faith motivation for the closed sessions, i.e., protecting non-finalists' names and applications from disclosure, is not a cure for noncompliance of the Open Meetings Act. Consequently, we find the Board's closed sessions to discuss each of the twelve superintendent candidates were improper.

Action by the Department of Justice

Since we have determined that the Board has violated the Open Meetings Act, it is now necessary for us to determine what additional action, if any, will be taken by this office. We do not believe that a criminal prosecution for a knowing, intentional violation of the Open Meetings Act is warranted here. We also do not believe that a civil lawsuit is warranted, in that the Board conducted interviews of four finalists in open session, one of whom was subsequently hired by the Board.

Over the years, this office has encountered situations similar to this one. However, in those situations, we declined to prosecute members of the public body because we believed they were acting on the advice of counsel during their meetings. In this instance, we are of the opinion that the members of the Board were acting on advice of counsel as well. However, we will admonish the members of the Board, through a copy of this letter to their counsel, that they must strictly adhere to the provisions of the Open Meetings Act, particularly with respect to closed sessions.

Since we have determined that no further action by this office is appropriate at this time, we are closing this file. If you disagree with our analysis, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under the Act.

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[2] We would suggest that there may be ways to mechanically screen applications in open session without having to disclose the names of the applicants. Identifying them by numbers, as the Board did here, is one such way.

Sincerely,

DOUG PETERSON
Attorney General

Natalee J. Hart
Assistant Attorney General

cc: Karen Haase

02-479-29