STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

DOUGLAS J. PETERSON
ATTORNEY GENERAL

NATALEE J. HART
ASSISTANT ATTORNEY GENERAL

July 1, 2015

Deena Winter
Nebraska Watchdog
2019 Lake St.
Lincoln, NE 68502

RE: *File No. 15-M-108; University of Nebraska; Complainant Deena Winter*

Dear Ms. Winter:

This letter is in response to your complaint in which you have requested that this office investigate alleged violations of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014), by the University of Nebraska ("University") during its 2014 search for the new President of the University. As is our normal practice with such complaints, we forwarded a copy of your complaint to the public body which is the subject of the complaint. We received a response from the attorney for the University, Joel D. Pedersen, Vice President and General Counsel, and have now had an opportunity to review your complaint and the University's response in detail. Our conclusion in this matter is set forth below.

FACTS

Our understanding of this matter is based upon your complaint, the response we received from the University, and information we reviewed on the University's website. Your complaint concerns the search for the University of Nebraska President, which began with the formation of two committees in March 2014 and culminated in the appointment of the new President by the Board of Regents of the University of Nebraska ("Board of Regents"). Your complaint surrounds the meetings of the committees formed by the Board of Regents, not the meetings subsequently held by the Board of Regents interviewing the four finalists for the position and ultimately selecting the new University President. Therefore, our analysis will concern only the work of the two committees.

In March 2014, the Board of Regents created two committees: the Presidential Search Outreach and Advisory Committee ("Outreach Committee") and the Presidential Search Screening and Selection Committee ("Selection Committee") (collectively, "the

Printed wth soy ink on recycled paper

Committees"). The Board of Regents appointed members to each of these Committees, including four Regents to each committee[1]. The Outreach Committee met three times between April and July 2014 and was tasked with working with the national search firm hired by the Board of Regents to assist with its search for the new University President, including formulating a list of desirable qualities for the new President and receiving initial application materials from potential candidates. The Selection Committee was charged with evaluating applications, interviewing select candidates, and recommending to the Board of Regents the four finalists for the position of University President. The Selection Committee held its final meeting on November 3, 2014, at which time it nominated the four finalists.

Your complaint is that the Committees conducted their work primarily in closed sessions until the Presidential Search Screening and Selection Committee held a vote in open session on November 3, 2014 nominating the four finalists for the University President. You believe the Committees violated the Open Meetings Act in holding closed sessions to narrow the list of candidates for University President.

The University has responded by denying that it violated the Open Meetings Act in any way and stating that it engaged outside counsel to assist it with compliance with the Act. The University argues that it has a significant economic impact on the State of Nebraska, and the selection of the University President is crucial to its operations. The University also maintains that "[t]he impact of the University President on the State of Nebraska is unique compared to any other appointed governmental position. As a result, it is crucial for the University and in the public interest to have a presidential selection process that results in obtaining the best candidate for the job." The University points to an Omaha World Herald article dated January 28, 2015 in which the newspaper concluded that the University "had 'clearly abided by the letter and spirit of the [Open Meetings] law'" in support of its position.

As to the Outreach Committee specifically, the University states that this Committee never took any formal action under the Open Meetings Act and was formed

[1] As an initial matter, we believe that both of these Committees meet the definition of "public body" found in Neb. Rev. Stat. § 84-1409(1)(a)(v) (2014). Both the Outreach Committee and the Selection Committee appear to us to be advisory committees, subject to the provisions of the Open Meetings Act. These Committees undertook the initial tasks of accepting applications for the University President, narrowing the search, interviewing selected applicants, and selecting the final four candidates from which the Board of Regents selected the new University President. While four members of the Board of Regents served on each Committee, the Board of Regents as a whole body was not asked to make a determination as to initial applicants; that process was completed entirely by the two Committees. The Committees here are classic examples of advisory committees and their function. An advisory committee is subject to the Open Meetings Act whether a quorum of the parent body serves on the advisory committee or whether it is made up entirely of members from outside the parent body; it was not improper under the Open Meetings Act for four members of the Board of Regents to serve on each Committee.

to give the national search firm "non-binding input and assistance with (1) soliciting stakeholder input on issues facing the University and qualities the University should seek in the next President, (2) conducting a broad and inclusive search, (3) seeking nominations and applications for the position, and (4) determining how well potential candidates met the criteria established by the Board [of Regents]." The University explains that the national search firm, aided by the Outreach Committee, "received public input from more than 400 people about the qualities the University should seek in the next President and the opportunities and challenges he or she will face." The search firm and the University President's Office then developed a "Presidential Profile" which was approved by the Executive Committee of the Board of Regents for use in the selection of the next University President.

As to the Selection Committee, the University states that it was "established by the Board of Regents to (1) review and evaluate application materials, (2) select and interview leading prospects, (3) conduct and/or review reference checks, and (4) recommend to the Board of Regents no fewer than four candidates who agree to become public finalists for the position." The Screening Committee "was also involved in negotiations, negotiating with candidates regarding participation in the selection process, release of their identities, and employment issues." The Screening Committee took formal action on two occasions: in August 2014 by discussing and adopting Committee "Operating Principles" and by nominating the four finalists for University President to be forwarded to the Board of Regents.

In its response to this office, the University states that in order to 'obtain the best candidate in light of the unique nature of the position and the significant associated financial ramifications. . .the Committees determined it was necessary to use closed sessions in order to obtain a broad and qualified applicant pool." The University was concerned that potential candidates for the position may not apply or agree to be considered if their identities could become public before they became one of the final four candidates.

ANALYSIS

Neb. Rev. Stat. § 84-1408 (2014) 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).

Closed Sessions

Your complaint relates to the closed sessions held by the Outreach Committee and the Selection Committee at each meeting of these Committees. 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;
>
> * * * *
>
> (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."

Your complaint, in summary, is that the two Committees formed to aid in the search for the University President violated the Open Meetings Act by conducting broad closed sessions encompassing the vast majority of each of the Committee meetings, with little to no discussion in open session.

Presidential Search Outreach and Advisory Committee

Our review of the minutes of the meetings for the Presidential Search Outreach and Advisory Committee reveals that at each of its meetings held on April 25, July 3, and July 25, 2014, closed sessions were held for virtually the entire meeting. No meaningful discussion was had by the Outreach Committee in open session, nor was any action taken in open session by this Committee. At each meeting the following motion was made:

> Moved by Clare and seconded by [a second Committee member] that the Committee go into closed session as authorized by Neb. Rev. Stat. § 84-1410 for the protection of the public interest, and to prevent needless injury to the reputation of persons who have not requested a public hearing, for the purpose of holding a discussion limited to the following subject:
>
> - Confidential personnel matters involving the search and selection of the President of the University of Nebraska.

Each meeting appears to have been conducted, and concluded, in closed session. On April 25, the closed session lasted nearly two hours; on July 3, the Committee was in closed session for nearly three hours; and on July 25, the Committee met in closed session for almost two and one-half hours. The Outreach Committee did not return to open session for discussion or votes at any of the three meetings, and it

appears to have adjourned its meetings from closed session. All told, the Outreach Committee met in closed session over three meetings for nearly seven and one-half hours, yet never held any discussion or took any formal action in open session. Despite this, the University states in its response that the Outreach Committee and the national search firm received public input from "more than 400 people" to assist in developing a "Presidential Profile." While we understand that this profile was ultimately created by the University's Office of the President and the national search firm, it appears to us from the University's response that the Outreach Committee aided in this process. However, the profile was never discussed or voted upon in open session by the Committee. We believe that the Committee should have held any discussions regarding the Presidential Profile in open session. It does not appear to us that holding closed sessions to discuss the creation of the "Presidential Profile" was in the public interest, nor necessary to prevent needless injury to the reputation of any individual, as the profile did not address any specific applicant, but was a general guidance document for proceeding with the search for the University President. We fail to see how the profile or any portion of its development was appropriately discussed in closed session.

The motions to close each of the meetings of the Outreach Committee indicate that it was for the "protection of the public interest, and to prevent needless injury to the reputation of persons who have not requested a public hearing" to discuss "confidential personnel matters involving the search and selection of the President of the University of Nebraska." The Outreach Committee was created for the purposes of: "(1) soliciting stakeholder input on issues facing the University and qualities the University should seek in the next President, (2) conducting a broad and inclusive search, (3) seeking nominations and applications for the position, and (4) determining how well potential candidates met the criteria established by the Board [of Regents]." We do not believe any of the enumerated purposes for the Outreach Committee are duties properly executed in a closed session in this context. Certainly, "stakeholder input" is a matter of public interest, where the Committee, presumably, sought comment and participation from members of the public. Similarly, conducting the search for the next University President is in the public interest to be done in the open. We see no reason that discussion regarding the search, in general, would adversely impact any individual or his or her reputation such that a closed session discussion would be necessary. We have very limited information regarding the extent to which the Outreach Committee discussed individual applicants for the University President position; however, any such discussions likely should have been undertaken largely in an open session, as will be discussed more fully below.

For the foregoing reasons, we believe the Presidential Search Outreach and Advisory Committee was in violation of the Open Meetings Act in holding the entirety of its meetings in closed session.

Presidential Search Screening and Selection Committee

The Presidential Search Screening and Selection Committee met on April 25, August 13, September 11, and November 3, 2014. On each of these dates, the following motion was made:

> Moved by [Committee member] and seconded by [Committee member] that the Committee go into closed session as authorized by Neb. Rev. Stat. § 84-1410 for the protection of the public interest, and to prevent needless injury to the reputation of persons who have not requested a public hearing, for the purpose of holding a discussion limited to the following subject:
>
> - Confidential personnel matters involving the search and selection of the President of the University of Nebraska.

On April 25 the Selection Committee held virtually its entire meeting in a two hour closed session. On August 13, before entering into closed session, the Committee passed a resolution for its "Operating Principles, Process, and Quorum Rule," but took no other action in open session. On that date, the Committee was in closed session for over two hours. On September 11, the Committee held a closed session which lasted over three hours, reconvened in open session, but did not hold any discussion or take any action in that open session. In its final meeting on November 3, the Selection Committee met in closed session for approximately one and one-half hours before reconvening in open session to move to advance the four finalists for consideration by the Board of Regents. The discussion and vote on the four finalists lasted approximately one-half of an hour before the meeting was adjourned. The Selection Committee met in closed session for a total of eight and one-half hours over four meetings. The only actions taken in open session were those establishing the Committee's initial "rules" and the advancement of the four finalists from the applicant pool.

While the information provided to this office does not indicate the number of initial applicants interested in the University President position, presumably there were more than four initial applicants and the Selection Committee narrowed that pool of applicants down to four finalists. However, none of those applicants were discussed, either in generalities or specifics, in open session during meetings of this Committee. The only discussion held in open session regarding the applicants was the execution of the Committee's fourth task: nomination of the four finalists to the Board of Regents. The Committee's remaining three responsibilities, which were, collectively, to conduct the initial interview process and winnow down the number of candidates to four, were conducted entirely in closed session.

The motions to close each of the meetings of the Selection Committee indicate that it was "for the protection of the public interest, and to prevent needless injury to the reputation of persons who have not requested a public hearing" to discuss "[c]onfidential personnel matters involving the search and selection of the President of the University of Nebraska." The University asserts that holding closed sessions was in the protection of the public interest because "[t]he impact of the University President on the State of Nebraska is unique compared to any other appointed governmental position. As a result, it is crucial for the University and in the public interest to have a presidential selection process that results in obtaining the best candidate for the job."

The University also argues that closed sessions were necessary to prevent needless injury to applicants' reputations. The University believes that qualified candidates may not have applied to become the next University President if their identities were to become public before they reached the pool of the four finalists. Additionally, the University states that the candidates' reputations could be injured in an open discussion of their weaknesses and publication of their identities "could injure their status with their current employer." The University was concerned that holding discussions in open session regarding any candidate would have "adversely affected" the pool of applicants. The University also argues that closed sessions were appropriate for "negotiation guidance" for approaching possible finalists. These negotiations included obtaining possible finalists' permission to make their identities public, and employment and salary negotiations.

The subject matter given by the Committee in each motion, to discuss "confidential personnel matters" regarding the President search, is questionable, particularly in light of the fact that the Committee had not identified the candidates by name in any public forum. 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."

In its response, the University points to Neb. Rev. Stat. § 84-712.05 of the Nebraska Public Records Statutes as being instructive on this issue. The University 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 University reads § 84-1410 of the Open Meetings Act in harmony with § 84-712.05(15) and argues that the Committees were permitted to discuss candidates for the University President in a closed session.

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. We have consistently said in the past that they are, however, two very different sets of statutes. Nonetheless, we understand that these two sets of statutes arguably concern the same subject matter, i.e., openness in government. If viewed in that way, the Open Meetings Act and the Public Records Statutes could be construed together to maintain a "consistent and sensible scheme, giving effect to every provision." *Archer Daniels Midland Company v. State*, 290 Neb. 780, 788, 861 N.W.2d 733, 740 (2015). Assuming *arguendo* that closed sessions in this instance were proper, there is nothing in the Open Meetings Act that addresses the confidentiality of documents discussed in closed session.[2] There is no clear 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 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).

The University points us to the legislative history for 2007 Neb. Laws LB 389, wherein the Legislature adopted the "four finalists" provision in the Nebraska Public Records Statutes and allowed a public body to withhold from public disclosure the application materials from all but the four finalists. Previously, Neb. Rev. Stat. § 84-712.05(15) defined finalist as an applicant who accepts an interview; 2007 Neb. Laws LB 389 narrowed that definition. The legislative history indicates that this bill was brought at the request of the University because past selection committees for high-level University positions had not been permitted to conduct preliminary interviews of applicants in order to winnow down the field of candidates without being required to release the names of those preliminary candidates upon request. Committee Records on LB 389, 100th Neb. Leg., 1st Sess. 23-24, 27 (Feb. 1, 2007). While the University could not cite to any particular individual who had not applied to the University for a high-level position because his or her name could be made public in an early stage of the selection process, the testimony of the then general counsel of the University indicated that he "ha[d] been told that many people will not apply or agree to go through the process if early in the stage, the hiring stage, their name becomes public because of the adverse effect it will have on their current position of employment." *Id.* at 25. Additionally, B.J. Reed, a dean at the University of Nebraska-Omaha at that time, testified that potential candidates are "very nervous about having their name released in a public venue, unless they have a pretty good sense of probability of success in getting the position." *Id.* at 26. Dr. Reed stated that he understood the balance "between the

[2] 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).

public's right to know and getting the best qualified candidates for the position" and that selecting a candidate for a high-level University position should not be a secretive process, but that the process should allow for some ability to interact with applicants before recommendations are made as to finalist candidates. *Id.* at 26-27. There was similar discussion on the floor of the Legislature, as Sen. Avery stated that "[w]e would like to be able to give the university the opportunity to have a broad pool, not a restricted pool, one that would give them the access to the best candidates possible, and I believe that this bill does that." Floor Debate on LB 389, 100th Neb. Leg. 1st Sess. 33 (March 14, 2007) (Statement of Sen. Avery).

The University argues that this legislative history "clearly supports" a position that the provision found in Neb. Rev. Stat. § 84-712.05(15) allowing a public body to withhold the job application materials of all but the four finalists applies to the Open Meetings Act and allows them to hold closed sessions to discuss all but the final four applicants. While we recognize the argument has some merit, we do not believe it to be as clear as the University contends. There is unresolved conflict between the Open Meetings Act and the Nebraska Public Records Statutes in this respect. The Nebraska Legislature appears to be aware of these competing principles and the concern among public bodies as to the requirement to hold open sessions for general discussion of applicants, while allowing the application materials of all but the finalists to be kept confidential. In the most recent legislative session, 2015 Neb. Laws LB 282 was introduced in an attempt to address this issue. This bill would have allowed a public body to enter into closed session under Neb. Rev. Stat. § 84-1410(1) for "discussion of applicants, other than finalists, who have applied for employment," defining "finalist" in the same manner as that found in Neb. Rev. Stat. § 84-712.05(15). However, this bill was indefinitely postponed on February 23, 2015. Additionally, as to the University, the Nebraska Legislature considered a bill that would specifically permit the withholding under the Nebraska Public Records Statutes of the job application materials from applicants, other than finalists, for the position of President, chancellor, or vice president of the University. In that case, "finalist" would have been defined as those applicants who advanced to consideration by the Board of Regents for the position. 2014 Neb. Laws LB 1018, § 1. That bill did not make it out of committee and was not considered by the full Legislature.

Ultimately, this is an issue that the Nebraska Legislature may need to clarify, not only for the University, but for other public bodies faced with similar dilemma. The Open Meetings Act and the Nebraska Public Records Statutes should be read *in para materia*. However we believe that there currently exists disharmony between the two sets of statutes. The Legislature has not clearly stated that applicants, other than the four finalists, may be discussed entirely in closed session in order to protect their identities. The Legislature has only addressed the written materials submitted by candidates, and not the discussion of those candidates by the public body.

Consequently, it is not entirely apparent what the 100th Nebraska Legislature believed the effect of the "four finalists rule" would be as it applies to the search for the final four candidates, as a whole, and the discussion of non-finalists during closed session. While legislation to address this dichotomy was introduced in the most recent legislative session, the bill was not advanced from committee.

Other states have faced similar situations in which open meeting laws provide limited circumstances in which a public body may close a public meeting. The Alabama Supreme Court has held, on two separate occasions, that interviews of candidates by public bodies could not be held in closed session, unless to discuss the applicant's "character or good name" as specifically provided by that state's open meetings laws. *Dale v. Birmingham News Co.,* 452 So. 2d 1321, 1322 (1984). See also *Miglionico v. Birmingham News Co.,* 378 So. 2d 677 (1979) (Noting "[o]ther states have statutes which . . . do not allow closed meetings for appointments," and citing Neb. Rev. Stat. § 84-1410). The Alabama Supreme Court has also pointed out that some other states have open meeting provisions which specifically allow a public body to conduct interviews in closed session. *Dale v. Birmingham News Co.,* 452 So. 2d at 1323. See, e.g., *Morning Call, Inc. v. Board of School Directors of the Southern Lehigh School District*, 164 Pa. Cmwlth. 263, 642 A.2d 619 (1994); *Gerstein v. Superintendent Search Screening Committee*, 405 Mass. 465, 541 N.E.2d 984 (1989) (the confidentiality provisions in the state's open meetings laws regarding initial applicants "demonstrates the Legislature's endorsement of such confidentiality"); *Brown v. East Baton Rouge Parish School Bd.,* 405 So. 2d 1148 (1981). Alabama does not have such a provision, nor does Nebraska. The court in *Dale* rejected the argument that anonymity of the applicants was "of crucial importance to the public interest in securing the best qualified applicants possible for the position" and that the court should impose a "rule of reason" upon the state's open meetings act. *Dale v. Birmingham News Co.,* 452 So. 2d at 1323. The court ultimately determined that while protecting an applicant's "character or good name" would permit limited portions of interviews to be conducted in closed session, "it is not broad enough, in our opinion, to justify the exclusion of the public to the extent that the candidates could remain anonymous to the public." *Id.*

Our determination of the matter at hand must be based upon the current statutory scheme. 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 meetings at issue should not have been closed in their entirety. This is consistent with our prior determinations in similar situations which have been presented to us in the past. Without legislative action, we are not in a position to change our interpretation of the Open Meetings Act and what we believe to be appropriate for closed sessions. We believe *Grein* continues to be instructive on this issue. *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).

We do not believe that the University's search for a new President clearly falls within what the *Grein* Court would have considered to be a pecuniary interest shared by citizens in general and by the community at large. We understand the University's argument that it has a large economic impact on the State of Nebraska. However, we remain unconvinced, given the current statutory scheme and the recent unsuccessful attempts to make specific changes to the Open Meetings Act to address this exact scenario. As a result, we believe that the screening of applicants for the position of University President likely should have been done primarily in open session, with closed sessions permitted to discuss discrete issues meeting the statutory requirements. While we could imagine a scenario where the Committees wished to discuss one or more

applicants in closed session to protect the reputation of that person, we do not believe that it is appropriate to have the entirety of the discussion regarding a candidate, let alone all candidates, during a closed session. We understand the argument that the public interest is best served by the University selecting its President from the largest possible pool of applicants. We also understand that many of the potential applicants for such a position desire confidentiality of their identity until such a time as their identities must be disclosed under the Nebraska Public Records Statutes. We would suggest that there are ways to mechanically screen applications in open session without having to disclose the names of the applicants. Identifying candidates by number, instead of name, would be one such way. Other public bodies in Nebraska have identified candidates in this way in order to discuss them in open session without identifying non-finalists by name. Identifying candidates by number would permit a public body to preserve an applicant's confidentiality while still allowing for an open discussion under the Open Meetings Act. 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, and not the entirety of any one candidate. We realize that this may require a public body to enter into closed session numerous times during an open meeting. However, we believe that this is what is required to comply with the provisions of the Open Meetings Act as that act currently exists. Moreover, as indicated in *Grein*, the University'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 believe that the Committees' closed sessions were likely improper.

Finally, the University argues that the actions of the Committees, if in violation of the Open Meetings Act, were "cured" by the Selection Committee and the Board of Regents discussing the final four candidates in open meetings. *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979). We do not agree. *Pokorny* holds that "where a defect occurs in proceedings of a governmental body, ordinarily the defect may be cured by new proceedings commencing at the point where the defect occurred." *Pokorny v. City of Schuyler*, 202 Neb. at 341, 275 N.W.2d 281, 285. To have cured any of the aforementioned Open Meetings Act violations, the Committee and the Board of Regents would have had to undertake discussion and votes as to all candidates in an open meeting, not just the four finalists. The defect in the proceedings occurred at the point where all applicants were discussed in their entirety in closed session, not at the point where the four finalists were named by the Selection Committee. The Open Meeting Act violations here were not cured by subsequent actions by the Selection Committee or the Board of Regents.

Agendas

Our analysis of your complaint also included a review of the agendas for each of the Committees. We found many of the agendas to be deficient under the Open Meetings Act. Neb. Rev. Stat. § 84-1411(1) provides the general agenda and notice requirements for purposes for the Open Meetings Act.

> (1) Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the principal office of the public body during normal business hours. Agenda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting. Except for items of an emergency nature, the agenda shall not be altered later than (a) twenty-four hours before the scheduled commencement of the meeting or (b) forty-eight hours before the scheduled commencement of a meeting of a city council or village board scheduled outside the corporate limits of the municipality. The public body shall have the right to modify the agenda to include items of an emergency nature only at such public meeting.

Neb. Rev. Stat. § 84-1411(1) (2014) (emphasis added). The purpose of these requirements is to give some notice of the matters to be considered at the meeting so that persons who are interested will know which matters are under consideration. *State ex rel. Newman v. Columbus Township Board*, 15 Neb.. App. 656, 735 N.W.2d 399 (2007); *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).

Any item to be discussed by a public body, whether during an open or contemplated closed session, must be on the agenda in a "sufficiently descriptive" manner for that meeting. In our inquiry into your complaint, we reviewed the agendas for the Committees, as found on the University website. We believe the agendas for the Committees to be deficient under the Open Meetings Act.

The Outreach Committee met on the following dates: April 25, 2014; July 3, 2014; and July 25, 2014. The April 25, 2015 agenda listed the following items:

I. Call to Order
II. Roll Call
III. Public Comment
IV. Closed Session
V. Adjournment

For the July 3, 2014 and July 25, 2014 meetings, the agendas state:

I. Call to Order
II. Roll Call
III. Approval of minutes and ratification of actions
IV. Public Comment
V. Closed Session
VI. Adjournment

These three agendas lack any "sufficiently descriptive" notice of what will be discussed by the Outreach Committee at its meetings. Even if a public body intends to discuss an item in closed session, it must provide a description of that topic on its agenda. These agendas do not provide the necessary notice to members of the public who wish to attend the meeting of the topic or topics to be taken up by the Committee at its meeting.

Finally, the agenda for the first meeting of the Selection Committee on April 25, 2015 lists only the following:

I. Call to Order
II. Roll Call
III. Public Comment
IV. Closed Session
V. Adjournment

This agenda, again, lacks any sufficient description of any topics to be discussed, whether in open or closed session, by this Committee. For each of its following meetings, beginning August 13, 2014, the Selection Committee did provide descriptions for agenda items which would include discussion, as required by the Open Meetings Act. For example, for the August 13, 2014 meeting, item "V. Resolutions" states that the Committee would discuss "Quorum Rule and Committee Operating Principles."

We believe the agendas for the Outreach Committee and the April 25, 2014 agenda for the Selection Committee lacked sufficient descriptions as required by the Open Meetings Act.

ACTION BY THE DEPARTMENT OF JUSTICE

Since we have determined that the University has violated the Open Meetings Act, particularly with respect to the Outreach Committee and the agendas for the Committees, we must determine what 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. Our office has encountered situations similar to this one in the past, and has declined to prosecute members of the public body because we believed they were acting on the advice of counsel during their meetings. As the members of the Committees were acting on the advice of counsel, there would be no basis for any criminal prosecution.

A civil lawsuit is also not warranted, as the University conducted interviews of four finalists in open session, one of whom was subsequently hired by the University. At this point in time, there is no relief a court could provide to remedy any closed session violations by the Committees. A new President has been hired, and it is not feasible or possible for a court to "unring the bell" as the selection process has been completed. However, we will remind the University, through a copy of this letter to its counsel, that, in the future, it must adhere to the provisions of the Open Meetings Act, particularly with respect to closed sessions.

Finally, as indicated above, we have revisited the interplay between the Open Meetings Act and the Nebraska Public Records Statutes, and now believe the gap between the two statutory schemes is not as wide as previously thought. To the contrary, we believe that statutes relating to transparency in government should be read together to effect and "maintain a consistent and sensible scheme."[3] However, in view of the language in § 84-1410, and its current limitations, we are unable to deviate from the conclusions made in previous dispositions on this subject. We believe the time has come for a meaningful dialogue among the University, school districts, other political subdivisions, and the Nebraska Legislature to determine whether the public policy in favor of protecting non-finalists' identities during the hiring process for public employment, manifested in the "four finalists rule," should be legislatively extended to the Open Meetings Act.

---

[3] *Archer Daniels Midland Company v. State of Nebraska*, 290 Neb. 780, 788, 861 N.W.2d 733, 740 (2015.)

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.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

Natalee J. Hart
Assistant Attorney General

cc: Joel D. Pedersen

02-512-29