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October 9, 2015

Marsha Rogers
521 S. 4th Street
P.O. 492
Ceresco, NE 68017

Sheri Henderson
205 W. Main St.
P.O. Box 164
Ceresco, NE 68017

Doug Wilson
213 8th Street
P.O. Box 192
Ceresco, NE 68017

RE: *File Nos. 14-M-138, 15-M-101, 15-M-105; Village of Ceresco; Various Complainants*

Dear Ms. Rogers, Mr. Wilson and Ms. Henderson:

This disposition letter is in response to the complaints received by this office in which you allege violations of the Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2014, Supp. 2015) (the "Act"), by certain members of the Village of Ceresco Board of Trustees ("Board"). Specifically, you are challenging certain actions by Board members occurring before and during a Board meeting held on December 16, 2014, and during a Board meeting held on December 18, 2014. As is our normal practice with complaints alleging violations of the Act, we requested the public body involved to provide us a response to your complaints. In this regard, we received responses to each of your complaints from attorney Maureen Freeman-Caddy, who responded on behalf of the Board. We have now had an opportunity to consider your complaints, which we have consolidated for the purpose of this disposition, and the Board's responses in detail. Our conclusion and future action in this matter are set forth below.

Before we begin, we would like to point out that Neb. Rev. Stat. § 84-1414 of the Open Meetings Act gives this office general enforcement authority over the Act. This authority requires us to determine whether a public body has complied with the various procedural provisions of the Act relating to notice, agenda, closed session, public comment, voting, minutes, etc. However, our authority does not extend to scrutinizing substantive decisions made by a public body in the course of a public meeting. These

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are matters inherent to a public body's *governance*, over which we have no authority or jurisdiction. As a result, we cannot determine the legality or appropriateness of a decision, act, motion, etc. made by a public body which does not implicate a provision of the Open Meetings Act.

We also note that this office received additional correspondence from Ms. Henderson in which she raised concerns relating to due dates for utility bills and the village's observance of Martin Luther King Day. She indicates that there are ordinances relating to these items, and she seeks state intervention "to assure appropriate and ethical behavior" of village officials. Again, with the exception of the Open Meetings Act (and the Nebraska Public Records Statutes), the Attorney General has no general enforcement authority over local political subdivisions, like the Village of Ceresco. As a result, we are unable to intervene, make any disposition or take any action with respect to these items.

FACTS

Our understanding of the facts in this matter is based solely on your complaints and the information contained in the Board's responses. We have set out below a summary of the allegations in each complaint, followed by the Board's response.

Rogers Complaint

Ms. Rogers alleges that it was apparent from the beginning that all Board members, except the two outgoing members [Ms. Rogers and Mr. Wilson], had made prior "arrangements" before the December 16, 2014, meeting. She claims that the new Board members determined who would fill the vacant position on the Board, held no discussion, and immediately made a motion to fill the seat with the individual selected without offering a list of the other proposed candidates. Ms. Rogers states that the next violation occurred when the chairperson moved to unseat the current city manager[1] and fill the position with another individual without posting the job in the newspaper. No reason was given for the change, and all Board members voted unanimously in favor. Ms. Rogers states that "if there is any question as to whether this was orchestrated, they had a locksmith at the close of the meeting rekeying the locks to the city offices. Obviously on standby." Ms. Rogers condemns "the blatant orchestration by two board members to manipulate city offices/officers and personnel so that no one opposes any actions."

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[1] The "city manager" is also referred to as the "village clerk" and the "administrator/clerk/treasurer" below.

The Board's Response

With respect to the allegation that arrangements had been made by all Board members except Ms. Rogers and Mr. Wilson, the Board states that "[t]he wrongful act alleged appears to be that the two outgoing members of the Board were excluded from arrangements made by the other two remaining members . . . ." The Board states that no meeting can occur in the absence of a quorum, and that three members of the Board are necessary for a quorum. The Board states that assuming the other two members of the Board [Mr. Hartshorn and Mr. Burklund] discussed Board matters, the allegation on its face does not constitute a violation of the Open Meetings Act because two members of the Board cannot conduct village business.

With respect to the appointment of the city manager, the Board states that (1) the agenda for the meeting indicated "Village Appointments"; (2) the position at issue is an appointed position pursuant to Ceresco Municipal Code § 1-403; and (3) the position is for a term of one year, unless the individual is reappointed. The minutes of the meeting indicate that Joan Lindgren was appointed to the position by Board motion, second and unanimous vote by the newly installed Board in open session.[2] Also according to the minutes, the former clerk [Ms. Henderson] tendered her resignation prior to the appointment of the new clerk. Further, there is no indication that a motion to "unseat" Ms. Henderson occurred. Further, based on its research, there is no requirement that village positions be posted in the paper.

Wilson Complaint

Mr. Wilson states that he is the outgoing Board chairperson. He states that while still chair, and without his knowledge, two Board members interviewed and hired a new village clerk. He indicates that there are issues with respect to this particular hire. The Board members also had a locksmith present at the meeting to change all of the locks. Mr. Wilson alleges that three laws have been broken: (1) no one can be hired or fired without a Board vote; (2) job openings have to be posted for three weeks and published in the newspaper; and (3) public interviews must be conducted so citizens can weigh in on the decision. Mr. Wilson indicates that three people applied for a vacancy on the Board, but were not given the opportunity to make a public statement. The Board then selected a "friend of the new chairperson" to fill the position. Mr. Wilson indicates that since he was outgoing chair and next on the ballot for a position on the Board, he should have been given the opportunity to speak to the new Board members.

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[2] The minutes for the December 16, 2014, meeting are attached hereto as Exhibit A.

The Board's Response

With respect to the allegation that two members of the Board interviewed and hired the village clerk while Mr. Wilson was still Board chair, the Board reiterates that two members do not constitute a quorum, and since no meeting can occur without one, there was no violation of the Act. The Board notes again that Ms. Henderson tendered her resignation prior to the vote to appoint the village clerk, who was appointed by the Board in open session upon motion, second, and a roll call vote. With respect to allegations that public interviews should have been held, the Board asserts that no such requirement exists. Similarly, there is no requirement that candidates for a vacancy on a public board have the right to address the public body or make public statements prior to appointment. (*See* Neb. Rev. Stat. § 32-569 (Supp. 2015).) Since the remaining allegations in Mr. Wilson's complaint did not implicate the Open Meetings Act, the Board declined for the most part to address them.

Henderson Complaint

Ms. Henderson's complaint contains a series of questions relating to the appointment of the administrator/clerk/treasurer. For example, Ms. Henderson questions the propriety of appointing someone to the highest paid position in the village without advertising the position, interviewing candidates, and establishing qualifications; and questions the chair's contact with the clerk prior to the meeting, without the knowledge of the current chair Wilson. Ms. Henderson also questions the legality of the Board's amendments to the village's Wage and Salary Ordinance 2014-4 during its meeting on December 18, 2014. She states generally that "[t]here have been other violations of the open meetings act as well as conflict of interest violations by Hartshorn and Burklund in the course of the past 2 years."

The Board's Response

With respect to the open meetings allegations raised in Ms. Henderson's complaint, the Board states that there is nothing in the Act that would prohibit a sitting member of the Board from discussing matters outside of an open meeting with a non-board member for investigative or other purposes. Further, there is no allegation that a quorum of the sitting Board discussed public business outside of an open meeting. Allegations that the new and old Board members, except the outgoing members, met prior to the reorganizational meeting are mere speculation. The minutes indicate that the chair "moved to appoint Joan Lindgren: Administrator, Clerk, Treasurer. Lloyd moved to accept the appointment. Miller seconded. Voting in favor: Lloyd, Miller, Peterson, Burklund and Hartshorn, against: none. Motion carried." Finally, although Ms. Henderson alleges that Mr. Hartshorn and Mr. Burklund have violated the Act, there are no specific references for the Board to address.

DISCUSSION

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 public 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 public 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).

Over time, this office has consistently taken the position that two things must occur for a public body to hold a "meeting" subject to the requirements of the Open Meetings Act. First, a quorum of a public body must be present. Second, the public body must engage in at least one of the activities set out in the definition of "meeting" in Neb. Rev. Stat. § 84-1409(2) (2014)—i.e., "briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body." In our view, absent either of those elements, no "meeting" of a public body has occurred under the Act.

In the present case, the Board asserts that even assuming Mr. Hartshorn and Mr. Burklund discussed Board business outside of an open meeting, two members do not constitute a quorum. The Board notes that for the purposes of establishing a quorum, three members are necessary. It cites for us Neb. Rev. Stat. § 17-205 (2012), which states in pertinent part: "At all meetings of the board a majority of the trustees shall constitute a quorum to do business." The Board asserts that in the absence of a quorum, no "meeting" subject to the Act could have occurred.

In our disposition letter to File No. 10-M-107 *(Beatrice Public Schools Board of Education, Patrick Ethridge, Editor, Beatrice Daily Sun, Complainant),* we examined an open meetings complaint submitted to our office involving certain members of the Beatrice School Board and their actions relating to the hiring of a school superintendent. Our review of the facts indicated that the board chair, with the help of another board member, telephoned the other members of the school board relating to a material term

in the superintendent's proposed contract. The material term at issue was beyond the negotiation authority given to the board chair. The two board members then compared notes as to what the board members said. Based on this information, and with the consensus of five members, the board chair proceeded to enter into a "gentleman's agreement" with the superintendent candidate. The issue there was whether the informal, serial communications among board members outside of an open meeting took the place of, or were a substitute for, a formal, deliberative discussion of the board with respect to the hiring. We concluded that these five members violated the Open Meetings Act when they engaged in communications with one another outside of any open meeting, which resulted in the approval of a contract for the district's next superintendent.

In contrast, while it appears to us that Mr. Hartshorn and possibly Mr. Burklund discussed Board business[3] outside an open meeting, those actions, in the absence of a quorum, do not constitute a violation of the Act. Moreover, it does not appear that the newly elected Board members [Pamela Lloyd, Robert Miller] or the Board member appointed on December 16, 2014 [Scott Peterson] met with the two incumbent members of the Board, discussed Board matters, and made *decisions* pertaining to the Board outside of an open meeting. Because we are not convinced that a quorum of the Board was attempting to circumvent the Open Meetings Act prior to the meeting held on December 16, 2014, we are unable to conclude that any violation of the Act occurred under the circumstances presented here.

In addition, we do not believe any of the remaining allegations in your complaints, if determined to be true, would constitute a violation of the Open Meetings Act. For example, while the better practice may have been to publish notice for the village clerk position, get a list of prospective applicants, conduct interviews, etc.—the fact that the newly installed Board did not do so does not a constitute a violation of law. Our review of the record indicates that Ms. Henderson resigned prior to the new appointment, and that the subsequent appointment was made by motion, second, and roll call vote. The vote was unanimous. With respect to the appointment of the new trustee, there is nothing in the relevant statute[4] that requires the public body to hold a public hearing so

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[3] We believe there is little question that Mr. Hartshorn spoke to Ms. Lindgren about the clerk position prior to the meeting on December 16.

[4] Neb. Rev. Stat. § 32-569 provides, in pertinent part:

> (b) The mayor or chairperson of the board shall call a special meeting of the council or board of trustees or place the issue of filling such vacancy on the agenda at the next regular meeting at which time the mayor or chairperson shall submit the name of a qualified registered voter to fill the vacancy for the balance of the unexpired term. The regular or special meeting shall occur upon the death of the incumbent or within four weeks after the meeting at which such notice of vacancy has been presented. The

candidates can address the public body. Again, while the better process may have been to allow Mr. Wilson and others to speak to the Board about their interest in the position, the process in which Mr. Peterson was appointed to the position does not appear to be a violation of § 32-569 or the Open Meetings Act.

CONCLUSION

In sum, we believe that since two members of the Board do not constitute a quorum of the Board of Trustees, no meetings subject to the Open Meetings Act were held. Allegations that the new and old members of the Board conspired to circumvent the Act are without merit. Finally, allegations relating to the appointment of village officers, filling board vacancies, and amending village ordinances, etc., fall outside the scope of our authority under the Open Meetings Act.

Since we have determined that no further action by this office is warranted, we are closing this file. If you disagree with our analysis herein, you may wish to discuss this matter with your private attorneys to determine what additional remedies may be available to you under the Open Meetings Act.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

Leslie S. Donley
Assistant Attorney General

c: Maureen Freeman-Caddy

49-1406-29

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council or board of trustees shall vote upon such nominee, and if a majority votes in favor of such nominee, the vacancy shall be declared filled. . . . .

VILLAGE BOARD OF TRUSTEES
REGULAR MEETING
DECEMBER 16, 2014

Wilson called the meeting to order at 7:30 PM. Board members had been given agenda and supporting documents, and notices were posted. Rogers, Wilson, Hartshorn, and Burklund answered roll call. Also present: Ed Schroeder, Skylar Falter, Cay Ewoldt, Joe Francis, Scott Peterson, Sean Burklund, Jill Fishbaugher, Pam Lloyd, Bob Miller, Brian Roland, Craig Benes, Steve Anderson, and Sheri Henderson.

Wilson pointed out the Open Meeting Law Act posted on the wall of the Board Chambers.

Rogers moved to pay the claims, Wilson seconded. Voting in favor: Rogers, Wilson, Burklund, and Hartshorn, against: none. Motion carried. The claims are as follows: AGRIsales $56.50/st maint, Auto Alley $71.88/st parts, Blue Cross & Blue Shield $2,078.78/health ins, BlueTarp Financial 108.98/st repair, Ceresco 60+ $202.50/donation, Ceresco Days Committee $1,333.33/fireworks, AOL Online $40.99/internet, Bomgaars $88.83/st/prk/wat/gen, Frontier Coop $960.15/fuel, Fud & Tracy's Plumbing $225.00/comm bldg repairs, Healthplan Services $153.66/dental, HOA Solutions $12,305.00/wat, J C Small Engine $95.45/st, Jackson Services $126.58/uniforms and rug service, Lexis Law Publishing $66.08/books/sub, Menards $34.45/st/wwtp maint, Midwest Labs $199.45/sewer tests, Nebraska Health Laboratory $31.00/lab fees, One Call Concepts $1.10/diggers, OPPD $4,067.72/electricity, Quality Disposal $5,646.70/garbage service, Raymond Central Post Prom Party $100.00/donations, Sandy Tvrdy $150.00/Janitor, Schwarz Paper Co. $31.68/supplies, Sid Dillon $19.25/vehicle repairs, Verizon $124.73/phones, Village of Ceresco $60.80/petty cash, Wahoo Newspaper $120.11/publishing, NCS Equipment $766.12/st equipment, Baker & Taylor $57.43/library books/sub, Healthplan Services $153.66/dental, Husker Electric $179.40/comm bldg repairs, Otte Oil & Propane $2,166.92/propane, Prague Insurance Agency $15.00/life ins, Purchase Power $200.00/sewer, water postage, Ricoh USA $189.50/office copier, Sam's Club $280.14/lib books, Windstream $364.76/phones, payroll $16,970.48

Rogers moved to approve the November 18 meeting minutes, Wilson seconded, Voting in favor: Rogers, Wilson, Burklund, and Hartshorn, against: none. Motion carried.

Rogers moved to adjourn the meeting Sine Die. Wilson seconded. Voting in favor: Roger, Wilson, Burklund and Hartshorn, against: none. Motion carried.

Pam Lloyd and Bob Miller took their oaths of office for Village of Ceresco Board of Trustees.

Re-organization: **Hartshorn moved to appoint Henderson as Chair Pro-Tempore for the purposes of electing a Chairperson, Burklund seconded. Voting in favor: Lloyd, Miller, Burklund, Hartshorn, against: none. Motion carried.** Henderson asked for nominations for Chairperson. Burklund nominated Hartshorn. **Burklund moved nominations cease, Lloyd seconded. Voting in favor: Lloyd, Miller, Burklund, and Hartshorn, against: none. Motion carried. Hartshorn was announced as the Chairperson and the regular meeting reconvened.**

Hartshorn moved to appoint Scott Peterson to the vacancy on the Village Board. Voting in favor of the appointment: Lloyd, Miller, and Burklund, against: none: Motion carried. Peterson took oath of office and his seat at the Board table.

Chairperson Pro-Tempore: **Miller nominated Burklund for Chairperson Pro-Tempore. Lloyd moved that nominations cease, Miller seconded, Voting in favor: Lloyd, Miller, Peterson, and Hartshorn. Burklund abstained. Motion carried. Burklund was announced as the Chair Pro-Tempore.**

Confidentiality Agreements were signed by Hartshorn and Burklund.

Burklund moved to recess the meeting at 8:02 PM, Peterson seconded. Voting in favor: Lloyd, Peterson, Miller, Burklund, and Hartshorn, against: none. Motion carried.

The meeting resumed at 8:06 PM.

Hartshorn moved to designate the Post Office, Village Office, and CerescoBank as the official posting locations for the Meeting Agendas and Ordinances. Miller seconded. Voting in favor: Lloyd, Peterson, Miller, Burklund, and Hartshorn, against: none. Motion carried.

Henderson presented a new agenda with supporting documents, which included Sheri Henderson's resignation and Cyndy Bohaty's resignation. The Village Board questioned why the new agenda was presented after the meeting was started. Henderson said she forgot.

Hartshorn moved to appoint Joan Lindgren: Administrator, Clerk, Treasurer. Lloyd moved to accept the appointment. Miller seconded. Voting in favor: Lloyd, Miller, Peterson, Burklund and Hartshorn, against: none. Motion carried.

Henderson left the meeting. Pam Lloyd took over as Acting Clerk.

Hartshorn made the following Village Appointments:
Zoning Administrator-Joan Lindgren; Deputy Zoning Administrator-Bob Walla; Village Attorney-Loren Lindahl; Street Superintendent-Dennis Graham Olsson Associates; Fire Chief-Justin Maxson; Assist Chief Fire-Matt Bower; Assistant Chief Rescue-Sheri Henderson; Planning Commission-Ed Warholoski, Ben Moore, Mark Nelson; Library Board-Barb Hanson, Christy Coughlin; Tree Board-Lynn Maxson and Doug McIntosh; Dog Catcher-Emily Hass; Village Depositories-Ceresco Bank and First National Bank NE; Tim Hartshorn-Solid Waste Management; Village Board Appointments: Bob Miller-Parks and Water, Scott Peterson-Streets and Sewer, Pam Lloyd-Water and Parks, Dave Burklund-Sewer and Police, Tim Hartshorn-Police and Streets; Water/Sewer Commissioner-Brian Roland, and Streets/Parks Commissioner-Craig Benes. **Peterson moved to approve the 2014-2015 Village Appointments, Hartshorn seconded. Voting in favor: Peterson, Hartshorn, Burklund, Lloyd and Miller, against: none. Motion carried.**

Ed Schroeder CPA was present to review the audit report. He noted that $147,000 of sales tax was taken in. He recommended the Water Savings of $80 and the Ceresco Playground account of $100 be moved to General Checking. It was noted the liquor license fees have been paid to the school.

Hartshorn moved to accept the audit, Peterson seconded. Voting in favor: Hartshorn, Peterson, Lloyd, Miller and Burklund, against: none. Motion carried.

Skylar Falter of the Nebraska Department of Environmental Quality was present to review the Ceresco Wastewater Treatment Facility Energy Assessment.

The Board unanimously agreed to recess the meeting at 9:25 PM.

The meeting resumed at 9:29 PM.

Burklund moved to change the office locks immediately. Peterson seconded. Voting in favor: Burklund, Peterson, Lloyd, Miller and Hartshorn, against: none. Motion carried.

Roland reviewed monthly water and sewer reports and requested scaffolding so he can work on plumbing and air leaks. He noted that he will be in Firth on Thursday to attend a class.

Miller moved to allow up to $500 for the purchase of scaffolding. Hartshorn seconded. Voting in favor: Miller, Hartshorn, Burklund, Peterson and Lloyd, against: note. Motion carried.

Benes was present to review the streets and parks. He will check into the repair of the school flashing lights. **Burklund moved to purchase 6 lights/bulbs not to exceed $400.00. Miller seconded. Voting in favor: Burklund, Miller, Peterson, Hartshorn and Lloyd, against: none. Motion carried.**

Burklund moved to accept Brian Wilson's resignation. Peterson seconded. Voting in favor:

Burklund, Peterson, Miller, Hartshorn and Lloyd, against: none. Motion carried.

Steve Anderson was present and shared the Police Report.

Hartshorn moved to approve the Retainer Agreement for the attorney Loren Lindahl. Peterson seconded. Voting in favor: Hartshorn, Peterson, Burklund, Miller and Lloyd, against: none. Motion carried.

Miller moved to accept Sheri Henderson's resignation letter. Peterson seconded. It was noted that Henderson left the meeting as of today and turned in her keys; however, she was asked to stay and finish the meeting and she refused. Voting in favor: Miller, Peterson, Burklund, Hartshorn and Lloyd, against: none. Motion carried.

Peterson left the meeting at 10:26 PM.

Hartshorn, moved to continue the compost site solution until next month's meeting. Burklund seconded. Voting in favor: Hartshorn, Burklund, Miller and Lloyd, absent: Peterson, against: none. Motion carried.

Burklund moved to accept and file the certified election results. Hartshorn seconded. Voting in favor: Burklund, Hartshorn, Miller and Lloyd, absent: Peterson, against: none. Motion carried.

Hartshorn moved to accept the Treasurer's Report as presented. Miller seconded. Voting in favor: Hartshorn, Miller, Burklund and Lloyd, absent: Peterson, against: none. Motion carried.

Hartshorn moved to adjourn the meeting at 10:29 PM, Burklund seconded, Voting in favor: Hartshorn, Burklund, Miller and Lloyd, absent: Peterson, against: none. Motion carried.

Tim Hartshorn, Chair
Pam Lloyd, Acting Clerk