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**

December 21, 2015

Committee for Logic
and Honesty in Government
John Curry
PO Box 8
Columbus, NE 68602

RE: *File No. 15-M-144; Columbus City Council; Complainant John Curry o/b/o Committee for Logic and Honesty in Government*

Dear Mr. Curry:

This letter is in response to your complaint 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 (2014), by the Columbus City Council ("City Council"). As is our normal practice with such complaints, we forwarded copies of your complaint to the public body which is the subject of the complaint. We have received a response from the attorney for the City of Columbus, Mark Sipple, and have now had an opportunity to review your complaint, the City Council'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 complaint, its supporting documentation, the video recording of the relevant City Council meeting, and the response we received from the City Council. Your complaint concerns the September 8, 2015 meeting of the City Council and contains a number of distinct allegations. In general, your complaints center around the City's plan to purchase a proposed site for a new Library and Cultural Arts Center. The City initially intended to use funds from a temporary one-half cent sales tax to fund this purchase, but altered the funding source at the September 8, 2015 meeting to instead utilize the City's general fund. You believe the City Council and other City officials have been deceitful in changing this funding source. We have identified the following Open Meetings Act complaints made by you:

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(1) The agenda on September 8, 2015 was rearranged at the beginning of the meeting, with two agenda items moved up in the order of discussion;
(2) The agenda for the September 8, 2015 meeting was not sufficiently descriptive to provide the public with notice that the City Council intended to discuss and vote on a change of funding source for the proposed project;
(3) The reason given by the City Council for entering into closed session on September 8, 2015 "did not qualify as legitimate" under the Open Meetings Act;
(4) The City Council's discussion in the closed session on September 8, 2015 exceeded the subject matter given in the motion to enter into closed session; and
(5) The City Council held no public discussions on changing the funding source for the Library and Cultural Arts Center from the sales tax to the general fund.

We will discuss each of your complaints, in turn, below.

## 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).

### *Agenda*

You have alleged that the agenda for the September 8, 2015 meeting was not sufficiently descriptive to allow the public notice that the City Council would be discussing changing the funding source for the proposed Library and Cultural Arts Center from a one-half cent sales tax to the City's general fund. You also complain that

the City altered the order of certain agenda items, moving two agenda items up in the meeting.

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.* "Agenda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting." *Id.* 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).

On the City Council's agenda for its September 8, 2015 meeting, item 14.D was listed as "Resolution No. R15-116 approving purchase agreement with Trowbridge Motor Company in the amount of $371,000 for property acquisition for proposed library/cultural arts center." Item 19.A was "Distribution system lease and franchise agreement with Loup River Public Power District." Following agenda item 6, the City Council made a motion to hold a closed session on these two items before they were scheduled to be heard in the open session. The closed session was held before the discussion of Item 7, Public Hearings. You believe this to be a violation of the Open Meetings Act, as it is an alteration of the agenda without the showing of an emergency. The City Council points out that the substance of the agenda items was not altered at the meeting at issue, only the order of those agenda items. Items 14.D and 19.A both appeared on the agenda provided to the public at least 24 hours before the meeting. We agree with the City Council that the substance of those items was not altered at the meeting. Additionally, our review of the minutes and the video recording of this meeting show that Item 14.D was discussed twice during the meeting, once during the closed session held before the discussion of Item 7, and again in open session in the order in which this item was noticed on the agenda. The public discussion and vote held by the City Council on Item 14.D was taken up immediately following that of Item 14.C. As to Item 19.A, the City Council took no action on this agenda item on September 8. While this office does not encourage the practice, the Open Meetings Act does not prohibit a public body from altering the order of items to be discussed at an open meeting. Provided that items are not added or deleted from an agenda within 24 hours of a public meeting absent an emergency, there is no violation of the Open Meetings Act. As to the September 8, 2015 meeting of the City Council, the public had "reasonable notice" of the topics to be discussed by the City Council on that day. While a closed session was held on two agenda items earlier in the meeting than the items appear on the agenda for discussion and action, it appears to us that the public discussion and vote took place

during the portion of the meeting expected by the public. We find no violation of the Open Meetings Act as to this portion of your complaint.

You also complain that the agenda for the September 8 meeting lacked an agenda item sufficient to indicate to the public that the City Council would be discussing a change in funding source for the development of the Library and Cultural Arts Center from the proposed one-half cent sales tax to the City's general fund. The agenda lists item "14.D. Resolution No. R15-116 approving purchase agreement with Trowbridge Motor Company in the amount of $370,000 for property acquisition for proposed library/cultural arts center." You enclosed the draft of Resolution No. R15-116 in your submission. That resolution, as proposed, stated that the City of Columbus would acquire the Trowbridge Motor Company property for the proposed new library/cultural arts center at a cost of $370,000 to be paid from "funds programmed in the one half cent sales tax authorized by the voters as part of the ballot approved for the expansion of the Pawnee Park Waterpark." During the meeting on September 8, the minutes of the meeting reflect that this resolution "was amended to state that the funds for acquisition of property for a proposed library/cultural arts center be paid from the general fund as opposed to the one-half cent sales tax fund."

The question under the Open Meetings Act is whether agenda item 14.D was sufficiently descriptive to provide enough notice to members of the public that the funding source for the purchase of the property may be discussed. We believe it is. It is reasonable to believe that any given agenda item will have a certain amount of discussion by any public body – that is the intent of a meeting. Changes to proposals are not uncommon; a public meeting is not intended to be called in order to rubber-stamp items as they appear on the agenda. The purpose of an open meeting is for discussion of agenda items; such discussion often involves differing ideas and changes to initial proposals. If a public body were not permitted to make changes to proposals during a meeting, the hands of that public body would be tied, and meaningful discussion would not be conducted. While the changes to the proposed resolution do change the source of the funding for the proposed project, we believe the adopted language still falls within the agenda item. The text of the initial resolution clearly states a funding source. It is reasonable to believe that the City Council may discuss that funding during its meeting. While you believe the City Council had nefarious intent in changing the funding source, which it denies, the intent for why the funding source was changed is not within our purview. We may only review whether the City Council violated the Open Meetings Act, not whether the resolution as initially proposed legally utilized the one-half cent sales tax. Based upon our review, we do not believe the City Council has violated the Open Meetings Act with respect to your complaint as to its agenda for the September 8, 2015 meeting.

***Closed Sessions***

You have also made a number of complaints relating to a closed session of the City Council on September 8, 2015. A closed session was called by the City Council to discuss agenda items 14.D, the resolution relating to the purchase of property for the library and cultural arts center, and 19.A, the franchise agreement with Loup River Public Power District. Neb. Rev. Stat. § 84-1410 of the Open Meetings Act provides, in pertinent part:

> (1) [a]ny 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;
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> > (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;
> >
> > ***
>
> Nothing in this section shall permit a closed meeting for discussion of the appointment or election of a new member to any public body.
>
> (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.

The City Council entered into closed session on September 8, 2015 for approximately 45 minutes to discuss the topics of Resolution No. R15-116 and the agreements with the Loup River Public Power District. We do not believe these two topics are related; the City Council chose to only call one closed session to discuss them both. The minutes reflect:

> [t]he subject matters discussed in closed session were: 1) strategy session with respect to real estate purchase; specifically the purchase agreement with Trowbridge Motor Company in the amount of $370,000 for property acquisition for proposed library/cultural arts center; the reason for going into closed session on this item was for protection of the public interests; and 2) contract negotiations; specifically the distribution system lease and franchise agreement with Loup River Public Power District; the reason for going into closed session on this item was for protection of the public interests.

It does not appear that you oppose the discussion of the agreements with the Loup River Public Power District in closed session. From your complaint, we believe your allegations center solely on the discussion of the real estate purchase for the library/cultural arts center. You have three complaints regarding the closed session as to the City Council's discussion of the property acquisition. First, that the reason given for the closed session was not a legitimate reason under the Open Meetings Act to enter into closed session. Second, that the City Council's closed session discussions exceeded the reasons given in the motion to close, because later in the meeting the City Council voted on the change in funding source for the property purchase. You also claim to have a "well-informed source" who told you that the City Council discussed "more than what the public had repeatedly been promised" during the closed session, presumably regarding the funding of the proposed property purchase. And, third, that

the City Council held no public discussion following the closed session before voting to change the funding source, which you believe indicates that the City Council held improper discussions during the closed session and merely ratified the decision during the open session.

In its response, the City Council denies any impropriety in the manner in which it conducted the closed session of September 8, 2015. The City Council states that its motion to enter into closed session was proper and the subject matter discussed was appropriate for a closed session. The City denies any impropriety in the discussions that occurred in the closed session, or that it took any formal action in the closed session.

We have reviewed both the relevant portions of the video recording of the City Council meeting of September 8, 2015 and the agenda and minutes from that meeting. First, the motion to enter into closed session was procedurally correct. The City Council provided both the subject matter and the reason for entering into closed session – protection of the public interest and discussion of the negotiation for the Trowbridge property. The City Council also restated the limitation of the closed session on the record immediately before adjourning to the closed session. The subject matter provided by the City Council for discussion during closed session, that of a strategy session with respect to the proposed purchase of the Trowbridge property is a proper subject matter for discussion in closed session; it is a specific subject matter that the Nebraska Legislature has determined is appropriate for closed session discussions. We can find no violations as to the procedure used by the City Council or the topic which the City Council set forth for discussion in its closed session on this date.

You believe that the City Council's discussion in closed session exceeded the subject matter provided in its motion to close. You cite a "well-informed source" as evidence that the City Council exceeded the subject matter. Additionally, you draw the conclusion that the City Council "clearly" had discussions in closed session exceeding the subject matter because the City Council later proposed an amendment to Resolution No. R15-116 regarding the change in funding source for the property purchase. In its response letter, the City appears to take the position that discussion of the funding source for the property acquisition could properly be taken up during the closed session on September 8, as called by the City Council. We agree. The City Council entered into closed session to discuss the strategy and negotiation of the purchase of the Trowbridge property. We believe that the funding for that purchase is necessarily an integral part of that discussion. A closed session must be clearly necessary to serve the public interest, which with respect to real estate, would be the economic concerns surrounding the potential purchase of property. Those economic concerns may include not only the purchase price of the property, but the funding source as well. If the City Council discussed the change in funding source during the

closed session[1], that discussion was proper under the motion made and approved by the City Council on September 8. Any such discussion did not exceed the limitations of the closed session.

Finally, you believe that the public discussion on September 8, 2015 regarding Resolution No. R15-116 was deficient. You assert that because the City Council did not discuss the change in funding source in depth before voting to change the resolution, that improper discussions must have been held. However, as we believe that the funding source could reasonably have been discussed during the closed session, we do not believe that any improper discussions occurred. We have reviewed the portion of the recording of the City Council meeting where this resolution was amended and discussed. While it certainly may have been preferable for the City Council to discuss its amendment of the funding source in more depth, there is no violation of the Open Meetings Act by failing to do so. Discussion of the resolution and the amendment thereto did occur in the open meeting of September 8, 2015. The City Council opened the floor for questions from the public on the amendment to the resolution, and no member of the public questioned or commented on why the funding source was being changed. Formal action was taken during the open session following the discussion of this resolution, both on the amendment and the resolution as amended. We find no violation of the Act as to this portion of your complaint.

The City argues that you have no standing to bring your claims regarding the propriety of the closed session on September 8. In support of this, the City Council cites *Wasikowski v. Neb. Quality Jobs Bd.,* 264 Neb. 403 (2002), which held that if a person present at a meeting of a public body observes an open meetings law violation in the form of an improper closed session, and fails to object, that person waives his or her right to object at a later date. However, that portion of *Wasikowski* was legislatively overruled by amendment of Neb. Rev. Stat. § 84-1414 (3) by 2006 Neb. Laws 898, § 4. Neb. Rev. Stat. § 84-1414 (3) provides that a citizen may bring action to void an action of a public body; in 2006, language was added that "[i]t shall not be a defense that the citizen attended the meeting and failed to object at such time." While you have standing to assert your Open Meetings Act claims, we have found no violations by the City Council with respect to each of your complaints.

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[1] The City Council does not admit to any particular discussions during its closed session. Your reference to a "well-informed source" is insufficient hearsay evidence that such discussions regarding the funding took place. We cannot say for certain that the City Council discussed changing the funding source from the one-half cent sales tax during its closed session. However, ultimately whether it did or not does not matter, as having such a discussion would not violate the Open Meetings Act in this circumstance.

## CONCLUSION

For the reasons stated above, we do not believe the City Council has violated the Open Meetings Act as to the allegations found in your complaint. Since we have determined that no further action by this office is appropriate, 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 Open Meetings Act.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

Natalee J. Hart
Assistant Attorney General

cc: Mark M. Sipple

02-593-29