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

JON BRUNING
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

July 19, 2010

Mark Hunt
805 East Douglas
O'Neill, NE 68763

RE: *File No. 10-M-113; O'Neill Public School Board; Mark Hunt, Complainant*

Dear Mr. Hunt:

This disposition letter is in response to your e-mail correspondence dated March 21, 2010, in which you have requested that this office investigate alleged violations of the Nebraska Open Meetings Act (hereinafter, the "Act"), Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2008, Supp. 2009). Specifically, you have alleged that the O'Neill Public School Board violated the Act in an executive session held during the November 2009 school board meeting. As is our normal practice, we forwarded a copy of your complaint to the public body which is the subject of the complaint. In this case, we forwarded your complaint to the president of the Board, Marge Ziska. On April 21, 2010, we received a letter from attorney Karen A. Haase, who responded on behalf of the Board. Additionally, on July 13, we requested copies of the November 9, 2009, meeting agenda and minutes, which were provided to us along with audio tapes of the Board's meeting recorded before and after the executive session at issue here. We have now had an opportunity to review your complaint and the Board's response in detail. Our conclusion and future action in this matter are set forth below.

In your March 21, 2010, e-mail, you state the following:

> My concern is centered around the school boards use of executive session. I was the head fb [football] and gbb [girls basketball] coach at O'Neill High. During the fb season of 2009, I made some inappropriate comments during practices. I resigned my position as the head fb at that time. After the conclusion of the 2009 fb season a movement was conducted to remove me as the head gbb coach based on actions during

> fb season. The school board placed on their agenda for the November 2009 board meeting the item "Head Girls Basketball Coaching". At the meeting they went into executive session. There were around 30 people at the meeting. The board said they would let anyone come in to discuss gbb for 3 min. each. I have been told by some that presented that questions were asked about the fb incident in the executive meeting and a group of 4 individuals were allowed in for over 20 minutes. **My question is: Did the board violate the use of executive session since they specified it was for the topic of gbb, but allowed testimony and etc. about fb.** (Emphasis added.)

Ms. Haase indicates that in late October or early November, Superintendent Amy Shane notified you that you were no longer to serve as the girls basketball coach. After notifying you about this change, Ms. Shane then informed the girls basketball team that you would no longer serve as its coach. This announcement prompted calls from some team members' parents. One parent requested that this matter be placed on the agenda for the next Board meeting. It was then scheduled for the November 9, 2009, Board meeting.

Ms. Haase further indicates that Superintendent Shane contacted you prior to the meeting to inform you that the girls basketball activity assignment would be on the agenda. It is our understanding that you were informed that you might be discussed at the meeting, and were specifically told that the matter could be discussed in closed session. We also understand that you spoke with Superintendent Shane about this matter several times before the meeting, but ultimately decided not to attend.

At the November 9, 2009, meeting, the Board determined that a closed session would be appropriate in order to prevent injury to your reputation, and to protect the privacy rights and interests of students and patrons. After a show of hands, a list of names was created to determine how much time would be given to each patron. The Board president, Jim Gotschall, told the individuals who wanted to speak to keep their comments as brief as possible. He also announced that patrons would be allowed to address the Board one at a time, although students and parents could address the Board together.

A motion was made to go into executive session at 7:53 p.m., to discuss the "Girls Basketball Activity Assignment." The Board members and staff recall that one student entered with a parent, and a husband and wife appeared jointly, but everyone else who addressed the Board did so individually. During the closed session, each patron was asked to tell the Board what he or she had to say about *basketball coaching.* According to Ms. Haase, the Board members never made any comments relating to football, although some patrons did. After the interested patrons had addressed the

Board, the Board then conferred with school administration for around 20-25 minutes. The Board reconvened in open session at 10:29 p.m. No formal action was taken with respect to the girls basketball activity assignment agenda item.

DISCUSSION

Based on the foregoing, we now address your allegation that the Board violated the Open Meetings Act when it "allowed testimony and etc about fb" during its closed session on November 9, 2009. Neb. Rev. Stat. § 84-1410 of the Open Meetings Act allows a public body to convene a closed session when necessary for the protection of the public interest, or when necessary to prevent needless injury to the reputation of an individual and the individual has not requested that the discussion take place in open session. Additionally, subsection (2) of § 84-1410 provides, in relevant part:

> 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.**

(Emphasis added.) By their very nature, closed sessions are not recorded, nor are minutes kept of the discussion held in closed session.

In order for us to conclude that a violation occurred, you must demonstrate to us that the Board did, in fact, consider matters other than the girls basketball activity assignment during the closed session. In support of your allegation, you broadly submit that some people who addressed the Board were asked questions about the football incident. As indicated above, Ms. Haase has represented to us that, on the contrary, "[t]he board members never made any comments or asked any questions about football or the football incident." Ms. Haase further represents that Board president Gottshall recalls asking one question, but it was not about football. Additionally, while some Board members thought they may have asked some clarifying questions in response to patron comments, none of the members could specifically remember doing so. However, even if they had, we do not believe that Board members' questions (or comments) about football would necessarily imply that they had deviated from the stated purpose for the closed session. It appears to us that your retention as girls

basketball coach is a direct corollary to the problems that led to your resignation as football coach. As a result, we would anticipate that "football" would be part of any discussion as to whether you are retained as the girls basketball coach.

Finally, you state that a group of four individuals were allowed in to talk to the Board for over 20 minutes. This information is irrelevant to support a finding that the Board discussed something other than your retention as girls basketball coach. Consequently, and in the absence of any direct evidence to the contrary, we are unable to conclude that the Board conducted an improper executive session on November 9, 2009.

CONCLUSION

Since we have determined that the O'Neill Public School Board did not violate the Open Meetings Act during its closed session on November 9, 2009, no further action by this office is warranted, and 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,

JON BRUNING
Attorney General

Leslie S. Donley
Assistant Attorney General

cc: Karen A. Haase

49-513-30