STATE OF NEBRASKA

Office of the Attorney General

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JON BRUNING
ATTORNEY GENERAL

DALE A. COMER
ASSISTANT ATTORNEY GENERAL
CHIEF, LEGAL SERVICES BUREAU

December 10, 2010

Pam Daly, PhD
4775 County Road P39
Fort Calhoun, NE 68023

Re: *File No. 10-M-119; Washington County Board; Daly.*

Dear Ms. Daly:

This letter is in response to your correspondence dated April 29, 2010, which we received on May 3, 2010, regarding alleged violations of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010), by the Washington County Board (the "Board"). We considered your correspondence to be an Open Meetings complaint, and we followed our normal procedure with respect to such complaints and sent a copy of your complaint materials to the Board for a response. On May 20, 2010, we received a response to your complaint on behalf of the Board from Deputy Washington County Attorney Edmund E. Talbot III. We have now had an opportunity to review your complaint and the Board's response in detail, and our conclusions regarding this complaint are set out below.

FACTS

Our understanding of the facts in this case is based upon your complaint and the materials you provided to us with it, along with the response we received from the Board. In addition, the underlying fact situation which precipitated your Open Meetings complaint also precipitated a request for an opinion of the Attorney General from the Washington County Attorney. That opinion request provided additional facts.

Counsel for the Board indicated to us that the Chairperson of the Washington County Board is authorized to appoint committees of the Board pursuant to a Board Resolution dated December 7, 1948. As a result, the Board states that, for at least the past twenty years, the Board's Chairperson has appointed Board committees, and this process has occurred during an open session of a public Board meeting. Committees

are typically appointed using volunteers or specific Board members identified and selected by the Board's Chairperson.

There are several appointed department heads in Washington County who are hired by the county for those positions.[1] Apparently, it was decided that some form of performance evaluation should be conducted for those department heads. As a result, members of the Board received evaluations to fill out for the individuals in question. Duane Wilcox, Chairperson of the Board, then contacted other Board members informally and asked them to be on a Personnel Evaluation Committee. Acting under his authority as Chairperson of the Board, Wilcox appointed himself, Jeff Quist and Kent Clausen to that committee. However, their appointment was not conducted at an open Board meeting; nor was it announced to the Board as a whole. Nonetheless, the Performance Evaluation Committee proceeded with interviews of at least four of the department heads.

At a Board meeting on March 23, 2010, one member of the Board, Commissioner Hineline, questioned the propriety of the manner in which members of the Personnel Evaluation Committee were appointed and the propriety of the evaluation process itself. He asserted that the Personnel Evaluation Committee should have been created by Board Resolution, that evaluations of county personnel should have been compiled by that Committee and shared with the entire Board in closed session, and that the Board should have approved the evaluations in Open Session. Commissioner Hineline then made a motion to discontinue performance evaluations for department heads until proper procedures were in place for the evaluation process. That motion failed. However, we understand that the Personnel Evaluation Committee was dissolved at a subsequent Board meeting in May, and that the personnel evaluation process was suspended pending a response from this office to an opinion request from the Washington County Attorney regarding the propriety of personnel evaluations by committee.

ANALYSIS

Your complaint raised three questions under the Open Meetings Act: 1. whether the Board violated the Open Meetings Act by forming an evaluation committee in recess, 2. whether the Board violated the Open Meetings Act by having a committee take action evaluating county personnel without full Board approval and input, and 3. whether an agenda item under the Open Meetings Act must specifically indicate that a "motion to approve, disapprove or table. . . " may be made in a particular instance in order for such a motion to be proper.

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[1] The materials which we have received variously indicate that there are 3, 4 or 5 department heads.

We assume that your first question grows out of comments by Chairperson Wilcox at a Board meeting in April, 2010, when he indicated that the Personnel Evaluation Committee might have been formed at a recess. Obviously, if the Board or a quorum of the Board met privately in some fashion during the recess of a Board meeting and took action to make appointments to a Board subcommittee, then the Open Meetings Act was violated because the Board took action in secret. However, that is not what we understand occurred with appointment of the Personnel Evaluation Committee in this instance. Instead, Chairperson Wilcox unilaterally exercised his authority as Board chair and made appointments to the Committee.[2] There was no gathering of the Board involved. We do not believe that such unilateral action by the chairperson of the Board implicates or violates the Open Meetings Act.

Your second question is similar to one of the questions posed to us by the Washington County Attorney in an opinion request involving the same factual circumstances as your complaint. We recently provided the Washington County Attorney with an informal response to her request. We have enclosed a copy of that response for your information. In sum, we concluded that a decision to use a Board committee to perform performance evaluations of county employees is a governance decision which does not violate or implicate the Open Meetings Act unless the committee conducts a "meeting" which is subject to the Act without proper notice, preparation of an agenda, minutes, etc. Therefore, in direct response to your second question, we do not believe that the Board violated the Open Meetings Act simply by choosing to have a committee evaluate county personnel without full board approval and input.

With respect to your final question, we have taken the position over time that action may be taken by a public body with respect to matters which are properly listed on its agenda without any specific indication that a vote might be taken. For example, if the agenda for a city council meeting contained an agenda item for "placement of stop light on Sixth Street," the city council could vote on that issue without any specific language in the agenda which said "motion for placement of stop light on Sixth Street," or "action item: placement of stop light on Sixth Street." We base that conclusion upon our view that, given the nature of public meetings, members of the public should assume that action might be taken on any item properly listed on a public body's agenda. As a result, we do not believe that the additional language listed in your third question is necessary for a public body to act on a motion in connection with a proper agenda item.

Given the circumstances in this case, we plan no further action with this complaint, and we are closing this file. If you disagree with our analysis as set out above, you may wish to discuss this complaint with your private attorney to determine what additional remedies, if any, might be available to you.

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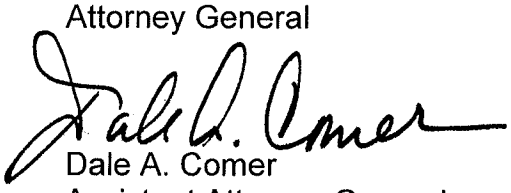
[2] We assume here, as has been represented to us, that the Board's Chairperson does have unilateral authority to make appointments to committees of the Board.

Sincerely,

JON BRUNING
Attorney General



Dale A. Comer
Assistant Attorney General
Chief, Legal Services Bureau

Enclosure

cc: Deputy Washington County Attorney Edmund E. Talbot III.

05-234-30

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JON BRUNING
ATTORNEY GENERAL

DALE A. COMER
ASSISTANT ATTORNEY GENERAL

December 10, 2010

Shurie R. Graeve
Washington County Attorney
1555 Colfax Street
Blair, NE 68008

Dear Ms. Graeve:

In an earlier letter to this office, you requested our opinion with respect to two questions involving the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2008, Cum. Supp. 2010), and the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010). In our Op. Att'y Gen. No. 88024 (March 17, 1988), we indicated, based in part upon the relevant statutes, that we would limit the issuance of formal opinions to county attorneys in Nebraska to questions involving criminal matters and matters relating to the public revenue (taxation). The questions you posed to us do not strictly fit within either of those categories. As a result, we cannot provide you with a formal opinion of this office. However, we will provide you with a brief, informal response to your questions, since we do have enforcement authority under both the Open Meetings Act and the Public Records Statutes, and since criminal sanctions can result from violations of either of those acts.

In your request letter, you state that Washington County has three appointed department heads who are subject to periodic performance evaluations. In the past, a three-person committee of the Washington County Board (the "Board") has apparently performed those evaluations, and that committee then makes a recommendation to the full Board if any action is desired. After completion of the evaluation process, evaluations are sealed and kept in your office. In light of those facts, you posed two questions to us:

1. Is it a violation of the open meetings law to perform the employee evaluations by committee with a recommendation to the Board for any action?

2. Are the performance evaluations prepared by all board members and submitted to the committee public records?

OPEN MEETINGS ISSUE

The Nebraska Open Meetings Act primarily deals with the public's right to observe the governing bodies of public entities in this state as they go about their business. To that end, that Act contains provisions which require notice of meetings, preparation of an agenda and preparation of minutes. In addition, the Act creates specific rights for members of the public who attend public meetings. However, while the Open Meetings Act requires that public business must be done in public, it does not speak to matters involving the governance of public bodies, i.e., how they choose to operate and carry out their duties. For example, the Open Meetings Act does not specify to what extent public bodies may act by committee or subcommittee, or under what circumstances the use of a committee or delegation of authority to a committee might be appropriate. Those latter issues are *governance* issues.

In the present instance, we do not believe that performing employee performance evaluations through a committee which makes recommendations to the full Board for action, in and of itself, violates, or even implicates, the Open Meetings Act.[1] A choice to use such a procedure represents a governance decision, not a decision pertaining to the public's right to observe the Board as it goes about its business. On the other hand, if a Board committee performing performance evaluations gathers together in a way which is subject to the Open Meetings Act without proper notice, publication of an agenda, minutes, etc., then the Act could be violated. For example, under § 84-1409 (1)(b), a meeting of a subcommittee of a public body is subject to the Open Meetings Act if a quorum of the public body attends the subcommittee meeting, or if the subcommittee is holding hearings, making policy, or taking formal action on behalf of its parent body. Consequently, a committee of the Board performing employee evaluations might act in a way which violates the Open Meetings Act *if* the committee meeting is subject to the Act under § 84-1409 (1)(b), *and if* the committee fails to give notice of its meeting and otherwise comply with the procedural requirements of Act. Absent those latter circumstances, the Open Meetings Act has no application to purely governance issues of the Board involving the use of committees.

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[1] If the Board is required by its policies to take action to form a committee for employee evaluations, such action would obviously have to be done by the Board in open session with proper notice, a roll call vote, etc.

PUBLIC RECORDS ISSUE

Under § 84-712.01, public records are defined as "all records or documents . . . of or belonging to this state, [or] any county . . . ." Accordingly, it appears to us that performance evaluations of county staff prepared by Board members and submitted to a performance evaluation committee are public records of Washington County.

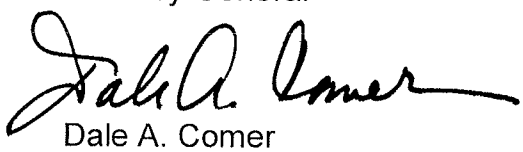
However, while the Nebraska Public Records Statutes do provide for access to public documents, they are not absolute, and they also provide for exceptions to disclosure by express and special provisions. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). For example, § 84-712.05 sets out a number of categories of documents which may be kept confidential from the public at the discretion of the agency involved, including one such category set out at § 84-712.05 (7):

> Personal information in records regarding personnel of public bodies other than salaries and routine directory information.

It appears to us that the performance evaluations described in your letter which involve evaluations of county staff by Board members do contain personal information regarding personnel of public bodies and do not constitute salary or routine directory information. Therefore, the Board may keep those records confidential under § 84-712.05 (7) unless they have been otherwise disclosed in a public meeting in some fashion.

Sincerely,

JON BRUNING
Attorney General



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