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

JON BRUNING
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

May 22, 2012

Martha Cook
83671 555th Avenue
Norfolk, NE 68701

RE: *File Nos. 10-M-143, 11-M-101, 11-M-102; Nebraska Unified District #1 Board of Education et al.; Martha Cook, Complainant*

Dear Ms. Cook:

This disposition letter is in response to the four complaints you filed with our office under the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2008, Cum. Supp. 2010; Supp. 2011) (the "OMA" or "Act"). Your complaints contain a series of allegations against the Nebraska Unified District No. 1 Board of Education (the "Board"), and its three advisory boards—Orchard, Clearwater and Verdigre. As is our normal practice, we forwarded a copy of the complaints to the public body which is the subject of the complaints. In this case, we forwarded your first two complaints to the then president of the Board, Gordon Schrader. Your third complaint was forwarded to Board legal counsel, John F. Recknor. Mr. Recknor responded to each of your complaints by letter to us dated January 6, 2011, February 3, 2011, and February 24, 2011, respectively. We received your final complaint on August 10, 2011, and determined that a response from the district as to the allegations raised in that complaint was unnecessary. We have now had an opportunity to review all of your complaints 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 OMA. This authority requires us to determine whether a public body has complied with the various procedural provisions of the OMA relating to agenda, notice, closed session, voting, minutes, etc. However, our authority does not extend to scrutinizing the substantive acts taken by a public body in the course of a public meeting. These 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.

ANALYSIS

Neb. Rev. Stat. § 84-1408 (2008) 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).

We have identified fifteen separate allegations in your four complaints, which we have set out below in boldface type. Our response follows each individual allegation.

FIRST COMPLAINT [NOVEMBER 15, 2010, BOARD MEETING]

1. You allege that agenda item #7 is not specific enough to inform patrons of what will be discussed, or that the Board would be speaking with its auditor.

Neb. Rev. Stat. § 84-1411(1) of the OMA requires, in part, that "[a]genda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting." Here, we believe the agenda item "Review and Approve the 2009-2010 Audit Report" is sufficiently descriptive to let the public know what the Board would be discussing, including a potential conference with the Board's auditor. As a result, we find no violation of the OMA.

2. You allege that agenda item #10 does not inform the public that the Board will discuss "the idea of combining the Orchard and Clearwater advisory boards."

To the contrary, we believe the agenda item "Discuss Boards [*sic*] Plan on Reorganization at Clearwater and Orchard for 2011-2012" is sufficiently descriptive to let the public know what the Board would be discussing at its meeting. As a result we find no violation of the OMA.

3. You allege that agenda item #13—"Executive Session to Interview Mr. Sanne and Mr. Martin for Possible Co-Superintendent Position"—is not a valid reason to go into executive session.

Neb. Rev. Stat. § 84-1410 of the OMA provides, in relevant 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;
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> (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; or
>
> (e) For the Community Trust created under section 81-1801.02, discussion regarding the amounts to be paid to individuals who have suffered from a tragedy of violence or natural disaster.
>
> Nothing in this section shall permit a closed meeting for discussion of the appointment or election of a new member to any public body.

Additionally, "[p]rovisions permitting closed sessions and exemption from openness of a meeting must be narrowly and strictly construed." *Grein* v. *Board of Education of the School District of Fremont*, 216 Neb. 158, 165, 343 N.W.2d 718, 723 (1984).

Thus, 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 individual has not requested an open forum. 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." With these statutory provisions in mind, we attempt to reconcile the subject matter of the closed session with the statutory reason given in the motion to close to make a determination as to whether the closed session was *clearly necessary.*

Mr. Recknor informs us that, at that time, the Board was considering a co-superintendency for the second semester of the 2011-2012 school year. He indicates that there was expressed concern that the individuals involved would not be interested in such an arrangement due to the myriad of complaints filed against the Board and the Verdigre board "stemming from a 2008 election in which [you] and others were apparently unhappy about the success of a bond question on the ballot that year." Mr. Recknor states that the Board wanted to know whether the two individuals could get along, and "under what conditions if any they would be inclined to do a temporary co-superintendent arrangement. The matter became moot when Mr. Sanne indicated he would not be interested in a permanent superintendency position."

The meeting minutes indicate that the Board approved a motion to go into closed session to interview both individuals for possible co-superintendent positions. The stated reason for the closed session was "the protection [*sic*] of needless injury to the reputation of an individual." The meeting was then closed for 57 minutes. In the present case, there has been no clear showing by the Board that the closed session on November 15, 2010, was clearly necessary to prevent needless injury to the reputations of Mr. Sanne and Mr. Martin. This is especially true when you consider that, prior to the closed session, Mr. Sanne told the Board his intention with respect to a proposed co-superintendency. Under these circumstances, we believe that the Board violated the Open Meetings Act when it chose to go into closed session to interview these individuals.

SECOND COMPLAINT [NOVEMBER AND DECEMBER 2010 BOARD MEETINGS]

4. You state that the December meeting minutes indicate that the Board "decided at some point on a course of action, to ask the advisory boards to consent to a proposed co-superintendent position and to accept the candidates." However, you assert that this decision was not reached in open session in November, and you ask us to investigate whether the decision was made during the November executive session.

The December 20, 2010, meeting[1] minutes provide, in relevant part:

> Superintendent Kuester reported that the consensus of the advisory boards was to support the co-superintendent position (Mike Sanne and Dale Martin) for the second semester of the 2011-2012 school year and Dale Martin as superintendent for the 2012-2013 school year. A motion was made by Thiele, seconded by McCormick, to approve a co-superintendent position with Mike Sanne and Dale Martin for the second semester of 2011-2012, with responsibilities and compensation to be determined. Voting Aye: Thiele, McCormick, Liska, Shrader. Nay: none. Absent: McKillip, Twibell. Motion Carried.
>
> A motion was made by McCormick, seconded by Liska, to approve Dale Martin as the superintendent of Nebraska Unified District #1 for 2012-2013. Voting Aye: McCormick, Liska, Shrader, Thiele. Nay: none. Absent: McKillip, Twibell. Motion carried.

It seems to us that just because Mr. Kuester reported that the advisory boards were in consensus on this matter does not mean that the Board came to a *decision*, either formally or secretly, to seek their consensus. It is a presumption we are unwilling to make, or further investigate.

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[1] Mr. Recknor informs us that the December 15, 2010, meeting was rescheduled to December 20, 2010, due to inclement weather. This meeting agenda was modified from the earlier meeting agenda with the addition of three new items. The Board's discussion on the co-superintendent positions was held under [revised] Agenda Item No. 11: "Discuss and Possibly Approve a Motion(s) to Fill the Superintendent Position for 2nd Semester of 2011-2012 & for 2012-2013."

5. You allege that Item #10[2] is not specific enough to indicate that the superintendent would request that the Board pay for legal representation for district staff facing lawsuits.

The particular agenda at issue read: Litigation/Complaint Update with Possible Motion. According to Mr. Recknor, "[n]o such motion as she complains of was requested by the Superintendent." Mr. Recknor suggests that maybe you are "confused about a request that the new superintendent's contract be evaluated with a request to [him] to discuss indemnification generally with the Board at a later date." Based on the information received here, and our analysis under number 15, we are unable to conclude that the agenda item was insufficient.

6. You allege that the minutes for item #10 [#12] do not report the substance of the discussion that took place during the meeting, i.e., (1) that the superintendent wanted the Board to approve a motion authorizing the school district to pay for legal counsel for any staff facing a lawsuit; (2) what the current litigation/complaints were; or (3) detailing the ex-chairman's "tirade."

Please see our responses to number 5 above, and number 15, *infra*. With respect to the litigation/complaints discussed, Mr. Recknor asserts that "[p]erhaps Ms. Cook did not know of litigation brought by Charles Cook, her relative, in the District Court of Knox County. I doubt she was attempting to suggest that she was unaware of the two open meetings act complaints that she has brought."

As to the comments of ex-president Shrader, § 84-1413 of the OMA only requires that the public body set out in the minutes "the time, place, members present and absent, and the substance of all matters discussed." Minutes are not intended to be a complete transcription of the proceedings, and any personal observations offered by Mr. Shrader are not necessarily matters discussed by the Board. We find no violation of the OMA as to these matters.

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[2] Item #10 became agenda item #12 in the December 20, 2010, agenda. The actual language remained the same, however.

7. You claim agenda item #11—"administrative superintendent evaluation"—is a meaningless phrase. You question the propriety of the executive session based on the Board's direction to the superintendent after the session to "'review and update the language in administrative contracts.'"

According to the meeting minutes:

> At 10:29 a.m., a motion was made by Thiele, seconded by McCormick, to go into executive session for superintendent evaluation and litigation strategies and is necessary for the protection [*sic*] of needless injury to the reputation of an individual. President Shrader repeated the motion.
>
> * * *
>
> The Board directed Mr. Kuester to contact legal counsel to review and update the language in the administrative contracts.

As indicated in our response to number 3 above, § 84-1410 expressly allows public bodies to go into closed session for the "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 . . . ." Mr. Recknor informs us that the superintendent's evaluation

> had nothing to do with any indemnification and there was no consideration undertaken of adding any indemnification language to any contract of any future superintendent. As is the practice of many districts, when a long-time administrator retires, the Board is simply taking the opportunity to seek my advice on how the administrative contract for a future superintendent might be improved upon or clarified.

Your assertion that it is unreasonable to believe the Board conducted an evaluation in light of the Board's directive to Mr. Kuester after the closed session is simply not plausible. Additionally, "'[i]n the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed.'" *Wolf v. Grubbs*, 17 Neb. App. 292, 314, 759 N.W.2d 499, 520 (2009) quoting *KLH Retirement Planning v. Okwumuo*, 263 Neb. 760, 764, 642 N.W.2d 801, 805 (2002).

THIRD COMPLAINT RELATING TO VARIOUS BOARDS AND MEETINGS

8. You allege that on November 4, 2010, the Orchard Advisory Board [OAB] went into executive session "to discuss a possible co-superintendency." The Clearwater Advisory Board [CAB] did the same on November 9, 2010. You claim that this topic does not qualify for an executive session.

Unlike the situation outlined in our response to number 3, where the Board closed its meeting to interview the candidates, here the two boards closed their meeting to discuss the idea of having co-superintendents. According to the meeting minutes for each board, the reason given for closing the meeting was for the "protection [*sic*] of needless injury to the reputation of any individuals." In his response, Mr. Recknor represents that nothing was decided during the closed session, "but the Advisory Board felt it could not have a frank discussion regarding whether two perspective [*sic*] co-superintendent participants could profitably work together." While the subject matter may have been an appropriate topic for a closed session, the record is unclear as to whether each board advised Messrs. Sanne and Martin that they would be the subject of the proposed closed session, and then gave them the opportunity to have that discussion take place in the open. A public body's reliance on this statutory reason to close a meeting requires notice to the individuals involved. As a result, it appears that the propriety of these closed sessions is questionable.

9. You state that on November 9, 2010, the Verdigre Original Board [VOB] went into closed session to discuss "personnel." You then state that the minutes of the December 6, 2010, meeting indicate that Melissa McCormick, one of the VOB members selected to serve on the Board, commented "that she had presented their recommendations to the unified board regarding the replacement of [the] superintendent." You claim that the VOB did not formulate any recommendations on this particular matter in open session.

Again, you have presumed that the VOB made formal recommendations with respect to the co-superintendent positions. The more likely scenario here, based on the record before us, is that the advisory board discussed the co-superintendency issue, and Ms. McCormick conveyed that discussion to the Board. Mr. Recknor represents to us that "Melissa McCormick was simply stating that she had some reservations about a co-superintendent position, and was informing the Verdigre Board of her position. The Advisory Board's responsibilities are advisory in nature and the Advisory Board would not have any authority to determine how a superintendency would be formulated for the unified district."[3] Ultimately, you have asked us to conclude that the VOB violated the

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[3] Mr. Recknor's comment and the introductory paragraph in your third complaint prompted our review of the "Interlocal Agreement for the Renewal and Continuation of Nebraska School District #1," which sets out the governance structure of the Unified District. Section 1, "Unified Board," provides in

Act based on comments made by Ms. McCormick at one meeting regarding comments she made at another meeting. We decline to do so.

10. You claim that the actions of the three advisory boards suggest that they were directed to discuss this topic in closed session.

Even if this were true, it would not necessarily constitute a violation of the Act, so long as the substantive and technical requirements of § 84-1410 were met.

11. You allege that none of the advisory boards passed a motion or reached a consensus in open session during their November meetings, and if they formulated recommendations during the executive sessions, they violated the OMA.

Please see our responses to numbers 8 and 9 above.

12. You allege that there is no "public record" as to when Ms. McCormick presented recommendations to the Board, etc.

Please see our responses to numbers 8 and 9 above. Additionally, Mr. Recknor states that your assertion "is accurate in that there is no public record of Melissa McCormick's comments since they were nothing more than an expression of her thoughts on the co-superintendency concept, and her comments did not constitute a motion or any manner of recommendation."

13. You allege that the minutes for the OAB meeting held on December 6, 2010, report that the decision to have one person fill the superintendent position, and have Martin and Sanne share the superintendent duties from January to June 2012, was made at the November 15, 2010, Board meeting. However, no motions were made at the November meeting. You inquire as to when the decision was made.

Our response to number 4 is applicable here. The record indicates that the Board discussed the co-superintendency at its meeting on November 15, 2010. On December 20, 2010, the Board further discussed the matter and moved to approve Messrs. Martin and Sanne for co-superintendent positions for the second semester of 2012, and to hire Mr. Martin as the Unified District's superintendent going forward. Mr.

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relevant part that "[i]t is important that the Advisory Boards advise only and do not attempt to micromanage the responsibilities of the Unified Board." Advisory boards are charged with "administering the Activity Fund, Special Building Fund, Bond Fund, Hazardous Waste Fund and Hot Lunch Fund." With these provisions in mind, and understanding that the advisory boards carry little to no weight in hiring a superintendent, we can understand why "recommendations" would not be not formally made.

Kuester may have reported this arrangement to the OAB at its December 6, 2010, meeting. But it was not formally decided until December 20, 2010.

14. You allege that Mr. Kuester reported to the Board, during the December 20, 2010, meeting, that the advisory boards had come to a consensus with respect to the co-superintendency positions and naming Dale Martin as Kuester's successor. However, none of the advisory boards came to a consensus regarding this matter.

We believe we have already addressed this allegation in our responses to numbers 8 and 9 above. Additionally, Mr. Recknor represents that

> Supt. Kuester did report to the Unified board that he believed it was the consensus of the various advisory boards to support a co-superintendency from January, 2012, through June, 2012. That information was obtained informally by Supt. Kuester in talking with various advisory boards at their December meetings. Supt. Kuester obtained this sense of the advisory boards by talking with various members, but no vote by an advisory board was necessary in order for the Unified Board to make its decision concerning filling the superintendency.

We are unable to conclude that a violation of the OMA occurred under the circumstances set out here.

FOURTH COMPLAINT [JULY 11, 2011, BOARD MEETING]

15. Your final allegation relates to the closed session held by the Board on July 11, 2011. You claim that "[i]n the motion to enter executive session, there is no mention of the subject matter." You state that "[t]he reason given that necessitated the executive session was the discussion of litigation strategies with legal counsel." However, you assert that the "subject matter" could have been any number of outstanding cases and/or complaints.

As an initial matter, we disagree with your assertion that "discuss[ing] litigation strategies with legal counsel" was the "reason" for the closed session. In our view, discussing litigation strategies with counsel was, in fact, the subject matter. What is missing here is the *reason* to close (protection of the public interest or prevention of needless injury to an individual's reputation). As a result, we believe that the Board's motion in this regard was not in compliance with § 84-1410, and therefore improper.

Ultimately, your question to us is whether the Board should have identified the specific litigation being discussed during its closed session. An almost identical question was recently raised in another open meeting complaint, where the complainant there alleged that the public body's agendas and minutes were insufficient under the OMA because they did not identify the specific litigation and imminent litigation which were the subject of the closed sessions. In our response to that complaint, we concluded that, on balance, the better answer is that public bodies are not required to identify the specific litigation (or imminent litigation) in their agendas and minutes. We cited several different reasons to support our conclusion. First, the agenda items prepared by the public body gave the public reasonable notice of the matters to be considered—that it would be discussing litigation involving the public body. Second, there is no specific language in the OMA which requires public bodies to identify the particular litigation which is the subject of a proper closed session. Third, there may be instances where identification of the particular litigation may have an adverse effect on the conduct of the litigation or any negotiations relating to its disposition. And fourth, clearly the OMA recognizes the public interests served by allowing discussion relating to litigation involving public bodies to be kept confidential.

Additionally, we pointed out that citizens had other means to obtain information about pending or imminent litigation involving public bodies. For example, public records requests under Neb. Rev. Stat. § 84-712 could elicit information, as would using the JUSTICE system to access the State of Nebraska's trial court case information. Finally, we noted that any significant settlement involving a public body was subject to reporting requirements under Neb. Rev. Stat. § 84-713 (Cum. Supp. 2010), and any final decisions involving litigation or the payment of such settlements would require an affirmative vote of the public body involved.

You have raised a relevant question with respect to the Board's closed session. However, based on the foregoing analysis, we believe that the Board was not required to identify the litigation discussed during its closed session on July 11, 2011. Consequently, we find no violation of the OMA.

ACTION BY THE ATTORNEY GENERAL

The question now becomes what action to take in light of our conclusion that the Nebraska Unified District No. 1 Board of Education violated the Open Meetings Act when it interviewed Mr. Sanne and Mr. Martin in closed session during its meeting on November 15, 2010; and failed to comply with the technical requirement with respect to its motion to close on July 11, 2011. Two possibilities exist under the statute—filing a civil lawsuit to void the Board's actions or pursuing criminal prosecution against the individual members of the Board. However, we do not believe a civil lawsuit to void is

appropriate because the Board could argue that it cured any violation by discussing and voting on the co-superintendent positions at its meeting on December 20, 2010. *See Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979). We also do not believe that a criminal prosecution of Board members for a knowing violation of the Open Meetings Act is appropriate because it appears that the Board relied on advice from counsel with respect to these proceedings. Consequently, consistent with our actions in previous cases, we will admonish the members of the Board, by sending a copy of this disposition letter to Mr. Recknor, and emphasize that closed sessions are only permissible when clearly necessary to protect the public interest or prevent needless injury to an individual's reputation. If the Board is unable to make this determination, then a closed session is improper. In the end, any question about the propriety of a closed session can be resolved by following the court's conclusion in *Grein*:

> 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.

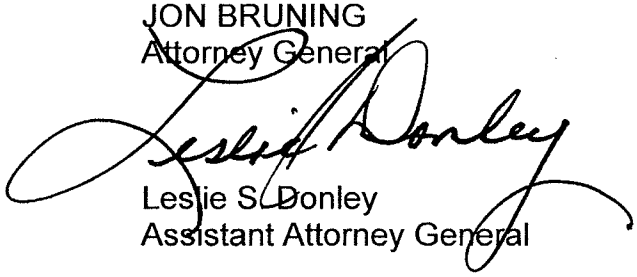
Grein at 168, 343 N.W.2d at 724. We would also like to point out to the members of the Board that they have now been fully advised as to how their conduct violated the Open Meetings Act. As a result, it will be far more difficult for those individuals to argue in the future that they did not "knowingly" violate the Act should any further questionable conduct occur.

Finally, we would like to comment briefly on the rancorous relationship that appears to have enveloped you and these various school boards, and Mr. Recknor. Early on in this process, Mr. Recknor sent us an e-mail that you had written to him on December 30, 2010, in which you indicated that it was your "new hobby" to keep track of all the ways that school personnel "obfuscate[d] the formation of public policy." We were alarmed by its divisive tone. However, a good deal of time has passed since you sent that e-mail. Superintendent Kuester has retired, and Gordon Shrader is no longer president. While you certainly may continue to file complaints for alleged violations of the open meetings law, we would ask you to be circumspect in doing so. And consider whether filing another complaint under the Act is merely a guise to attack these boards for other perceived offenses.

Since we have determined that no further action by this office is warranted, we are closing these files. However, you may wish to discuss this matter with your private attorney to determine what remedies, if any, may be available to you under the Open Meetings Act.

Sincerely,

JON BRUNING
Attorney General



Leslie S. Donley
Assistant Attorney General

cc: John F. Recknor

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