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June 16, 2011

Dorothy Lanphier
Director, Papio-Missouri NRD
812 S. 51st St.
Omaha, NE 68106

Re: *File No. 10-M-112; Papio-Missouri NRD Board; Dorothy Lanphier*

Dear Ms. Lanphier:

This letter is in response to your correspondence received by us on March 16, 2011 in which you requested that this office investigate alleged violations by the Papio-Missouri River Natural Resources District Board of Directors (the "Board") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2008; Cum Supp. 2010). In accordance with our normal procedures, we requested a response from the Board after we received your complaint, and we subsequently received a response from John Winker, General Manager of the Papio-Missouri River NRD. We have now had an opportunity to review your allegations and the Board's response in detail, and our conclusions are set out below.

FACTS

Our understanding of the facts in this case is based upon your correspondence, along with the response from the Board. Your Open Meetings Act concerns relate to the 2011 Legislative Conference of the Nebraska Association of Resources Districts held in January, 2011. Your allegation, as we interpret it, is that the Board held an improper meeting at the Legislative Conference to discuss legislative bills. Each member of the Board who was present expressed his or her view on several different bills. These discussions were then utilized by the Board's voting representative to help determine the Nebraska Association of Resources Districts' official position on these bills.

ANALYSIS

Over time, we have consistently taken the position that two things must occur for a public body to hold a meeting that is subject to the requirements of the Open Meetings Act. First, we have indicated that a quorum of a public body must be present to

constitute a "meeting." Second, we believe that a meeting of a public body only occurs if that public body engages in some of the activities set out in the statutory definition of "meeting" found at Neb. Rev. Stat. § 84-1409(2) (2008), i.e., the public body must engage in "briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body." In our view, when both of these elements have been satisfied, a "meeting" of a public body has occurred under the Open Meetings Act.

It is our understanding from your letter that the Board is composed of eleven members, and that a majority of the members constitute a quorum.[1] In other words, a quorum is reached by the attendance of six Board members. It appears on January 25, 2011, eight members of the Board met in private at the conference to discuss legislative bills.[2] Thus, a quorum of the Board was present and the first factor as to whether a meeting occurred was satisfied.

The other element that must be met is that the quorum of the public body engaged in briefing, discussion of public business, the formation of tentative policy, or the taking of any action. When the Board met in its private caucus on January 25, 2011, its purpose was to discuss legislative bills that had been introduced and had the potential of affecting the Papio-Missouri River NRD. Your letter states that "Directors informally discussed their support or opposition to certain bills during the private caucus. Ne legislative bills were singled out to be voted on separately. . . .The purpose of the discussion was to provide input to our NRD's voting representative at the NARD Conference, Rich Tesar." We believe that under these set of facts, briefing, the discussion of public business and/or the formation of tentative policy occurred at this meeting. This is further supported by the letter you attached, dated February 4, 2011 in which Mr. Winker stated that the Board had taken an official position regarding certain legislative bills. This was little more than a week following this private conference, and according to the website of the NRD, no Board meeting had occurred in the interim during which an official policy could have been adopted at an Open Meeting.

The Board's position is somewhat unclear in their response to your complaint. However, we interpret their response to be that because Director Tesar was not bound by the views of his fellow Directors in how he would vote at the Conference as the "voting representative" of the Board, no violation of the Open Meetings Act occurred. According to the response of the Board, what took place was "nothing more than everyday and permissible political discussions." However, we disagree, given the topic of conversation was the position of the Directors on various legislative bills, which would

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1 *See* Neb. Rev. Stat. § 17-105 (2007).

2 Mere attendance at the conference by a quorum of the Board is not a violation of the Open Meetings Act, as Neb. Rev. Stat. § 84-1410(5) excludes conference attendance and travel from the Act. This office is concerned only with the private meeting consisting only of Board members and staff, not of the conference in general.

be utilized by the voting representative in casting his vote, and a quorum of the Board was present. This constitutes "briefing" under the Open Meetings Act. The Board also states that the annual conference is "very rarely . . attended by enough of the NRD's directors needed to constitute a quorum." However, a quorum *did* attend in 2011, so this argument is unpersuasive.

As to the February 4, 2011 letter, Mr. Winker states that it expresses "[his] own opinion and [his] opinion of the mood of the NRD Board of Directors concerning the proposed legislation therein discussed." However, Mr. Winker's letter is written as General Manager of the NRD, in his official capacity and was written to "clarify the position" of the NRD and the Nebraska conference. On its face, the letter is not one of Mr. Winker's "opinion."

As there was a quorum and a briefing, discussion or public business, or a formation of tentative policy, the January 25, 2011 gathering of Board members was, therefore, a "meeting" subject to the provisions of the Open Meetings Act. However, the Board did not provide public notice prior to this meeting, nor did it appear to follow any other provisions of the Open Meetings Act on this date. These are required by the Act of all public bodies, even if they are "unjustifiably strict and unreasonably paralytic," in Mr. Winker's view. Based on the information you have provided, it is our conclusion that this meeting of the Board violated the Open Meetings Act.

However, as the Board did not engage in a vote, only briefing and discussion, this situation does not warrant further action by this office. As there was no formal action by the Board, there is nothing that can be void or voidable under the Open Meetings Act. However, we would strongly caution the Board in any future meetings in which a quorum is present not to discuss any public business.

CONCLUSION

For the reasons stated above, we believe that the Board violated the Open Meetings Act on January 25, 2011. However, as explained above, no further action is necessary by this office. If you disagree with the analysis we have set out above, you may wish to contact your private attorney to determine what additional remedies, if any, are available to you under the Open Meetings Act.

Sincerely,

JON BRUNING
Attorney General

Natalee J. Hart
Assistant Attorney General

cc: John Winker

02-246-30