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September 12, 2011

Clifford Bergfield, Jr.
75 Bergfield Rd.
Whitney, NE 69367

Re: *File No. 11-M-118; Whitney Irrigation District; Clifford Bergfield, Jr.*

Dear Mr. Bergfield:

This letter is in response to your correspondence received by us on May 13, 2011, in which you requested that this office investigate certain alleged violations by the Board of Directors of the Whitney Irrigation District (the "Board") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2008, Cum. Supp. 2010). As is our normal procedure, we requested a response from the Board and received a response from the attorney for the Board on June 20, 2011. 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

Your complaint alleges two violations of the Open Meetings Act, and also includes one complaint regarding the election for the Board that took place in February 2011. Your Open Meetings Act allegations are that the Board failed to provide sufficient notice for a February 24, 2011 special meeting, and that the Board went into an improper closed session on that date.

The remainder of your complaint goes to the Board election of February 1, 2011. However, our review has revealed that the election complaints are not related to the Open Meetings Act. We understand that you dispute the election results, however, we will not address those issues herein, as this office does not have general supervisory authority over political subdivisions, including the Board. Any election of the Board is outside the enforcement authority of this office. Therefore, we will only address your Open Meetings Act complaints herein.

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ANALYSIS

Notice

While it is not entirely clear, you appear to allege that the Board failed to provide adequate notice for the February 24, 2011 special meeting. The Open Meetings Act requires a public body to give "reasonable advanced publicized notice of the time and place of each meeting." You state only that you "found" a special meeting notice on the day of the Board's meeting, but do not specifically allege that it was not posted sooner than that date. We infer from your letter that your expectation was that you should have been personally notified of this meeting. The Open Meetings Act makes no such requirement.

The Board denies that it did not give reasonable, advanced notice of this meeting, and affirmatively states that notice for the February 24, 2011 meeting was posted on February 17, 2011 at the Whitney Irrigation District building and at the Whitney Post Office. We must presume that the Board is being truthful and also that they acted in good faith under the Open Meetings Act. Therefore, we can find no violation of the Open Meetings Act related to this allegation.

Closed Session

You have also complained that the closed session on February 24, 2011 was improper, although you do not specify the grounds for your allegation, other than being "in violation of the Open Meetings Act."

Neb. Rev. Stat. § 84-1410 (2009) addresses closed sessions.

> (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;
>
> (b) Discussion regarding deployment of security personnel or devices;

> (c) Investigative proceedings regarding allegations of criminal misconduct; or
> (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.

We have reviewed the minutes of the February 24, 2011 meeting, specifically that section that deals with the closed session you appear to be concerned with. The minutes of the meeting state:

> Legal Council (sic) suggested that the Board again go into closed session to discuss if a qualified candidate for Precinct number one election could be determined. T. Thompson so made the motion; seconded by R. Grant. All Directors present voted yes. Motion carried. C. Bergfield protested the close (sic) session. Board went into closed session at 5:30 PM.
>
> All patrons and the secretary were dismissed. Board came out of closed session at 6:09 PM. Patrons C. Bergfield and Secretary, D. Thompson returned. Legal Council (sic) announced that no official action was taken. C. Bergfield protested.

Subject Matter and Reason Necessitating the Closed Session

First, in our review of the minutes of the February 24, 2011 meeting, we noted that the motion to enter into closed session, as it appears in the minutes, does not contain the subject matter *and* the reason necessitating the closed session, as required by the Open Meetings Act. "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" and the entire motion should be recorded in the minutes. Neb. Rev. Stat. § 84-1410(1). The Open Meetings Act also requires that if a motion for closed session passes, the "limitation of the subject matter of the closed session" shall be restated on the record.

The motion to go into closed session stated that it was "to discuss if a qualified candidate" could be determined, and the attorney for the Board states that he provided privileged legal advice during this closed session. However, the Board does not indicate in its motion why the closed session was necessary for protection for the public interest or the prevention of needless injury to the reputation of an individual, as required by the Open Meetings Act. In failing to include this, the Board has violated the Open Meetings Act in the motion for closed session.

Propriety of the closed session

There is also a question as to whether the topic discussed in the closed session was proper under the Open Meetings Act. The Board states it sought legal advice from its attorney for interpretation of the statutes related to the election that took place on February 1, 2011. The Board requested legal counsel as to the allowance of certain votes and also the statutory framework for a proper candidate for office.

As discussed above, the Board did not indicate in its motion that the closed session was "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." Neb. Rev. Stat. § 84-1410. If a public body's reason for going into closed session does not fall under either of these two statutory reasons, the session is improper. The Open Meetings Act also provides a list of acceptable topics for closed sessions. While this list is not exhaustive, it does provide guidance for public bodies who wish to utilize a closed session. The Open Meetings Act also specifically prohibits a public body from going into closed session "for discussion of the appointment or election of a new member to any public body." Neb. Rev. Stat. § 84-1410 (1)(d).

In addition, the Nebraska Supreme Court case *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984), is dispositive on a number of issues pertaining to closed sessions. *Grein* involved an action to void a contract between the school board and a contractor submitting the second-lowest bid on a school boiler project, on the ground that the contract resulted from an improper closed session of the board. The *Grein* court made several critical findings:

> (i) "Provisions permitting closed sessions and exemption from openness of a meeting must be narrowly and strictly construed." 216 Neb. at 165, 343 N.W.2d at 723.
>
> (ii) "The 'public interest' mentioned in § 84-1410 is that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities." 216 Neb. at 165, 343 N.W.2d at 723.
>
> (iii) "[G]ood faith or good intention on the part of the public body is irrelevant to the question of compliance with the provisions of the Public Meetings Laws authorizing a closed session." 216 Neb. at 167, 343 N.W.2d at 724.
>
> (iv) "The prohibition against decisions or formal action in a closed session proscribes 'crystallization of secret decisions to a point just short of ceremonial acceptance,' and rubberstamping or reenacting by a pro forma vote any decision reached during a closed session." 216 Neb. at 168, 343 N.W.2d at 724.
>
> (v) "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." 216 Neb. at 168, 343 N.W.2d at 724.

Consequently, we must determine whether Board was justified in discussing election issues in a closed session in light of *Grein.*

The Board's attorney states that the Board sought his counsel in the closed session as to issues related to the election of February 1, 2011. Legal advice, outside litigation or the threat of litigation, is not one of the reasons specified by the Open Meetings Act to necessitate a closed session. § 84-1410 (1)(a). However, this fact alone does not preclude a public body from closing the meeting, and in that regard, this office has previously stated that closed sessions of a public body to meet with legal counsel are appropriate with respect to legal matters "both for pending litigation or

discussions of the legal consequences of specific action." 1975-76 Rep. Att'y Gen. 150 (Opinion No. 116, dated August 29, 1975). Nevertheless, given the circumstances here, we are not convinced a closed session was warranted.

First, we question how discussing the statutes surrounding election of a member to the Board in closed session protected the public interest. On the contrary, it appears to us that citizens would be interested in matters relating to the election of their representatives to the Board. Second, if the closed session was necessary to prevent the needless injury to the reputation of an individual or individuals (i.e., Mr. Bergfield), it does not appear that he was advised that the Board would be talking about him or his companies in the closed session, and whether he was given the opportunity to have the discussion take place in open session, as required under the statute. To the contrary, Mr. Bergfield objected to the closed session during the meeting.

In addition, there is no evidence of any litigation or threatened litigation that prompted the closed session. Nor does counsel indicate that he discussed any legal consequences with the Board; it appears to us that only the statutes relevant to the election and counsel's interpretation thereof were discussed.

In addition, the prohibition against closed session to discuss the election of a new member to any public body may apply here. This closed session was to discuss the election of February 1, 2011 and the candidates for the Board. While the Board argues that this section does not apply because the Board was seeking "legal guidance regarding elector and directory qualifications, not as to whom or who should or should not be elected," we remain concerned that the ultimate purpose of the closed session was to determine who should be elected to the Board.

Section 84-1410 allows a public body to go into closed session when it is clearly necessary for the protection of the public interest or to prevent the needless injury to the reputation of an individual. *Grein* requires us to narrowly and strictly construe the provisions relating to closed sessions. In the present case, there is not enough evidence to support a finding that the closed session was clearly necessary. Balancing the arguments of counsel with the Open Meetings Act, related cases, and the published opinions of this office, we question the Board's decision to go into closed session on February 24, 2011.

While the Board did not take any action following this closed session at the February 24, 2011 meeting, it did take action at the March 1, 2011 meeting. This action was very clearly related to the advice of counsel given during the closed session at issue, as reflected in the minutes. However, the action taken by the Board to disqualify Bergfield Land and Cattle Inc. from the February 1, 2011 election is best challenged not through an Open Meetings Act complaint, but through direct litigation involving the

propriety of the election. Therefore, this office will take no action against the Board relating to the February 24, 2011 closed session.

Restatement of the Motion to Close

We also note, in our review of the minutes of each of these meetings, that the Board has failed to comply with the requirement that, following a vote for a closed session, "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." It does not appear this was done.

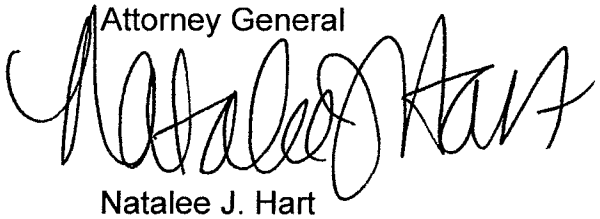
CONCLUSION

For the reasons stated above, we conclude that the Board has violated the Open Meetings Act with respect to the procedure of the closed session on February 24, 2011. We also question the propriety of the subject matter of the closed session. While no action was taken on February 24, 2011, the Board did take action related to the advice of counsel received on that date at its next meeting on March 1, 2011. For this reason, we must admonish the Board for its violation of the Open Meetings Act. The Board should take steps to ensure that it does not violate the Open Meetings Act in the future. However, as this appears to be an unusual issue related to the election of a Board member, we do not anticipate further Open Meeting Act concerns related to this topic, and will not take further action against the Board.

If you disagree with the analysis we have set out above, you have the option to contact your private attorney to determine what additional remedies, if any, are available to you under the Open Meetings Act or other statutes.

Sincerely,

JON BRUNING
Attorney General



Natalee J. Hart
Assistant Attorney General

Cc: John Skavdahl, Esq.
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