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December 8, 2011

Nancy McGill
The Milford Times
PO Box 723
Milford, NE 68045

Re: *File No. 11-M-132; Dorchester Village Board; Nancy McGill*

Dear Ms. McGill:

This letter is in response to your correspondence in which you requested that this office investigate alleged violations by the Dorchester Village Board ("Board") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2008, Cum. Supp. 2010, 2011). 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 Scott Gropp, the Board's attorney. 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, its supporting documentation, and the response from the Board. On September 6, 2011, the Board was informed that the chief of the Dorchester Volunteer Fire Department may have resigned, and that potential litigation may arise. Following that meeting, during the weekend immediately prior to Monday, September 12, four additional members of the Dorchester Volunteer Fire Department ("DVFD") resigned, including EMTs. On September 12, 2011, the Board called an emergency meeting due to a concern that the DVFD may not have sufficient remaining EMTs to provide service for rescue calls. As a result, the Board convened its Emergency Meeting, and spent much of that meeting in closed session. According to Mr. Gropp, the Board discussed several topics during the closed session.

The Board needed to obtain information to determine if there was any merit to the possible litigation concern raised by Assistant Chief Johnson at the September 6, 2011 meeting; who was actually in charge of the DVFD; if the DVFD could provide immediate fire and rescue services to

the community; and, should there be any substance to the litigation claim, how to help staff the DVFD should that disqualify a member of serving as an officer based on the constitution and by-laws of the DVFD. If there was no merit to the items brought forth at the previous meeting, it would seem unnecessary to sully the reputation of that person based on accusations provided by a former member of the DVFD who was no longer available. The Board called in members of the DVFD who they believed would have knowledge of the events and who could inform the Board of the state of the department with regard to the issues above. The Board also was trying to find out how the structure of the department stood with unwritten changes to the by-laws so that if action was required, the department could comply with any grievance procedures.

Following the closed session, the Board took a vote to appoint temporary liaisons between the fire and rescue services and the Board. Your complaint arises out of the emergency meeting and the closed session. Specifically, we have identified the following Open Meetings Act allegations in your correspondence:

- (1) The Emergency Meeting called on September 12, 2011 was not proper;
- (2) The Board lacked an agenda for the Emergency Meeting;
- (3) Insufficient notice was given for the topic(s) to be discussed at the Emergency Meeting;
- (4) The minutes from the Emergency Meeting are inaccurate and embellished; and
- (5) The closed session the Board entered into during the Emergency Meeting was not appropriate.

We will address each of your concerns below.

ANALYSIS

Whether the Emergency Meeting was proper under the Open Meetings Act

Neb. Rev. Stat. § 84-1411(1) (2010) provides the general agenda and notice requirements for purposes for the Open Meetings Act.

Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the principal office of the public body during normal business hours. Agenda items shall be sufficiently

descriptive to give the public reasonable notice of the matters to be considered at the meeting. Except for items of an emergency nature, the agenda shall not be altered later than (a) twenty-four hours before the scheduled commencement of the meeting or (b) forty-eight hours before the scheduled commencement of a meeting of a city council or village board scheduled outside the corporate limits of the municipality. The public body shall have the right to modify the agenda to include items of an emergency nature only at such public meeting.

The purpose of these requirements is to give some notice of the matters to be considered at the meeting so that persons who are interested will know which matters are under consideration. *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (2007); *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).

You complain that the Board did not provide "reasonable advanced publicized notice" pursuant to § 84-1411(1) of the September 12, 2011 Meeting. The Board states notice was placed at both the Village offices and on the marquis in downtown Dorchester, along with notice directly to the news media, as soon as enough members of the Board constituting a quorum confirmed their availability for that evening's meeting, which was approximately three hours before the meeting was to begin. Typically, three hours is not sufficient notice for the meeting of a public body.

However, the Open Meetings Act permits a public body to call an emergency meeting under limited circumstances. Neb. Rev. Stat. § 84-1411(5) states

When it is necessary to hold an emergency meeting without reasonable advanced public notice, the nature of the emergency shall be stated in the minutes and any formal action taken in such meetings shall pertain only to the emergency. Such emergency meetings may be held by means of electronic or telecommunication equipment. The provision of subsection (4)¹ of this section shall be complied with in conducting emergency meetings. Complete minutes of such emergency meetings specifying the nature of the emergency and any formal action taken at the meetings shall be made available to the public by no later than the end of the next regular business day.

¹ The secretary or other designee of each public body shall maintain a list of the news media requesting notification of meetings and shall make reasonable efforts to provide advance notification to them of the time and place of each meetings and the subjects to be discussed at that meeting. § 84-1411(4). The Board informs us that no news media has requested notification pursuant to this section. However, the Board states they complied with this section by notifying local news media, including yourself, of the emergency meeting. As you have made no complaint regarding this section, we will not discuss it further.

This office has consistently stated that a proper emergency meeting is one called to address an issue that is both (a) unforeseen and (b) requires immediate action. If a meeting is called to address a true emergency, then a public body is excused from the requirement of "reasonable advanced publicized notice." As we discuss below, portions of the September 12 meeting were of an emergency nature, and therefore, the Board's notice as to those topics was not deficient.

The facts the Board provided to us are that several members of the Dorchester Volunteer Fire Department ("DVFD") resigned over the weekend prior to the September 12, 2011 meeting. The Board was concerned that the DVFD may not have sufficient EMTs for emergency calls, and the status of fire service was unknown. It appears to us that the Board had legitimate concerns regarding public safety that required immediate action by the Board. The sudden resignation of four members of the DVFD, including the acting chief, also appears to us to be unforeseen. We do not find a violation of the Open Meetings Act relating to the need for an Emergency Meeting for the purpose of ensuring that the needs of the public would be met for fire and rescue services. The Board's discussion of staffing needs and the leadership of the DVFD on September 12 does not violate the Open Meetings Act. Therefore, the three-hour notice for the emergency meeting as to these topics also does not constitute a violation of the Open Meetings Act.

The Board also appears to have met the statutory requirements of § 84-1411(5) for the emergency meeting. The emergency was stated in the minutes of the meeting ("rapid resignations by officers of the Dorchester Volunteer Fire Department"), the formal action taken by the Board pertained only to this emergency (temporary liaisons were appointed until further action could be taken), the news media was notified of the meeting, and complete minutes were available by the end of the next business day.

However, we do question a number of other items that the Board discussed during the meeting. In addition to the immediate staffing needs and leadership of the DVFD, the Board states that it also discussed possible litigation, whether individual members of the DVFD should be disqualified from serving as officers due to the possible litigation, and the structure of the DVFD given unwritten changes that had been made to the by-laws since 2006.

This office does not believe the Board has shown that these issues were emergencies. Therefore, these topics should not have been discussed at the September 12 meeting. Again, an emergency is unforeseen and requires immediate action. The Board was informed that the DVFD may be involved in possible litigation at its September 6, 2011 meeting, and at the September 12 meeting, no action was required on the issue of the potential litigation. Therefore, this issue meets neither prong of the test for an emergency: it was not unforeseen and requiring immediate action. Any discussion related to possible litigation, or the role of individual members of the DVFD in litigation and whether any should be disqualified from serving as officers as

a result, does not appear to us to qualify as an emergency, and was improper for the September 12 meeting.

The same is true for the discussion relating to the by-laws of the DVFD. The Board discussed this matter at its September 6 meeting, and tasked a member of the DVFD with investigating the unwritten changes to the DVFD by-laws. While this member of the DVFD resigned in the weekend immediately prior to the September 12 meeting, that did not appear to create an unforeseen circumstance pertaining to the by-laws; nor was any action taken on September 12 with respect to the by-laws. It does not appear to us that the structure of the DVFD and its by-laws were of an emergency nature, and therefore, were not appropriate topics for the Emergency Meeting.

We conclude that as to the immediate staffing and leadership needs of the DVFD, the Board's Emergency Meeting did not violate the Open Meetings Act. However, as addressed above, the Board should have limited its discussion only to those unforeseen items requiring immediate action; discussion of possible litigation and the by-laws of the DVFD were improperly discussed. However, as the Board took no action as to these matters, and there is nothing that can be void or voidable under the Open Meetings Act, this office will take no action against the Board relating to these issues. We will remind the Board that should an emergency meeting be needed again in the future, they must limit discussion to only those unforeseen items *requiring immediate action*.

Whether the Board provided an agenda for the emergency meeting

Your second complaint is that there was not an agenda available to the public for the September 12 meeting. Neb. Rev. Stat. § 84-1411(1) requires that the notice for a meeting of a public body contain the agenda, or a statement of where the agenda may be viewed. The notice that was provided to the public and media prior to the September 12 meeting stated that topic of discussion was to be "DVFD personnel issues." As an emergency meeting is limited to only those items that require immediate action, in this instance, the notice contained the agenda for the meeting, as allowed under § 84-1411(1).

Since the notice contained the agenda, we do not find a violation of the Open Meetings Act with respect to this portion of your complaint.

Whether the notice provided a sufficient description of the emergency

Your next complaint is that the notice of the September 12 meeting contained an insufficient description. Again, the notice of the Emergency Meeting stated that the meeting was called "Regarding DVFD Personnel Matters." This, indeed, was what was discussed during the emergency meeting. While ideally, the notice would have provided a bit more information ("DVFD Resignations and staffing issues," perhaps), the

notice provided sufficient information to the public that the Board would be discussing matters related to the DVFD personnel. The Open Meetings Act does not require us to judge the eloquence of the notice, only whether members of the public were sufficiently informed as to the topic of the emergency. We think they were. Therefore, the Board did not violate the Open Meetings Act in its description of the emergency. Moreover, because an emergency meeting was proper under the circumstances here, that meeting could have been held without reasonable advance public notice. Neb. Rev. Stat. § 84-1411(5).

Whether the Board has violated the Open Meetings Act in preparing its minutes

You also complain that the minutes for the September 12 meeting were inaccurate and embellished. Whether a public body holds a regular, special, or emergency meeting, it is required to complete minutes for that meeting. "Each public body shall keep minutes of all meetings showing the time, place, members present and absent, and the substance of all matters discussed." § 84-1413(1) (2010). In the case of an emergency meeting, the minutes are required to be made available to the public by no later than the end of the next business day. § 84-1411(5). Your complaint does not appear to go to the timing of the minutes, but rather to their accuracy.

You state that the minutes reflect discussion of the village municipal code that did not occur. The Board admits that the municipal code was not specifically referenced at the meeting. ("The meeting was called to order by Chairman Koll, who then briefly discussed the situation and the purpose of the meeting. Though not specifically stated those present at the meeting (sic), the Village of Dorchester Revised Municipal Code Section 3-301 states that 'The Village operates the Fire Department through the Fire Chief and Firemen.')

We are concerned that the minutes of the meeting reflect a statement that the Board admits was never made during the meeting.

You also state that the Board only discussed the appointment of Todd Axline as a liaison, and not the additional appointment of Deb Vernon. The Board disputes this, and states that the motion for the liaison position included provisions for both Mr. Axline and Ms. Vernon. When there is a dispute as to a factual issue in an Open Meetings Act complaint, we must assume, absent direct evidence to the contrary, that the public body has acted in good faith, which we will do here.

Finally, you allege that the motion for closed session only referenced "personnel," but the minutes show a much more descriptive motion for "executive session upon advisement of Atty. Gropp to discuss the fire department personnel matter as it related to a Fire Chief and oversight of the Dorchester Volunteer Fire Department. The executive session was necessary to prevent needless injury to the reputation of a person or persons involved." The Board replies that "Ms. McGill may feel that Chairman Koll was inartful in his description of the necessity of the closed session." However, this is not a matter of whether the Chairman was "inartful," it is a matter of whether the

Board complied with the provisions of the Open Meetings Act in going into closed session, and that the minutes reflect what actually occurred. The Board does not deny that the minutes were exaggerated as to this motion. Again, we are concerned that the minutes of this meeting have been elaborated upon to ensure that it appeared that the Board complied with the Open Meetings Act.

Based on what has been provided to this office, it is not clear to us that a violation of the Open Meetings Act has occurred. However, we do have concerns about the Board's minutes. Therefore, the Board is to be advised, by a copy of this letter, that it should not make additions after-the-fact to its minutes to make them "more artful." The minutes should reflect only those items specifically stated or discussed and motions should be in the minutes as they were stated at the meeting. The Board, or the clerk, should prepare minutes of the meeting exactly as it occurred. If minutes are being created that elaborate upon what has occurred at a meeting, we advise the Board to cease this practice immediately.

Propriety of the Closed Session

Finally, you question the propriety of the closed session and the motion to enter into closed session on September 12. The Board also included minutes from its September 6, 2011 meeting which have raised questions in this office as to whether the closed sessions on that date were in compliance with the Open Meetings Act.

The Open Meetings Act states:

(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.

Neb. Rev. Stat. § 84-1410 (2008).

September 12, 2011

The motion for closed session states it was called “to discuss the fire department personnel matter as it related to a Fire Chief and oversight of the Dorchester Volunteer Fire Department. The executive session was necessary to prevent needless injury to the reputation of a person or persons involved.”

First, the motion to enter into closed session, as it appears in the minutes, appears to be in compliance with the Open Meetings Act. However, as addressed above, if this motion has been embellished by the Board or the clerk in the minutes to make it appear as though the Board was in full compliance with the Open Meetings Act, when in fact it was not, that is of great concern to this office. As there are conflicting statements as to the accuracy of the motion in the minutes, we will simply remind the Board, again, to ensure that its minutes accurately reflect motions as actually made during the meeting, and that every motion for closed session should fully comply with the Open Meetings Act.

Next, the Board details in its response to this office the topics discussed in closed session. These included the issue of possible litigation raised at the September 6 meeting, staffing issues of the DVFD and whether it could provide fire and rescue services, a determination as to the current leadership of the DVFD following the resignations, whether individual members of the DVFD needed to be disqualified from serving as officers due to potential litigation, and the structure of the DVFD given unwritten changes to its by-laws.

As we discussed, above, in evaluating the necessity of the emergency meeting, several of these items were not appropriate for the emergency meeting. Therefore, they should not have been discussed on September 12, whether during open or closed session. The topics that were not of an emergency nature were the issues related to the possible litigation, whether individual members of the DVFD should be disqualified from serving as officers due to this potential litigation, and the structure of the DVFD and its by-laws. In addition, none of these items was included in the motion to enter into closed session. Thus, even if they were appropriate topics for the meeting, they should not have been discussed in the closed session, as that session was defined by the Board in its motion. The Open Meetings Act is very clear that

If the motion to close [the meeting] 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.*

Neb. Rev. Stat. § 84-1410(2)(emphasis added). By discussing any issues outside the stated reason for the closed session, which was the “fire department personnel matter as it related to a Fire Chief and oversight of the Dorchester Volunteer Fire Department,” the Board was not in compliance with the Open Meetings Act.

The issues appropriate for the emergency meeting were the staffing of the DVFD and its leadership. However, whether these topics were also appropriate for a closed session is a distinct analysis from that of whether they were appropriate for an emergency meeting.

To comply with the Open Meetings Act, a discussion in closed session must be for the protection of the public interest or to prevent needless injury to the reputation of an individual if such individual has not requested a public meeting. The stated purpose of the closed session on September 12 appears to fit in the limitations of the Open Meetings Act for an acceptable executive session. The Open Meetings Act allows a public body to discuss matters that may cause needless injury to a person’s reputation in closed session. We believe the Board has provided sufficient justification for the necessity of the closed session, related to this one limited topic. Therefore, discussion in closed session of personnel relating to the Fire Chief and oversight of the DFVD did not violate the Open Meetings Act.

As to the immediate staffing needs of the DVFD, this issue was not included in the motion to close the meeting. The motion included only the “personnel matter as it related to a Fire Chief. . .” Therefore, we do not believe the general discussion of the whether the DVFD was sufficiently staffed to provide fire and rescue services was appropriately discussed in closed session.

In summary, the closed session was proper as to the discussion of the leadership of the DVFD. The staffing needs of the DVFD, and whether it could provide fire and rescue services, were not included in the motion to close, and either should have been included in that motion or discussed in open session. Further, none of the other topics discussed in closed session on September 12 were appropriate for an emergency meeting.

The only action taken by the Board on September 12 was to appoint two liaisons to the Board from the DVFD. This related directly to the leadership of that department. Therefore, the action taken arose out of an appropriate closed session. No other action was taken at that meeting. Therefore, as there is nothing to void or be voidable from the September 12 meeting, this office will not take action against the Board as to its lack of full compliance with the Open Meetings Act as to portions of the September 12 meeting.

September 6, 2011

As stated above, Neb. Rev. Stat. § 84-1410 requires the motion to enter into closed session, and consequently the minutes of the meeting, to state both the reason and the subject matter for the closed session.

The Board conducted a regular meeting on September 6, 2011 in which it called three closed sessions. The Board included these minutes in its response to this office. While not raised in your complaint, the closed sessions on this date require discussion as to the propriety of the motions made by the Board, as reflected in the minutes.

One closed session on September 6, 2011 was called for "legal matters." First, 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. Second, the Open Meetings Act 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. 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). However, the Board should indicate whether litigation is pending or threatened, or whether it will be discussing a specific topic. A broad subject matter of "legal matters" does not meet the requirements of the Open Meetings Act.

Two additional closed sessions were also called on September 6, 2011, with the minutes reflecting the reasons for these closed sessions to be "personnel matters." Again, "personnel matters" is not a sufficient reason meet the requirements of the Open Meetings Act. The Board is required to state *both* the subject matter and the reason for the closed session. The motion must indicate why the closed session was clearly necessary for the protection of the public interest or the prevention of needless injury to the reputation of an individual, when that individual has not requested an open session. "Personnel matters" is not sufficiently descriptive as a subject matter, and the motion does not contain the necessary language as to why the closed session is necessary for the public interest or the reputation of an individual.

The Board will be advised, through a copy of this letter, to review the requirements of the Open Meetings Act related to closed sessions and ensure that it is complying with all the requirements of the Act when it votes to enter into closed

sessions, including indicating both the reason and the subject matter in its motions to close.

CONCLUSION

For the reasons stated above, we do believe that the Board failed to comply with the Open Meetings Act, in full, on September 12, 2011. In addition, as to the September 6, 2011 meeting, the Board should review the Open Meetings Act related to closed sessions to ensure that it is fully complying with the requirements therein. However, we decline to take action against the Board, as explained herein.

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

A handwritten signature in black ink, appearing to read "Natalee J. Hart". The signature is fluid and cursive, written over the printed name and title of the signatory.

Natalee J. Hart
Assistant Attorney General

Cc: Scott R. Gropp, Village Attorney