

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

September 13, 2013

Don Smith, Publisher
Jim Faddis, Managing Editor
Grand Island Independent
422 West First Street
P.O. Box 1208
Grand Island, NE 68802-1208

RE: *File No. 13-M-102; Grand Island City Council; Grand Island Independent, Smith/Faddis, Complainants*

Dear Messrs. Smith and Faddis:

This letter is in response to your complaint received by us on February 6, 2013, in which you requested that we investigate the adequacy of the notice provided for a special meeting held by the Grand Island City Council ("City") on February 5, 2013. As is our normal practice with complaints alleging violations of the Open Meetings Act [Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2008, Cum. Supp. 2012) (the "Act")], we contacted the public body involved and requested a response. In this case, we forwarded your complaint to City Attorney Robert J. Sivick. On May 13, 2013, we received Mr. Sivick's response on behalf of the City.¹ We have now had an opportunity to consider your complaint and the City's response in detail. Our conclusion and future action in this matter are set forth below.

FACTS

Our understanding of the facts in this matter is based on your complaint and the information contained in the City's response. In addition, we requested and received from Mr. Sivick the minutes for the meeting in question. We also asked Mr. Sivick to provide us the notification methods used by the City for its regular and special meetings, and a copy of the minutes where the methods were recorded. His response to our request is discussed below.

¹ We note for the record that Mr. Sivick requested, and received, additional time to submit his response to this office.

Don Smith
Jim Faddis
September 13, 2013
Page 2

You indicate that the City sent the newspaper a legal notice at 8:13 a.m. on Monday, February 4, 2013, for publication in the newspaper the following day. According to the notice, a meeting was scheduled for Tuesday, February 5, 2013, at 7 p.m. at Grand Island City Hall. You state that Mr. Sivick indicated that notices would be displayed at the post office, library and courthouse on February 4, but you found no notices at the courthouse as of 4 p.m. You further note that the City added the notice for the meeting on its website shortly after 8 a.m. on Monday, February 4, but no agenda was posted as of 3:45 p.m. that day. You state: "We do not believe this method of notification gives the public reasonable advance notice of the meeting."

According to Mr. Sivick, the February 5, 2013, meeting of the city council was a special meeting called pursuant to Neb. Rev. Stat. § 84-1411 (Cum. Supp. 2012) and Grand Island City Code § 2-3, which states in pertinent part:

Special meetings may be called by the mayor or any four council members, upon twenty-four hours written notice to every member of the council; provided, that the requirement of notice shall not be binding in any special meeting at which all members of the council are present without objection.

Mr. Sivick states that the meeting was "called to address the method of calculating lump sum pension benefits for retiring police officers." He indicates that this issue was addressed in a special meeting rather a regular meeting due to the fact that a police officer had recently retired, and no lump sum pension benefits could be paid to this individual until the city council formally determined the calculation method. Mr. Sivick informs us that the issue of police pensions had been widely discussed in the community since November 2012, and has been well covered in print and broadcast media. In addition, there was media coverage about the special meeting prior to the meeting and afterwards.

The City's response also included an affidavit from City employee Carla L. Englund. Ms. Englund states that she posted notice for the February 5, 2013, meeting during the afternoon of February 4, 2013, at the Grand Island City Hall, the Hall County Courthouse, and the Grand Island Public Library. Ms. Englund further states that she delivered a copy of the notice to the newspaper offices on that same date. She was not specific as to the time of posting. The City further informs us that notice of the meeting was not posted at the post office because postal officials do not allow it. As set out in the response: "The City contends it complied with both State and City law in scheduling and publicizing the meeting and the extensive news media coverage and public participation is indicative the City complied with those laws and provided the public 'reasonable advance publicized notice.'"

ANALYSIS

Neb. Rev. Stat. § 84-1407 of the Nebraska Open Meetings Act states:

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 Nebraska open 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); *Steenblock v. Elkhorn Township Board*, 245 Neb. 722, 515 N.W.2d 128 (1994); *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984). Their purpose is to ensure that public policy is formulated at open meetings of the bodies to which the law is applicable. *Dossett v. First State Bank, Loomis, NE*, 261 Neb. 959, 627 N.W.2d 131 (2001); *Marks v. Judicial Nominating Commission for Judge of the County Court of the 20th Judicial District*, 236 Neb. 429, 461 N.W.2d 551 (1990); *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979). In Nebraska, the formation of public policy is public business, which may not be conducted in secret. *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010); *Johnson v. Nebraska Environmental Control Council*, 2 Neb. App. 263, 509 N.W.2d 21 (Neb. Ct. App. 1993).

You have alleged that the City failed to provide “reasonable advance publicized notice” of its February 5, 2013, meeting. The statute at issue, Neb. Rev. Stat. § 84-1411, provides in relevant part:

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.

Don Smith
Jim Faddis
September 13, 2013
Page 4

In response to our request for the City's notification methods and a copy of the minutes where the methods were recorded, Mr. Sivick informs us that the city clerk and his staff conducted an extensive search for this information. He indicated that apart from Grand Island City Code § 2-2 ["Regular Meetings"] and § 2-3 ["Special Meetings"], no other authority was found. Mr. Sivick further informs us that in the course of the search, evidence was discovered indicating the City has published notice of city council meetings in the *Grand Island Independent* since the late 1800s. Mr. Sivick states that the City has designated the newspaper as a "sole source provider" under City procurement laws, with the most recent designation occurring with the approval of Resolution 2013-247 on July 23, 2013. He reiterates that with respect to the February 5, 2013, special meeting, the notice provided consisted of publication in your newspaper the morning of the meeting, and posting at city hall, the public library, the courthouse, and the offices of the *Independent*. Additionally, the notice of the meeting and the agenda were placed on the City's website, and paper copies were available to the public at city hall more than a day prior to the meeting.

Two Nebraska Supreme Court cases guide our analysis. In *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007), a case involving competing city ordinances to annex certain territories, the "pivotal issue" was whether the City of Omaha violated the Open Meetings Act in the course of its proceedings to adopt an ordinance to annex the City of Elkhorn. With respect to the Act's notice provision, the court stated:

Unlike many states, the Legislature has not imposed a minimum time period for public notification of a special meeting. . . . Instead, the Legislature permits each public body to designate its own method of notification for all meetings. Under § 84-1411(1), the Legislature has imposed only two conditions on the public body's notification method of a public meeting: (1) It must "give reasonable advance publicized notice of the time and place of each meeting" and (2) it must be recorded in the public body's minutes.

Id. at 877, 715 N.W.2d at 803 (internal citations omitted). The court found that in 1975, the City of Omaha passed a resolution pertaining to the notification of regular and special meetings. The action was recorded in the minutes of the Omaha City Council. With respect to special meetings, the resolution provided that notice may be publicized by posting on the bulletin board in the city-county building in accordance with the Open Meetings Act and section 2.10 of the city's home rule charter. This provision, in turn, stated: "Council Members shall be given at least twelve hours written notice of the time and place of such special meetings, except that only two hours notice shall be required when an emergency has been declared." *Id.* The record established that the city clerk posted notice on the bulletin board and the city's web site, and the agenda was available to the public, at 10:15 a.m. for the meeting scheduled for 10:00 p.m. that

evening. The record further established that the local newspaper printed an article about the meeting in its afternoon edition and four television broadcasters were present at the meeting. Consequently, the court found that the city's notice to the public was sufficient. *Id.*

However, Elkhorn argued that the notice was nonetheless deficient because the council members did not receive the full twelve hours' notice required under the City's resolution. In addition, the city council members did not file waivers for nonconformance. The court rejected this argument, indicating *inter alia* that any defect in notice intended for the benefit of council members would not invalidate the special meeting because here all of the members of the council attended without objection.

Elkhorn further argued that under *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979), "a notification of approximately 12 hours does not comport with the 'reasonable advance publicized notice' requirement in § 84-1411(1)." *City of Elkhorn*, 272 Neb. at 878-79, 725 N.W.2d at 804. In *Pokorny*, the court also considered the sufficiency of the public notice given by a city council for a special meeting. Here, the court found that notice posted in three places at 10:00 p.m. for a 10:30 meeting the following morning "could hardly be considered to be reasonable advance publicized notice as required by the statute." *Pokorny*, 202 Neb. at 338, 275 N.W.2d at 284. However, in distinguishing the notice provided in *Pokorny* from its own facts, the *Elkhorn* court stated:

In *Pokorny*, we did not state that a 12-hour notice is always insufficient under § 84-1411(1). Instead, we determined that the short time between the notice and the meeting was insufficient because the notice was unlikely to reach the public before the scheduled meeting. In contrast, Omaha provided public notice early on a business day and the city moved quickly to notify many local media outlets. The record shows that Omaha faxed an agenda of the special meeting to the main Omaha newspaper by 10:16 a.m. on February 22, 2005, and to 18 other local media outlets by 10:54 a.m. The Omaha World-Herald published an article about the meeting in its afternoon edition of the February 22 paper. Four television broadcasters were at the meeting, and one station broadcast the meeting live. Therefore, unlike the notice in *Pokorny*, the record shows that Omaha's notice reached a substantial part of the public before the scheduled meeting.

City of Elkhorn, 272 Neb. at 879, 725 N.W.2d at 804-05. The court further noted that while it did not condone the practice of giving only twelve hours' notice before a meeting, under the circumstances here, the "notification methods were reasonable and sufficient." *Id.* at 880, 725 N.W.2d at 806.

Don Smith
Jim Faddis
September 13, 2013
Page 6

The issue identified by the court—whether the notice provided would reach a substantial part of the public before the scheduled meeting—appears to be the standard to apply in determining whether the City of Grand Island’s notice was sufficient under the circumstances here. In that regard, we have carefully considered whether the City’s notice likely reached a substantial part of the public before the scheduled meeting on February 5. We have taken into account the relatively short time frame involved and the fact that the publicized notice was published in the *Independent* on the same day as the meeting. However, we believe the short time frame must be considered in conjunction with City Code § 2-3, which allows the mayor or any four council members to call a special meeting upon twenty-four hours’ written notice to all council members. We have also considered that these events occurred on a Monday and Tuesday, two business days, and did not involve a weekend day or holiday. On balance, we believe that the combination of physical posting, posting online, and publication in the *Grand Island Independent* was reasonable and sufficient to reach a substantial part of the public before the meeting on February 5, 2013. Consequently, we conclude that the City’s notice did not constitute a violation of the Act.

Finally, in *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010), the Nebraska Supreme Court considered whether the City of Ord had violated the Open Meetings Act during its process to annex certain land to be used for an ethanol plant. In response to the plaintiffs’ claim that the City violated the Act by not formally recording the method of notification in its meeting minutes, the court stated:

We find no merit to this contention, derived from the statutory language set forth in § 84-1411 that the notice be "by a method designated by each public body and recorded in its minutes." The city clerk testified that she was able to discern, through the minutes of past meetings, a customary and consistent method of notifying the public.

Id. at 443, 786 N.W.2d at 924. In the present case, while the city clerk et al. were unable to determine when the City’s notification methods were memorialized in an ordinance or by resolution, if ever, it appears that the City has engaged in a “customary and consistent method” for notification of its meetings for many years. And this practice appears to have involved the *Grand Island Independent* for decades. However, to avoid any ambiguity in the future, we would suggest that the City take steps to formally adopt its notification methods, and record such action in its meeting minutes in accordance with Neb. Rev. Stat. § 84-1411.

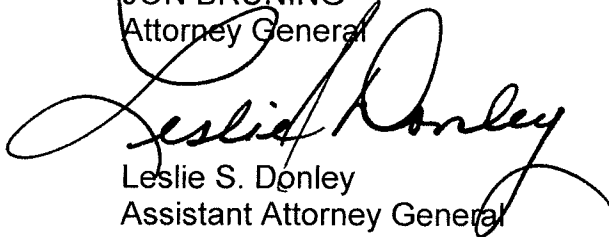
Don Smith
Jim Faddis
September 13, 2013
Page 7

CONCLUSION

Since we have determined that the City of Grand Island did not violate the Open Meetings Act with respect to the notice provided for its February 5, 2013, special meeting, no further action by this office is appropriate at this time. Consequently, we are closing this file. If you disagree with our analysis under the Open Meetings Act, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under those statutes.

Sincerely,

JON BRUNING
Attorney General



Leslie S. Donley
Assistant Attorney General

cc: Robert J. Sivick

49-1021-30