

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

June 20, 2014

Mary Avery
Special Audits and Finance Manager
Auditor of Public Accounts
Room 2303, State Capitol
Lincoln, NE 68509

RE: *File No. 13-M-134; Scotts Bluff County Board of Commissioners; Mary Avery, Auditor of Public Accounts, Complainant*

Dear Ms. Avery:

This disposition letter is in response to your complaint received by us on November 1, 2013, in which you allege potential violations of the Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2008, Cum. Supp. 2012, Supp. 2013) (the "Act"), by certain members of the Scotts Bluff County Board of Commissioners ("Board"). As is our normal practice with complaints alleging violations of the Act, we contacted the public body involved and requested a response. In this case, we forwarded your complaint to Board chairperson Mark J. Masterton. On December 4, 2013, we received a response from Scotts Bluff County Attorney Doug Warner, who responded on behalf of the Board. We also requested and received documentation from the City of Gering with respect to a committee meeting held on October 21, 2013. We have now had an opportunity to consider your complaint and the Board'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, the information contained in the Board's response, and the documentation we received from the City of Gering.

As an initial matter, you indicate that the Auditor of Public Accounts ("APA") encourages citizens to submit information to your office where governmental waste, mismanagement, or fraud is suspected. In this regard, the APA received a news article—"Commissioners crash the party, but nothing gets resolved in Interlocal

dispute”—sometime in late October 2013. You indicate that this article appeared on the website of KNEB 960 Rural Radio, a Scotts Bluff radio station, some time on or around October 21, 2013. You state that “[a]t the bottom of the copy provided to us, the sender wrote simply, ‘Isn’t three commissioners a quorum?’ The obvious insinuation is that the Board members violated the Act by appearing together at the meeting in Gering.”

The alleged violation at issue involves a meeting held by the Administrative, Office, and Economic Development Committee, a standing committee of the Gering City Council, on October 21, 2013.¹ This meeting was originally noticed for 5:00 p.m. at the Gering City Council Chambers, but was subsequently rescheduled for a 6:00 p.m. start at the Gering Civic Center. According to the meeting notice, the sole agenda item for this meeting was “Discussion on the Communication Center.”

According to information posted on its website at <http://www.scottsbluffcounty.org/commissioners/commissioners.html>, the Board is comprised of five members—Mark J. Masterton, Sherry Blaha, Mike Marker, Ken Meyer, and Steve Stratton. Mr. Warner represents that the Board held a regularly scheduled meeting also on October 21, 2013. After the meeting, three of the Board members decided to attend the committee meeting. Mr. Warner indicates that the Board members had not been invited, but attended due to their interest in the agenda item. Mr. Warner states that the discussion involved funding for the county communications center through an interlocal agreement between Scotts Bluff County and other local political subdivisions, including the City of Gering. He states that members of other city and village councils also attended the meeting.

According to the meeting minutes, Chairman Masterton, Commissioner Blaha and Commissioner Marker are listed among the individuals present at the meeting. Apparently at one point during the meeting, Mr. Masterton indicated that “they are at this meeting to listen; they’re not going to make comments.” However, the minutes contain several other references where the three Board members did, in fact, engage in the discussion.”²

You indicate that since that APA “lacks the authority to address or otherwise pursue matters involving suspected violations of law,” you have brought this matter to our attention in the hope that we would further investigate and take appropriate action, if necessary.

¹ This particular committee is established in the Code of Gering, § 30.24 (2009).

² A copy of the meeting minutes is attached to this disposition letter as Exhibit A.

DISCUSSION

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).

The question before us is whether certain members of the Scotts Bluff County Board of Commissioners violated the Open Meetings Act when they attended a public meeting convened by a committee of the Gering City Council. Over time, this office has consistently taken the position that two things must occur for a public body to hold a “meeting” subject to the requirements of the Open Meetings Act. First, a quorum of a public body must be present. Second, the public body must engage in at least one of the activities set out in the definition of “meeting” in Neb. Rev. Stat. § 84-1409(2) (Cum. Supp. 2012)—i.e., “briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body.” In our view, absent either of those elements, no “meeting” of a public body has occurred under the Act.

In the present instance, it appears that both conditions were met. We believe that the attendance of three members of a five-member board constituted a quorum.³ And according to the minutes, it appears that the three Board members actively participated in the meeting by discussing the public business relating to the county communications center. Had the Board members done what Mr. Masterton voiced earlier in the meeting—that they were there to listen—no violation of the Act would have

³ We could find no specific statutory provision which prescribes the number of commissioners necessary to establish a quorum. The general rule, which we apply here, is that “in all cases a majority of a legislative body is a quorum entitled to act for the whole body, except where the power that creates it has otherwise directed.” *City of North Platte v. North Platte Water-Works Company*, 56 Neb. 403, 76 N.W. 906 (1898) (quoting *Zeiler v. Central R. Co.*, 84 Md. 304, 35 A. 932 (1896)).

occurred.⁴ However, under these circumstances, the Board members should have treated their attendance and participation at this meeting as a meeting of the Board of Commissioners, with proper notice, agenda, minutes, etc. They failed to do so. Consequently, we believe the Board violated the Open Meetings Act when Mr. Masterton, Ms. Blaha, and Mr. Marker attended and participated in the Administrative, Office and Economic Development Committee meeting on October 21, 2013.

ACTION BY THE DEPARTMENT OF JUSTICE

Since we have determined that the Board violated the Open Meetings Act with respect to the actions taken by a majority of its members on October 21, 2013, we must also determine what further enforcement action by this office, if any, is appropriate under the circumstances of this case. In this regard, a civil lawsuit is unnecessary because there is no evidence that the three Board members attempted to take formal action or vote during the meeting. We also do not believe that a criminal prosecution of the Board members for a knowing violation of the Open Meetings Act is warranted because, as a practical matter, it appears there was ample public notice of the meeting. In addition, the media was there and reported on the proceedings. On the other hand, members of the public who follow the Board would have no idea that a quorum of the Board planned to attend and discuss the communications center based on a published notice for a city committee meeting. In the end, we will caution the members of the Board, through a copy of this letter to Mr. Warner that, in the future, they must not conduct any of the activities which constitute a meeting in those instances where a quorum is assembled outside of a properly noticed meeting of the Board.

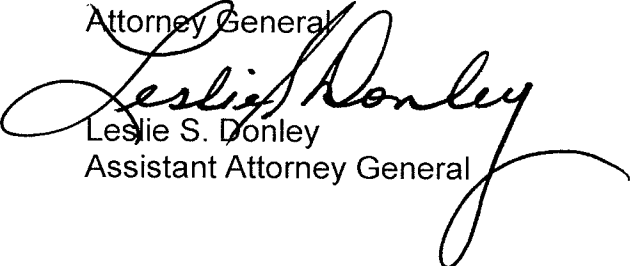
⁴ See *Schauer v. Grooms*, 280 Neb. 426, 447-448, 786 N.W.2d 909, 926 (2010) ("If there is no meeting of a public body when less than a quorum convenes and discusses an issue, there is likewise no meeting of a public body when, although there is a quorum present, there is no interaction as to the policy in question. There is no meeting of a public body based upon unspoken thoughts of council members who happen to be sitting in the same room.")

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Since we have determined that no further action by this office is appropriate at this time, we are closing this file.

Sincerely,

JON BRUNING
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Doug Warner

49-1132-30

City of Gering
Administrative, Office, Economic Development Committee Meeting
Gering Civic Center
October 21, 2013, 6:00 p.m.

Present: Councilmember Don Christensen, Councilmember Troy Cowan, Councilmember Jill McFarland, Councilmember Larry Gibbs, Councilmember Dan Smith, Councilmember Julie Morrison, Mayor Edwin Mayo, Mayor Kent Greenwalt, County Commissioner Chairman Mark Masterton, Commissioner Mike Marker, Commissioner Sherry Blaha, Communications Director Ray Richards, Chief George Holthus, Chief Jay Templar, Administrator Lane Danielzuk, City Attorney Jim Ellison, Kathy Welfl, Bob Taglier, Bruce Molk, Mayor Denise Sinner, Tammy Cooley, Ty Abernathy, Jerry Green, Lonnie Miller, Mayor Brian Taylor, Mayor Alfred Pieper, Pat Heath, Kevin Mooney, Jerry Purvis

Agenda item: Discussion on the Communication Center

Councilmember McFarland opened the meeting by stating that this was never meant to be an argument, regarding the discussion of the Scotts Bluff County Communications Center. The intent of the meeting on September 9, 2013 was to work it out; hopefully that can happen this evening.

Introductions were made.

Councilmember McFarland stated that we have prepared talking points to the agreement. Administrator Danielzuk said that we took a look at the consolidated agreement and believe that this is the one that was approved by the City of Scottsbluff. He asked Commissioner Marker (at the September 9 meeting) if it would be in everyone's best interest to look at the agreement and negotiate it before it was signed and moved forward. The City of Scottsbluff approved and signed it anyway and possibly a few other municipalities; they signed the County's and City of Scottsbluff's version. The City of Gering was in the process of looking at it. Administrator Danielzuk stated that it wasn't negotiated in the Mayor to Mayor meetings. It started with the City of Scottsbluff and Howard Olsen preparing the agreement. He knows in fact that we agreed to have the City of Scottsbluff have the first initial crack at the agreement, but nothing was said about that being the final say on the agreement. With that in mind and with Mr. Marker in the audience that night (September 9), Administrator Danielzuk made the suggestion that everyone hold off until *everyone* had a chance to look at the agreement and work out the kinks; make it a balanced process and move forward. Mr. Danielzuk, with the City Attorney, has put an agreement together; the talking points give an idea of what can be changed. The Gering City Council will look at the agreement first before it's given to the other political jurisdictions. He stated that we will only talk in generalities this evening.

Councilmember McFarland said as we look at it, there aren't immense changes, but there is some clean-up. She stated that she went to the City of Scottsbluff and spoke to them; it didn't go over well. She went to Mitchell and was treated very well. She asked if anyone at the meeting has anything they would like to bring forward at this point. Mayor Pieper said one thing that the City of Minatare is concerned about is the double-taking; they will refuse to sign and will go with another proposal. Councilmember McFarland said that Councilmember Gibbs has been saying for years that double taxation exists and this is a good example.

Mayor Taylor said more importantly it needs to be said that this is a service that we need; it's something that we'll all end up paying for one way or another. The way it was brought to us, however, is in question. He said there's a lot of misinformation out there; he doesn't think everyone gets the same picture. It's important we get together and talk like this. He would like more information as far as what was in the paper; he would like the whole story.

Councilmember McFarland said she doesn't see why there has to be a drop dead date; it may take several more months. She asked why that is an issue? She has no doubt that the County has been strapped with everything they've had to do. It's an amazing new system in a nice new environment. One thing that concerns her is that the County may be pressed for cash and challenged by balancing their budget, but the County ignored the fact that some communities are more strapped than the County is.

EXHIBIT
A

Blumberg No. 5116

Mayor Mayo said when we first got the letter saying that the County was going to cut us off if we didn't sign, he didn't see all the other communities listed. In 1986 the City of Gering gave their equipment to the Communications Center to run it. In 1990 or later Scottsbluff was getting ready to turn their equipment over. The Equipment that was listed in the contract showed ownership with all the communities. If we're paying for it, we should all have equal ownership. Everyone has had different feelings about it and the way the committee to maintain the equipment was going to be set up; as well as the voting rights. Those issues need to be addressed. It should be one community, one vote. We don't want the equipment to fall out of current status or maintenance; it needs to be kept up as you would anything. Mayor Denise Sinner replied that it's old equipment, none of that equipment is still in operation. Mayor Mayo asked so you're asking us to pay for new equipment but not have any ownership? Mayor Sinner stated that she was part of the consolidation in 1986; they had a radio and a type writer. Ray Richards said this isn't the only local agreement that has been signed, there have been others (in the past) and other communities signed on as well. Mr. Richards said he sent those older agreements over during the merger; he can get those to the City of Gering again; they are signed.

Councilmember McFarland said we can't go back and undo anything, but it did concern her that they operated on equipment that was so old. She doesn't see any assurances that we're going to do a better job; we would like to see a tech advisory group with people who can keep us on the edge of technology. We have a great system now; she hopes we put some things in place to stay on the cutting edge.

Councilmember McFarland said we've asked for information on the \$496,000 figure. We'd feel better if we could see an itemized list for everything that was purchased. She wants to be sure that everyone understands that we fully understand we need to help the County with the equipment; we've never said anything other than that. We don't want to pay for operations, we already do through taxes.

Councilmember Gibbs said he agrees we need to contribute; our contention on the funding was that it wasn't fair. He mentioned the article in the paper that the Commissioners submitted. It said they provided the service for free for 28 years; we contributed a lot of money over the years to services too. We're all residents of Scotts Bluff County; we're not two entities. We're paying a County tax and a City tax to subsidize that.

Mayor Sinner asked if anyone has looked at all the taxes on your house and broken it down; her Scotts Bluff County taxes do not pay for communications. She was charged one time and not again. She and the Assessor and Clerk broke it down and we're not being charged on the property taxes twice. She said .3895 was the County levy, .29832 was the City's; we're paying roughly 30% more for the County's taxes than the City.

Councilmember McFarland said she'd like to hear from the County. Chairman Masterton said they are wanting to cooperate. He commented to Mayor Mayo that if he wants to run the Communications Center, go ahead and do it; to build your own is insanity. Chairman Masterton stated they are at this meeting to listen; they're not going to make comments. Councilmember McFarland asked if it is possible for their position to change; Mr. Masterton replied yes.

Councilmember Morrison asked if Councilmember McFarland's formula made sense to them (the County). Commissioner Marker said they plain and simple needed help paying for it, so they divided it as equally as possible. They're trying to make sure we have a decent system; this is how much they need, period. It's not about the operations, it's just for equipment. Once paid for the amount will drop dramatically, that's why they came up with this advisory council; they think that's a fair way of doing it. He said the formula Councilmember McFarland came up with did not make sense to them for what they wanted to do; it only shifted more of the burden back to the County which is fine, but they can't afford to do that.

Councilmember Gibbs said the County pays their levy and the City pays that levy and another levy. Chairman Masterton said there are a lot of double taxes in the relationship between City and County. The County is an extension of the state; the state limits their taxing ability. Rather than saying it's double taxation, let's say the County doesn't do it. Councilmember Gibbs said combining was the only way to do

enhanced 911. Chairman Masterton agreed and said they can't throw any more money at it. Commissioner Marker said they just don't have it; if they did they wouldn't be here tonight.

Mayor Mayo stated to the Commissioners that when we bring something forward we want the County to be fair and open-minded since you say you don't have any more money. He said we brought forward the joint agency and that was poo poo-ed; you said you've exhausted every avenue for more money, then be open-minded when we come forward with suggestions on the agreement. Commissioner Marker replied they'd be willing to look at it, chairman Masterton also said they'd be willing to look at it. Commissioner Marker doesn't agree that it's a double taxation though.

Commissioner Masterton said they have a crisis but it's their own doing, but the expenses go on and upgrades are needed. He said maybe the best way is to just divide up the 1.2 million and everyone go their own way. He asked why the City didn't cooperate five years ago. Councilmember Gibbs said we didn't know about it then. Commissioner Marker said the fact is they tried hard to keep the Communications Center going with the equipment they had; it was maintained as best they could. We have a super Communications Director who is doing the best he can. 1.2 million is the total Communications Center budget.

Commissioner Marker said let's get this thing worked out, we'll look at the agreement; let's go forward. Mayor Mayo said his impression he had two weeks ago at the Commissioner meeting was sign it or take a flying leap. Commissioner Blaha said it should not be coming to this; we should be meeting in the County, this meeting should not have been called. She said bottom line is we have a Communications Center that we need to run and all we're asking is for payment for the equipment. There should be a more fair tax than property tax; everyone who uses cell phones should also pay for it. The property owners shouldn't have to pay for all of it. The Commissioners agree it needs to be taken care of and soon. None of us can afford to pay for a new center; we need to work together.

Councilmember Gibbs said we're all in agreement, if it were possible, that a joint agency would be the best way to fund it; but he understands that counts against the County's levy max. He said suppose we came up with an agreement and a funding mechanism for one year and work with our legislators and try to create an agency to fund this. Commissioner Masterton said they've been backwards and forwards on how to fund this; it's very difficult. To say we can separate by zip code doesn't work either. We can't separate by 436 either and we can't separate by cell phone. What do you get when people from out of town use our 911 Center? He said there's really no good way to do this, but property tax is all they have; they don't have LB840, etc. Councilmember Gibbs said he understands but it would be coming out of all the property, not double taxation; he said we need to change State law. Commissioner Masterton said that could take a long time; it's very difficult to do. Councilmember Gibbs said if we were unified and worked with the League we might get it done.

Ray Richards said in February of 2009 he talked to people and put his advisory board in place. The Advisory board died a natural death; it wasn't needed anymore. He called those people and drew from their wisdom to do things. The Communications Center is now in line with most of the mandates; we don't need everything in those mandates. Much of the equipment was barely hanging on; it took three years to get where they are. Now they're to the point of handing out the offering plate.

Councilmember Morrison asked when we go with this, and upgrades are needed again, will the County have money to do the upgrades or repairs so it doesn't blow up in their face again? How will that be addressed? Mr. Richards said he has maintenance agreements in place with people who know the equipment well. Updates are being sent or done remotely. They're already doing that and they have technical people on staff. There's some infrastructure in place. Councilmember Smith asked if the amount requested pays for the equipment; Mr. Richards replied yes.

Chairman Masterton said if there's another formula is it fair to charge people who own a big farm with a lot of money more than the guy with not as much? We need to come up with a fair and equitable fee. It serves everybody, potentially. He said they're getting \$163,000 from the telephone lines.

Councilmember Gibbs asked of the 911 funds that go to the state, what percentage do we get back?

Chairman Masterton said the money that comes out of the cell phone bills goes into a pot; we have x-number of people donating 50 cents a month. They distribute the funds based on grants. A community would write for a grant for certain things provided it was for cell phones; it cannot be used to enhance anything with land lines. There are some gray areas there; people have dropped land lines more and more so they're losing money. He said Ray has applied for grants and got some. There are a lot of things that aren't fair on our taxes and what they pay for. Commissioner Masterton asked what does Gering suggest? How do we fund this; what's the fairest way of funding it?

Brian Taylor, Mayor of Mitchell, mentioned the deadline of November 15. Commissioner Blaha said it was an extension so the municipalities could go to their Boards and discuss it. The Inter-local agreement was done by Howard Olsen who is an expert on inter-local agreements. Mayor Taylor said so we have November 15 as a deadline. He said it's a remarkable facility, but it is already paid for, why does it have to be done on November 15? He asked if it can be done April 15 so we have more time to discuss the issues that came up. He said it seems like we're really under the gun; why does it have to be done this way?

Councilmember McFarland said we need to have the communities give their input. She asked the County if they will consider another date to finalize this. She said they need to have a conversation with themselves as to what they're willing to do and how we can solve this thing. We cannot fight this battle in the media, we all need to stop doing that; it's not helping. She said continued conversation on the verbiage on the agreement is very important.

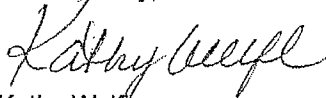
Mayor Taylor said the night they had the Commissioners come to their Council meeting, he walked away with the feeling that they needed to get on board or they won't have a 911 service; that didn't sit well. He said if the County had come to them and said they don't have any more money, and explained that they need to fix this, the City of Mitchell's attitude would be different. Commissioner Marker said Mr. Taylor is probably right; there were probably some things that were said or not said. All they're trying to do is get this thing moved forward; they're not trying to pull the wool over anyone's eyes.

Councilmember Christensen said he has been told that some of the communities are having a hard time dealing with money; he understood that the communities don't have to pay it all at once if they can't. Chairman Masterton said that's right.

Councilmember McFarland asked the Commissioners to discuss what their position is so we can work this out.

Meeting adjourned at 7:25 p.m.

Submitted by,



Kathy Welf
City Clerk
City of Gering