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Office of the Attorney General

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DOUGLAS J. PETERSON
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July 6, 2017

Via email at [REDACTED]
Joe Pongratz

Via email at [REDACTED]
David Wright
[REDACTED]

RE: *File No. 16-M-129; Nebraska Brand Committee; Joe Pongratz, Complainant, and File No. 16-M-130; Nebraska Brand Committee; David Wright, Complainant*

Dear Messrs. Pongratz and Wright:

In August 2016, you both submitted complaints alleging that the Nebraska Brand Committee ("Committee") violated the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014, Cum. Supp. 2016) during its meeting held on August 16, 2016. Subsequently, we followed our normal practice and sought a response to the matters alleged in your complaint from the Committee by sending a letter to Committee chairperson Jerry Kuenning. On October 25, 2016, we received a response from attorney Mark A. Fahleson, of the Rembolt Ludtke law firm, acting as counsel for the Committee.

Upon completion of the process described above, we reviewed the entire file, including your complaints and the response from Mr. Fahleson, to determine if the situation warranted immediate action by this office for knowing violations of the Open Meetings Act. We determined that it did not. We have now had an opportunity to prepare an analysis of your complaints, and our comments are set out below. For the reasons discussed, we do not believe that this situation warrants any further action by this office at this time, and we are closing these files. However, we will caution the Committee with respect to two aspects of your complaints.

Before we begin, we will point out that your complaints contain items of concern that fall outside the scope of the Open Meetings Act, e.g., the Commission's handling of the executive director position. However, our enforcement authority is limited to

determining whether a public body has complied with the various procedural provisions of the Act relating to agenda, notice, closed session, voting, minutes, etc. Our office does not scrutinize decisions made by a public body that are inherent to the public body's governance. Consequently, any matters that do not implicate the Open Meetings Act will not be addressed.

FACTS

Sometime on or around August 9, 2016, the Committee posted the following public notice:

A telephone conference call meeting of the Nebraska Brand Committee has been scheduled for August 16, 2016, at the Nebraska Brand Committee Headquarters Office, 411 Niobrara Avenue, Alliance Nebraska. The meeting will begin at 2:00 p.m. MST. In accordance with the Americans with Disabilities Act, reasonable accommodations will be provided for persons with disabilities. If you need a reasonable accommodation to attend, please call (308) 763-2930 to coordinate necessary arrangements.

The agenda for the August 16, 2016, meeting provided as follows:

1. Discussion on negotiating the timeline and cost of the technology plan proposed by Nebraska Interactive.

According to your complaints, Mr. Kuenning convened the meeting around 2:05 p.m. MST. After a few minutes, Committee member Widdowson made a motion to go into closed session to discuss "Nebraska Interactive."¹ Accordingly, members of the audience had to step out of the meeting room, and those individuals participating by phone were placed on hold. It appears that Mr. Wright dropped the call to take another call, and Mr. Pongratz was disconnected. In any event, you both contacted the Committee and were told you would be contacted when the Committee came out of closed session. You indicate that you were both eventually contacted and able to get back on the conference call. You further indicate that Committee members were already speaking when you rejoined the call. The Committee then passed a motion to hire Nebraska Interactive.² At this time, Mr. Wright asked Mr. Kuenning to repeat the motion

¹ Nebraska Interactive is currently under contract with the Nebraska State Records Board to manage the State of Nebraska's web portal, and provides e-government services, e.g., custom applications and web design, to state agencies and local political subdivisions. See Neb. Rev. Stat. § 84-1205 (2014).

² According to Mr. Wright's complaint, Nebraska Interactive gave a lengthy presentation at the Committee's August 8, 2016 meeting in North Platte, after which the Committee unanimously passed a motion to hire the company.

to close the meeting, and reminded the chair of “the situation in which a committee can go into executive session.” Mr. Kuenning indicated that the closed session was to buy property [software property]. It appears that the closed session lasted approximately two hours, and the meeting adjourned at 4:21 p.m.

According to Mr. Fahleson, a quorum of the Committee, consisting of members Metz, Meyring and Wilson, was physically present at the Committee’s Alliance office. He states that representatives of the Nebraska Cattlemen and the Alliance Times Herald were also physically present in the meeting room in Alliance. Mr. Fahleson indicates that the sole purpose for the meeting was to discuss and determine negotiating strategies relating to a proposed addendum to the Electronic Government Service Level Agreement between the Committee, Nebraska Interactive, and the Nebraska State Records Board. He states that timing was critical, due to the requirement to finalize negotiations prior to the State Records Board meeting on September 28, 2016.

Mr. Fahleson further states:

The Committee published adequate advance notice of the meeting and the public was involved, including some by telephone (Complainants Wright and Pongratz, and Members Kuenning & Widdowson). There was absolutely no intention on the part of the Committee to exclude the public from this meeting (as evidenced by their participation), and the Committee believed that the sheer urgency of the negotiations necessitated permitting participation by two Members (whose votes were inconsequential as the three members physically present voted in the affirmative) and the public by telephone.

Mr. Fahleson states that the Committee took remedial action to address the issues raised in the complaints. In that regard, at a duly convened and published public meeting held on October 5, 2016, the Committee reconsidered approval of the addendum at issue,³ which was approved by an affirmative roll call vote.

You both subsequently submitted complaints to this office. You generally allege that (1) the meeting on August 16, 2016, did not rise to the level of an emergency requiring a telephone conference call; and (2) the closed session held during the meeting was improper.

³ The agenda item for the reconsideration stated:

Consideration of whether to enter into Addendum Two to the Electronic Government Service Level Agreement Between Nebraska Interactive, LLC, Nebraska Brand Committee and Nebraska State Records Board, authorization of Chairman to execute Addendum Two on behalf of the Nebraska Brand Committee, and ratification of actions taken by Chairman on behalf of the Nebraska Brand Committee with respect to Addendum Two.

ANALYSIS

Several statutory provisions are pertinent to your complaints. First and foremost are the provisions in Neb. Rev. Stat. § 84-1408 (2014), which state:

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.

Neb. Rev. Stat. § 84-1411(3) allows certain public bodies⁴ to hold meetings by telephone conference call so long as certain requirements are met. Section 84-1411(5) states that

[w]hen it is necessary to hold an emergency meeting without reasonable advance public notice, the nature of the emergency shall be stated in the minutes and any formal action taken in such meeting shall pertain only to the emergency. *Such emergency meetings may be held by means of electronic or telecommunication equipment.* The provisions of subsection (4) 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 meeting shall be made available to the public by no later than the end of the next regular business day.

(Emphasis added.) Neb. Rev. Stat. § 84-1411(6) further provides that “[a] public body may allow a member of the public or any other witness *other than a member of the public body* to appear before the public body by means of video or telecommunications equipment.” (Emphasis added.)

With respect to closed sessions, Neb. Rev. Stat. § 84-1410 provides, in pertinent part, that

⁴ At the time of the meeting in question, the only public bodies authorized to hold meetings by telephone conference call included the following: (1) a board of an educational service unit; (2) the Educational Service Unit Coordinating Council; (3) the governing body of an entity formed under the Interlocal Cooperation Act, the Joint Public Agency Act, or the Municipal Cooperative Financing Act; (4) the governing body of a risk management pool or its advisory committees organized in accordance with the Intergovernmental Risk Management Act; (5) a community college board of governors; (6) the governing body of a public power district; and (7) the governing body of a public power and irrigation district.

[a]ny 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. . . .

1. Emergency Meeting

With those statutory provisions in mind, we will now address your allegations. On the meeting date in question, the Committee was not one of the public bodies authorized by statute to conduct a meeting by telephone conference call. And pursuant to § 84-1411(6), members of a public body are not authorized to participate in a public meeting by “video or telecommunications equipment.” Thus, the only option left to the Commission to justify the telephone conference call would be an emergency meeting.

The Nebraska Supreme Court construed the term “emergency” in the context of an open meeting in *Steenblock v. Elkhorn Township Board*, 245 Neb. 722, 515 N.W.2d 128 (1994). In *Steenblock*, the township board convened an “emergency” meeting during a snowstorm to consider the job status of a township employee who operated the road grader/snow plow. The board contended that the roads had not been cleared and that residents were unable to leave their homes, and that “these circumstances called for immediate actions which were of pressing necessity.” *Id.* at 726, 515 N.W.2d at 130. At the meeting, Steenblock was provided a written review of his job performance, and a motion to terminate Steenblock, with two weeks’ notice, was approved. The minutes of the meeting indicate that the board convened the meeting to review Steenblock’s job performance. *Id.* at 726, 515 N.W.2d at 130.

The court disagreed that the circumstances warranted an emergency meeting, noting that

[a]n emergency has been defined as “[a]ny event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency; a sudden or unexpected happening; an unforeseen occurrence or condition.”

Id. at 726, 515 N.W.2d at 130 (quoting *Colfax County v. Butler County*, 83 Neb. 803, 810, 120 N.W. 444, 447 (1909)). See also *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009). The court held that the meeting was not a proper emergency because the reasons given for the employee’s termination were based upon his past performance—not Steenblock’s failure to remove snow. The court further held that the fact that Steenblock could continue to operate the road grader for two weeks after the meeting as further evidence that no emergency existed. *Id.* at 727, 515 N.W.2d at 131.

In the present case, the Committee contends that time was of the essence to finalize negotiations with Nebraska Interactive prior to the State Records Board meeting on September 28. While the Committee members may have felt some urgency to finalize negotiations, this situation did not warrant “immediate action or remedy.” It appears from the information provided that the Committee had been engaged in talks with Nebraska Interactive for *months* prior to the August 16 meeting. The State Records Board was not scheduled to meet for *six weeks*. There was also no apparent “sudden or unexpected happening” or “unforeseen occurrence or condition.” To the contrary, the Committee provided notice of the meeting *seven days* in advance. There is nothing in the record that indicates that the requirements pertaining to emergency meetings set out in § 84-1411(5) were considered or complied with. Based on the facts presented, no emergency existed, and the Committee violated the Open Meetings Act by having two of its members participate by telephone conference call.

2. Propriety of Closed Session

The second allegation raised in your complaints relates to the propriety of the closed session to discuss “Nebraska Interactive.” It appears that almost immediately after convening the meeting, the Committee went into closed session, and remained there for almost the entire meeting, totaling approximately two hours. You both indicate that when you got back on the conference call, Committee members were in the process of approving a motion to hire Nebraska Interactive.

As set out above, a public body may close its meeting when it is *clearly necessary* to protect the public interest or to prevent needless injury to the reputation of an individual, and that individual has not requested an open meeting. Our Supreme Court has held that “[t]he ‘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.” *Grein v. Board of Education*, 216 Neb. 158, 165, 343 N.W.2d 718, 723 (1984). The *Grein* court also noted that “[t]he prohibition against decisions or formal action in a closed session also 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.” *Id.* at 168, 343 N.W.2d at 724.

The sole agenda item for the meeting was to discuss “negotiating the timeline and cost of the technology plan proposed by Nebraska Interactive.” It is unclear from the information provided to this office the statutory basis for the closed session.⁵ It is plausible that the Committee would want to discuss the costs for the proposed services in a closed session if, in fact, the Committee was in active negotiations with Nebraska Interactive over those costs. However, merely discussing Nebraska Interactive’s cost proposal

⁵ Section 84-1410(1) requires the public body to state the subject matter *and* the statutory reason necessitating a closed session in its closure motion.

would not warrant a closed session. Also, we are not convinced that a closed session was clearly necessary for a general discussion of the project's timeline. It also appears from the record that the Committee came out of closed session and rubberstamped decisions apparently made in closed session, which is strictly prohibited under *Grein*. Based on the circumstances presented, we believe the Committee's closed session did not meet the necessary criteria set out in § 84-1410 and was improper.

3. Action by the Attorney General

Neb. Rev. Stat. § 84-1414 sets out civil and criminal enforcement options available with respect to violations of the Open Meetings Act. In particular, subsection (4) provides, that

[a]ny member of a public body who *knowingly* violates or conspires to violate or who attends or remains at a meeting knowing that the public body is in violation of any provision of the Open Meetings Act shall be guilty of a Class IV misdemeanor for a first offense and a Class III misdemeanor for a second or subsequent offense.

(Emphasis added.) As we stated from the outset, our initial review of these files did not warrant immediate action by this office because we were unable to determine that the missteps by Committee members constituted *knowing* violations of the Act, which is what this office must prove in a criminal prosecution. Moreover, the Committee took affirmative steps to cure the violations which occurred at its August 16, 2016 meeting by reconsidering the matters relating to Nebraska Interactive at a duly convened Committee meeting held on October 5, 2016. *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979) (defects in the proceedings of a governmental body may be cured by new proceedings commencing at point where defect occurred).

While we decline to take any further action with respect to these files, we will caution the Committee, through a copy of this letter to Mr. Fahleson, in the following respects:

1. Emergency meetings may only be held when circumstances arise which demand immediate action or remedy by the Committee.
2. Under limited circumstances, the Committee may discuss certain matters in closed session if the Committee can articulate that it is *clearly necessary* to do so under the statutory standards set out in § 84-1410(1).

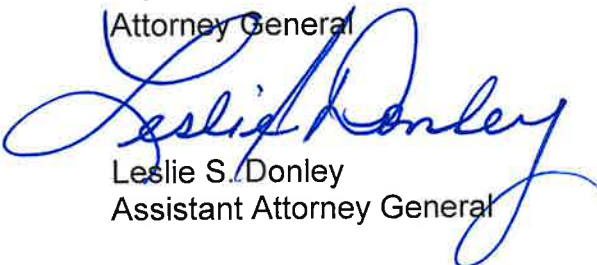
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3. Provisions of the Open Meetings Act permitting closed sessions must be narrowly and strictly construed. *Grein* at 164-165, 343 N.W.2d at 723.
4. The Committee must follow all technical requirements relating to closing its meeting, which includes stating the subject matter and the statutory reason to close in the closure motion, and restating on the record the limitation of the closed session following an affirmative vote on the motion.

Finally, we understand that the Nebraska Legislature has added the Nebraska Brand Committee to the list of public bodies in § 84-1411(3), which are allowed to conduct some of its meetings by telephone conference call. See 2017 Neb. Laws LB 318. In this regard, we would strongly advise the Committee members and staff to review carefully the various requirements set out in § 84-1411(3) relating to this type of meeting to ensure full compliance of the Open Meetings Act.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Mark A. Fahleson

49-1813-29