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March 30, 2017

Daniel Morrill
[REDACTED]

RE: *File No. 17-M-105; Creighton Public Schools Board of Education;
Complainant Daniel Morrill*

Dear Mr. Morrill:

This letter is in response to your complaint in which you have requested that this office investigate alleged violations of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014, Cum. Supp. 2016), by the Creighton Public Schools Board of Education ("Board"). As is our normal practice with such complaints, we forwarded a copy of your complaint to the public body which is the subject of the complaint. We have received responses from the attorney for the Board, Bobby Truhe, and also from Board member Colleen Farnik, and have now had an opportunity to review your complaint and the responses in detail. Our conclusion in this matter is set forth below.

FACTS

Our understanding of this matter is based upon your complaint, the responses we received from the Board and Ms. Farnik, a video recording of the meeting received from the Board, and the minutes of the relevant meeting. Your complaint concerns a closed session called by the Board on January 9, 2017 during the agenda item regarding the Board's search for a new superintendent. The Board met in closed session for approximately 30 minutes before reentering open session and concluding its meeting. The subject matter and reason for the closed session is of some debate. The minutes which appeared on the Board's website on the day we received your complaint stated that the Board "moved to enter closed session to strategize about what we are looking for in a new superintendent, the qualities we want." Following your complaint, those minutes were amended at the February 13, 2017 meeting to read that the Board "moved to enter closed session to strategize about board requirements for a new superintendent and to discuss the survey results and to avoid needless injury to a board member's reputation."

We reviewed the video from the meeting in question. There is a motion to enter into closed session during discussion/action item "G. Discuss [Superintendent] Search process." The motion made is for a "strategy session" to include the new members in the discussion of the new personnel contract and to discuss what the Board is looking for in a new superintendent. The reason given is to prevent "personal harm" to a person's reputation, but no indication is given as to who that person may be or what may be harmful to his or her reputation. Following the motion, there is discussion as to whether a closed session is appropriate to discuss the qualities the Board is looking for in a new superintendent. The vote is then taken to enter into closed session. Following the vote, the Board reviews its policy for closed sessions and has additional discussion regarding the purpose of the closed session. Immediately before entering into closed session, the Board President states that it is her reputation being protected by going into closed session. Specifically, she declares that some of the survey results received back by the Board regarding its superintendent search are disparaging to her reputation.

The Board admits that the motion to enter into closed session is "unartfully articulated and difficult to follow." The motion to enter into closed session and the discussion thereof lasts for several minutes during the meeting. It appears that the Board agrees to limit discussion during closed session to include only the negative comments regarding the one member of the Board. The Board states that the only topic discussed in closed session was that Board member's reputation, and not any strategy regarding the new superintendent, as the motion suggests. However, the motion to enter into closed session was never amended to reflect this.

ANALYSIS

The primary purpose of the open 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 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); *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984).

Neb. Rev. Stat. § 84-1410 provides, in pertinent part:

- (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;
- (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;

* * * *

- (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.

First, we will address the motion made by the Board to close. In order to be valid, a closed session must be clearly necessary for the protection of the public interest or to prevent needless injury to the reputation of an individual, and that person has not requested an open forum. 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. Neb. Rev. Stat. § 84-1410(1). Both the subject matter and the reason for the closed session must be identified in the motion to close, and the subject matter must also be one appropriate for a closed session.

Reason for the closed session

In its motion for closed session as found in the original minutes of the January 9 meeting, it appears that the Board failed to identify the reason for the closed session, whether for the protection of the public interest or to prevent needless injury to the reputation of an individual, as required by Neb. Rev. Stat. § 84-1410(1). Consequently, the motion to enter into closed session as found in the minutes is deficient in this respect. However, when reviewing the video of the meeting, the motion to close does include the reason as being to protect the reputation of an individual. We would advise the Board to ensure that both the subject matter and the reason to close are both in the motion and reflected in the minutes of the meeting, to avoid any appearance that a proper motion was not made.

The Board amended its meeting minutes after your complaint was filed to include that the closed session was called to “avoid needless injury to a board member’s reputation.” The minutes state that the Board member did not object to the closed session. The Open Meetings Act does allow a public body to go into closed session to protect the reputation of an individual. Neb. Rev. Stat. § 84-1410(1). However, we do not believe that it is a proper reason for a closed session to protect the reputation of a member of the public body. Op. Att’y Gen. No. 89063 (October 12, 1989). Consequently, the protection of the Board member’s reputation was not a proper reason to go into closed session. The Board will be cautioned, by sending a copy of this letter to its attorney, to ensure that it has a proper purpose for which it may close its meeting to the public.

We also question the addition of the protection of a Board member’s reputation in the minutes as to the motion to close after your complaint was received. We understand the amended minutes more accurately reflect what occurred at the meeting. However, even the amended minutes are incorrect in some respects. It is clear from the video recording of the meeting that the motion made included protection of a person’s reputation, but did not name that person as being a member of the Board. The motion was never modified to include the protection of a Board member’s reputation as the revised minutes would indicate, although discussion was held which ultimately made clear the underlying reason for the closed session. We are concerned that the Board amended its minutes after your complaint was filed, when the Open Meetings Act requires the minutes of a public body’s meetings to be written and available for inspection within ten working days. Neb. Rev. Stat. § 84-1413(5) (2014). The Board minutes as found on its website as of the date of your complaint should have been an accurate representation of what occurred at the meeting. It is improper to amend the minutes of a meeting when to do so changes the substance of what actually occurred at that meeting. The Open Meetings Act contains no provision to amend minutes in such

a way. In the present situation, this included the additions of a reason for a closed session in the minutes relating to the motion to close. The amended minutes here did not accurately reflect the motion which was made.

Subject matter for the closed session

The Board's stated subject matter for entering into closed session was to: 1) "strategize" regarding its future superintendent; 2) to discuss the qualities the Board is looking for in a new hire; and 3) to discuss the results of a Board survey concerning the new superintendent. We understand that the Board did not actually discuss any strategies or qualities it was seeking in its new superintendent in the closed session. The Board states it discussed only the negative comments made on its survey results regarding one member of the Board during the closed session. However, no amended motion to close was ever made or voted upon which would reflect this. Your complaint is based on the motion to enter into closed session and we will discuss your complaint as to the motion to close, not the subsequent discussion.

We have previously stated, on more than one occasion, that we question the necessity of a public body entering into closed session to discuss the desired qualities of a potential future hire, when no candidate has been identified and the public body is speaking only in generalities. We fail to see how such discussion is at all in the public interest. In fact, we believe the opposite to be true: that it is in the public interest for discussion of desirable qualities for a future superintendent to be held in an open session. The Board represents to us that it did not discuss this topic in closed session. However, the motion to close, as made, was in violation of the Open Meetings Act. We will take this opportunity to remind the Board about its obligations related to a closed session. The subject matter given in the motion to close must be one that is appropriate for a closed session. In this instance, the stated topic was not appropriate for a closed session. [Additionally, it appears to us from the video of the meeting that the Board President was attempting to disguise the true reason for the closed session: to discuss negative comments made about her.] The Board has a duty to be forthcoming in its motion about the actual reason it is going into closed session and to ensure that such a reason is proper under the Open Meetings Act. If discussion is held which changes or limits what is to be discussed in closed session, the motion should be amended and the vote retaken. We would also remind the Board of the requirement of the Open Meetings Act to restate the limitation of the closed session on the record immediately before the meeting is closed. In this instance, the Board failed to do so.

CONCLUSION

The motion to close the session on January 9, 2017 was certainly confusing and misleading. If the Board President wished to enter into closed session to discuss negative comments made about her on the survey, the motion to close should have clearly stated that as the subject matter and reason. While we do not believe it is proper to enter into closed session to protect a member of the public body, the Board has a responsibility to be straightforward in its reasons for entering into closed session. Additionally, following the discussion after the vote to close the session, the motion to close should have been amended to reflect the actual reason for the closed session.

The motion to enter into closed session on January 9 for discussion of superintendent qualities was in violation of the Open Meetings Act for the reasons we have stated above. Additionally, the discussion regarding a member of the public body in closed session was also a violation of the Open Meetings Act. A public body has a statutory duty to operate openly.

Neb. Rev. Stat. § 84-1414(1) states that any "motion, resolution, rule, regulation, ordinance, or formal action of a public body made or taken in violation of the Open Meetings Act" is void or voidable. The Board here took no formal action related to the closed session held on January 9, 2017. Consequently, while the Board has violated the Open Meetings Act, there is no action to void or be voidable.

ACTION BY THE DEPARTMENT OF JUSTICE

Since we have determined that the Board has violated the Open Meetings Act, it is now necessary for us to determine what action, if any, will be taken by this office. We do not believe that a criminal prosecution for a knowing, intentional violation of the Open Meetings Act is warranted here. We also do not believe that a civil lawsuit is warranted, given the facts and what was actually discussed by the Board in closed session on January 9, 2017 and that there was no action taken by the Board following this closed session.

Over the years, this office has encountered situations similar to this one. However, in those situations, we declined to prosecute members of the public body because we believed they were acting on the advice of counsel during their meetings. In this instance, we are of the opinion that the members of the Board were acting on advice of counsel as well, at least in its amendment of its minutes and how to proceed at its February 13 meeting to mitigate the violations of the Open Meetings Act which occurred in January. We also understand that the Board President has since been provided education on the Open Meetings Act and has consulted with counsel to assist in drafting future motions for closed sessions. However, we will remind the members of the Board, through a copy of this letter to their counsel, that they must strictly adhere to the provisions of the Open Meetings Act, particularly with respect to closed sessions.

Daniel Morrill
Page 7

Since we have determined that no further action by this office is appropriate at this time, we are closing this file. If you disagree with our analysis, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under the Act.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Bobby Truhe

02-652-29