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June 11, 2021

Via email at [REDACTED]
John Harms

RE: *File No. 20-M-138; Columbus City Council; John Harms, Complainant*

Dear Mr. Harms:

This letter is in response to your complaint regarding alleged violations of the Nebraska Open Meetings Act (“Act”), Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014, Cum. Supp. 2020), amended 2021 Neb. Laws LB 83, §§ 11-14, by the Columbus City Council (“Council”) at a special meeting held on November 24, 2020. In accordance with our normal procedure with respect to such complaints, we sent a copy of your complaint materials to the Council for a response. On December 31, 2020, we received a response to your complaint on behalf of the Council from Columbus City Attorney Neal J. Valorz. We understand that the city ordinance at issue in your complaint was amended on January 4, 2021, and expired on February 23, 2021.¹ Nevertheless, we continued to review the complaint and the Council’s response. Our conclusions on the issues raised in the complaint are set out below.

FACTS

On November 24, 2020, the Council conducted a special meeting to consider enactment of an ordinance to require individuals to wear facial coverings in Columbus, subject to certain exceptions. Notice of the meeting was published in the Columbus Telegram, a newspaper of general circulation in the community, on Friday, November 20, 2020. Further notice to the public was provided on the City of Columbus (“City”) website and through a public/media announcement. The agenda for the meeting was kept on file with the City Clerk and was available on the City’s website. The meeting, which commenced at 7:00 p.m. on Tuesday, November 24, 2020, was held in the Council

¹ See https://columbustelegram.com/news/local/columbus-mask-mandate-to-end-in-a-week/article_4566589d-13f4-59e8-a2cd-058845c51abf.html

Chambers, the location where all regular meetings of the Council are conducted, and the location where broadcasting and technology are available.

Following a motion to adopt the ordinance by the Council president, seconded by another Council member, the mayor, who presided over the meeting, provided a summary of the purpose for the meeting and opened the meeting for public comment. The meeting minutes reflect comments were first opened to opponents of the ordinance, with a request “that comments be kept short and to the point.” Video of the meeting shows that, for approximately one hour and sixteen minutes, opposing comments were allowed.² At that point, the mayor noted that many of the comments were repetitive, and invited comments which differed from those presented to that point. Additional opposing comments were entertained until, after around one hour and forty-four minutes, the mayor requested a show of hands of those in attendance who were against the ordinance. After an apparent majority of persons present raised their hands, public comment from those in favor of the ordinance was permitted. After those comments were received, other opponents were allowed to comment or ask questions. At that point, public comment was concluded after approximately two hours and thirty-one minutes. The Council then commented and discussed the ordinance, and a vote was taken on adoption of the ordinance. Since the Council vote was a tie, the mayor elected to cast a tie-breaking vote in favor of adopting the ordinance. The meeting was adjourned at 9:55 p.m.

ISSUES PRESENTED

Your complaint raises two issues, restated as follows:

1. Whether it was improper to have members of the public social distance and move to a room adjacent to the Council Chambers to hear and observe the meeting; and
2. Whether public comment was improperly limited.

DISCUSSION

Neb. Rev. Stat. § 84-1408 (2014) of the 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.

² <https://www.youtube.com/watch?v=CCBxKne2Lug&list=PL1FUFgHTINgizirTlykbdyjL0R6YUtjJj&index=12>

The Act is a statutory commitment to openness in government. *Wasikowski v. 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 open meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public. *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010).

A. Use of Overflow Room.

According to the Council's response, the Council Chambers is the location where all regular meetings of the Council are conducted. Neb. Rev. Stat. § 84-1412(1) provides that, except for closed sessions, "the public has the right to attend and the right to speak at meetings of public bodies" Section 84-1412(5) provides that "[n]o public body shall be deemed in violation of this section if it holds its meeting in its traditional meeting place which is located in this state." Thus, it was not a violation for the Council to hold the meeting to consider the ordinance at its traditional meeting place.

The Act does, of course, permit the public to "attend" a meeting. At the time of the Council meeting, a directed health measure ("DHM") was in effect for Boone, Nance, Platte, and Colfax counties, addressing the public health threat to members of the public by exposure to COVID-19 through "community spread."³ The DHM was intended "to minimize in-person interaction, which is the main means of transmission of COVID-19," and was to "ensure that members of the public do not gather in large numbers, in close proximity to each other, or in enclosed spaces, thereby endangering the health of themselves and the public." DHM at 1. The DHM, however, did not include events at certain locations, including "city operations." DHM at 4. Nevertheless, given the threat to public health recognized in the DHM, as well as other widely recognized sources of information on the risk of transmission of COVID-19 at that time, it was not unreasonable for the Council to request the public to maintain social distancing and accommodate some attendees by use of an adjacent room.

It is our understanding that the adjacent or overflow room did not have a separate speaker system or video feed. The Council has, however, provided pictures and video showing the Council Chambers, the adjacent room, and the door between the two rooms. The door between the two rooms was left open during the meeting, and is fairly close to the podium used by speakers. The Council Chambers is wired for sound with microphones at each councilmember's table, the city staff table, and the podium used for public comments/presentation. A speaker located towards the ceiling, which picks up sounds coming through the microphones, is roughly ten feet from the doorway to the adjacent room. The meeting video demonstrates that audio could be heard loudly and clearly, and an additional video provided by the Council supports concluding sound through the Council Chambers speakers can be heard in the adjacent room. While

³ <https://dhhs.ne.gov/Archived%20DHMs/ECHD-October%2021-2020.pdf>.

observation from the adjacent room would be somewhat limited due to the size of the door, the Council maintains most persons attending were in the Council Chambers. Your complaint states that, after the meeting, “a few people” expressed difficulty hearing and observing “a TV screen showing slides.”

Ideally, where it is necessary to resort to an overflow room or area to accommodate all persons desiring to attend a meeting of a public body, the room will be equipped with audio and visual equipment capable of providing a direct feed of the proceedings. Not all public bodies, however, may possess the resources to provide such access, and the reasonableness of the accommodations made to ensure the public’s right to attend a meeting will depend on the facts in each case. Based on the totality of the circumstances before us, we cannot say the Council failed to provide adequate access to meeting attendees by use of the adjacent room in addition to the Council Chambers.

B. Limit on Public Comment.

“Subject to the Open Meetings Act, the public has the right to attend and the right to speak at meetings of public bodies” Neb. Rev. Stat. § 84-1412(1). The right of the public to speak at meetings, however, is not absolute. “A body may not be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings.” Neb. Rev. Stat. § 84-1412(2). “It shall not be a violation of [§ 84-1412(1)] for any public body to make and enforce reasonable rules and regulations regarding the conduct of persons attending, speaking at, videotaping, televising, photographing, broadcasting, or recording its meetings” *Id.*

The Rules of the City Council of the City of Columbus, Nebraska (“Rules”) provide that “[t]he mayor shall preside at all meetings of the council.” Rule IV.1. The mayor shall “preserve order and decorum, and decide all questions of order, subject to an appeal of the council.” *Id.* Regarding persons speaking before the Council, “[t]he presiding officer shall have the right to limit or exclude the presentation of information or testimony which is irrelevant or redundant.” Rule IV.10.

The record of the meeting reflects that the public presented comment for approximately two and one-half hours. Opponents were permitted to speak first and, after seventeen individuals spoke, the mayor noted that many of the comments were repetitive and invited comments that were different from those presented to that point. Additional opposing comments were then entertained until, after around one hour and forty-four minutes, the mayor requested a show of hands from those in attendance who were against the ordinance. After an apparent majority of those present raised their hands, the Council moved to public comment from those in favor of the ordinance. After those comments were received, additional opponents commented or asked questions.

While the Council was not required to allow public comment, it did so and permitted testimony and comment from thirty-seven individuals, thirty in opposition to the ordinance and seven in favor. Public comment is subject to reasonable rules and regulations

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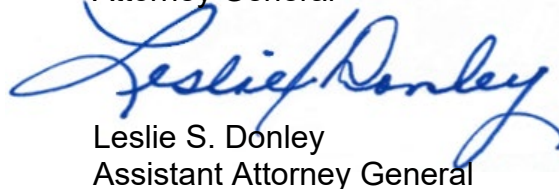
adopted by a public body. The Council Rules reasonably allow the mayor to limit the presentation of information or testimony that is irrelevant or redundant. Substantial public comment time was allowed to opponents up to the point that the mayor advised comments were becoming redundant and invited comments raising different points. It does not appear any person who wanted to comment was denied the opportunity to do so. Again, given the totality of the circumstances, we find no violation of the Act based on the manner in which public comment was conducted at the November 24, 2020, special meeting.

CONCLUSION

Based on the foregoing, we find no violation of the Open Meetings Act based on the matters raised in your complaint. Since no action will be taken by this office with respect to this matter, we are closing our file. If you disagree with the analysis set forth above, you may wish to consult with your private attorney to see what additional remedies, if any, may be available to you under the Open Meetings Act.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Neal J. Valorz (via email only)

49-2716-29