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February 26, 2021

Via email at [REDACTED]
Steve Boshart

RE: *File No. 20-M-137; Shields Township Officials; Steve Boshart, Complainant*

Dear Mr. Boshart:

On October 29, 2020, you emailed a complaint to this office alleging a violation of the Open Meetings Act ("Act"), Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2014, Cum. Supp. 2020), by certain members of the Shields Township Board ("Board"). We followed our normal practice and sent your complaint to Board president, Ed Burival, and requested a response. We subsequently received a response from Board Treasurer Allen Spangler. At our request, Mr. Spangler provided us additional documentation pertaining to the meeting at issue. We have now completed our review of your complaint, and our findings and conclusion are set out below.

FACTS

Our understanding of the facts in this case is based upon your complaint, together with the information we received from Board members.

The Board conducted an annual meeting on September 2, 2020. The published notice for the meeting stated as follows:

NOTICE OF BUDGET HEARING AND BUDGET SUMMARY

* * *

PUBLIC NOTICE is hereby given, in compliance with the provisions of State Statute Sections 13-501 to 13-513, that the governing body will meet on the 2 day of September 2020, at 8:00 o'clock P.M. at Court House Annex Building for the purpose of hearing support, opposition, criticism, suggestions or observations of taxpayers relating to the following proposed budget. The budget detail is available at the office of the Clerk during regular business hours.

Except for the budget items, no other agenda items were listed.

The meeting was convened as scheduled. Two members of the Board attended the meeting (Mr. Spangler and Kent Johring, Clerk/Secretary). Mr. Burival was absent due to a family emergency. According to the minutes, you and five other electors attended the meeting. Sometime during the meeting, you brought up the issue of township road maintenance. The minutes in this regard state that “[d]iscussion was voiced on road maintenance. Motion was made by Kent Johring to have Supervisor Steve Boshart¹ inquire about the Holt County road department doing road maintenance for Shield[s] township. Allen Spangler seconded.” Although not recorded in the minutes, the electors in attendance approved the motion by a majority voice vote.

In a letter dated October 14, 2020, purportedly provided to the Holt County Board of Supervisors (“County Board”), Mr. Burival and Mr. Spangler stated as follows:

We the Sheilds [sic] township board have decided that we will stay with the hired maintainer that we have now. Ron Bennets will stay and do the road maintaining and the snow removal at this time until further notice. Thank you for your patience on this matter.

On October 15, 2020, the County Board discussed the issue under the agenda item “Shields Township road maintenance.” The minutes for this meeting indicate that “Shields Township road maintenance was discussed and Shields Township will continue to maintain their township roads.”

You subsequently filed your complaint with this office, which contained the October 14, 2020, letter referenced above. You allege that “members voted to have the county maintain their roads. However, on 10/14, the Township President and Treasurer notified the county in a letter stating they will continue maintenance through the current contractor This is an open meetings act violation. Please investigate.”

In subsequent correspondence to the undersigned, you indicate that the “county attorney has said it definitely was a violation”

ANALYSIS

Neb. Rev. Stat. § 84-1408 (2014) states that it is “the policy of this state that the formation of public policy is public business and may not be conducted in secret.” The Nebraska open meetings laws are a statutory commitment to openness in government. *Wasikowski v. 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.*

¹ You were serving on the Holt County Board of Supervisors at the time of the September 2, 2020, annual meeting. We also understand that you served as the president of the Shields Township Board for a number of years.

Board of Education of the School District of Fremont, 216 Neb. 158, 343 N.W.2d 718 (1984). “The purpose of the open meeting law is to insure that public policy is formulated at open meetings of the bodies to which the law is applicable.” *Pokorny v. City of Schuyler*, 202 Neb. 334, 339, 275 N.W.2d 281, 284 (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). The open meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public. *State ex rel. Upper Republican NRD v. District Judges*, 273 Neb. 148, 728 N.W.2d 275 (2007). “The purpose of the agenda requirement is to give some notice of the matter to be considered at the meeting so that persons who are interested will know which matters will be for consideration at the meeting.” *Pokorny*, 202 Neb. at 339-340, 275 N.W.2d at 285.

The parties have presented two different versions of the motion made on September 2. You allege in your complaint that “members” voted to have the county maintain the township roads. The meeting minutes indicate that the motion was limited to you *inquiring* about the county maintaining the roads. As we understand it, certain County Board members subsequently contacted township Board members indicating that the county was not interested in taking work away from local contractors. We also understand that there was general opposition to the idea. Consequently, Mr. Burival and Mr. Spangler sent the October 14 letter advising that the township would continue to do its own road maintenance.

We began our review by considering whether Mr. Burival and Mr. Spangler violated the Open Meetings Act by composing and sending the October 14 letter. However, in the course of our review, it became apparent that the electors’ conduct at the September 2 meeting was far more problematic. We find support for this conclusion in *Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (2007). In *Newman*, two electors of the township [“the Newmans”] filed suit against the township board and its members seeking a writ of mandamus requiring the board to put into effect certain motions passed during the annual meeting. The agenda items listed for the meeting included “rates for custom work, insurance policies, an equipment update, equipment storage, and meeting notices.” *Id.* at 658, 735 N.W.2d at 403. However, during the meeting, the Newmans, two board members and nine other electors voted to (1) permanently terminate an employee, (2) reduce the township board members’ meeting per diem, (3) change the meeting place of the township board, and (4) sell the “old maintainer.” There was no emergency declared with respect to these motions, “and no effort . . . to modify the agenda to include those items.” *Id.* at 658, 735 N.W.2d at 403.

The Court of Appeals first considered whether the electors at an annual meeting are a public body subject to the Act.² The court noted that under Neb. Rev. Stat. §§ 23-

² The court noted that a township is organized as a unit of county government and is one of the rare examples of direct democracy in Nebraska. “The essential characteristic of the township meeting form of government is that all the qualified inhabitants meet, deliberate, act, and vote in their natural and personal

224 and 23-228, the electors of a township have broad powers at their annual meeting, including selling township property, directing the raising of money by taxation for certain purposes, electing town officers, and raising money for the support and maintenance of roads and bridges. Electors are authorized “to take measures and give directions for the exercise of their corporate powers” Neb. Rev. Stat. § 23-228. In light of these powers, the court

conclude[d] that the electors of a township, when assembled at the annual meeting, constitute a governing body of the township. At other times, the individual electors do not constitute members of a governing body. In the hours and days before the annual meeting and the hours and days after that meeting, the electors are not a governing body. But when the electors come together at the annual meeting to exercise the powers granted to them by statute, they become a governing body of a political subdivision and are thus a public body subject to the requirements of the Act.

Id. at 662, 735 N.W.2d at 406.

The court then determined that since the electors at the annual town meeting constituted a public body under the Open Meetings Act, they were subject to the Act’s notice and agenda requirements. “Under § 84-1411(1), each public body must give reasonable advance publicized notice of the time and place of each meeting, and the notice must 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.’ That statute also grants the public body the right to modify the agenda to include items of an emergency nature.” *Id.* at 663, 735 N.W.2d at 406. The Newmans argued that since the agenda advertised the meeting as an annual meeting, that was sufficient notice that the electors could exercise the powers granted to them by statute. The court disagreed, finding that the agenda “failed to advise the general public of the matters at issue.” *Id.* at 664, 735 N.W.2d at 407. The court noted that “[i]n the ‘old days,’” electors could simply attend an annual meeting and bring up any subject falling within their broad powers. However, “[u]nder the Act, generally, in advance of the meeting, the elector must request an addition to an agenda. The Act places great value on the openness and knowledge fostered by such requirements.” *Id.* at 664, 735 N.W.2d at 407.

The court ultimately found that the Newmans were not entitled to the relief sought. “Because the actions taken by the electors at the annual meeting violated the agenda requirement of the Act, the Newmans failed to clearly and conclusively show that they had a clear legal right to a writ of mandamus compelling the performance of the actions taken at the annual meeting.” *Id.* at 665, 735 N.W.2d at 408.

capacities in the exercise of their corporate powers, each qualified inhabitant of the town having an indisputable right to vote on every question presented, as well as to discuss it. It exercises both legislative and executive functions.” *Newman*, 15 Neb. App. at 660, 735 N.W.2d at 404 (internal citations omitted).

In the present case, while the published notice referenced only the public hearing on the township's budget, this event was for all practical purposes the township's annual meeting.³ (In fact, you referenced "the Shields Township annual meeting" in your complaint.) Since it was the annual meeting, all eight individuals in attendance (you, the two Board members, and five other electors) constituted a public body subject to the Open Meetings Act. Section 84-1411(1) requires that the public body's notice "contain an agenda of subjects known at the time of" publication. It also mandates that "[a]genda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting." However, here there was no agenda and nothing to inform the public that the electors would be discussing the road maintenance issue. There was no emergency declared with respect to this issue, and no effort by the electors to make it an agenda item. Consequently, as in *Newman*, all of the electors in attendance at the Shields Township annual meeting on September 2, 2020, violated the agenda requirement in the Act by discussing and voting on the road maintenance issue.

We have considered the subsequent action taken by Mr. Burival and Mr. Spangler in the context of the violation occurring at the annual meeting. While their letter could be construed as taking formal action outside of a public meeting, it appears to us that Board members were merely acting on information that the County Board was not interested in assuming maintenance of the township's roads. Their letter was a reflection of the status quo, nothing more. Thus, we do not believe that their actions implicate any clear violation of the Act.

With respect to the violation of the agenda requirement at the annual meeting, any enforcement options which we might have in this case are limited. There does not appear to be any clear and "knowing" violation of the Act by the electors which would warrant a criminal prosecution under Neb. Rev. Stat. § 84-1414(4).⁴ Nor did the electors take any action which could be voided by a lawsuit under Neb. Rev. Stat. § 84-1414(1). Consequently, while we contemplate no further action regarding your complaint, we will admonish the parties involved, through a copy of this letter to the Board members and the county attorney, that strict compliance with the Open Meetings Act in the future is imperative. This directive not only relates to the availability and sufficiency of agendas, but to all aspects of the Act, including notices, proper voting and minutes. In light of the discussion above, it will be much harder for electors to argue that they did not "knowingly" violate the Open Meetings Act should similar violations occur in the future.

³ As provided in Neb. Rev. Stat. § 23-227 (2012): "The citizens of the several towns of this state, qualified by the Constitution of Nebraska to vote at general elections, shall assemble and hold annual town meetings at their respective towns at the time of the budget hearing as provided by the Nebraska Budget Act."

⁴ Neb. Rev. Stat. § 84-1414(4) (2014) 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."

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CONCLUSION

Based on the foregoing, you and the seven other electors who attended the Shields Township annual meeting on September 2, 2020, violated the Open Meetings Act by discussing the road maintenance issue in the absence of an agenda. We find no clear violation with respect to the actions of Mr. Burival and Mr. Spangler regarding the October 14, 2020, letter. For all the reasons discussed above, we plan no further action with respect to your complaint, and we are closing this file.

If you disagree with our analysis under the Open Meetings Act set out above, 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,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Ed Burival
Allen Spangler
Kent Johring
Brent Kelly

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